

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN EDUCATION ASSOCIATION

and

SHEBOYGAN AREA SCHOOL DISTRICT

Grievance of Steven Bannow
dated 7-14-94 regarding
non-selection as South H.S.
Boys Varsity Soccer Coach

Case 108
No. 52405
MA-8952

Appearances:

Ms. Ellen M. McFarlane, UniServ Director, Kettle Moraine UniServ Council, N7778 Rangeline Road, Sheboygan, Wisconsin 53083, appearing on behalf of the Association and Grievant.

Mr. Douglas M. Born, Director of Personnel Services, Sheboygan Area School District, 830 Virginia Avenue, Sheboygan, Wisconsin 53081, appearing on behalf of the District.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Marshall L. Gratz as Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of their July 1, 1993 -- June 30, 1996 collective bargaining agreement (herein Agreement or Collective Bargaining Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the District Office in Sheboygan, Wisconsin, on May 17, 1995. The hearing was not transcribed, but the parties agreed that the Arbitrator could maintain an audio tape recording of the evidence and arguments for his exclusive use in award preparation. The parties summed up their positions on the record at the conclusion of the hearing. The hearing was closed as of the conclusion of the proceedings on May 17, 1995.

The parties requested that the Arbitrator either render a bench decision or commit to issuing the award on or before June 1, 1995. The Arbitrator chose not to issue a bench decision and agreed to issue the award, in expedited form if necessary, within the time frame requested by the parties.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issue:

1. Did the District violate Appendix C of the Collective Bargaining Agreement when Steve Bannow was not selected as the Boys Varsity Soccer

Coach?

The parties further agreed that the Arbitrator was authorized to fashion a remedy for any such violation found. The Association stated on the record at the time the issue was agreed upon that the remedy it was requesting consisted of prospective relief in the form of an order that the District offer Grievant Bannow the South High School Boys Varsity Soccer Coach assignment for 1995-96.

PORTIONS OF THE AGREEMENT

ARTICLE VII-GRIEVANCE PROCEDURE

7.1 Definition. A grievance is defined as any alleged violation of a specific provision or provisions of this Agreement between the Association and the Board regarding wages, hours or conditions of employment. Aggrieved parties may be the Association or any bargaining unit employee.

. . .

7.5 Grievance Procedure. Grievances shall be processed in accordance with the following procedure:

. . .

D. Step Four - Arbitration

. . .

3. . . . The arbitrator shall have no power or authority to add to, disregard, subtract from, or modify any of the terms of this Agreement or any amendments hereto, or to establish or change any wage or wage structure, nor to change the structure of a classification, nor to interpret an administrator's evaluation of a teacher or guidance counselor.

4. No arbitration award shall grant relief retro-active before the date upon which the grievance occurred.

5. In rendering a decision, an arbitrator shall give due regard to the responsibility of management and shall so construe the Agreement that there will be no interference with such responsibilities, except as they may be specifically conditioned by this Agreement.

. . .

ARTICLE II - BOARD FUNCTIONS

2.1 Nothing in this Agreement shall interfere with the right of the Employer in accordance with applicable laws, rules and regulations to:

A. Carry out the statutory mandate and goals assigned to the Board of Education utilizing personnel, methods and means in the most appropriate and efficient manner possible.

B. Manage the employees of the board of Education; to hire, promote, transfer, assign or return employees to positions within the employment of the Board of Education, and in that regard to establish reasonable work rules.

C. Suspend, demote, discharge, non-renew, place upon probation, and take other appropriate disciplinary action against the employee for just cause; to lay off employees pursuant to Article IV, Section 4.9.

2.2 The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms hereof and in conformance with the Constitution and laws of the State of Wisconsin.

2.3 The Board of Education recognizes that items in the management rights clause are subject to negotiation providing they do not conflict with the Statutes of the State of Wisconsin.

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Appendix C

EXTRA PAY AND CO-CURRICULAR SALARIES Effective July 1, 1994

High Schools

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Category 2 Activities 1994-95

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... Head Varsity Soccer

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Coaches and sponsors will be appointed by the Board of Education for the following year according to this schedule:

Fall Sports - February meeting
Winter Sports - April meeting
Spring Sports - June meeting
Other activities - April meeting

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The staffing of these activities is by volunteers obtained from the professional staff. The administration of the school will survey its professional staff and give each teacher an opportunity to sign up for a specific activity or assignment. The administrator will confer with members of his/her building in an attempt to fill any vacant assignments.

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BACKGROUND

In dispute is the District's appointment of Vicente Rincon rather than the Grievant as the Boys Varsity Soccer Coach at South High School for the 1994-95 school year.

The Grievant has been a certified teacher and a member of the District's professional staff since the 1989-90 school year. Rincon has been appointed the Boys Varsity Soccer coach at South High School every school year since 1988-89. He is neither a certified teacher nor a member of the District's professional staff.

Prior to April of 1994, Grievant asked South High School Vice Principal and Activities Director Jamie Berlin how, as a member school of the Wisconsin Interscholastic Athletic Association (WIAA), South High could appoint Rincon year after year to a coaching assignment without posting it. Berlin responded that the District's appointments of Rincon have been in compliance with applicable provisions of the WIAA Official Handbook and that the District was not obligated by the WIAA or the Agreement to post the position before reappointing Rincon.

As of April of 1994, the District had requested and been granted emergency relief for each of the years it assigned Rincon as a coach, under the following provisions of that Handbook which remained in effect for 1994-95:

Article VII - Coaches Qualifications

Section 1 - Certified to Teach

A. Only persons certified or eligible and applying for certification to

teach in Wisconsin shall be assigned as coaches (including assistants, helpers, aides, etc.) of teams representing a school in interscholastic competition.

. . .

Section 3 - Emergency Provision

A. A school may receive emergency relief for unusual circumstances to employ other than a certified teacher for coaching, but emergency permission shall not extend beyond one season in the sport involved.

B. If a certified teacher is unavailable or unacceptable for coaching assignment, an emergency status will be recognized by the WIAA. The Request for Permission to Use Noncertified Coach Application will be considered, but not until after May 1 for fall sports or September 1 for winter and spring sports.

After communications with the Association and with the Executive Director of the WIAA, Grievant wrote District Director of Personnel Services Douglas Born on April 4, 1994, as follows:

Dear Mr. Born:

The purpose of this letter is to explain why I have requested the boys' varsity soccer coaching position at South be posted for the 94-95 season.

I am available, experienced and acceptable as a candidate for the varsity position for the following reasons:

I am a **certified** teacher at South completing my fifth year. I have continued my education by completing certification in the area of emotional disturbance and I am currently working on a Masters of Education degree from Lakeland College.

I have 5 years soccer playing experience at the following programs: UW-Marquette 1986 junior college championship team, Oshkosh Titans and UWGB Phoenix indoor team.

For 5 years I coached youth soccer through the Green Bay Kickers.

For 4 years I have been junior varsity soccer coach at South.

I have organized and will be acting as head coach for the girls' club soccer program at South this spring.

Because of the above reasons, I feel South is not justified in requesting an emergency relief for unusual circumstances to employ other than a certified teacher for coaching. I am "**available**" and I feel my qualifications are "**acceptable**" under Article XVII (VII?) of the WIAA Official Handbook.

It is my hope you will take this into consideration when making your decision on posting or not posting the position for the 94-95 season.

Sincerely,

Steven Bannon

Following a discussion with Berlin, Born caused to be posted District-wide a Special Bulletin dated April 12, 1994, stating:

The following vacancies exist in the Sheboygan Area School District. All interested persons shall make written application to the Director of Personnel Services by 4:00 p.m. on Tuesday, April 19, 1994. The Sheboygan Area School District does not discriminate on the basis of age, handicap, marital or parental status, national origin, pregnancy, race, religion, sex or sexual orientation.

South

Varsity Soccer Coach	\$2,075.00
Assistant Debate Coach	\$1,638.00
Assistant Football Coaches (2)	\$2,075.00
Freshman Football Coach	\$1,638.00

Berlin testified that although the Varsity Soccer Coach assignment at South had not been vacated by Rincon and was not vacant, it was included on the Bulletin to give the District an opportunity to hear from both Grievant and Rincon regarding the assignment. To Berlin's knowledge this was the first and only time the District had ever posted an Appendix C assignment that was not vacant. Berlin also testified that Grievant's April 4 letter was also the first time that a certified teacher on the professional staff had formally asked to be considered for an Appendix C activity or assignment that was assigned to other than a certified teacher. (The difference, if any, between an "activity" and an "assignment" in Agreement and District parlance was not clear in the record. The Arbitrator uses those terms interchangeably in this Award.)

In response to the Bulletin, only Grievant and Rincon expressed an interest in the Boys Varsity Soccer Coach position. Both were interviewed by Berlin and South Principal Thomas

Edson. Grievant testified that to the best of his recollection neither interviewer told him during the interview that the posting had been a mistake or that the position for which he was being interviewed was not vacant. Edson and Berlin both testified that to the best of their recollection they told Grievant during the interview that Rincon had not resigned and that he remained the Boys Varsity Soccer Coach at South as of the time of the interview.

Following the interviews, Berlin and Edson recommended that the Board reappoint Rincon for 1994-95. Both administrators testified about their reasons for making that recommendation. Edson stated that Rincon had never resigned from or been asked by the District to give up the position; and that Rincon had done well in building student involvement, had excellent knowledge of the game and of skill development techniques, and had a very positive rapport with athletes and parents in the program. Berlin explained that Rincon had successful experiences as a Junior Varsity boys soccer coach in the District for two years and as South High Varsity Boys Soccer coach since 1988-89, during which time he turned the program around, won a regional championship, expanded the numbers of athletes participating, began a freshman club soccer program, and drew positive praise from the community, parents, and current and past players. Berlin also noted that Rincon has experience with the Sheboygan Youth Soccer program; has been a member of the Columbia National Soccer team; has played the sport all his life; has attended numerous soccer coaching clinics and watched many related films; and has passed the annual WIAA rules tests annually, never scoring lower than a 92. Berlin added that there was no reason to believe that Rincon would not continue his positive role modeling and positive relationship building and no reason to let a qualified soccer coach go.

After Grievant learned that he had not been selected, he again contacted the Association, and the instant grievance was initiated on July 14, 1994. The grievance asserted that the District was violating Appendix C as regards the South High School Soccer coaching assignment and requested that the District adhere to the contract, grant Grievant the soccer coaching position and grant just and proper make whole relief.

District representatives denied the grievance at all pre-arbitral steps of the contractual grievance procedure. Edson based his denial on two reasons: "1. The position was never vacated. 2. Mr. Rincon (present Soccer coach) is doing an excellent job and meeting all expectations." The Board of Education's Professional Contract Administration Grievance Committee's answer based its denial on "reasons of past practice and those points raised during the hearing."

The matter was then submitted to arbitration as noted above.

POSITION OF THE ASSOCIATION

The District's resort to an emergency selection of other than a certified teacher as coach for more than one year violated Art. VII of the WIAA Official Handbook in effect for 1994-95, especially where, as here, the Grievant, a certified teacher, was available and acceptable.

The language of Appendix C clearly gives preference to the selection of professional staff members over others, as well. The District had an option to post or not post the assignment in

question. Had it chosen not to post it, the instant grievance would not have been filed. However, by including the position on its notice of vacant positions, the District declared and rendered the position in question vacant. When it is selecting between qualified candidates, the Agreement requires the District to select a member of the professional staff rather than someone outside the staff. At the time of the instant selection, Grievant had been coaching junior varsity boys soccer in the District for years and was also coaching the newly-established spring girls soccer program. He is clearly qualified to coach Boys Varsity Soccer at South, and the District and its witnesses have not asserted otherwise.

The Arbitrator should therefore conclude that Grievant's non-selection violated the Agreement and should order the District to offer Grievant the position for the 1995-95 school year.

POSITION OF THE DISTRICT

As confirmed by correspondence with the WIAA, the 1994-95 WIAA Handbook allowed a member school to decide whether or not certified teachers available for its coaching assignments are "acceptable." The District found that Rincon was more acceptable than Grievant and therefore that Grievant was not acceptable within the meaning of Art. VII of the Handbook. The District was therefore within its rights under that provision to treat the situation as an emergency and reappoint Rincon for 1994-95.

The language of Appendix C concerning staffing of coach and sponsor positions is "loose" and unclear, so it ought not preclude the District from retaining an outside coach who has performed satisfactorily just because a member of the professional staff has volunteered for the assignment involved. In the past, the District has always exercised the right to reappoint satisfactory non-professional-staff coaches without a posting. If the District erred in posting Rincon's position as a vacancy, it did so for good reasons: to clear the lines of communication by allowing Grievant to apply and be considered; and to resolve what might otherwise have been a grievance over the District's refusal to do so. Grievant had reason to know that the posting and interview did not mean that the District considered the position to be vacant because Berlin told him during the interview that Rincon remained the South High Varsity Boys Soccer coach as of that time and that Rincon had not vacated that assignment for 1994-95. Edson's grievance answer similarly informed Grievant that the position had not been vacated by Rincon. It would be disruptive and beyond the parties' mutual intent as reflected in the language of Appendix C for professional staff members to be empowered to insist on replacing successful outside coaches otherwise available to be reappointed for the following year. The bargaining table rather than grievance arbitration is the place where such a change should be pursued.

The Arbitrator should therefore find no violation and deny the grievance.

DISCUSSION

The portions of the Agreement Grievance Procedure quoted above and the issue as submitted by the parties limit the Arbitrator's authority to interpreting and applying the Agreement as regards the District's non-selection of Grievant for the coaching assignment in question. Hence this award must be based on the Agreement rather than on WIAA regulations.

Even if that were not so, the WIAA's 1994-95 regulations provide no reliable guidance on the issue submitted by the parties. Correspondence by both the Union and the District with WIAA officials reveals that the WIAA interpreted its 1994-95 coaches qualification rules to mean only that member schools are expected to annually review all positions staffed by coaches not licensed to teach, but not as mandating either the removal of a non-certified-teacher coach from a position or the posting of coaching positions last previously assigned to a non-certified-teacher unless the District is required to do so by its own policies or provisions of a negotiated agreement. In other words, the WIAA interpreted its regulations as leaving it to the judgment of District officials whether there was an emergency within the meaning of the WIAA regulations.

The portion of Agreement Appendix C quoted above clearly provides that it is the Board of Education that appoints coaches and sponsors of Appendix C activities and that the appointments are made by the Board annually. The record evidence indicates that the Board of Education in fact makes such appointments annually after receiving recommendations from the administration. There is no evidence that the District has annually or otherwise surveyed its professional staff to give each teacher an opportunity to sign up for every Appendix C activity and assignment. Rather, the District has posted notices District-wide offering "all interested persons," hence including all teachers, the opportunity to sign up for the specific activities or assignments listed on that notice. In the past, the District has listed activities or assignments on those notices only when the District needed a new person for that activity or assignment. Thus, prior to the instant case, the administration had never posted Appendix C activities and assignments for which the person (professional staff member or otherwise) satisfactorily performed it in the current year and was willing to perform it in the following year. In practice, one or more administrators have interviewed the persons who have signed up in response to posted notices, and then the administrators have forwarded their recommendations to the Board of Education concerning who should be appointed to those posted positions along with their recommendations concerning reappointments to activities and assignments that were not posted. There is no evidence that administrators have conferred with members of their buildings in making decisions regarding attempts to fill vacant assignments, except by interviewing those of them who expressed interest in writing as regards a particular posted assignment or activity.

In the past, the Board has sometimes appointed persons from outside the District's professional staff to Appendix C activities and assignments. Some of those persons have been certified teachers, some have not. However, the only instance of record where the District selected an outsider over a volunteer from within the District professional staff was with respect to a posted diving coach position which the evidence establishes requires specialized knowledge and

skills that the inside applicant may have lacked. By all accounts, the Grievant's efforts in this case are the first instance in which a member of the professional staff asked to be considered for appointment to an Appendix C activity or assignment which was being performed satisfactorily by a person outside the District's professional staff who was willing to perform it in the following school year.

The Appendix C sentence stating, "The staffing of these activities is by volunteers from the professional staff" surely gives a preference to professional staff members over outsiders. However, that sentence must be read together with the balance of that paragraph and of Appendix C. The two sentences which follow it focus the first sentence's preference for professional staff volunteers on the "specific activity or assignment" about which the administration surveys its staff and for which the administration gives each teacher an opportunity to sign up, and upon the "attempt to fill any vacant assignments" about which the administration will confer with members of his/her building. For those reasons, and in light of the longstanding and previously uniform practices of posting only when the District needed a new person for an activity or assignment and of interviewing volunteers only "in an attempt to fill any vacant assignments," the Agreement does not require the District to post or to interview volunteers from the professional staff for Appendix C activities or assignments for which the District does not need a new person.

However, read as a whole, the Agreement does not prohibit the District from doing so. For, as noted, Appendix C clearly provides that appointments of coaches and sponsors are made by the Board of Education annually, and the evidence confirms that the Board has, in practice, made such appointments annually. Given Agreement Art. II (particularly Sec. 2.2) and Art. VII Sec. 7.5 D.5., judgments about whether to post and interview for Appendix C activities and assignments are reserved to the District unless the Agreement specifically and expressly provides otherwise. Appendix C does not specifically and expressly limit the District to posting and interviewing only for activities and assignments for which the District has no current appointee whom the District might choose to reappoint. If the District chooses to treat an activity or assignment as vacant and hence the proper subject of posting and interviews, it is within its rights under the Agreement in doing so.

In the instant case, the District administration chose to include South High School Varsity Soccer Coach on the April 12, 1994 Special Bulletin that was posted District-wide. That Bulletin declared on its face, "The following vacancies exist in the Sheboygan Area School District." It was issued shortly after the District had received Grievant's April 4 letter to Born explaining "why I have requested the boys varsity soccer coaching position at South be posted for the 94-95 season." The District's admitted purpose in posting the position and interviewing Grievant and Rincon was to give Grievant (as well as Rincon) the opportunity to be heard and considered for appointment as the South H.S. Varsity Boys Soccer Coach before a decision was made concerning whether to reappoint Rincon to that position for 1994-95. The administrators' telling Grievant during his interview that Rincon had not vacated the position does not alter the existence and contents of the Bulletin or the fact that interviews of Grievant and Rincon were conducted pursuant

to it.

By so posting and interviewing for the 94-95 coaching assignment in question, the District expressly declared and effectively rendered that assignment vacant and thereby subjected the District's selection for it to the preference for "volunteers from the professional staff" that is imposed by Appendix C as regards the District's "attempt to fill any vacant assignments."

While the Agreement imposes a preference for volunteers from the professional staff in the filling of any assignments treated by the District as vacant, Appendix C read together with Art. II Sec. 2.2 and Art. VII Sec. 7.5 D.5., does not require that the District appoint a volunteer from the professional staff who is not qualified to perform the Appendix C assignment involved. Here, however, there is no District contention or proof that Grievant is not qualified for the assignment in question. The District's witnesses testified, in essence, that they selected Rincon rather than Grievant because Rincon was exceptionally well qualified for the position and there was no reason not to reappoint him. They did not assert that Grievant was not qualified for the assignment, and none of the pre-arbitral grievance denials contain such an assertion, either. There is no basis in the record on which to conclude that Grievant is not qualified for the position in question.

For the foregoing reasons, the Arbitrator concludes that the District violated Appendix C by its non-selection of Grievant as Boys Varsity Soccer Coach for 1994-95 in the circumstances of this case. By way of remedy, as requested by the Union at the outset of the hearing, the Arbitrator has ordered the District to offer to appoint Grievant as the South H.S. Boys Varsity Soccer coach for 1995-96, instead of Vicente Rincon.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the STIPULATED ISSUES noted above that

1. The District did violate Appendix C of the Collective Bargaining Agreement when the Grievant, Steven Bannow, was not selected as the South High School Boys Varsity Soccer Coach for 1994-95.

2. By way of remedy for that violation, the District, its officers and agents, shall immediately offer the Grievant, Steven Bannow, the South High School Boys Varsity Soccer Coach assignment for 1995-96.

3. Requests in the grievance for relief other than that set forth in 2, above, are denied.

Dated at Shorewood, Wisconsin this 23rd day of May, 1995.

By Marshall L. Gratz /s/