

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

DEERFIELD EDUCATION ASSOCIATION

and

DEERFIELD COMMUNITY SCHOOL DISTRICT

Case 31  
No. 52550  
MA-9017

Appearances:

Mr. A. Phillip Borkenhagen, Executive Director, Capital Area UniServ-North, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Daniel G. Vliet, appearing on behalf of the District.

ARBITRATION AWARD

Deerfield Education Association, hereinafter referred to as the Association, and Deerfield Community School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of grievances arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Deerfield, Wisconsin, on July 25, 1995. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were received on September 20, 1995.

BACKGROUND:

The grievant has been employed as a teacher by the District since 1980. From 1980 through 1994-95, the grievant was a science teacher. In 1980, he founded the Science Club and was its advisor through the 1994-95 school year. In 1995-96, the District assigned the grievant to teach in a non-science area. On February 20, 1995, the District gave notice to the grievant that the District was considering non-renewal of the Science Club advisor portion of his contract. On March 1, 1995, the District Administrator stated the reason for this recommendation as follows:

Since your teaching responsibilities will not be in the science area, it makes more sense for us to look for another person, with

science teaching responsibilities, to be the science club advisor.

On March 13, 1995, the District's Board voted to non-renew the Science Club advisor portion of the grievant's contract. On March 20, 1995, the grievant filed a grievance over the District's action in non-renewing him as Science Club advisor. The grievance was processed through the grievance procedure and appealed to the instant arbitration. The parties stipulated that the grievance was proper and timely before the arbitrator.

ISSUE:

The parties stipulated to the following:

Did the District violate the terms of the collective bargaining agreement when it nonrenewed the grievant, Gerald Wichlacz, of his duties as Science Club advisor for the 1995-96 school year?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

**ARTICLE II. MANAGEMENT BOARD DUTIES**

It is agreed that the Board of Education, as management, possesses the sole right to operate the school district, to carry out the statutory mandates and goals of the educational programs. Management rights repose in management. However, such rights must be exercised within the provisions of this agreement. The management rights include, but are not limited to:

- A. To manage and to direct the employees of the school district.
- B. To hire, promote, transfer, assign, or retain employees in positions within the school system and educational programs.
- C. To establish reasonable work rules and rules of conduct.

D. To suspend, dismiss, non-renew, or take appropriate disciplinary action against employees for just cause.

(1) Suspension: Nothing in this agreement shall preclude suspension with pay by administration action, where deemed necessary by the administration, in the best interest of the school district and students enrolled in the public schools. Any suspension of an employee must be the subject of a school board hearing held within 72 hours of the suspension. The teacher has a right to attend this hearing with representation.

(2) Dismissal: The District reserves the right to dismiss a teacher.

(3) Non-Renewal: The District reserves the right to non-renew a teacher contract.

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#### ARTICLE IV. WORKING CONDITIONS

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V. The Board of Education reserves the right to remove a teacher from an extracurricular assignment; however, such removal may not be for arbitrary or capricious reasons.

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X. Teaching staff will be evaluated in accordance with District policy. Teacher evaluations will be a continuous process with emphasis upon teacher improvement.

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#### ASSOCIATION'S POSITION:

The Association contends that the District non-renewed the grievant without just cause and for arbitrary and capricious reasons. The Association points out that Article II, paragraph D of the

parties' contract mandates that the District can only non-renew employees for just cause and the record is clear that the District failed to apply any of the tenets of just cause when it non-renewed the grievant. It submits that the District did not forewarn the grievant and did not investigate the matter. It notes that the District gave no reasons of deficiencies or wrong doing by the grievant for its non-renewal. The Association concludes that the District clearly violated the just cause standard. The Association observes that the District is relying on Article IV, Section V to support its actions. It argues that Section V mentions "removal" and does not specify "non-renewal."

It claims that removal could have been accomplished in a couple of ways, one of which is simply to amend a teacher's individual contract by deleting the extracurricular position but the District labeled this a non-renewal and followed the non-renewal statute. The Association maintains that Article II, D does not cite Sec. 118.22, Stats., but plainly refers to any non-renewal of contract, consequently, the District was obligated to follow the contractual standard and cannot hide exclusively behind Article IV, Section V, alone.

The Association submits that the District's behavior in this case is arbitrary and capricious. It insists that the Science Teacher - Science Club connection is superficial and bogus. It alleges that a survey of the many extracurricular activities demonstrates that a teacher is assigned outside his/her area of curricular expertise. It gives examples that show no correlation between curricular and extracurricular assignments, such as DeWitte (Spanish) - Forensics; Harter (computer) - Math Club; Moe (art) - Yearbook Advisor and Witkowski, who does not teach in a curricular area - Dramatics. Thus, according to the Association, the District's rationale of maintaining strict adherence to the curricular/extracurricular connection is superficial and bogus.

The Association alleges that the District has hidden reasons for the non-renewal which is a continuation of penalizing the grievant. It states that the District has suspended the grievant for the last eight weeks of the first semester and by degrading his position and demeaning his work, it is attempting to oust him or hope he will leave. It submits that the District's removing him from Science Club advisor is merely an extension of its previous actions. It points out that while the District has hired a new science teacher, no one has been assigned to the Science Club advisorship. It asserts that this is egregious behavior on the part of the District.

The Association claims that the District's position was determined prior to the conclusion of the non-renewal conference. It maintains that the District had made its mind up and at the first step of the grievance procedure, the District reported it would be a waste of time to go through each step as the District had acted and could not be convinced to change its position. It argues that this posture reflects arbitrary and capricious behavior. It insists that the District's reference to other non-renewals is misplaced as none of these are comparable to the instant case.

The Association takes the position that the District's posture demonstrates that it had disciplinary motives for the non-renewal rather than a mere removal due to a lack of curricular connection. The Association contends that the District must be fair in its handling of the process

up to the non-renewal, the evidence must be reliable and the decision arrived at in good faith. It cites arbitral decisions in support of its position and insists that the criteria were not followed by the District. It observes that the non-renewal subjected the grievant to double jeopardy by increasing the penalty after discipline was already imposed for the offense.

The Association argues that other contractual provisions support its position including evaluating and directing the grievant as well as establishing reasonable work rules and rules of conduct. It states that the evidence demonstrated that the grievant dramatically increased the number of Science Club participants as well as documented students' enthusiasm, accomplishments and awards. It points out that the District recognized that grievant did a reasonable job. It maintains that the grievant has the desire, enthusiasm and cooperation to run the club and forcing another to run it would be counterproductive by suggesting that only curriculum area teachers be assigned the extracurricular activity. It claims that this is an unreasonable work rule and violates the tenets of properly managing and directing its work force.

As the remedy, the Association asks that the grievant be reinstated and made whole and the District be ordered to cease and desist.

#### DISTRICT'S POSITION:

The District contends that it is not required to show just cause to remove a teacher from an extracurricular position. It asserts that Article II, Section D, which provides that just cause is required to non-renew a teacher's employment is clearly intended to apply to disciplinary situations as opposed to a reassignment. The District's position is that the general just cause provision is superseded by the more specific provision, Article IV, Section V, which allows removal from an extracurricular position provided the removal is not for arbitrary or capricious reasons. The District claims the quid pro quo for this provision was a teacher's right to resign an extracurricular assignment after two years of service. It submits that the Association cannot attempt to revise the contract and argue that Article IV, Section V does not apply. The District points out the prevailing rule with respect to specific versus general language is that where there is a conflict, the specific language will prevail. The District maintains that the standard to evaluate its Board's decision is the arbitrary and capricious standard found at Article IV, Section V.

The District claims that it was not required to evaluate the grievant's performance prior to non-renewing him. It suggests that Article IV, Section X has no bearing on the instant case. It argues that the evidence establishes that the District has no policy on evaluation of teachers in their extracurricular activities and the District does not take the position that the grievant was non-renewed from the Science Club advisorship because of poor performance, and the Union's raising the issue is no more than an effort to distract the arbitrator from the simple explanation of why the grievant was removed from the extracurricular position.

The District contends that the decision to non-renew the grievant had a reasonable basis and must be upheld. It maintains that the decision for non-renewal was based solely on the decision to change his teaching assignment. It states that the rationale is that the Science Club advisor should be someone currently teaching science in the District because this strengthens the connection between the Club and classroom activities. It notes that the grievant has not grieved his 1995-96 teaching assignment and it is inconsistent to grieve the non-renewal of the Science Club advisorship but not the reassignment. The District does not deny that there are extracurricular assignments which do not directly relate to the area taught by the teachers but some are sports related or do not relate to specific subjects such as class advisor, student council and future problem solving. The District asserts that the Math and Science Clubs have always been advised by a math or science teacher, respectively.

The District posits the phrase "arbitrary or capricious" is a term of art and an arbitrary or capricious decision is one that is so unreasonable to be without a rational basis or the result of an unconsidered, willful or irrational choice of conduct. The District insists that nothing in the record indicates this type of behavior on its part. The District offers an arbitrator's definition of an arbitrary and capricious decision as one that a normal and prudent school board could not reach after consideration of the facts and circumstances. It claims that as the District's decision was based on the grievant's change in assignment, the decision has a sound basis.

The District maintains that it had a valid reason to non-renew the grievant based on the fact that he would not be teaching science in the 1995-96 school year. The District insists that nothing in the record supports the grievant's argument that the District intended to punish him or that he was singled out or that the District's reason was a subterfuge. It acknowledges that the Association may disagree with the decision but the District has a rational basis for its decision and under the contractual standard, nothing more is required of it. It requests that the grievance be denied and dismissed.

#### ASSOCIATION'S REPLY:

The Association contends that the lack of filing associated grievances over assignments has no bearing on the instant case. It argues that whether or not others filed grievances over each and every threat of job loss is not a sign of acquiescence or a lack of merit on the grievant's or Association's part. It asserts that there is no linkage between the grievant's individual teaching assignment for 1995-96 and the non-renewal of his extracurricular position and whether the grievant filed a grievance over his teaching assignment is irrelevant.

The Association suggests that the District failed to produce convincing evidence to support its argument that each extracurricular club should be aligned to a curricular area. It claims the District offered no specific exhibit to substantiate this argument. It points out that the District cites only three extracurricular areas (one of which is non-existent) which it claims are directly related to the classroom. The Association believes that at the very best there is a loose connection between the two. It maintains that nothing is sacred about the science area and the grievant should

be given the benefit of the doubt as no substantiated reason remains to force the grievant out of his position as Science Club advisor.

The Association argues that the District's assumptions as to contract interpretations such as Article II, D applying to disciplinary situations and the quid pro quo for a lesser standard than just cause, are not supported by any evidence. It submits that the language is plain and unambiguous and must be given effect. It observes that the District is claiming a nexus between the just cause and arbitrary and capricious clauses when it asserts that the more specific must be given effect and the District is obligated to follow the non-renewal standard because that is the area in which the District initiated its action against the grievant.

The Association contends that the District's assertion that Article IV, Section X does not apply is contradicted by the testimony of the District Administrator.

The Association maintains that the District continues to attempt to hide the real reasons for the non-renewal of the grievant's extracurricular assignment but has grossly bungled the camouflaging of its real reasons for the non-renewal which was continued concerns regarding safety issues. It contends that the District's bias and subsequent actions are arbitrary and capricious and asks that the grievance be granted.

#### DISTRICT'S REPLY:

The District rejects the Association's argument that it must comply with both the just cause and arbitrary and capricious standards in order to remove the grievant from the Science Club position. It argues that nothing supports this argument and it cites arbitral authority to support its conclusion. The District claims that the Association has attempted to confuse the issue by its alleged distinction between "removal" and "nonrenewal." It observes that it should not be faulted for providing the grievant with written notice and an opportunity for a hearing and nothing precludes the District from following Sec. 118.22, Stats., if it so desires, when removing a teacher from an extracurricular position.

The District maintains that it has asserted a legitimate reason for the grievant's removal and the Association's arguments to the contrary are based on the inaccurate and hazy recollections of the grievant. The District claims that the arbitration decisions cited by the Association do not apply here because each involved the non-renewal of a teacher from the teacher's position as a teacher and not a change in an extracurricular assignment. It suggests that as these cases are factually and legally inapplicable, they should be ignored because of irrelevance.

The District insists that the record does not support the Association's claim that the District's real reason for removing him was its vindictiveness. It argues that there is no evidence of this and it is inconsistent with the basis for the District's decision. It suggests that the grievant knew his assignment had been changed and along with it the Science Club advisorship, and if this was important, why didn't he grieve both his change in assignment as that was the underlying

cause for the removal. The District points out that there was no explanation offered for this lapse. The District notes that the grievant raised issues related to discipline but it was never explained how these relate to his removal. It concludes that there is nothing in the record to sustain the grievance. The District states that it acted in a fair and reasonable manner both in the process utilized in making the decision as well as the ultimate decision and therefore the grievance should be denied and dismissed.

#### DISCUSSION:

The issue presented here is whether the grievant's non-renewal as Science Club advisor violated the parties' collective bargaining agreement. The Association contends that Article II requires that the non-renewal must be supported by just cause. The Association's argument is misplaced. A careful reading of Article II, D reveals that it relates to suspension, dismissal, non-renewal, or taking appropriate disciplinary action against employees. All of these are disciplinary actions for misconduct. Section 3 of Article II, D reserves to the District the right to non-renew a teacher's contract. These provisions are general and relate essentially to the District's rights to non-renew a teacher as an employee. Article IV, Section V, specifically states: "The Board of Education reserves the right to remove a teacher from an extracurricular assignment; however, such removal shall not be for arbitrary or capricious reasons." This provision is clear and unambiguous and clearly controls this case. Acceptance of the Association's assertion that Article II applies would render this language a nullity and parties do not include specific provisions in their contract that have no effect. Thus, it is concluded that Article II is inapplicable to this case. Furthermore, the procedural requirements of just cause related to a non-renewal provided by Article II likewise are not applicable to this case. The case is very similar to Central High School District of Westosha, (unpublished, Nielsen, 8/92), in which the same argument was rejected. Also, the mere fact that the District followed Sec. 118.22, Stats., in removing the grievant from the Science Club advisorship does not bring the case within the ambit of Article II.

Article IV, V controls this case and the grievance must be denied unless the removal was for arbitrary and capricious reasons. A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct. 1/ The District's reason for the removal was as follows:

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1/ Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n, 109 Wis.2d 256 (1982); State ex rel. Young v. Shaw, 162 Wis.2d 276 (CtApp 1991).

Since your teaching responsibilities will not be in the science area, it makes more sense for us to look for another person, with science teaching responsibilities, to be science club advisor." 2/

The District's decision has a rational basis, i.e., assign the Science Club advisorship to an active science teacher. The grievant may disagree with the decision and he may be more qualified, more experienced and having started the Club and been its advisor for 14 years, may feel he has a proprietary interest in it. However, the test is not whether the grievant is better, more interested, more enthusiastic, experienced, knowledgeable, etc., rather all that is required is that the decision have a rational basis. The evidence indicates it does.

The Association has argued that the rationale is bogus and the real reasons were to continue to punish the grievant for some other conduct. The evidence presented here did not establish why the grievant was suspended or that the removal was in any manner related to it. In other words, the record failed to demonstrate any other reasons to prove the decision offered was bogus or pretextual. The evidence presented established that the District's decision to remove the grievant from the extracurricular duty of Science Club advisor had a rational basis and was not unconsidered, willful and irrational. The District had the right to do this under Article IV, Section V and the evidence fails to establish any contractual violation.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

#### AWARD

The District did not violate the terms of the collective bargaining agreement when it non-renewed the grievant of his duties as Science Club advisor for the 1995-96 school year, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 4th day of October, 1995.

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

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2/ Ex. 6.