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# THE IMPACT OF TEACHER COLLECTIVE BARGAINING AGREEMENTS ON HIGH SCHOOL COACHES

HARVEY M. SHRAGE\* AND CURT HAMAKAWA\*\*

## INTRODUCTION

The purpose of this article is to consider the impact of teacher collective bargaining agreements (CBA) on high school coaches.<sup>1</sup> In considering the subject, the authors have reviewed labor arbitration decisions over a six-year period, 2009–2014, that involve secondary school coaches who are impacted by CBAs between teachers and school districts. The authors compiled the arbitration decisions from the LexisNexis database of arbitration decisions and the Bloomberg (BNA) database of arbitration decisions.<sup>2</sup> High school teachers

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1. This article does not address cases involving school districts in which coaches are in their own bargaining unit. *See, e.g.*, *Police Dep't. v. State Bd. of Labor Relations*, 622 A.2d 1005, 1007 (Conn. 1993). The court concluded that coaches who work at least 120 days per calendar year and at least 20 hours per week may form their own union. *Id.* In addition, it should be noted that states may provide statutory protection for supplemental positions held by teachers. *Id.* Such statutes may provide protections in the absence of a collective bargaining agreement or provide protection beyond those provided for in a collective bargaining agreement applicable to supplemental positions, including coaching positions. *Id.*; *see* 2012 AAA LEXIS 307 (2012) (Jaffe, Arb.) (The state of Ohio provides statutory protection over supplemental positions for its teachers, requiring that before a district offers a position to a “non-licensed” applicant, its school board must first adopt a resolution stating that it had offered the position to licensed employees, first within the district and then outside the district, and that no such employee qualified to fill the position. Therefore, this statutory measure ensures that teachers in Ohio enjoy a first consideration in applying for and being offered coaching jobs regardless of whether their CBA provides them with such preferential treatment.).

2. Not all arbitration decisions are made available to LEXIS and/or Bloomberg BNA (BNA) for publication. The arbitration process is subject to the terms agreed upon by the parties and decisions may not be released to LEXIS, BNA or any other publication source. Moreover, even if a decision is released to LEXIS and/or BNA the editors of the respective database have the discretion in determin-

are a highly unionized group and a significant number of teachers are covered by CBAs.<sup>3</sup> Since coaching positions are often an extra-curricular position for a teacher,<sup>4</sup> teacher CBAs impact high school coaches. Therefore, issues impacting high school coaches covered by a teacher CBA will be subject to the grievance arbitration procedure<sup>5</sup> included in that agreement.<sup>6</sup>

According to the Bureau of Labor Statistics, 11.1% of wage and salary workers were members of a union in 2015.<sup>7</sup> In contrast, the union membership rate in the public sector was 35.2% in 2015.<sup>8</sup> Of the 4,535,249 teachers employed in elementary, secondary, and special education in 2014, 49% were unionized.<sup>9</sup> Although this represents a decline from the 57.5% of the 1.5 million teachers that were union members in 1983 (when the Bureau of Labor Statistics started tracking teacher union membership),<sup>10</sup> it is still significantly

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ing which cases are published.

3. *Status of K-12 Public School Teacher Bargaining*, NAT'L EDUC. ASS'N COLLECTIVE BARGAINING & MEMBER ADVOC. fig.1, <http://www.neacollectivebargaining.org/collbarg/Content/maps/Status%20of%20K-12%20Public%20School%20Teacher%20Bargaining-Feb16.pdf> (last visited May 15, 2017); see Benjamin M. Superfine & Jessica J. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier for Civil Rights*, 2014 MICH. ST. L. REV. 737, 766–67 (2014).

4. GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 432 (4th ed. 2010) (often, high school coaches are “teachers first and coaches second.”). In such cases, the teacher is serving as a coach as an extra-curricular activity and is subject to the provisions of the teacher collective bargaining agreement. *Id.*

5. Grievance arbitration is the submission of the parties’ grievance to a private arbitrator or arbitrators who listen to the disputed question and give a binding decision regarding the dispute. *Id.* at 432.

6. Approximately 99% of collective bargaining agreements include a grievance/arbitration procedure. Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL’Y J. 313, 317 (2007).

7. News Release, Bureau of Labor Statistics, UNION MEMBERS—2015 (Jan. 28, 2016).

8. *Id.*

9. *Status of K-12 Public School Teacher Bargaining*, *supra* note 3. The significance of the 49% must be considered in light of the fact that only 34 states and the District of Columbia have bargaining laws covering K-12 teachers. *Id.* Nine states have no bargaining law but limited bargaining takes place; in six states bargaining is prohibited; in one state “collaborative conferencing” is permitted. *Id.* Further, it should be considered in the context of statistics gathered by the National Center for Educational Statistics revealing that in the thirty-four states that have bargaining laws for teachers, in twenty of the states in excess of 70% of the school districts have entered into collective bargaining agreements. *Schools and Staffing Survey: Percentage Distribution of Public School Districts, by Specific Agreements with Teachers’ Associations or Unions and State: 2007–08*, NAT’L CTR. FOR EDUC. STAT. tbl.7, [https://nces.ed.gov/surveys/sass/tables/sass0708\\_tbl7.asp](https://nces.ed.gov/surveys/sass/tables/sass0708_tbl7.asp) (last visited May 15, 2017).

10. *Status of K-12 Public School Teacher Bargaining*, *supra* note 3. The decrease in teacher union membership is due in part to the passage of state laws that have weakened the bargaining rights of teacher unions. In *Teacher Evaluation and Collective Bargaining: The New Frontier for Civil Rights* the authors state:

higher than the percentage of private and public sector employees that are unionized.<sup>11</sup>

In this highly unionized environment, student participation in high school sports exceeded 7.8 million in 2014–2015,<sup>12</sup> which was an all-time record. In fact, National Federation of State High School Associations (NFHS) data indicates that 2014–2015 was the twenty-sixth consecutive year that high school sports participation has increased.<sup>13</sup> This means that of the estimated 15 million high school students,<sup>14</sup> more than half participate in organized sport activities. Given this trend, the implication for unionized school districts is that there will likely be a steady increase in the number of teacher-coaches covered by CBAs.<sup>15</sup>

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[A]t least twelve states modified their laws governing collective representation of public employees in 2012 alone. In doing so, many of these states have weakened teachers' unions' abilities to bargain over issues such as teacher employment, grievance procedures, compensation, and working conditions. Together, states' enactment of teacher evaluation and accountability systems and modifications of laws governing collective bargaining form the centerpiece of reforms aimed at equalizing and increasing teachers' effectiveness.

Superfine & Gottlieb, *supra* note 3, at 741 (citations omitted). In addition, public sector labor unions have been weakened by right to work laws. In a right to work state, employers may not require employees to join a union or pay union dues as a condition of employment. *Id.*

11. Even in states allowing compulsory dues, public sector unions can only assess a “service fee” to cover the cost of collective bargaining. Peter Kauffman, Note, *Unionized Charter School Contracts as a Model for Reform of Public School Job Security*, 88 N.Y.U. L. REV. 1379, 1382 n.10 (2013).

Recently, the Supreme Court considered the constitutionality of the service fee. *See Friedrichs v. Cal. Teachers Ass'n*, 136 S.Ct. 1083 (2016). Due to a deadlocked 4-4 vote the lower court ruling upholding the constitutionality of the service fee stands. *Id.* Finally, the increase in the number of charter schools has contributed to the decline. Kauffman, *supra*, at 1385. A recent study indicates that most charter schools are not unionized. *Id.*

12. *2014–2015 High School Athletics Participation Survey*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, [https://www.nfhs.org/ParticipationStatistics/PDF/2014-15\\_Participation\\_Survey\\_Results.pdf](https://www.nfhs.org/ParticipationStatistics/PDF/2014-15_Participation_Survey_Results.pdf) (last visited May 15, 2017); see Bryan Toporek, *High School Sports Participation Eclipses 7.8 Million for First Time*, EDUC. WEEK'S BLOG (Aug. 19, 2015, 1:25 PM), [http://blogs.edweek.org/edweek/schooled\\_in\\_sports/2015/08/high\\_school\\_sports\\_participation\\_eclipses\\_78\\_million\\_for\\_first\\_time\\_ever.html](http://blogs.edweek.org/edweek/schooled_in_sports/2015/08/high_school_sports_participation_eclipses_78_million_for_first_time_ever.html).

13. *2014–2015 High School Athletics Participation Survey*, *supra* note 12.

14. *Public School Enrollment*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/coe/pdf/coe\\_cga.pdf](https://nces.ed.gov/programs/coe/pdf/coe_cga.pdf) (last visited May 15, 2017); see *2011–2015 American Community Survey 5-Year Estimates: Selected Social Characteristics in the United States*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_5YR\\_DP02&src=pt](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP02&src=pt) (last visited May 15, 2017) (census estimates the number enrolled in grade 9 to grade 12 at 17,016,693).

15. *Coaches and Scouts: Occupational Outlook Handbook*, U.S. DEP'T LAB. STAT. (Dec. 17, 2015), <http://www.bls.gov/ooh/entertainment-and-sports/coaches-and-scouts.htm#tab-2>.

### I. Overview of the Issues Raised by the Cases

The authors reviewed forty-five arbitration decisions over a six-year period, twenty-seven of which involved the hiring of non-union members. In descending order, the remaining cases were grievances relating to discipline (five), compensation (five), position elimination/transfer (three), arbitrability (three), and contract interpretation (two).<sup>16</sup> While the authors acknowledge the limited sample size, it is nonetheless telling that most grievances brought by teacher-coaches allege wrongdoing on the part of the school district over its hiring of non-bargaining unit individuals over union members for positions as coaches of school teams.

### II. Hiring of Coaches

Our review of arbitration cases indicates that decisions favoring bargaining unit members often hinge on the language of the CBA that explicitly or implicitly grants preferential treatment to union members. In *2011 BNA LA Supp 150387*,<sup>17</sup> a union member teacher who applied for his high school's head football coaching job was passed over in favor of a non-teacher for the position. In his grievance, the teacher alleged that in hiring the non-bargaining unit member as football coach, the school district violated the CBA, which, in addressing supplemental positions including coaching positions, stated that "[i]nterested bargaining unit members will be granted an interview for said position, and qualified applicants will be hired."<sup>18</sup> The arbitrator stated that where the CBA grants favored status to "qualified" bargaining unit members in hiring for coaching positions, it is generally management's prerogative to determine the requisite qualifications for a given position.<sup>19</sup> However, in this instance, the arbitrator ruled that the district abused its discretion in determining that the internal applicant was not qualified given his prior coaching experience, adding that the bargaining unit member need only be qualified, and not more qualified, than outside candidates.<sup>20</sup>

Other agreements are less definitive in terms of the hiring imperative, but nonetheless grant union members favorable treatment in the hiring process in

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16. Many cases raised more than a single and isolated issue, and categorization was based on the authors' judgment and discretion.

17. 2011 BNA LA Supp 150387 (2011) (Klein, Arb.).

18. *Id.*

19. *Id.*

20. *Id.*

comparison to non-union members. In *2009 AAA Lexis 504*,<sup>21</sup> the CBA granted bargaining unit members “first consideration” in applying for supplemental coaching positions, but without defining the term. The arbitrator took this to mean that a bargaining unit member who applied for a supplemental position as a sport team coach had to be “thoughtfully regarded” before a hiring decision was made to fill the vacancy with a non-bargaining unit person.<sup>22</sup> In the instant case, the arbitrator found “thoughtful regard” to have occurred by the grievant’s inclusion in the hiring process through the finalist stage.<sup>23</sup> Conversely, some agreements are silent regarding preferential treatment for union members while others expressly state that supplemental positions can be assigned to non-union members if “no teacher who has the requisite skills and competencies has expressed an interest in the activity.”<sup>24</sup> In *2012 AAA Lexis 377*, the CBA expressly stated that coaching positions could be assigned to non-bargaining unit members if no otherwise qualified teacher had applied, which the school district took to mean that coaching positions were not the exclusive domain of the bargaining unit.<sup>25</sup> Taking into consideration objective standards, including the fact that the applicant/grievant had previously coached baseball but not softball, the position for which he applied, the arbitrator concluded that it was not unreasonable for the district to conclude that the grievant was not qualified, especially since the person who was hired for the position had previous softball coaching experience.<sup>26</sup>

Even in cases in which a school district has discretion to hire one person over another, the decision should have a rational basis and not be made in “bad faith” or in an “arbitrary or capricious” manner.<sup>27</sup> In *2012 BNA LA Supp. 149133*,<sup>28</sup> the union alleged that three teachers who were bargaining unit

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21. *2009 AAA Lexis 504* (2009) (Murphy, Arb.).

22. *Id.* at 11.

23. *Id.*

24. *2012 AAA Lexis 377*, 12 (2012) (Chiesa, Arb.).

25. *Id.* at 8, 12.

26. *Id.* at 16–17.

27. *In re City of Mansfield v. Fraternal Order of Police*, 135 BNA LA 1081 (2015) (Szuter, Arb.) (“[A]gency action is arbitrary and capricious if the agency contravenes the legislature’s intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise.” (citations omitted)). Further, “arbitrary and capricious” has been defined as “a decision or action . . . without consideration or in disregard of facts or law or without determining principle.” 2005 AAA LEXIS 853, 12 (2005) (Lewandowski, Arb.) (quoting *Arbitrary and*

*Capricious*, BLACK’S LAW DICTIONARY (6th ed. 1990)). See *U\_\_ Teachers Ass’n v. Emp’r* 2013 BNA LA Supp. 149945 (2013) (Germano, Arb.); *Teachers Union v. Emp’r*, 2012 BNA LA Supp. 149133 (2012) (Dunn, Arb.); 2011 BNA LA Supp. 150387 (2011) (Klein, Arb.).

28. *Teachers Union*, 2012 BNA LA Supp. 149133.

members were encouraged by the school's athletics director to apply for the head girls' basketball coaching position.<sup>29</sup> Subsequently, however, the athletics director seemed less encouraging, leaving the teachers with the impression that the athletics director became aware of an outside candidate with sterling credentials.<sup>30</sup> While the union characterized this change in tone as an indication that "the fix was in" and tantamount to bad faith on the part of the district, the arbitrator disagreed, saying the "[e]mployer enjoys significant discretion to select the person who it assesses to be 'most qualified.'"<sup>31</sup> In *2013 BNA LA Supp. 149945*,<sup>32</sup> the arbitrator considered language in the CBA that stated that the district "shall not act in an arbitrary or capricious manner" in its hiring of coaches.<sup>33</sup> The arbitrator held that the district's decision to hire outside the unit was not arbitrary and capricious because it considered all candidates on an equal basis in exercising its right to hire the most qualified person as coach.<sup>34</sup> Specifically, the arbitrator noted that the interview committee was properly constituted, the questions were fairly and reasonably constructed and asked of each candidate, the scoring system was applied equally to each candidate, and the successful candidate's score was significantly higher than that of the grievant.<sup>35</sup> In *2012 AAA Lexis 582*,<sup>36</sup> the union alleged bad faith on the part of the district because the district hired a non-bargaining unit member as coach of the girls' basketball team over three bargaining unit members.<sup>37</sup> Since the CBA did not grant a hiring preference to bargaining unit members, however, and the non-bargaining unit member received the highest ratings from the hiring committee, the arbitrator found that the district did not act in bad faith in hiring outside the union.<sup>38</sup>

In *2014 AAA Lexis 318*,<sup>39</sup> the CBA contained a provision for the employer to identify suitable candidates for a vacant position in concert with the union under a "joint best efforts" clause.<sup>40</sup> In this case, two teachers, both union members, in addition to one applicant (non-bargaining unit member) from

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29. *See id.*

30. *Id.*

31. *Id.*

32. 2013 BNA LA Supp. 149945.

33. *Id.*

34. *Id.*

35. *Id.*

36. 2012 AAA Lexis 582 (2012) (Dunn, Arb.).

37. *See id.* at 34–35.

38. *Id.* at 37–38.

39. 2014 AAA Lexis 318 (2014) (Martin, Arb.).

40. *Id.* at 3.

outside the district, applied for a soccer coaching position.<sup>41</sup> For reasons that the principal found to be disqualifying, the two teachers were passed over in favor of the outside applicant, who was given the job.<sup>42</sup> In doing so, however, the principal neglected to respect the contract provision that stated “if no appropriate volunteers apply, the Principal and Association President shall make their ‘joint best efforts’ to find other appropriate volunteers from among members of the bargaining unit,” and the union filed a grievance on this basis.<sup>43</sup> Because there was no consultation between the principal and the union president in an attempt to solicit interest from appropriate union members, the grievance was upheld.<sup>44</sup>

### III. Compensation

Five of the forty-five arbitration decisions that the authors reviewed addressed compensation as the primary issue.<sup>45</sup> Since teachers sometimes volunteer as coaches, particularly as assistant coaches, the issue of longevity pay might be raised when a previously volunteer position becomes a paid position. In *2014 AAA LEXIS 71*,<sup>46</sup> two teachers who each contributed various years of service as assistant football coaches, both in paid and unpaid capacities, requested that the district count their voluntary, unpaid years for purposes of longevity pay.<sup>47</sup> Pursuant to these union members’ CBA, extracurricular coaches

with at least five (5) complete and continuous years of service in a particular extracurricular sport or activity shall receive longevity pay equal to five percent (5%) of the base pay for that particular sport or activity for each consecutive five (5) complete and continuous school year periods of service in that particular sport or activity.<sup>48</sup>

In upholding the district’s denial of credit towards extracurricular longevity pay for the grievant teachers, the arbitrator noted that since the teachers

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41. *Id.* at 4.

42. *Id.* at 4–5.

43. *Id.* at 3, 5–6.

44. *Id.* at 10, 12.

45. Supplemental pay for coaching jobs not only boost one’s current income, but over twenty, thirty, or forty years and can significantly impact other benefits.

46. *2014 AAA LEXIS 71* (2014) (Kaufman, Arb.).

47. *See id.* at 8–9.

48. *Id.* at 4.



were not paid in the years that they volunteered, there was no basis to use as a multiplier those unpaid years.<sup>49</sup> The arbitrator determined that because the CBA was silent with regard to compensation for volunteer coaches, it was not unreasonable to conclude that the parties did not contemplate crediting volunteer service for purposes of longevity pay.<sup>50</sup> In a retroactive pay case, *In re Cardinal Local Schools v. Cardinal Education Ass'n*,<sup>51</sup> a teacher who previously served as an unpaid, volunteer scout sought back pay based upon the creation of a new scout position as a paid job.<sup>52</sup> Even though the position was made retroactive to the beginning of the then-current school year, the teacher's request was denied because there was no guarantee that just because he held the position as a volunteer he would have been appointed to the job when it became a paid position.<sup>53</sup> In addition, the mere creation or existence of an authorized position does not obligate the district to fill it, and the teacher should not have assumed that (a) it would have been filled in the current year and (b) he would have been appointed to the position.<sup>54</sup>

Sometimes contract language of the CBA itself gives rise to grievances because of undefined or ill-defined terminology, the meaning of which is not clear on its face even when taking into account the ordinary meaning of the words. In *2011 AAA LEXIS 472*,<sup>55</sup> two high school football teams qualified for post-season play; one team was eliminated after losing its second playoff game while the other was eliminated after losing its third playoff game.<sup>56</sup> The coaches of the team that was eliminated after its third postseason game received one additional week's pay, while the coaches of the other team did not receive any extra pay, about which they grieved. While the CBA included a provision stating that "[p]ay for extended season is to be pro-rated," it did not define "extended season."<sup>57</sup> Thus, the arbitrator was obliged to look to past practice within the district. While each high school football team in the district ordinarily played eleven regular season games, playoff eligibility was determined by the team's record after the tenth regular season game.<sup>58</sup> Teams making the playoffs then commenced play in the eleventh week while

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49. *Id.* at 21–22.

50. *Id.*

51. *In re Cardinal Local Sch. v. Cardinal Educ. Ass'n*, 127 BNA LA 882 (2010) (Lalka, Arb.).

52. *See id.* at 883.

53. *Id.* at 884.

54. *Id.* at 885.

55. *2011 AAA LEXIS 472* (2011) (Brown, Arb.).

56. *Id.* at 3.

57. *See id.* at 3, 12.

58. *Id.* at 4.

non-playoff teams finished out the season against their regularly scheduled opponent in week eleven.<sup>59</sup> The high school team that advanced to a third playoff game played that game on the day after Thanksgiving, and based on the school district's policy that considered the football season to end on Thanksgiving Day, only the coaches of the team that played after Thanksgiving received pro-rated pay for one week.<sup>60</sup> Here, the union argued that extended season was tantamount to post-season play (meaning any games beyond the regularly scheduled competition season for that sport), but the district denied the requests based on its position that the football season ended on Thanksgiving Day; thus, only games subsequently played were deemed to be in the extended season.<sup>61</sup> In addition, the district insisted that past practice dictated that the football season ended on Thanksgiving Day.<sup>62</sup> The arbitrator found that the union did not meet its burden of proving that the district violated the CBA or past practice by its refusal to pay extended season pay to the grievants.<sup>63</sup> In this case, the arbitrator was persuaded that the football regular season, in accordance with tradition and practice, ended on Thanksgiving Day.<sup>64</sup>

#### IV. Discipline

A review of discipline cases involving coaches highlights the importance of documentation in the handling and disposition of ensuing grievances. In large part, this is because unlike most hiring situations where the district has latitude to exercise discretion in its management decisions, disciplinary actions generally require a showing of "just cause." Just cause is the term used in a significant number of CBAs to evaluate whether disciplinary action taken by an employer was justified.<sup>65</sup> Over the years, arbitrators have developed a number of definitions for determining just cause. A well-known and widely referenced standard developed by arbitrator Carroll Daugherty includes seven factors that an arbitrator must consider to determine if there is just cause for the disciplinary action.<sup>66</sup> The following seven questions are considered under

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59. *Id.*

60. *Id.* at 4–5.

61. *Id.* at 12, 15.

62. *Id.* at 15.

63. *Id.* at 16.

64. *Id.* at 20.

65. FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* 930–31 (Alan Miles Ruben ed., 6th ed. 2003); see Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 832 (1991).

66. *In re* Grief Bros. Cooperage Corp. v. United Mine Workers of Am., 42 Lab. Arb. Rep. (BNA) 555, 558 (1964) (Daugherty, Arb.); *In re* Enterprise Wire Co. v. Enterprise Indep. Union, 46 Lab.

the Daugherty standard in order to determine whether just cause exists for the discipline or termination:

(1) Did the [employer provide] to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequences of the employee's conduct?

...

(2) Was the [employer]'s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the [employer]'s business and (b) the performance that the company might properly expect of the employee?

...

(3) Did the [employer], before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of [the employer]?

...

(4) Was the [employer]'s investigation conducted fairly and objectively?

...

(5) At the investigation[,] did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

...

(6) Has the [employer] applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

...

(7) Was the degree of discipline administered by the [employer] in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the [employer]?<sup>67</sup>

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Arb. Rep. (BNA) 359, 362-65 (1964) (Daugherty, Arb.).

67. *In re Enterprise Wire Co.*, 46 Lab. Arb. Rep. at 363-64. *See In re Grief Bros. Cooperage Corp.*, 42 Lab. Arb. Rep. at 558; *see also* Harvey Shrage, *The "Just Cause" Standard: Is an Investigation Needed?*, 3 ROCKY MTN. L.J. 17, 20 (2015).

As arbitrator Daugherty stated, “A ‘no’ answer to any one or more of the . . . questions normally signifies that just and proper cause did not exist.”<sup>68</sup> Arbitrator Daugherty’s test has been criticized as being too focused on the investigatory factor and thus has been regarded as a guideline rather than a strict formula.<sup>69</sup>

In 2010 AAA LEXIS 25,<sup>70</sup> a hockey coach was removed from his position for using profanity, making racial stereotypes, and playing a student-athlete who was under a doctor’s instruction not to play. In the grievance arbitration, the district was held to the just cause standard, as contained in the CBA, to wit: “No teacher or teaching assistant will be disciplined, reduced in rank, or deprived of professional advantage without just cause.”<sup>71</sup> In support of its decision to remove the coach from his position, the district was able to demonstrate by tape recordings that the coach used “inappropriate, demeaning and derogatory language toward the student-athletes” and made “inappropriate racial stereotypes.”<sup>72</sup> In addition, the district established that the coach used a player who was not medically cleared to play in two games, a decision that the arbitrator found to be careless at best.<sup>73</sup> Further, the district was able to show that on at least two prior occasions, it had put the coach on notice about inappropriate and unprofessional behavior, and that he had been warned that further instances of misconduct would have more serious consequences.<sup>74</sup>

In another arbitration case, a longtime teacher, coach, and athletics director was given a two-day suspension for referring to his principal as a “bitch.”<sup>75</sup> The derogatory reference was made as the athletics director was leaving the principal’s office and in the presence of the principal’s administrative assistant and a student’s parent, who was in the waiting area outside the principal’s office.<sup>76</sup> When the administrative assistant informed the principal what the athletics director said, the principal asked both the administrative assistant and the parent to make written statements of what they had just witnessed, in which they corroborated the name calling with the athletics director using the

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68. *In re Grief Bros. Cooperage Corp.*, 42 Lab. Arb. Rep. at 558.

69. Howell L. Lankford et al., *Did He Do It?: Employer Handbook ‘Just Cause’ Meets the Collective Bargaining Agreement*, 17 LERC MONOGRAPH SERV. 17, 22 (2003); see Shrage, *supra* note 67, at 20.

70. 2010 AAA LEXIS 25 (2010) (Donn, Arb.).

71. *Id.* at 3.

72. *Id.* at 41.

73. *Id.*

74. *Id.*

75. 2009 AAA LEXIS 1031, 2–3 (2009) (Daniel, Arb.).

76. *Id.* at 1–2.

word “bitch” in reference to the principal.<sup>77</sup> In the letter notifying the athletics director of his two-day suspension for his misconduct, the athletics director was cited for his “continued use of inappropriate language and disrespectful conduct.”<sup>78</sup> The letter further reminded the athletics director that use of “derogatory, offensive and demeaning language was unprofessional and would not be tolerated under any circumstances and that he, along with all other staff, was expected to act as a role model for students.”<sup>79</sup>

While the more extreme examples of employee discipline involve discharge, demotion, or some form of suspension, even circumstances that give rise to warnings require the employer to prove just cause.<sup>80</sup> Even discipline issued to an employee short of termination is important for districts to prove because lower-level discipline often serve as evidence of progressive discipline<sup>81</sup> justifying higher-level discipline to be issued to the employee upon proof of future misconduct. In another discipline case, where a bargaining unit member called in sick for his regular job as a campus security aide but then showed up later that day to coach the school’s baseball team, resulting in his reprimand for abuse of sick leave, he was able to demonstrate that he had a legitimate excuse.<sup>82</sup> In this situation, the coach had been up all night because he took his son to the hospital’s emergency room around midnight and was not discharged until approximately 7 a.m., after which he called in sick to care for his son, which he was entitled to do under the CBA.<sup>83</sup> Subsequently, the coach provided his supervisor with the emergency room slips with date and

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77. *Id.* at 2.

78. *Id.* at 3.

79. *Id.* at 3–4.

80. 2007 AAA LEXIS 820, 10 (2007) (Cain, Arb.) (Arbitrator Cain stated, “Pursuant to the [c]ontract, the Company has the right to impose and issue discipline for just cause, including letters of warning.”).

81. *See* 2008 AAA LEXIS 558, 42 (2008) (Henderson-Ellis, Arb.) Arbitrator Henderson-Ellis provided an excellent description of progressive discipline, “[p]rogressive discipline—a system of addressing employee behavior through escalating penalties—is a central principle of industrial due process and just cause.” *Id.* at 58. She goes on to state:

A basic tenet of just cause is providing employees with a fair opportunity to correct misconduct and to undergo rehabilitation. It is only when it can be fairly determined that an employee is incorrigible, or when a matter is so serious that an employer should not have to keep someone in his/her employ even another day, can discharge be imposed summarily.

*Id.* at 59.

82. *In re Rio Rancho Pub. Sch. v. Rio Rancho Emps. Union*, 132 BNA LA 977, 979 (2013) (Keyl, Arb.).

83. *See id.*

time stamps.<sup>84</sup> About two weeks later, the coach was given a written reprimand for abusing his sick leave, based on him calling in sick for his security duties but then returning later that day to coach the baseball team.<sup>85</sup> The coach's grievance seeking removal of the written reprimand was sustained since he followed the reporting protocol in notifying his immediate supervisor that he would not be in that day and would be taking a sick day.<sup>86</sup> In addition, the arbitration award required the district to apologize in writing to the coach for alleging misconduct regarding misuse of sick leave, since the coach complied with the CBA and district policy in calling in sick.<sup>87</sup>

#### V. Position Elimination/Transfer

While it is understood that a school district's economic circumstances might dictate a reduction in staffing that leads to the elimination of teaching positions, this same effect is sometimes the product of school mergers due to declining enrollments. When schools merge, there are inherent redundancies that can be eliminated because there would be no need for duplication of functions; for

example, two principals, two athletics directors, two band directors, two head football coaches, etc. Thus, in situations of school mergers, it is not uncommon for teachers and staff to become displaced in the process. In *2013 BNA LA Supp. 148123*,<sup>88</sup> the arbitrator addressed the merger of two high schools' football

programs, where one district ceded control of the football coaching appointment process to the other district, which resulted in the bargaining unit member—who was the high school football coach at one of the schools—losing his coaching job.<sup>89</sup> Even though the supplanted coach was offered a position as coach of the combined districts' freshman football team, he declined the offer and grieved his displacement on the basis that the district did not utilize the CBA provisions governing “the appointment and compensation of the football coach.”<sup>90</sup> Here, the merger decision was driven by fiscal constraints and made in reasonable exercise of the district's managerial rights,<sup>91</sup> and following the merger, it was not possible for the district to heed the CBA procedures for the

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84. *Id.*

85. *Id.*

86. *Id.* at 982.

87. *Id.* at 984.

88. 2013 BNA LA Supp. 148123 (2013) (Rinaldo, Arb.).

89. *See id.*

90. *Id.*

91. *Id.*

appointment of a football coach.<sup>92</sup> The arbitrator concluded that the job offer to the displaced coach as freshman coach of the merged high schools' football programs was made in good faith, and the football coach's decision not to accept it did not give rise to an actionable grievance.<sup>93</sup> The arbitrator noted that while the grievant sought strict performance under the CBA, once the two districts merged, thereby eliminating one high school football program entirely, it became impossible for the district that lost its football program to adhere to the hiring provisions under the CBA.<sup>94</sup> Another case, *2009 AAA LEXIS 863*,<sup>95</sup> involved an apparent cost-savings measure, whereby a district combined the position of middle school principal with that of director of physical education upon learning that the physical education position was required by state regulation.<sup>96</sup> Inasmuch as there was no state regulation requiring districts to have an athletics director, the district opted not to fill that position, which was a listed position in the CBA.<sup>97</sup> The arbitrator concluded that since the CBA neither required nor guaranteed that all of the supplemental coaching positions, including the athletics director position, be filled, it was left to the district's discretion whether to fill any of the positions.<sup>98</sup> In denying the union's grievance, however, the arbitrator made clear that his decision did not give the district *carte blanche* to abolish bargaining unit work and reassign positions outside the unit.<sup>99</sup>

Another related situation is the involuntary transfer of bargaining unit members from one school to another. The issue that arises is whether, under management's function to allocate resources—including personnel—across the educational landscape, it is reasonable for districts to transfer teachers from one school to another in order to best address their curricular needs. In *In re Northwest Local School District Board of Education v. Northwest Ass'n of Educators*,<sup>100</sup> as part of a district-wide reduction-in-force action, two teachers were involuntarily transferred from one high school to another high school and

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92. *Id.*

93. *Id.*

94. *Id.*

95. 2009 AAA LEXIS 863 (2009) (Trela, Arb.).

96. *See id.* at 3–5.

97. *Id.* at 4.

98. *Id.* at 17–18.

99. *Id.* at 20.

100. *In re Nw. Local Sch. Dist. Bd. of Educ. v. Nw. Ass'n of Educators*, 128 BNA LA 1690 (2011) (Heekin, Arb.).

middle school, respectively.<sup>101</sup> Both teachers were told that the reason for their transfer was that the district wanted to retain teachers at the incumbent high school who were department heads or varsity head coaches, and since they were neither, they were designated to be transferred out, notwithstanding their

longevity seniority over other teachers.<sup>102</sup> The teachers' grievance hinged on the CBA language that granted the superintendent "sole discretion" to assign and transfer members in the district for "valid educational reasons."<sup>103</sup> In large part because of the clarity of the CBA's language granting sole authority to the superintendent in this matter, and the inability of the union to undermine the

validity of the district's educational objectives, the grievance was denied.<sup>104</sup> The arbitrator noted that the lack of any reference to teacher seniority *vis-à-vis* involuntary transfers in the CBA underscored the primacy of the superintendent's unfettered power and authority to determine such matters.<sup>105</sup> The arbitrator denied the grievance based on language in the CBA conferring teacher transfer authority on the superintendent, the lack of any provision in consideration of teacher seniority, and the union's failure to make a persuasive case that the transfer was not for valid educational reasons.<sup>106</sup>

#### VI. Contract Interpretation

Careful drafting of a CBA is critical to eliminating or at least reducing grievances during the life of a CBA.<sup>107</sup> In *2011 BNA La Supp. 149464*,<sup>108</sup> the arbitrator noted with regard to contract interpretation, "[t]he starting point is to review the actual language adopted by the parties to express their intent and to determine what that language meant to them when the Agreement was drafted and mutually-adopted."<sup>109</sup> The arbitrator went on to state, "Arbitrators cannot search for inferences and intentions that are not apparent and not actually

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101. *See id.*

102. *Id.*

103. *Id.* at 1691.

104. *Id.* at 1692.

105. *Id.*

106. *Id.*

107. *See, e.g.*, 2011 AAA LEXIS 472 (2011) (Brown, Arb.) (where the issue was whether a coach was entitled to extra pay for post-season play where the CBA did not define "extended season." *Id.* at 2.).

108. *Emp'r v. Sch. Emps., AFSCME Local \_, Local #\_, 2011 BNA LA Supp. 149464* (2011) (Stein, Arb.).

109. *See id.*



supported by any contractual language documenting any purported intent.”<sup>110</sup> However, at times, past practice may be relied upon.<sup>111</sup> The arbitrator noted:

No matter how clear the language of the [CBA] seems to be, it does not always tell the full story of the parties’ intentions . . . Conduct of the parties may be evidence of a subsequent modification of their contract . . . C[BAs] include not only the written provisions stated therein but also the understanding and mutually accepted practices which have developed over the years.<sup>112</sup>

In *2008 AAA LEXIS 911*,<sup>113</sup> the arbitrator provided a well-established definition of a past practice:

Past practice as a tool for contract interpretation is used most widely where the contract is (1) ambiguous as to the practice being scrutinized and (2) the evidence shows a consistent and mutually accepted pattern of administering the agreement under similar circumstances. Ambiguity exists where the meaning of the contract language is unclear. The practice, if it meets the requirements of consistency and mutuality, supplies substance to language that lacks specificity.<sup>114</sup>

In the above case, the arbitrator considered a situation where two separate groups of student-athletes participated in voluntary, off-campus, sport-related activities over the summer, and where the union asserted that such activities constituted “field trips” under the terms of the CBA and consequently required the district to provide district-owned transportation and use bargaining unit drivers.<sup>115</sup> Under this provision, field trips were defined as “a curricular or extra-curricular event involving the transportation of nine (9) passengers not

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110. *Id.*

111. *Id.*

112. *Id.* (citations omitted).

113. *2008 AAA LEXIS 911* (2008) (Kahn, Arb.).

114. *Id.* at 6. In his decision, Arbitrator Kahn considered the role of past practice in a case involving an 8th grade math teacher and coach for the 7th grade volleyball team that claimed that he was being improperly compensated for his volleyball coaching assignment.

115. *Sch. Emps., AFSCME Local \_ , Local #\_*, 2011 BNA LA Supp. 149464.

including driver.”<sup>116</sup> While it was stipulated that there were more than nine student-athlete participants in each of the above-mentioned activities, the focus here was whether the summer activities constituted “curricular or extra-curricular events” within the meaning of the CBA.<sup>117</sup> The union argued that the football coach was present, that the coach directed his players at the scrimmage, and that the players used district-provided helmets and other equipment at the event. The district countered that neither event was listed in the district’s events calendar and that neither had been planned nor executed with the district’s knowledge or approval.<sup>118</sup> Further, the events were out-of-season and out-of-school programs that were voluntary, and as such did not involve members of the entire football and soccer teams.<sup>119</sup> In this case, the arbitrator concluded that the facts indicated:

[A] meeting of the minds between the parties that reflects that both of them, by their actions and inactions, have chosen to consistently recognize that “Field Trips,” as defined in Article XVIII, does not include trips, such as the football and soccer events leading to the instant grievances, which have been viewed as extracurricular activities requiring District-provided transportation. It is apparent that the parties have reached a mutual agreement regarding that practice. The Union has had ample opportunity to reject and/or grieve the existing practice or negotiate specific and more favorable terms into the current Agreement.<sup>120</sup>

However, even where a clear past practice exists, the practice can have limited or no impact due to rights conferred in the CBA. In *2008 AAA LEXIS 911*,<sup>121</sup> the arbitrator, citing Elkouri and Elkouri, stated:

While custom and past practice are used very frequently to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision which is clear and unambiguous.

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. 2008 AAA LEXIS 911 (2008) (Kahn, Arb.).

Elkouri continues, citing arbitration decisions[,]“Prior acts cannot be used to change the explicit terms of a contract . . . [N]o matter how well established a practice may be, it is unavailing to modify a clear promise.”<sup>122</sup>

In *2011 BNA LA Supp. 149704*,<sup>123</sup> a clear and unequivocal thirty-year past practice existed that “[t]he Athletic Director will forward the name of the incumbent unit member to the Superintendent for recommendation to that coaching position,” and “[t]he superintendent will recommend the incumbent coach to the Board of Education for their decision regarding reappointment.”<sup>124</sup> In this case, however, the recommendation was not made and the incumbent coach was not appointed to the position.<sup>125</sup> Although the arbitrator concluded that the district’s longstanding past practice was “clear and unequivocal,” and thus the teacher’s non-recommendation violated the CBA, he drew the line there, adding that the district did not violate the CBA by not reappointing the teacher as soccer coach because “matters of hiring and appointment are non-delegable rights and responsibilities reserved to the [district].”<sup>126</sup> While past practice is commonly used by arbitrators as an aid to interpret ambiguous terms in a CBA, here the arbitrator determined that the district’s authority to hire and appoint members was not susceptible to interpretation, and that the responsibility was “reserved to the Board of Education.”<sup>127</sup>

The impact of past practice can also be eliminated through bargaining. In *2010 BNA LA Supp. 162490*,<sup>128</sup> a school district was held not to have abused its discretion in filling a coaching vacancy from outside the district, notwithstanding a provision in an earlier CBA granting “first consideration” to qualified bargaining unit teachers.<sup>129</sup> The arbitrator noted that the applicable CBA removed the preference for bargaining unit members, and therefore it was reasonable to conclude that the parties did not intend to grant favored status for union members.<sup>130</sup>

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122. *Id.* at 7.

123. *Teachers Ass’n v. Emp’r*, 2011 BNA LA Supp. 149704 (2011) (LaLonde, Arb.).

124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 2010 BNA LA Supp. 162490 (2010) (Caffera, Arb.).

129. *See id.*

130. *Id.*

### VII. Arbitrability

The jurisdiction of an arbitrator to decide the merits of a case can be limited by the terms of the CBA entered into between a union and an employer. Arbitrability refers to the “jurisdiction or authority” of an arbitrator to decide the merits of a case.<sup>131</sup> Substantive arbitrability describes whether the subject of the grievance has been specifically excluded from being arbitrated.<sup>132</sup> In *2007 AAA LEXIS 516*,<sup>133</sup> the arbitrator stated, “Substantive arbitrability raises the question of whether the parties agreed to submit the dispute to arbitration. Arbitration is a consensual process, and no party may be compelled to engage in grievance arbitration over an issue that it has not agreed would be subject to determination by an arbitrator.”<sup>134</sup>

Procedural arbitrability describes whether the procedures provided for in the CBA have been followed.<sup>135</sup> In the instant case, the arbitrator provided insight into the question of procedural arbitrability in his consideration of whether a grievance was filed within the time limits set forth in the CBA.<sup>136</sup> The contract required that a grievance be filed “within thirty (30) days after the grievant had knowledge or should have had knowledge of the asserted violation of the Agreement giving rise to the grievance.”<sup>137</sup> Therefore, the arbitrator noted that “[t]he question of procedural arbitrability turns on the point from which the 30 days is measured, and that depends upon when the Grievant may be said to have ‘had knowledge’ of the violation.”<sup>138</sup>

In *2009 AAA LEXIS 1227*,<sup>139</sup> a case where a long-serving athletics director was not reappointed to his position and grieved his dismissal, the arbitrator wrestled with the question of whether the dispute was arbitrable.<sup>140</sup> Although the union was able to show that the district had, two years earlier, agreed to settle a grievance concerning the compensation of the athletics director, the CBA contained several references indicating the parties’ intent to exclude the athletics director position from the bargaining unit.<sup>141</sup> First, the CBA’s

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131. HARVEY A. NATHAN & SARA MCLAURIN GREEN, LABOR AND EMPLOYMENT ARBITRATION § 8.01(2) (LexisNexis Grp. 2016).

132. *Id.* § 8.01(3).

133. 2007 AAA LEXIS 516 (2007) (Nielsen, Arb.).

134. *Id.* at 30.

135. NATHAN & GREEN, *supra* note 131, § 8.01(2).

136. 2007 AAA LEXIS 516 at 33–37.

137. *See id.* at 33.

138. *Id.*

139. 2009 AAA LEXIS 1227 (2009) (Wolkinson, Arb.).

140. *See id.* at 1.

141. *Id.* at 8–9.

recognition clause specifically lists “teachers, school librarians, social workers, the school psychologist, instructional support recruiter, mentor, and teacher consultant,” but it did not include the athletics director.<sup>142</sup> In addition, the athletics director’s job description stated that the position “is part of the management team” and, as such, was not covered by the CBA.<sup>143</sup> Further, the athletics director position was listed in a section of the CBA that provided “all employees appointed under this Schedule serve ‘at the pleasure of the board.’”<sup>144</sup> In addressing the district’s previous settlement of a grievance with the athletics director, the arbitrator noted, “[O]ne instance does not establish a past practice” and concluded that the athletics director position was not included in the bargaining unit, and therefore, the grievance was not arbitrable.<sup>145</sup>

In *2009 AAA LEXIS 1120*,<sup>146</sup> a school basketball coach was rejected for reappointment by the Board of Education in favor of a non-bargaining unit member, despite favorable recommendations from the district’s athletics director and superintendent.<sup>147</sup> Even though the coach was a bargaining unit member covered by the CBA, the CBA itself contained language that effectively removed hiring and appointment decisions from the arbitration process.<sup>148</sup> In this instance, the CBA granted broad administrative rights to the district stating that “the direction of the working forces are solely and exclusively the function and prerogative of the Board of Education and its administration and the exercise thereof . . . are reserved and retained exclusively by and to the Board of Education and are not subject to arbitration.”<sup>149</sup> Based upon the broad discretion given to the Board, the arbitrator concluded that the grievance was not arbitrable.<sup>150</sup>

Other grievances are not arbitrable due to procedural flaws. For example, in *2013 AAA LEXIS 292*,<sup>151</sup> a teacher who served variously as his school’s athletics director and coach of several teams including a position as head football coach for twenty-six years, resigned to coach in another district.<sup>152</sup>

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142. *Id.* at 9.

143. *See id.*

144. *Id.* at 11.

145. *Id.* at 15–16.

146. 2009 AAA Lexis 1120 (2009) (Kaufman, Arb.).

147. *See id.* at 6.

148. *Id.* at 27–28.

149. *Id.* at 3.

150. *Id.* at 28.

151. 2013 AAA LEXIS 292 (2013) (Zeiser, Arb.).

152. *See id.* at 9.

Subsequently, when the school's current football coach asked him to help out with the program as coach of the junior varsity program, he agreed.<sup>153</sup> However, the Board of Education voted against appointing him to the position even though the superintendent recommended him, and the coach thereafter grieved the Board's decision.<sup>154</sup> Notwithstanding the merits of the grievance, however, the coach failed to timely file his grievance in accordance with the CBA.<sup>155</sup> Here, the coach had five days from the date of the adverse decision on his grievance to request that his union submit the matter to arbitration, after which the union had another five days to notify the Board of its demand for arbitration.<sup>156</sup>

Unfortunately for the grievant, he did not serve notice to the Board of his demand for arbitration until 13 working days after receipt of the Board's decision, and in determining that he did not comply with the CBA's ten-day contractual limit, the grievance was dismissed as not being arbitrable.<sup>157</sup>

## CONCLUSION

Although grievances over the hiring (or non-hiring) of unionized teachers for coaching positions within a school district constituted the majority of arbitration cases reviewed in this study by the authors, teacher/coaches also grieved issues concerning discipline, compensation, position elimination/transfer, arbitrability, and contract interpretation.

### *I. Hiring*

Since teacher CBAs often contemplate the opportunity for teachers in the bargaining unit to seek appointment as school coaches via supplemental contracts, the parameters for such hiring are set forth in the contract.<sup>158</sup> Our research indicates that such contracts often grant some degree of preference to bargaining unit members, sometimes compelling their appointment over outside applicants of equal or better qualification.<sup>159</sup> Certainly, the inclusion or exclusion of language giving preferential treatment in hiring to bargaining unit members impacts the district's flexibility in the hiring of coaches.<sup>160</sup>

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153. *Id.* at 10.

154. *Id.* at 11–13.

155. *Id.* at 19–20.

156. *Id.* at 20.

157. *Id.* at 25–26.

158. *See* 2011 BNA LA Supp. 150387 (2011) (Klein, Arb.).

159. *See* 2014 AAA LEXIS 318 (2014) (Martin, Arb.).

160. *See id.*

Although a school district does lose flexibility where employing a full-time teacher as a part-time coach, it must be recognized that in hiring a part-time coach in the same way that it hires teachers to perform other extra-curricular duties, it is making a statement regarding the role of a coach in its athletic programs. In light of the rather modest stipends paid to teacher/coaches,<sup>161</sup> school districts may well be recognizing that in order to attract teachers to take on the duties of a part-time coach, it must be willing to bargain away the flexibility of hiring from outside the bargaining unit. This may well be an acknowledgement that if a school district moves to a full-time coaching staff, it may lead to a separate bargaining unit<sup>162</sup> for coaches and to the need to pay significantly more in salary.

## II. Compensation

The arbitration cases in this study that raised compensation issues did so in the context of whether volunteer service as a coach counted for purposes of longevity pay,<sup>163</sup> retroactive pay,<sup>164</sup> and for compensation calculations for coaching duties during an extended season.<sup>165</sup> An issue that did not arise in any of the cases reviewed was whether the extra-curricular pay of a coach was considered for retirement benefits calculation. Although the extra pay may often be nominal, over the course of years of coaching it would likely have an impact on the retirement benefits of a teacher-coach. It is an issue worthy of consideration during the negotiation process.

## III. Discipline

The just cause standard is incorporated in almost all CBAs.<sup>166</sup> In evaluating the facts of a case under the just cause standard, arbitrators consider, among other things, evidence demonstrating that the employee committed the offense, evidence of the employer's rules upon which the employee was issued discipline, the employee's employment record, and whether discipline was issued in a consistent manner.<sup>167</sup> The common thread across discipline cases

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161. Dana Severson, *How Much Do High School Basketball Coaches Get Paid?*, HOUSTON CHRON., <http://work.chron.com/much-high-school-basketball-coaches-paid-13525.html> (last visited May 15, 2017).

162. *See, e.g.*, *Police Dep't v. State Bd. of Labor Relations*, 622 A.2d 1005 (Conn. 1993).

163. 2014 AAA LEXIS 71 (2014) (Kaufman, Arb.).

164. *In re Cardinal Local Sch. v. Cardinal Educ. Ass'n*, 127 BNA LA 882 (2010) (Lalka, Arb.).

165. 2011 AAA LEXIS 472 (2011) (Brown, Arb.).

166. *See* ELKOURI & ELKOURI, *supra* note 65, at 930–31.

167. *See, e.g.*, *In re Grief Bros. Cooperage Corp.*, 42 BNA LA at 558; *In re Enterprise Wire Co.*,

is the importance of documentation of events—on both sides—leading up to the imposition of discipline and other documentation required to support a just cause finding by the arbitrator. It stands to reason that arbitrators hearing discipline cases would expect evidentiary proof in support of, or against, discipline. Thus, both unions and school districts should not underestimate the importance of initiating and maintaining records of relevant employment activities on a systematic basis.

#### IV. *Position Elimination/Transfer*

Economic circumstances and demographic considerations may lead to the elimination of positions, realignment of positions, or even the merger of schools.<sup>168</sup> Even in cases in which a coach is able to retain his or her position in a realigned organization, a grievance may arise.<sup>169</sup> Although school districts generally enjoy wide latitude to deploy resources under its management function, school districts must act in good faith<sup>170</sup> and follow the dictates of the applicable CBA. The inclusion of contract language that requires or guarantees coaching positions will help counter a school district's claim that it has the right to eliminate a coaching position.<sup>171</sup> In contrast, contract language granting a school district sole discretion to assign and transfer members in the district for "valid education reasons," will be supportive of a district's claim that it has a right to move a coach or even eliminate a coaching position.<sup>172</sup>

#### V. *Contract Interpretation*

The parties to a CBA should prefer that terms of their labor-management relationship not be determined by an arbitrator. Under established rules of contract interpretation, an arbitrator must start his or her analysis by looking to the language set forth in the CBA.<sup>173</sup> However, if contract language is not carefully crafted with clarity, arbitrators will look to the rules of contract interpretation to determine the intent of the parties.<sup>174</sup> Past practice is one

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46 BNA LA. at 362–65 (1964); Shrage, *supra* note 67, at 20.

168. *See, e.g.*, 2013 BNA LA Supp. 148123 (2013) (Rinaldo, Arb.).

169. *Id.*

170. *Id.*

171. *See, e.g.*, 2009 AAA LEXIS 863 (2009) (Trela, Arb.).

172. *In re* Nw. Local Sch. Dist. Bd. of Educ. v. Nw. Ass'n of Educators, 128 BNA LA 1690 (2011) (Heekin, Arb.).

173. *Emp'r v. Sch. Empl.*, AFSCME Local \_\_, Local # \_\_, 2011 BNA LA Supp. 149464 (2011) (Stein, Arb.).

174. *Id.*



method used by arbitrators to determine the meaning of contract language.<sup>175</sup> Under the definition of “past practice,” the pattern of administering the contract will be part of the analysis used by an arbitrator in determining the meaning of the contract.<sup>176</sup> Therefore, it is critical in negotiating a CBA that a party intending to change a prior practice clearly draft new language that is clear and that requires an arbitrator to rely solely on the new language and not on past practice.<sup>177</sup>

#### VI. Arbitrability

The fact that a coach is often subject to the teacher CBA does not automatically mean that an arbitrator has jurisdiction or authority to decide the grievance filed by the coach.<sup>178</sup> The jurisdiction of an arbitrator to decide the merits of a case can be limited by the terms of the CBA.<sup>179</sup> An arbitrator’s jurisdiction can be limited if one party or the other has missed contractually established time limits established by the grievance procedure,<sup>180</sup> or due to the grievant’s position or the subject matter of the grievance not being subject to the grievance procedure.<sup>181</sup>

#### FINAL COMMENT

Although student participation in high school sports has been growing,<sup>182</sup> many school districts have continued to hire part-time coaches that are subject to teacher CBAs. Such positions are often considered “extra-curricular” work despite the fact that coaches may be subject to the employment issues described in this article. In light of the employment issues impacting high school coaches, teacher unions and school districts would be well advised to review their CBAs with an eye towards protecting and advancing their respective interests, and then seek language inclusions and/or exclusions in the next round of labor-management negotiations to reflect those interests.

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175. *Id.*

176. *Id.*

177. *See* 2010 BNA LA Supp. 162490 (2010) (Caffera, Arb.).

178. *See* NATHAN & GREEN, *supra* note 131, § 8.01(2).

179. *See id.* § 8.01(3).

180. *See* 2007 AAA LEXIS 516 (2007) (Nielsen, Arb.).

181. *See* 2009 AAA LEXIS 1227 (2009) (Wolkinson, Arb.); 2009 AAA LEXIS 1120 (2009) (Kaufman, Arb.).

182. *See* 2014–2015 *High School Athletics Participation Survey*, *supra* note 12.