

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CLAUDE HUARD

and

SCHOOL DISTRICT OF ELCHO

Case 24
No. 52186
MA-8866

Appearances:

Mr. Claude Huard, appearing pro se.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Ronald J. Rutlin, appearing on behalf of the District.

ARBITRATION AWARD

Claude Huard, hereinafter referred to as the Grievant, entered into an Extra Curricular Duty Contract with the School District of Elcho, hereinafter referred to as the District, to perform the extra curricular duty of Head Boys Basketball Coach for the 1994-95 school year. On November 28, 1994, the District suspended the Grievant from his coaching duties without pay. The Grievant then sought a Temporary Restraining Order against the District in the Langlade County Circuit Court. The Circuit Court held that the Grievant had the right to arbitrate his dispute with the District under the terms of a collective bargaining agreement between the Elcho Education Association and the District. That collective bargaining agreement has a grievance procedure which provides for the binding arbitration of disputes arising thereunder. The District requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide the Grievant's termination as basketball coach pursuant to the Order of the Circuit Court. The undersigned was so designated. Hearing was held in Elcho, Wisconsin, on April 5, 1995. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on April 27, 1995.

BACKGROUND:

The basic facts underlying this case are not in dispute. The Grievant is not a member of the bargaining unit but was hired to perform the extra curricular duty of Head Boys Basketball Coach for the 1994-95 school year. The Grievant signed the extra curricular duty contract

sometime around August 9, 1994. 1/ The contract provided that it was subject to the terms and conditions of the collective bargaining agreement between the Elcho Education Association and the District. 2/ Approximately three weeks before the start of boys' basketball practice, the Grievant contacted the District Administrator and told him that an employe quit at the Grievant's business in Green Bay, Wisconsin, and the Grievant would miss some practices in the first six weeks of the season. The District Administrator asked the Grievant to send him a schedule of when he would be at practices. The Grievant stated he would do whatever the administration requested, including resign. By a letter dated October 27, 1994, the Grievant submitted a schedule and also stated that he had a meeting with players and the consensus was that he not resign. 3/ The Grievant's schedule indicated that he would attend 3 or 4 out of 11 or 12 practices in November, 1994, and 8 or 9 out of 16 or 17 practices in December, 1994, i.e., 11 of 27 or 13 of 29 practices. 4/ The District Administrator requested that the Grievant resign because he was not able to fulfill his contract but the Grievant refused. 5/ By a letter dated November 11, 1994, the District Administrator informed the Grievant that the District's Board was meeting on November 14, 1994, and that the Grievant was suspended with pay until the matter of the Grievant's fulfilling his contract was resolved. 6/ On November 14, 1994, the Grievant submitted his resignation effective

1/ Ex. 1.

2/ Id.

3/ Ex. 3.

4/ Ex. 3.

5/ Ex. 5.

the end of the basketball season. 7/ The District's Board met and decided to continue his contract as long as he fulfilled it. 8/ The Grievant missed practices on November 16, 1994, and again on November 17, 1994, and was suspended without pay. 9/

ISSUE:

The parties' stipulated to the following:

Whether the District had cause to terminate the Grievant as
Basketball Coach for the 1994-95 school season?

DISTRICT'S POSITION:

The District contends that the Grievant was clearly aware that his attendance at practice was an essential responsibility under his contract to coach the varsity boys basketball team. It submits that after the District Administrator reviewed the practice schedule submitted by the Grievant, he deemed it unacceptable that the Grievant miss the number of practices under that schedule, told the Grievant so and wanted the Grievant to resign. According to the District, the Grievant agreed to resign and then changed his mind and the District put the Grievant on notice that if he did not attend the practices, he would be disciplined. The District points out that the Grievant did not attend practices and was permanently suspended. It claims that it had every right to expect the Grievant to attend practices and the Grievant's argument that regular attendance is not specifically required by the contract is totally without merit as regular attendance is an understood obligation of any employe who agrees to provide services.

6/ Ex. 6.

7/ Ex. 7.

8/ Ex. 8.

9/ Exs. 9, 10.

The District maintains that the Grievant's allegations of a conspiracy, profiting by school board members and different treatment from other coaches was not supported by any credible evidence. The District states that the Grievant breached his contract and was properly relieved of his duties. It alleges that it is irrelevant whether certain players or parents were willing to accept his absences. It claims that the District decided in good faith that his absence was not in the best interest of the boys' basketball program. The District requests its decision to replace the Grievant as coach of the boys' basketball team be sustained.

GRIEVANT'S POSITION:

The Grievant contends that the District has clearly failed to demonstrate that he is covered by the terms of the contract in effect between the District and the Elcho Education Association (EEA). The Grievant points out that he derives no benefit or protection from the EEA. The Grievant argues that application of the collective bargaining agreement against him renders the contract an "adhesion contract" which is draft unilaterally by the dominant party and imposed on a "take or leave it" basis on the weaker party who has no real opportunity to bargain about its terms. The Grievant claims that to avoid injustice, the weaker party or adherent should not be bound by such a stipulation.

Assuming the Grievant is bound by the collective bargaining agreement, the Grievant insists that the District failed to act correctly pursuant to Article XII, Section D, but instead gave the grievant a written reprimand followed by permanent suspension. The Grievant notes that the extra-curricular contract is silent about attendance at practice as well as failing to express duties to perform or fulfill. The Grievant alleges that he should have been suspended for only three (3) days and then reinstated and the District's actions were arbitrary and prejudicial and outside the authority of the collective bargaining agreement.

The Grievant asserts that he was an independent contractor and not an employe of the District. He submits that as an independent contractor he had the right to run and manage the basketball program as he saw fit and to determine when to practice and who should play on varsity as well as all other logical and reasonable matters concerning the team.

The Grievant maintains that the District could non-renew his contract but did not possess the right of interference over matters they disliked, otherwise the District could dictate offensive and defensive matters, etc.

The Grievant claims that he was fired for missing two (2) practices, yet the head girls' basketball coach refused to coach during a game and was not reprimanded. Furthermore, a board member, according to the Grievant, profited by the Grievant's dismissal as he became the Junior High Basketball Coach. The Grievant also points out that other coaches violated WIAA rules and have missed practices but received no discipline for such conduct. The Grievant asserts that hiring parents to coach brings with it the acceptance that they may occasionally miss practice due to the

requirements of work.

The Grievant concludes that the District did not possess the authority to suspend and discharge him for failing to fulfill duties not expressly defined in the contract. He argues that the District could only non-renew or buy out his contract. The Grievant claims he deserves to be paid the balance of his contract and awarded punitive damages for the District's blatant breach of contract.

DISCUSSION:

The issue presented in this matter is whether the District had cause to terminate the Grievant's extra-curricular contract. The undersigned concludes that it did. The Grievant informed the District that he would miss a number of practices during the first six weeks of the basketball season. The number of days the Grievant indicated he would not attend totaled over half the practices and this constituted an anticipatory breach of his contract with the District. The District could have immediately held the contract was no longer in effect due to the Grievant's anticipatory breach but instead informed the Grievant to perform it or resign. The Grievant did neither and instead missed the practices he had previously informed the District he would not attend, thereby presently breaching the contract, and the District then terminated the Grievant. It was unnecessary to wait for the Grievant to miss all the practices he said he would before taking action, as his actions indicated he was now breaching the contract in accordance with his notice given in his anticipatory breach.

The facts clearly establish that the grievant breached his contract and he has no right to claim any relief against the District. The extra-curricular contract signed by the grievant was a personnel services contract, and the District agreed to pay the Grievant for his personally performing substantially all the duties required as the Boys' Head Basketball Coach. The Grievant was certainly aware of these requirements. The Grievant's failure to perform such services breached said agreement and the Grievant is not entitled to claim pay for work not performed under a contract he breached. Consequently, the District acted properly and the Grievant has no basis to complain and is not entitled to enforce a contract he breached. The Grievant's case is therefore dismissed in its entirety.

A review of the Grievant's defenses demonstrate that they are without merit. The Grievant claimed that because he was not a member of the bargaining unit, the collective bargaining agreement did not apply to him. First, the contract signed by the Grievant states it is subject to the terms and conditions of the collective bargaining agreement.^{10/} Secondly, the Circuit Court decision of Judge Jansen held that the reference in the extra-curricular contract to the collective

^{10/} Ex. 1.

bargaining agreement meant that the grievant had a right to arbitrate his dispute. 11/ Thus, these arguments were raised and disposed of in Court and the grievant is precluded from reasserting them in this proceeding.

The Grievant claims that application of the collective bargaining agreement to him creates an "adhesion" contract. Clearly, the extra-curricular contracts are negotiated between the District and the Elcho Education Association and it cannot be concluded that one party is so weak as to have no meaningful input into the negotiations. Generally, an "adhesion" contract is one found to be unenforceable because of its being unconscionable but here the Grievant is seeking to enforce the contract, not to hold it unenforceable. If it were unenforceable, the Grievant would not be entitled to any relief except release from said contract.

The Grievant's reliance of Article XII, Section D is totally misplaced. That Section refers to the penalty for abuse of sick leave. Also, Article XIII, Section E contains the same language which relates to unauthorized funeral leave, emergency leave, personal leave or jury duty leave. None of these leave provisions are applicable in this case; rather, the Grievant decided not to attend practices because of the press of other business. Thus, these provisions are not applicable.

The Grievant also claims that he is an independent contractor. The Grievant is confusing having the ability to exercise discretion as to coaching decisions and having the ability to decide when and who should perform the coaching responsibilities. The Grievant signed a personal services contract which meant he was obligated to perform all the duties of Head Boys' Basketball Coach and could not delegate someone else to do it as an independent contractor might do. The Grievant, as coach, could design plays, determine offenses and defenses and so on as coach; however, the Grievant could not, in mid-season, send a neighbor to act as coach for the rest of the season. Furthermore, the Grievant could not unilaterally decide to hold practices from 2:00 a.m. to 4:00 a.m. or to play only three players rather than five during the games. There are limits on a coach, and the biggest limit is personal performance of the duties in a reasonable fashion. The mere fact that the number of practices required and the exact duties and responsibilities are not spelled out in the extra-curricular duty contract does not change the result as the obligations as a coach are understood, especially when the Grievant coached the prior year.

The Grievant has asserted that others violated rules, refused to coach or were absent on occasion. These cases are irrelevant. There is no evidence any coach had indicated that he would miss such a large number of practices and then commence doing so without being terminated. Certainly, an occasional absence of a coach from practice may be excused but here the Grievant's absences were so substantial as to conclude he was not substantially performing the contract he signed. While the Grievant missed only two practices before he was terminated, his missing these

11/ Ex. 16.

were in line with his notice to the District that he intended to miss another fourteen in a six-week period. Clearly, the Grievant was not going to perform his contract and a failure to perform was proper cause to terminate the contract. The Grievant's arguments are not persuasive and his case is denied and dismissed in all respects.

Dated at Madison, Wisconsin, this 17th day of May, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator