STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ABBOTSFORD EDUCATION ASSOCIATION AND BRUCE TESSNER, Complainants, vs. ABBOTSFORD PUBLIC SCHOOLS JOINT DISTRICT NO. 1 and BOARD OF EDUCATION OF ABBOTSFORD PUBLIC SCHOOLS JOINT DISTRICT NO. 1, Respondents.	Case I No. 15889 MP-152 Decision No. 11202-A

Appearances:

Lawton & Cates, Attorneys at Law, appearing on behalf of the Complainant Association.

Mr. Clarence Gorsegner, Attorney at Law, appearing on behalf of Complainant Tessner.

Nikolay, Jensen & Scott, Attorneys at Law, by Mr. Frank Nikolay, appearing on behalf of the Respondent Board and Respondent District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Neillsville, Wisconsin, on September 12, 1972, before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Abbotsford Education Association, hereinafter referred to as the Complainant Association, is a labor organization within the meaning of Section 111.70(1)(j) of the Wisconsin Statutes, having offices at Abbotsford, Wisconsin, and represents all certified classroom teachers employed by Joint School District No. 1, City of Abbotsford, et al. for purposes of collective bargaining on questions of wages, hours and working conditions.

2. That at all times material herein Bruce Tessner, an individual

et al., hereinafter referred to as the Respondent District and Respondent Board are, respectively, a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of Wisconsin with the management, supervision and control of the Respondent District and its affairs.

4. That at all times material herein, Complainant Association and the Respondent Board were parties to a collective bargaining agreement which expired on June 30, 1972, covering wages, hours and conditions of employment for all classroom teachers employed by the Respondent District; that said agreement contained the following provisions relevant herein:

"ARTICLE V. GRIEVANCE PROCEDURE

A. The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure, and there shall be no suspension of work or interference with the operations during the term of the Agreement.

B. For the purpose of this Agreement a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement.

C. Grievances shall be processed in accordance with the following procedure:

Step I.

a. An earnest effort shall first be made to settle the matter informally between the teacher and his immediate supervisor.

b. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within five (5) days after the facts upon which the grievance is based first occur or first become known. The immediate supervisor shall give his written answer within five days of the time the grievance was presented to him in writing.

Step 2. If not settled in Step I, the grievance may within five (5) days be appealed to Administrator. The Administrator shall give a written answer no later than ten (10) days after receipt of the appeal.

Step 3. If not settled in Step 2, the grievance may within ten (10) days be appealed to the Board. The Board shall give a written answer within thirty (30) days after receipt of the appeal.

D. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

E. The written grievance shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, the specific section(s) of the Agreement alleged to have been violated, and the relief sought.

F. At all levels of a grievance after it has been formally presented, at least one member of the Association's Professional Rights and Responsibilities Committee may attend any meetings, hearings, appeals, or other proceedings required to process the grievance if requested by the grieved individual.

G. Saturdays, Sundays and legal holidays shall be excluded in computing time limits under this article.

H. Association officers and/or Welfare Committee members may visit school buildings or classrooms during periods other than class time to investigate grievances and to check on compliances with this Agreement after giving notice to the Administrator.

. . .

ARTICLE X. PROBATION, DISMISSAL, AND TEACHER EVALUATION PROCEDURES

A. Basis for probation or dismissal shall be insubordination, immorality, or incompetence. Burden of proof and evidence substantiating such charges against a teacher must rest with the Board.

1. Insubordination shall be described as unjustified refusal to perform normal duties assigned to professional staff members in accordance with this Agreement and applicable Board policies.

2. Immorality shall be described as moral conduct contrary to local conventions governing morality or moral conduct unbecoming to a member of the teaching profession.

3. Incompetence shall be described as a failure to perform or lack of ability to perform normal pedagogic skills in teaching the children placed in the teacher's charge.

4. The Administrator may temporarily suspend a professional staff member for insubordination, immorality, or incompetence, pending grievance procedures described in Article VII of this Agreement. In all instances of suspension, probation, or dismissal, the involved teacher may be represented by the Association throughout the grievance procedure. Fringe benefits shall continue for thirty days from the time of written notice of suspention (sic).

. . .

ARTICLE XIV. DURATION

The provisions of this Agreement will be effective as of the 1st day of July, 1971, and shall continue and remain in full force and effect as binding on the parties until the 30th day of June 1972. This Agreement shall not be extended orally, and it is expressly understood that it shall expire on the date indicated.

. . ."

5. That, on or about March 15, 1972, the Respondent Board tendered a teaching contract to Complainant Tessner in accordance with the provisions of Section 118.22 of the Wisconsin Statutes, wherein it offered to renew Tessner's teaching contract for the 1972-1973 school year; that, on or before April 15, 1972, Complainant Tessner signed the contract tendered and returned same to the Respondent Board; that, on Monday, June 26, 1972, by action taken at a special meeting called for that purpose, the Respondent Board considered the evidence pertaining to certain alleged misconduct on the part of Complainant Tessner and decided that Tessner should be discharged because of said alleged misconduct and directed Harold R. Mills, School Administrator, to notify Tessner that his contract was terminated effective July 1, 1972; that Mills took no action with regard to the Respondent Board's direction until Friday, June 30, 1972, on which date Mills wrote the following letter to Tessner, which was received by Complainant Tessner in the regular course of the mails:

"I have been directed by the Board of Education to inform you of the termination of the contract agreed, between Bruce A. Tessner and the Board of Education of the Abbotsford Public Schools, Joint District No. 1, Abbotsford, Curtiss et. al. for the school year 1972-73. Effective date of the termination of said contract is July 3, 1972.

Said contract was agreed between Bruce A. Tessner, and the Abbotsford Board of Education for the school year 1972-73, and became valid on April 15, 1972.

The reason for the dismissal decision by the Board of Education which terminates said contract is misconduct."

6. That on Saturday, May 13, 1972, the annual prom sponsored by the junior class at the Abbotsford High School was held in the gymnasium

at the Abbotsford High School; that Complainant Tessner, who acted as advisor to the junior class which sponsored the event, attended the festivities in the capacity of a chaperon and was accompanied by Donna Lidstead, a music teacher, Linda Stueck, an art teacher, and Mr. Stueck, husband of Linda Stueck; that Complainant Tessner, Lidstead and the Stuecks arrived at approximately 9:00 p.m. and entered the High School from the northwest entrance; that upon arriving Complainant Tessner and his party passed through the student commons where they were seen by a number of students and entered the gymnasium; that Complainant Tessner and Mr. Stueck left the High School by way of the northwest entrance a short time thereafter, advising a student, B 1/ that they were going out to get some film for Stueck's camera; that when Complainant Tessner and Mr. Stueck returned B and three other students, A, C and D observed that Mr. Stueck was carrying his arm in an unusual manner creating the impression that he had something under his coat.

7. That sometime during the evening, probably after Complainant Tessner and Mr. Stueck were observed returning from their above described departure, Complainant Tessner approached the table in the gymnasium where punch was being served by E and F, two students who were on the prom committee; that Tessner asked E if he could "spike the punch" or words to that effect, and E said that she did not want him to do so.

8. That sometime during the evening, probably after the incident in which Complainant Tessner asked E if he could "spike the punch", Complainant Tessner and Mr. Stueck were observed in front of the trophy case in the student commons by A, C and D; that said students observed Mr. Stueck hand Complainant Tessner a bottle which resembled a liquor bottle in shape and size; that after accepting the bottle from Mr. Stueck, Tessner walked out of the commons and down the corridor leading towards the east entrance of the building.

9. That sometime during the evening, probably after the incident which occurred in front of the trophy case, Complainant Tessner entered the homemaking room which can be reached by way of the east corridor leading from the student commons; that F was in the homemaking room with Nancy Hess, a former student at the High School, when Mr. Tessner arrived; that Hess was standing at the sink working with ice while Complainant Tessner had a conversation with F, wherein Complainant Tessner produced a bottle of tequila and indicated his intent to put its contents in the green punch that F was preparing; that F advised Complainant Tessner that she did not want him to put the tequila in the punch but that Complainant Tessner did so anyhow; that the empty bottle of tequila was then placed in the refrigerator along with two bottles bearing vodka labels, probably by F; that sometime during this occurrence, probably after Complainant Tessner poured the tequila in the punch, B entered the homemaking room and observed Tessner tasting the punch; that B asked Tessner what he was doing and Tessner advised her that he was the "official taster"; that after Complainant Tessner left the room, Hess or F tasted the green punch in which the tequila had been poured and determined that

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1/ Because all of the students involved were minors at the time of the occurrence of the events relevant herein, letters are used in lieu of their names or the names of their relatives. Letters were assigned on the basis of their order of appearance at the hearing.

it should not be served because it "tasted terrible"; that the green punch in which the tequila was poured was either disposed of or removed from the homemaking room, but it was not served to anyone in attendance at the prom.

10. That Donna Lidstead states that she followed Complainant Tessner on the occasion during the evening when Complainant Tessner entered the homemaking room and that she stood in the corridor outside the homemaking room and looked in through the door; that Lidstead admits that she could not see or hear what transpired in the homemaking room but that Lidstead states that she did not observe Complainant Tessner pour anything into the punch even though she could only see his back as he stood by the table on which the punch was being prepared.

11. That on Sunday, May 14, 1972 or Monday, May 15, 1972, E and F entered the homemaking room for the purpose of removing the three empty bottles which were in the refrigerator; that F took the three bottles in question to her home for the purpose of disposing of them; that F placed the two empty vodka bottles in the garbage can but she did not immediately dispose of the tequila bottle because of its unusual nature and that when said bottle was observed on the kitchen table by G, F's brother, F advised G that it "came from the school"; that the two empty vodka bottles were observed in the garbage can by F's mother sometime before they were removed with the garbage on Tuesday, May 16, 1972; that on Wednesday, May 17, 1972, Harold Mills visited F's home and was unable to find any of the three bottles in question.

12. That on Monday, May 15, 1972, Harold Mills, School Administrator, received an anonymous telephone call in the afternoon advising him that someone had "spiked" the punch at the prom; that Mills asked the individual if he would identify himself and the person declined on the claim that he "would rather not get involved" but thought that Mills should know; that on the following morning Mills contacted Vincent T. Saulino, High School Principal, and asked that he investigate the matter; that Saulino called E and F to his office and questioned them individually as to whether the punch had been "spiked"; that F was reticent but that E was not and that from his conversations Saulino concluded that the punch had been "spiked" by E and F in cooperation with other students; that Saulino advised Mills of his conclusion and Mills talked to E and F individually; that F was again reticent but E was not; that Mills talked to F a second time and confronted her with his knowledge that the punch had been "spiked" and F then admitted that all of the red and green punch had been "spiked" with vodka by herself in cooperation with E and B and a third person who was not a student and that one bowl of green punch had been "spiked" with tequila by Mr. Tessner but that the latter bowl had not been served.

13. That Harold Mills, School Administrator, continued to investigate the "spiking" of the punch by the students and the "spiking" of the punch by Complainant Tessner and talked to Complainant Tessner about the subject on at least two occasions, probably on Wednesday, May 17, 1972, after his visit to the home of F wherein he discovered that all three bottles had been disposed of, and on May 22, 1972; that on both occasions Tessner denied that he had put any alcoholic beverage in the punch; that on May 25, 1972, the Respondent Board conducted an investigation into the matter and talked to Complainant Tessner and to a number of the students involved outside the presence of Complainant Tessner; that after the investigation conducted on May 25,

1972, and before June 19, 1972, Tessner obtained an attorney and asked for a hearing before the Respondent Board; that on June 19, 1972, Complainant Tessner and his attorney were allowed to appear before the Board, however Complainant Tessner was not confronted with the witnesses who had provided information to the Board regarding his alleged misconduct; that on June 26, 1972, another hearing was held before the Respondent Board at which Tessner was allowed to appear with his attorney and confront three of the principal witnesses against him, B, E, and F; that immediately after the hearing the Respondent Board advised Mills that Tessner should be terminated effective July 1, 1972, and that the Respondent Board took no further official action on the matter thereafter.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That the dismissal of Complainant Tessner was governed by the terms of the collective bargaining agreement existing between the Complainant and the Respondent Board.

2. That the Respondent Board, by its action and the action of its agent, Harold R. Mills, of meeting with Complainant Tessner on several occasions prior to June 26, 1972, for the purpose of discussing his alleged misconduct on May 13, 1972, without insisting that the provisions of the grievance procedure be followed, waived the requirements of the grievance procedure contained in Article V of the collective bargaining agreement.

3. That pursuant to Article X of the collective bargaining agreement existing between the Complainant Association and the Respondent Board the Respondent Board is under an obligation to establish by a clear and satisfactory preponderance of the evidence that Complainant Tessner was discharged for one of the reasons set out therein and that such obligation does not contradict the provisions of Section 111.07(3) of the Wisconsin Statutes.

4. That the dismissal of Complainant Tessner did not violate the provisions of Article X of the collective bargaining agreement existing between the Complainant Association and Respondent Board and that the Respondents have not committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 26th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In their complaint, Complainants alleged that the discharge of Complainant Tessner violated Article X of the collective bargaining agreement and asked that the Respondents be ordered to reinstate him to his position without loss of salary or other benefits. The Respondents did not file an answer in the matter prior to the hearing and at the hearing entered a special appearance for the purpose of filing a written motion to dismiss the complaint on the claim that the Commission lacks jurisdiction over the subject matter because there was no collective bargaining agreement on the date of the discharge, which the Respondents contend was July 3, 1972. In the alternative the Respondents moved that the complaint be dismissed for lack of jurisdiction because the Complainants had not exhausted the grievance procedure set out in the collective bargaining agreement. 2/

The Examiner reserved ruling on the Respondents' motion and the Respondents entered a general appearance and filed a written answer wherein they again denied that there was a collective bargaining agreement in existence at the time of the dismissal of Tessner and assert, by way of affirmative defense, that the Complainants have not exhausted the contractual grievance procedure. In addition, the Respondents deny that the action taken against Tessner violates Article X of the agreement.

Although the Respondents' motion raises two threshold issues, the Examiner does not view either question as affecting the jurisdiction of the Commission in this case. Certainly if the Commission has jurisdiction to determine whether there has been a violation of a collective bargaining agreement in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act, the Commission has jurisdiction to determine if the collective bargaining agreement covers the particular violation alleged. Similarly, the Respondents' contention that the Complainants have failed to exhaust the grievance procedure raises a question regarding an application of the terms of the agreement and does not go to the question of jurisdiction.

Existence of a Collective Bargaining Agreement

By its terms the collective bargaining agreement expired on June 30, 1972, which means that there was a collective bargaining agreement on June 30, 1972, but that there was no such agreement on July 1, 1972. Because all of the relevant facts which gave rise to the discharge and the final decision to discharge Tessner occurred on or before June 26, 1972, and the only thing remaining to be done was communication of that fact to Tessner, the Examiner is satisfied that the provisions of the collective bargaining agreement apply to the Respondents' action. The fact that the agreement has now expired does not excuse the Respondents from their duty to remedy any breaches of the agreement arising during the term of the agreement. 3/

2/ At the hearing the Respondents indicated that they sought to have the complaint dismissed and were not asking that the matter be remanded for compliance with the grievance procedure. In their brief the Respondents indicated that an order remanding the matter for compliance with the grievance procedure might be appropriate in this case.

3/ Safeway Stores, Inc., (6883) 9/64; The Kroger Company, (7563-A) 9/66.

Even assuming arguendo that the dismissal was not "complete" until the purely mechanical steps had been taken to communicate the fact of the dismissal to Tessner, the Examiner is satisfied that the decision was governed by the terms of the collective bargaining agreement. The letter advising Tessner of the dismissal was placed in the mails, the method of communication chosen by the Respondents' agent, four business days after the decision had been made and on the last day the agreement was in effect. Had the Respondents' agent been more diligent or chosen a more direct form of communication, the notification could easily have been received by Tessner on or before the last day on which the contract was effective and the Respondents should be estopped from asserting his failure to do so as a defense. 4/

Failure to Exhaust Grievance Procedure

The evidence discloses that Tessner was advised as early as Wednesday, May 17, 1972, that he was suspected of having engaged in certain misconduct which jeopardized his employment and that he was offered the opportunity to resign on at least one occasion before the Board meeting on May 26, 1972, when the decision was made to dismiss him. It is clear from the record that the Respondents did not insist at any time prior to the hearing on the complaint herein that the Complainants proceed in accordance with the grievance procedure and that such judgment was probably based on the futility of attempting to deal with a grievance of this type in that procedure. By discussing the matter with Tessner and his representatives at various times without insisting that Tessner engage in an effort to settle it between himself and his immediate supervisor and awaiting a written answer at that level before proceeding to talk to the School Administrator and ultimately to the Respondent Board the Respondents effectively waived the requirements of Article V. Apparently all parties concerned made the sensible judgment that since the decision in this matter would be made by the Respondent Board itself upon the advice of the School Administrator, there was no need to follow the initial steps of the grievance procedure.

Burden of Proof

At the outset of the hearing, the parties stipulated to the admission of certain documents, namely a copy of Tessner's individual teaching contract, a copy of Administrator Mills' letter of dismissal and a copy of the collective bargaining agreement. The Respondents admitted that these documents established that Tessner was under an individual teaching contract and that he was dismissed.

The Complainants moved that the Respondents be required to proceed to introduce evidence in order to support its claim that the dismissal was for one of the reasons set out in Article X of the collective bargaining agreement. The Respondents contended that the Complainants have the obligation under the provisions of Section 111.07(3) of the Wisconsin Statutes to proceed and prove by a clear and satisfactory preponderance of the evidence that Tessner was not dismissed for one of the reasons set out in Article X. The Examiner ruled in favor of

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4/ Because the Examiner is satisfied that the discharge of Tessner is clearly covered by the terms of the collective bargaining agreement, it is unnecessary to make a finding regarding the School Administrator's reasons for waiting four days before writing the letter and unilaterally changing the effective date of the discharge.

the Complainants' motion and directed the Respondents to proceed to introduce evidence.

The Complainants contend that because it is uncontroverted that Tessner was dismissed, the "burden of proof and evidence substantiating the charges" is on the Respondent Board because of the provision to that effect contained in paragraph A of Article X. The Respondents contend that the burden of proof in this case is on the Complainants since the Complainants are the parties that "seek to arouse the action of the Commission" and cite the case of Century Building Company v. WERB 5/ as authority for their position.

Section 111.07(3) of the Wisconsin Statutes reads as follows:

> "(3) A full and complete record shall be kept of all proceedings had before the commission, and all testimony and proceedings shall be taken down by the reporter appointed by the commission. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

The issue in the Century case was not who has the burden of proof in a complaint case but what standard of review should be applied by the court in reviewing the findings of the Commission. The Court, like the Commission, assumed that the burden of proof was on the Complainant and had the following to say in discussing the standard of review to be applied by courts reviewing findings of the Commission under Section 111.07(7):

> ". . .This [Section 111.07(3)] imposed upon the party seeking to arouse the action of the [Commission] the burden of establishing his facts by a clear and satisfactory preponderance of the evidence. However the standard by which the findings are to be tested by a court upon a petition for review is not the same as that prescribed for the [Commission]." 6/

The language of Section 111.07(3) does not state that the burden of proof is, in all circumstances, on the Complainant but rather states that the party on whom the burden of proof rests must sustain the burden with clear and satisfactory preponderance of the evidence. While it is true that the party seeking to arouse the action of the Commission ordinarily has the burden of proof, 7/ there would seem to be no reason

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5/ 235 Wis. 376 (1940). The Respondents also cite Blum Bros. Box Co. v. WERB, 229 Wis. 651 (1939), which dealt with the standard of review established by the Wisconsin Labor Relations Act which was subsequently repealed. The latter decision is irrelevant to this proceeding.

6/ Ibid. at p. 382. More recent cases dealing with the standard of review are St. Joseph's Hospital v. WERB, 264 Wis. 396 (1953); St. Francis Hospital v. WERB, 8 Wis. 2d 30 (1959); Muskego-Norway Consolidated Schools v. WERB, 35 Wis. 2d 540 (1967); and, Kenosha Teachers Union v. WERC, 39 Wis. 2d 196 (1968).

7/ See e.g. Gehl Company (10891-A) 3/73. None of the cases of the Commission or the Supreme Court which make reference to the burden of proof state that the burden of proof is in all instances on the Complainant under Section 111.07(3).

why the parties could not agree by contract that it should be otherwise in cases involving a review of disciplinary action taken under a collective bargaining agreement.

Although there is not universal agreement on the quantum of proof required, most arbitrators in discipline cases not only place the burden of going forward with the evidence on the employer, but either implicitly or explicitly require that the employer assume the burden of proof. 8/ The rationale for placing the burden of going forward with the evidence of the employer stems from the superior knowledge of the employer as to why it acted as it did and from the unnecessary evidence often introduced in cases where a party attempts to prove the negative of a proposition. 9/ The rationale for placing the burden of proof on the employer stems from ideas of equity and fair play implicit the frequent contractual requirement that an employer must have "just cause" to discharge an employe, particularly where the misconduct alleged to have occurred might have a serious affect on his future employability. Here it is not necessary to find an implied undertaking to assume the burden of proof since the Respondent Board has explicitly agreed to do so and the Complainants are entitled to enforce that provision of the agreement. Because enforcement is sought pursuant to the procedure set out in Section 111.07 of the Wisconsin Statutes, the quantum of proof required by statute should be applied.

The Respondents argue that the parties cannot by contract, agree to a provision which contradicts a statute. The Examiner finds no such contradiction in the provision in question. The statute clearly contemplates that there might be circumstances under which the burden of proof could be on the Respondent as to certain issues. If, for example, there were an issue here as to whether Tessner had resigned rather than been discharged, the burden of proof that he had been discharged would rest with the Complainants since the agreement does not put the burden on the Respondents except in cases involving probation or dismissal. Nor would the burden be on the Respondents if the Complainants made the assertion that the Respondents have violated any of the other provisions of the agreement, with regard to their actions in Tessner's case.

Misconduct Alleged

It appears then that the question that must be answered is, have the Respondents established, by a clear and satisfactory preponderance of the evidence, that Tessner was guilty of the misconduct alleged? Although the letter discharging Tessner did not specify the "charges", there could have been no doubt in Tessner's mind that the misconduct referred to was the allegation that he had put an alcoholic beverage in the punch that was being served to the people attending the Abbotsford High School Prom. There can hardly be any doubt that such

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8/ Fleming, The Labor Arbitration Process, pp. 67-74 (Univ. of Ill: Urbana 1965); Elkouri and Elkouri, How Arbitration Works, pp. 189, 416-419 (BNA 1960).

9/ In some instances parties appearing before the Commission for enforcement of disciplinary provisions of collective bargaining agreements have stipulated that the employer should have the opportunity of going forward with the evidence for these reasons.

conduct, if proven, is "unbecoming to a member of the teaching profession" however vague that phrase might otherwise seem. This is true because of the potential for harm to the persons, most of them minors, who might unwittingly drink the punch as well as the harmful example given to the sutdents who either saw or heard about the alleged "spiking" incident. The fact that Tessner was not only a chaperon at the dance but an advisor to the junior class which was in charge of Prom arrangements tends to aggrevate the alleged misconduct.

The conflicting evidence of record cannot be reconciled without resolving the question of credibility adversely to Tessner or to some, if not all, of the Respondents' witnesses. Tessner admits that he may have made some humorous reference to "spiking the punch" to E and admits that he went into the Home Economics room where the punch was being prepared for the purpose of obtaining punch for his party; but he denies that he accepted a bottle from Mr. Stueck or that he poured the contents of a bottle of tequila into the punch being prepared by F. If Tessner's version of the facts is to be accepted, the Examiner would have to find that F was lying when she testified that she saw Tessner pour the contents of a tequila bottle into the punch, that E and G were lying to protect F when they testified that they saw the tequila bottle and that A, C and D were either lying or mistaken when they testified that they saw Mr. Stueck hand Mr. Tessner a bottle while standing in front of the trophy case.

The one possible motive that F might have for lying would be in an effort to save herself from the consequences of her own participation in the placing of the contents of two bottles of vodka in the punch. 10/ There is no doubt that E and F, with the help of B and at least one other individual, did place the contents of two bottles of vodka in the punch that was being served that night. When E and F were called in to Principal Saulino's office on Tuesday morning, it is possible that F might have been tempted to lie in order to shift the suspicion to Tessner. In fact, F said little or nothing to Saulino during the first interview and it was E who first admitted that students had put vodka in the punch. When Mills, in a subsequent interview, confronted F with his knowledge that the punch had been spiked by students, F not only admitted that the punch had been spiked by the students, but implicated Tessner as well.

Because F did not implicate Tessner until after the fact of her own participation had come to light, the only possible benefit that might accrue to F by falsely implicating Tessner would be to divert attention from her own misconduct by drawing attention to the more serious misconduct of Tessner. It was too late for F to claim innocence in the matter.

If the Examiner had to reconcile this conflict by the testimony of F alone, it would not be possible to say that the Respondents had proved their case by a clear and satisfactory preponderance of the evidence. However, there is considerable circumstantial evidence to support the conclusion that F's version of what transpired in the Home Economics room is the correct version.

10/ At the hearing the Complainants' Counsel suggested that the Respondents might have induced all of the witnesses to lie as a pretext for a discriminatory discharge based on Tessner's activities as spokesman in bargaining. This motive is totally without support in the evidence.

First of all, all of the testimony indicates that the students who were involved in the conspiracy to "spike" the punch had arranged for the purchase of two bottles of vodka. F's claim that Tessner placed the contents of a bottle of tequila in the punch is consistent with the testimony of E and G who both saw the tequila bottle thereafter. While it is true that E was linked to the conspiracy to put vodka in the punch, G had no connection to that effort, and the only basis for questioning his credibility is his family relationship as F's older brother. In addition, Tessner was seen by A, C and D accepting a bottle from Mr. Stueck which had been concealed in Stueck's coat. Neither A nor D were members of the junior class or the Prom Committee which had hatched the conspiracy to add vodka to the punch on the previous Wednesday and had no apparent connection to the successful effort to do so.

It is significant to note that the Complainants did not see fit to call Mr. Stueck or Nancy Hess in an effort to contradict the claims of the Respondents' witnesses. The Complainants' failure to call these two important witnesses in the face of the damaging direct and circumstantial evidence presented by the Respondents' witnesses only leaves room for speculation as to whether the two witnesses in question would have confirmed Tessner's version of either incident. 11/

The testimony of Donna Lidstead is of little value in the absence of testimony from Hess. Lidstead was not in a position to

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11/ The only indication of what Hess might have stated under oath comes from the report prepared for the Respondents' board by Administrator Mills who had talked to Hess, which reads in relevant part as follows:

> "However, before [B] arrived in the homemaking room, Nancy Hess, daughter of Bob Hess, accompanied by [F] went to the homemaking room to fill the punch bowl. The mixed punch from containers prepared Saturday morning was poured into the punch bowl. It was determined by both Nancy Hess, and [F] that ice should be added to the punch. Mr. Tessner entered the homemaking room at this time. Nancy Hess took the ice to the sink and began to pour water on it to melt the ice ring to be placed in the punch. While at the sink, she overheard a discussion between Mr. Tessner and [F]. She heard conversation to the effect that if it was poured into the punch bowl there would be trouble. Mr. Tessner left the room shortly after. Apparently, some discussion over the punch took place between [F] and Nancy Hess about the condition of the punch after Tessner's departure. Nancy tasted the punch and reported that the punch tasted horrible. The green punch in the bowl that tasted horrible was poured into two of the containers used to store the mixed punch. Red punch was taken from other containers and poured into the punch bowl and taken to the gym for serving purposes. (This bowl of red punch appears to be the only punch served during the evening that was not 'spiked').

There is no indication in the record of what Mr. Stueck might have been willing to state under oath. His failure to appear at the meeting of the Respondent Board was attributed to his inability to be absent from his employment. No reason was given for his failure to appear at the hearing herein.

see or hear what transpired while Tessner was in the Home Economics room. If Hess had given testimony supporting Tessner's version of what transpired in the Home Economics room, Lidstead's testimony might have helped buttress Tessner's version of the incident and lent support to his claim that F was lying; but Lidstead's testimony standing on its own does not contradict the testimony of F.

In short, the record will not support a finding that the Respondents' witnesses were either lying or mistaken in their testimony which establishes that Mr. Stueck handed Tessner a bottle; that Tessner poured the contents of a tequila bottle into the punch and that the tequila bottle was removed from the school by E and F. These facts, which were established by a clear and satisfactory preponderance of the evidence, support the inference that Tessner placed an alcoholic beverage in the punch that was being served to the people attending the Prom. Such conduct on the part of a teacher, under the circumstances present herein, constitutes conduct "unbecoming of a member of the teaching profession" and therefore the Respondents did not violate Article X of the collective bargaining agreement when they discharged Complainant Tessner.

For the above and foregoing reasons the Examiner has dismissed the complaint herein.

Dated at Madison, Wisconsin, this 26th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner