

Beitner #2

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

Employer,

-and-

Union

Grievant: Employee 1 / Denial of Coaching Position

Arbitrator: Elliot I. Beitner

OPINION AND AWARD

Arbitration hearings were held on June 1, 2006 and July 10, 2006 at the Library in City A, Michigan. At the hearings the parties had an opportunity to present sworn testimony, to cross examine witnesses and to offer documentary exhibits into evidence. The parties also filed post bearing briefs that were received by September 5, 2006 at which time the hearing was closed.

BACKGROUND

On November 9, 2005, Employee 1, a teacher since 1998, filed a grievance protesting her non-selection for an extra curricular position as the seventh grade basketball coach. Employee 1 is certified in physical education K-12 with an education minor in coaching 7-12. From 1998 to 2001 she served as the seventh grade basketball coach but gave up that position because of

family responsibilities. Prior to working for the Employer, she taught at several Catholic schools and coached various sports, including basketball. She received a bachelor's degree from University A and a master of arts in education with a major in sports administration from University B.

The parties stipulated that the seventh grade boys' basketball coach position was originally given to Employee 3, a non-bargaining unit employee who resigned the position between November 1 and November 16. The position was then given to Employee 2, also a non-bargaining unit employee on November 16, 2006.

The parties also stipulated to the following issue:

Did the Employer violate Section VIII. G. of the collective bargaining agreement when it failed to award the position of seventh grade boys' basketball coach to Employee 1, a bargaining unit member? If so, what should the remedy be?

Article VIII - VACANCIES, ASSIGNMENTS AND PROMOTIONS, Section G. reads:

ARTICLE VIII - VACANCIES, ASSIGNMENTS AND PROMOTIONS

* * *

G. Non-teaching positions as listed in this Agreement shall be posted for ten (10) calendar days.

1. In an emergency a position may be filled temporarily during the posting period.
2. Positions which may be filled by teaching staff from other buildings than where the job is, must be posted in all buildings, on the Employer web-site, and with Union. Such positions shall be filled on the basis of the qualifications as posted. The position, as posted, will be awarded to the eligible employee who is qualified and where two or more employees are relatively equal, seniority in the Employer shall prevail.
3. Posting shall contain a brief job description.
4. If there are no bargaining unit applicants within the ten (10) day

posting period, the position or vacancy may be filled for the duration of the school year. At the end of the school year the position will be posted.

On October 10, 2005, the Employer posted vacancies for several coaching positions, including the seventh grade boys' basketball team. That posting reads:

PLEASE POST

EMPLOYER

123 Some Avenue

City A, Michigan

October 10, 2005

Applications are now being accepted for the following Winter Sports Coaching positions for the 2005-2006 school year:

BOYS 8TH GRADE BASKETBALL
HEAD VARSITY BOYS WRESTLING
VARSITY GIRLS VOLLEYBALL

BOYS 7TH GRADE BASKETBALL
BOYS FRESHMAN BASKETBALL JUNIOR
GIRLS JV CHEERLEADING

Objective: Provide team leadership and athletic instruction for Middle School and/or High School students.

COMPENSATION: According to Contractual Agreement

ESSENTIAL FUNCTIONS:

1. Recruit and select members of the team.
2. Develop and implement an age-appropriate conditioning program for team members.
3. Teach fundamentals of the sport.
4. Monitor team members' academic progress (weekly).
5. Distribute and collect uniforms and equipment.
6. Provide first aid, as needed.
7. Attend all meetings required by the Director of Secondary Student Activities.
8. Provide discipline as determined by the Coaches Handbook.
9. Direct and supervise all team practices and events,
10. Complete all required reports in a timely manner.
11. Successfully complete the PROGRAM.
12. Ability to monitor student classroom academic progress.

13. Ability to coordinate a program for teaching fundamentals of the sport.

ADDITIONAL RESPONSIBILITIES:

1. Participate in the athletic banquet.
2. Maintain communications with the team members' homes.
3. Provide assistance to college recruiters (high school coaches).

JOB QUALIFICATIONS:

1. Preference to Union member as determined by interviewing committee.
2. Must have previous coaching experience at the appropriate level.
3. Demonstrated ability to work with pre-adolescent and adolescent students.
4. Must be able to demonstrate competence in Essential Function areas.

COMPENSATION: Consistent with Schedule B-2, Collective Bargaining Agreement.

* * *

The grievant and another applicant for the seventh grade boys' basketball coaching position, a non-bargaining unit employee, were interviewed on October 27, 2005 by a committee consisting of Committee Member 1, Athletic Director; Committee Member 2, Assistant Superintendent for Human Resources; Committee Member 3, Middle School Principal; and Committee Member 4, Boys Varsity Basketball Coach. All applicants were asked identical questions and graded on their answers separately by each of the interviewers. After the interviews, Employee 3, a non-bargaining unit employee, was recommended for the seventh grade position and Employee 4, a bargaining unit employee for the eighth grade position. Employee 3 resigned the seventh grade position and Employee 2, a non-bargaining unit employee was appointed as the seventh grade coach. He continued in that position for the balance of the season.

It is the Union's position that the grievant met the posted qualifications and should have been awarded the position instead of a non-bargaining unit employee.

During the interview, the grievant was asked if she was willing to scout for the high school team and if she was willing to engage in out-of-season practice. She told the interviewers that she did not think those tasks were part of the listed qualifications for the job, were against the guidelines of the ORGANIZATION and would interfere with her desire to obtain other part-time positions during the off-season. She said that other coaches had coached basketball and then coached a spring sport.

Director 1, the athletic director, testified that the grievant was not selected because she did not support the philosophy of the athletic department. He stated the out-of-season activities that the grievant was asked to performed were camps before and after the season and that camps did not violate ORGANIZATION rules.

The grievance was not resolved in the grievance steps and was processed to this arbitration hearing.

OTHER RELEVANT CONTRACT PROVISIONS

SECTION II -- BOARD OF EDUCATION RIGHTS AND RESPONSIBILITIES

- A. Both parties to this Agreement recognize that because of limitations which apply, and for sound business practices in the operation of the schools, the Board has the responsibility of limiting expenditures to reasonably anticipated revenues.
- B. The Board and the Union agree that the Board, on its own behalf and on behalf of the electors of the Employer, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Michigan including, but without limiting the generality of the foregoing, the right:
 - 1. To the executive management and administrative control of the school system and its properties and facilities, and the activities of its employees in respect to the execution of their professional duties and responsibilities.
 - 2. To hire all employees, and, subject to the provisions of the law and this Agreement, to determine their qualifications, and the

conditions of their continued employment, or their dismissal or demotion, and to promote and transfer all such employees.

SECTION XIX -- GRIEVANCE PROCEDURE

D. The procedure for the consideration of grievances shall be as follows:

Level Four

If the Superintendent/Designee and the Union shall be unable to resolve any grievance, and such grievance shall involve an alleged violation, misrepresentation or a specific article or section of the Agreement, the grievance may be appealed to arbitration within twenty (20) schools days after the decision of the Superintendent/Designee. Such appeal shall be in writing and shall be delivered to the American Arbitration Association and the Board within said twenty (20) day period, and if not so delivered the grievance shall be abandoned. If the parties are unable to agree upon an Arbitrator, one shall be appointed under the rules of the American Arbitration Association. The Arbitrator so selected will confer with the parties and hold hearings promptly and will issue a decision not later than twenty (20) days from the date or close of the hearing. The Arbitrator's decision shall be in writing and will set forth his/her findings of fact, reasoning, and conclusions on the issues submitted. The Arbitrator shall be limited to deciding whether an alleged violation, misinterpretation or misapplication of a specific article or section of this Agreement has occurred and shall be subject to, in all cases, the rights, responsibilities and authority of the parties under the Michigan School Laws, the Constitutions of the United States and the State of Michigan, and all other applicable state and federal laws. The Arbitrator shall not usurp the functions of the Board of Education or the proper exercise of its judgment and discretion under the Law and this Agreement or to require any retroactive adjustment in compensation for more than fifteen (15) days prior to the date the grievance was filed.

The decision of the Arbitrator, if within the scope of the authority as above set forth, shall be final and binding.

The costs of the Arbitrator shall be shared equally by the parties; however, each party shall bear its own expense.

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POSITION OF THE PARTIES

UNION:

The Union asserts that the Schools violated Article VIII-G by denying a non-teaching coaching position to the grievant who met the qualifications of the job posting and instead granted the position to a non-bargaining unit member. The grievant was able to perform all the essential functions listed, the additional responsibilities and the listed job qualifications.

The evidence is undisputed that the grievant in the past had successfully filled the position of boys' basketball coach and had voluntarily resigned that position for personal reasons. She had more previous coaching experience at the middle school level than either Employee 3 or Employee 2 and had demonstrated her ability to work with pre-adolescents and adolescent students.

The Employer does not have the discretion under Article VIII-G to add additional requirements for that position. The additional requirements violated the letter or spirit of the ORGANIZATION coaches' guidebook Article V.A OUT-OF-SEASON LIMITATIONS and Article X SUMMER REGULATIONS which reads:

These limitations out-of-season apply to COACHES:

- a. Outside the school season during the school year (from Monday the week of Aug. 15 to the last day of the school year for that school), school coaches are prohibited from providing coaching at any one time under one root, facility or campus for more than three students in grades 7-12 of the Employer for which they coach. This applies only to the specific sport(s) coached by the coach, but it applies to all levels and both genders, whether the coach is paid or volunteer (e.g., a volunteer JV boys' soccer coach may not work with more than three girls in grades 7-12 outside the

girls' soccer season during the school year).

The Union asks that the grievance be granted, that the grievant be awarded the compensation required under the Agreement for being the boys' seventh grade basketball coach for the 2005-2006 school year and that she not be denied the position to continue as that coach for the 2006-2007 school year as well.

EMPLOYER:

The Employer argues that the management's rights section of the labor agreement, Section II items A and B, sets forth the Employer's right to hire all employees and to determine their qualifications and the conditions of their continued employment. Committee Member 1, a 36 year employee with the school Employer and the athletic director, testified that the administration had decided to implement a basketball program beginning with the seventh and eighth grade teams and developing players to eventually become varsity athletes. Thus, coaches of the seventh and eighth grades would be required to coordinate their efforts to implement this program,

The schools argue that the grievant was not asked to perform any duty that violated any of the provisions of the ORGANIZATION coaches' guidebook and her reluctance to accept these responsibilities was predicated on her desire to obtain other part-time work.

The Employer states that the contract language is clear and not ambiguous and the arbitrator would be exceeding his power were he to grant the grievance.

The Employer asks that the grievance be denied.

DISCUSSION AND DECISION

The parties stipulated that the issue to be decided is whether the Employer violated Section VIII.G of the collective bargaining agreement when it failed to award the position of seventh grade boys' basketball coach to Employee 1, a bargaining unit member. If so, what should the remedy be?

Article VIII.G requires that non-teaching positions be awarded to bargaining unit members if qualified based on the qualifications as posted. Here, the evidence is persuasive that the grievant met all the essential functions listed on the job posting and had successfully acted as boys' basketball coach for three years in the past. She also met the additional responsibilities and the listed job qualifications. Her non-selection was not predicated on a lack of the essential functions, additional responsibilities or job qualifications. Rather, her non-selection was because she refused to perform scouting for the high school basketball team or participate in out-of-season activities. To decide this grievance, it is not necessary for me to determine whether these activities would violate the ORGANIZATION guidelines. My job is solely to determine whether the Employer violated the labor agreement.

The Employer relies on the authority granted it in Section II, Board of Education Rights and Responsibilities in deciding to require seventh and eighth grade coaches to perform out-of-season duties and to scout for the high school team. It is true that Section 11.8.2 grants the Employer the right to determine the qualifications and the conditions of continuing employment for its employees. However, Section B-2 also conditions that right by stating its exercise is "subject to the provisions of the law and this Agreement." Therefore, the question to be decided

is whether the Board's additional requirements for middle school coaches violate a provision of the Agreement.

Section VIII.G grants primacy to bargaining unit members over non-bargaining unit members, providing the bargaining unit member meets the qualifications of the postings. The evidence is clear that Employee 1 met the qualifications set forth in the posting. To add out-of-season requirements for the position violates the posting as listed. It also may violate Section B-2 of the labor agreement which contains the pay schedule for boys' basketball under the general category "Winter Sports Season."

I conclude that the Employer violated the labor agreement when it denied the grievant the position of seventh grade boys' basketball coach. Therefore, she shall be awarded that position retroactively for the 2005-2006 season and paid the appropriate contractual amount. If she had been appointed for the 2005-2006 season and if this would have automatically entitled her to continue in the position for the 2006-2007 academic year, and if she still wishes that position, she should be awarded the position for the 2006-2007 academic year. Jurisdiction shall be maintained for 90 days in the event the parties cannot agree on the implementation of this award.

Dated: September 25, 2006

ELLIOT I. BEITNER, Arbitrator