

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RONALD BERBY and TOMAHAWK :
EDUCATION ASSOCIATION, :
 :
Complainants, : Case XXII
 : No. 27883 MP-1212
vs. : Decision No. 18670-C
 :
UNIFIED JOINT SCHOOL :
DISTRICT NO. 1, CITY OF :
TOMAHAWK, BOARD OF EDUCA- :
TION, UNIFIED JOINT SCHOOL :
DISTRICT NO. 1, CITY OF :
TOMAHAWK, :
 :
Respondent. :
 :

Appearances:
Kelly and Haus, Attorneys at Law, by Mr. Stephen G. Katz, Attorney at Law, appeared on behalf of the Complainants.
Korth, Rodd, Sommer, Mouw & Johnson, S.C., Attorneys at Law, by Mr. James A. Johnson, Attorney at Law, and Mr. James Weis, Attorney at Law, appeared on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants having, on April 27, 1981 filed a complaint with the Wisconsin Employment Relations Commission, wherein it has been alleged that the above named Respondent has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on May 8, 1981, having appointed William C. Houlihan, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law, and Order as provided in Section 111.07(5), Wis. Stats.; and a hearing on said Complaint having been conducted in Tomahawk, Wisconsin on July 21 and 22, September 8, 9 and 10, November 2, 3 and 4, 1981, and January 14, 1982 before the Examiner; and a transcript of the proceedings having been provided to the Examiner and the parties on January 19, 1982; and the Respondent having filed a post hearing brief, received April 5, 1982 and a reply brief, received August 13, 1982, and the Complainant having filed a post hearing brief, received July 13, 1982 and a reply brief, received August 16, 1982; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

- (1) That Ronald Berby is an individual, who formerly resided in Rhinelander, Wisconsin, and who currently resides in Ann Arbor, Michigan, who was formerly employed as a teacher by the Unified Joint School District No. 1, City of Tomahawk from 1978 to 1981.
- (2) That the Tomahawk Education Association, hereinafter referred to as the Association or the Union, is an organization, organized and existing, at least in part, for the purpose of engaging in collective bargaining with the Unified Joint School District No. 1, City of Tomahawk, concerning grievances, labor disputes, wages, hours and conditions of employment, whose offices are at WEAC UniServ Council No. 18, 217 South Pelham St., Rhinelander, Wisconsin.
- (3) That Unified Joint School District No. 1, City of Tomahawk, hereinafter referred to as the District or Employer, is a school district, organized and existing under and by virtue of the laws of the State of Wisconsin, which engages the services of numerous employees, and whose address is East Washington Ave., Tomahawk, Wisconsin.

(4) That during the 1980-81 school year the Association and the District were signatories to a collective bargaining agreement, which contained the following among its provisions:

ARTICLE 1

RECOGNITION

- A. The Board recognizes the Association as the exclusive and sole bargaining representative for the following unit of employees whether under contract, on leave, employed or to be employed by the Board all as included in the Board's resolution as passed on the 11th day of May, 1965.
- B. The bargaining unit embraces all certified teaching personnel including classroom teachers, special teachers, guidance counselors, librarians, part-time teachers, teachers and teaching principals who teach more than 50 per cent of their time, but excluding the administrators, Elementary coordinator, principals teaching less than 50 per cent of their time, nurses, clerical, substitute teachers, and maintenance personnel.
- C. The purpose of this article is to recognize the rights of the bargaining agent to represent the teacher in negotiations with the board as provided in 111.70 of the Statutes granting the right of recognition.
- D. If a vacancy occurs during the course of the school year and the district decides to fill the vacancy, the district shall fill said vacancy with a bargaining unit employee, if a qualified applicant is available. State certification does not necessarily imply that the person is qualified. The district retains the sole right to determine if a person is qualified.

ARTICLE 7

GRIEVANCE PROCEDURE

. . .

- D. Initiation and Processing
 - 1. Level One. The aggrieved person will first discuss his Grievance with his principal or immediate supervisor, either directly or through the Association's designated Building Representative, with the objective of resolving the matter informally.
 - 2. Level Two. (a) If the Aggrieved Person is not satisfied with the disposition of his grievance at Level One, or if no decision has been rendered within five (5) school days after presentation of the Grievance, he may file the Grievance in writing with the Chairman of the Association's Grievance Committee (hereinafter referred to as the "Grievance Committee") within five (5) school days after the decision at Level One, or ten (10) school days after the grievance was presented, whichever is sooner. Within five (5) school days after receiving the written grievance, the Chairman of the Grievance Committee will refer it to the Superintendent of Schools.
 - (b) Within five (5) school days after receipt of the written Grievance by the Superintendent, the Superintendent will meet with the Aggrieved Person and Association representative in an effort to resolve it.

(c) If the Aggrieved Person does not file a grievance in writing with the Chairman of the Grievance Committee and the written Grievance is not forwarded to the Superintendent within forty (40) days after the teacher knew or should have known of the act or condition on which the Grievance is based, then the Grievance will be considered as waived.

3. Level Three. If the Aggrieved Person is not satisfied with the disposition of his Grievance at Level Two, or if no decision has been rendered within five (5) school days after he has first met with the Superintendent, he may file the Grievance in writing with the Chairman of the Grievance Committee within five (5) school days after a decision by the Superintendent, or ten (10) school days after he has first met with the Superintendent, whichever is sooner. Within five (5) school days after receiving the written grievance, the Grievance Committee may refer it to the Board if it determines that the grievance is meritorious and that appealing it is in the best interest of the school system. Within five (5) school days after receiving the written grievance, the Board will acknowledge that the Aggrieved person and Association Representative will meet for the purpose of resolving the grievance indicating a date for said meeting.

ARTICLE 14

DISCIPLINE, NONRENEWAL AND DISMISSAL PROCEDURES

- A. All teachers hired after July 1, 1980, shall serve a probationary period of two (2) years. Paragraph two of this section A will not apply during this two (2) year probationary period.

After completing a two (2) year probationary period, no teacher shall be discharged, nonrenewed, reduced in compensation, or disciplined without just cause.

- B. After the two (2) year probationary period, dismissal, nonrenewal of contract, or withholding of an increment shall follow no less than two conferences between supervisor and the the teacher. The teacher involved will be given notice and reason in writing that dismissal, nonrenewal of contract, or withholding of an increment is being considered. This notice must be given at the first of the required three meetings. A third conference between supervisor, teacher, and superintendent shall be held before recommendation is made to the school board.
- C. Preliminary notice in writing of consideration of nonrenewal or withholding of an increment shall be no later than February 20. If a teacher files a request therefore with the school board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the school board prior to being given written refusal to renew contract or withholding of increment.
- D. Any teacher, upon receipt of any letter from his supervisor, principal, superintendent, or the School Board shall have the right to write a reply to that letter. The written reply is to be attached to any and all copies of the letter the teacher received and filed with the letter.

(5) That there is no provision for final and binding arbitration of grievance disputes contained in the collective bargaining agreement.

(6) That Ronald Berby was hired by the District to teach 7th and 8th grade Science commencing with the 1978-79 school year; that in addition to his teaching obligations Berby was expected to coach intra-mural football and basketball.

(7) That Mr. Berby interviewed for the teaching job in Tomahawk well before the beginning of the 1978-79 school year, that he heard nothing about the results of his interview until he happened, by chance, to encounter Donald Hendrick, Principal of the Junior High School, in Rhinelander; that upon meeting Mr. Hendrick Berby inquired as to the status of his application and was advised that someone else had been given the job; that subsequent to that conversation, sometime in July, Mr. Berby's wife received a telephone call from a friend informing her that the Tomahawk newspaper had reported that the District had hired Mr. Berby; that that was the first indication Mr. Berby received that he had been hired by the District; that the District first formally contacted Mr. Berby in mid-August when it sent him a letter advising him as to when teachers were to start work.

(8) That during the 1978-79 school year Berby taught 2 classes of 7th grade science and 3 classes of 8th grade science in addition to coaching intra-mural football and basketball.

(9) That the intra-mural football team Berby coached practiced 3 or 4 times a week after school; that they played a total of 5 games, all against a team coached by another teacher, Al Overhaug; that they lost the first four games and won the final game of the season.

(10) That during the football season some of the players under Berby's supervision ran about the halls; that Al Overhaug brought that fact to Berby's attention on a number of occasions; that Berby told his players to stop running in the halls; that Overhaug regarded the students running in the halls to be a severe enough problem that he brought it to the attention of Donald Hendrick; that Hendrick did not discuss the matter with Berby at that time.

(11) That Mr. Berby did not feel comfortable as a football coach; that he made his feelings in that regard generally known, and that at the end of the football season he asked to resign from the coaching assignment. In response to his request Mr. Hendrick indicated that it would depend upon whether or not the District could get a replacement; that Berby discovered he would not be coaching football at the beginning of the next school year when Mr. Pobuda was introduced as the new football coach.

(12) That at the end of the football season Berby's players awarded him a trophy inscribed with "Coach of the Year", in appreciation of his coaching efforts.

(13) That Berby coached intra-mural basketball during the 1978-79 year; that during his basketball coaching tenure, he, at times left his students unsupervised while he went to jog; that Al Overhaug complained to Donald Hendrick about this; and that Hendrick told Berby not to leave his boys without supervision; Berby told Hendrick that it wouldn't happen again, and Berby thereafter stayed with his basketball players.

(14) That during the spring of 1979 Mrs. Foster, the track coach, discovered that Mr. Berby had run track as a student at Michigan State University and urged Berby to become the Head Track Coach and offered to serve as his assistant; that the two of them approached Donald Hendrick and inquired about Berby becoming the Track coach; that Hendrick responded that he would think about it but that Hendrick never got back to Berby.

(15) That during his tenure with the District Mr. Berby used a teaching technique of lecturing and teaching from the text; and that for most of his students it represented their first experience taking notes from a lecture.

(16) That during the 1978-79 school year Berby did not have a room assigned to him; rather, he had a desk in the teacher's lounge assigned to him, and moved from room to room to teach his classes; and that he was, at times, late for some of his classes.

(17) That Berby was evaluated by Principal Hendrick on June 1, 1979, following his first year with the District; that the evaluation referenced the following perceived weaknesses: "appear to have tendency to irritate some pupils when reprimanding them. Often late for homeroom and sometimes for class. Appear to forget items necessary for class causing returns to desk to remedy."

(18) That Berby coached intra-mural basketball again during the 1979-80 school year; that the Junior High School boys who Berby coached were without locker facilities and were required to use the shower locker facilities of the High School; that Mr. Berby became concerned over the safety of the boys under his supervision and over the security of the facilities available to them; that as a consequence of his concern he made his classroom available as a changing room.

(19) During the 1979-80 basketball season, Berby's room was used as a changing room and was left unlocked while the boys practiced; there occurred an incident where a boy's wristwatch was stolen from his street clothes; following this theft Berby was instructed to keep his room locked during practice and he directed the boys that the last one out should lock up; that thereafter there reoccurred an incident where the door was left unlocked; that Principal Hendrick came to the gym and complained loudly about the door being left unlocked and directed Berby and another teacher, Pobuda, to see to it that the door was kept locked.

(20) That at the end of the basketball season there was a banquet; that at the banquet Berby addressed those present and made remarks about every boy on his team; that he intended his remarks to be both positive and constructive; but a few of his remarks were regarded, by some, to be belittling and/or derogatory; that in particular his observation that Jeff Foster had little or no talent but made the most of what he had was not well received; that the first time Berby was advised that his remarks were upsetting was at his non-renewal hearing before the School Board, in March of 1981.

(21) That following the basketball banquet Berby went to Hendrick and asked to resign as basketball coach; that in response Hendrick advised him to put his request in writing, which he did; that in September of the following school year Berby learned that another teacher had been given basketball coaching assignment, which is how he learned that he would not have that assignment that year.

(22) That during the 1979-80 academic year Berby was assigned one class of seventh graders and four classes of 8th graders; that he regarded his 7th grade class as surprisingly confrontational.

(23) That Berby typically had a practice of allowing students to do extra work or projects in order to raise the grades which they would otherwise receive; that he did not permit extra credits for extra projects during one grading period in the 1979-80 academic year; that a number of students experienced substantial declines in their grades.

(24) That the School District of Tomahawk has a policy calling for the issuance of unsatisfactory progress reports under circumstances where a student is not working up to his or her capability; that despite the fact that a number of his students were experiencing significantly declining grades Berby did not send out unsatisfactory progress reports, because he did not realize that he was required to do so under the circumstances.

(25) That when report cards came out reflecting lower than usual grades for a number of students, a number of parents, including LeAnne R. Steinhafel, Pat Garrow, Howard Coomans, Janet Hagen, Patricia Nick, Carmen Bellile and Nancy Bartz were quite upset over the grades their children had received from Mr. Berby and over the fact that they had gotten no indication that their children's grades would be lower.

(26) That a meeting was arranged for parents to meet with Mr. Berby; that the meeting was conducted in the Library right after school; that Mr. Sullivan, a school counselor, arranged for the meeting by advising concerned parents of when and where it would be conducted; that Berby was unaware of the fact that he would be meeting with so many people, believing instead that he was to meet with one parent in his classroom; that Berby discovered that there was a meeting in the Library, went there and was confronted by a number of upset parents seated behind rows of tables, that Mr. Berby took the chair apparently reserved

for him in front of the parents; that Mr. Sullivan, Mr. Hendrick, and, for a while Superintendent Johnson, sat behind Mr. Berby.

(27) That no one introduced Mr. Berby to the assembled parents, who asked him why they had not received unsatisfactory progress reports and also questioned him about his grading and teaching techniques; that Mr. Berby acknowledged that he should have kept the parents informed and expressed a willingness to keep parents informed on a weekly basis from that point forward; that Berby was surprised and felt intimidated and uncomfortable in the meeting.

(28) That following the parent meeting Berby did keep parents informed of their children's grades.

(29) That, during the spring of 1980 Berby and another teacher, Mr. Brehm, went to look over the construction of a new school building; that they did so on their way to supervise an after school student activity; that they were late in arriving at their supervisory assignments; that the two men were given letters of reprimand for being late and that they filed grievances in response to the reprimands.

(30) That Principal Hendrick did not evaluate the teaching staff for the 1979-80 school year because the Berby and Brehm grievances were pending, and he feared that the evaluations he would have made would have been regarded as inappropriate under the circumstances.

(31) That during the spring of 1980 Berby accompanied 7th and 8th grade students in their separate trips to a forest area; the purpose of the trips were for the students to identify various species of life found in the forest; that during the trip Berby indicated to students that he could put a toad in his mouth; a student brought him a toad, he washed it off, placed it in his mouth and then removed it; that later in the day a student dared him to eat wood ticks and he did.

(32) That during the spring of 1980 Mr. Berby began smoking cigars in the teacher lounge and, at times, left the butts in the refrigerator; that a number of teachers were upset with his practice in this regard and one of them, Barbara Cepaitis, asked Berby to stop smoking cigars in the lounge; that in response to Cepaitis, Berby did not smoke in the lounge while non-smokers were present.

(33) That Berby went to Hendrick, and asked the Principal if there was any problem if he, Berby, smoked cigars in his room; that Hendrick said he knew of no problem; that Berby did, on a few occasions smoke cigars in his homeroom; that students complained to Hendrick; that Hendrick asked Berby to stop smoking cigars in his room; and that Berby stopped.

(34) That in late August, 1980, at the end of a noon hour two boys brought a toad to Berby and asked him to put it in his mouth; Berby did so in their presence.

(35) That during his tenure at Tomahawk, Mr. Berby spent a substantial portion of class time talking about private/personal matters, including running, his family, and his past, which were largely unrelated to the subject matter he taught.

(36) That Berby, at times, gave his students tests which were difficult to read.

(37) That a substantial number of students disliked Berby; that a substantial number of students found it difficult to learn from Berby.

(38) That a substantial number of parents were dissatisfied with Mr. Berby's performance in the classroom; that they began to complain and express their dissatisfaction to the administration, to School Board members, and to other teachers; that as time passed the volume of complaints increased.

(39) That a substantial number of teachers disliked Berby; that they found him difficult to deal with, regarded him as uncooperative and somewhat anti-social; that many of these teachers brought their concerns to Principal Hendrick.

(40) That Berby's grading system was predicated upon a standard Bell shaped curve, applied by class; that it had a number of componants; that it was not well understood by students nor by their parents; that for some exams scores were determined solely by the number of words written in response to short essay questions; that certain grades were determined by group effort without regard to individual performance; that Mr. Berby had correct answers graded wrong and vice versa; that many of the multiple choice and matching exams given by Mr. Berby had ridiculous answer possibilities included to simplify the exam and to break the tension accompanying exams.

(41) That on November 12, 1980 Berby was called in for a conference involving himself, Principal Hendrick, and Barbara Cepaitis, the Association Building Representative; that on November 19, 1980 Hendrick sent the following letter which accurately reflects what Berby was told:

November 19, 1980

Mr. Ron Berby
Science Teacher
Tomahawk Junior High School
Tomahawk, Wisconsin 54487

Dear Mr. Berby:

This is a resume of the conference held in my office on November 12, 1980. Present at the conference besides you and I was the building representative of the Tomahawk Education Association, Miss Barbara Cepaitis. The purpose of this meeting was to discuss with you five areas of concern that I have with regard to your performance as a teacher in Tomahawk Junior High School.

I. Complaints

You were told that I was receiving numerous complaints about your performance. These complaints are coming from your students, from parents, from parents to other teachers and from teachers to me. You were told that the students lack respect for you, resent your disciplinary procedures and that they illustrate a flagrant disrespect for you when they write punishment essays for you. I explained that even if I did not, at this time, have specifics on all the complaints, I was pointing out these concerns to you so that you would be aware of them. I also explained that when I hear this many complaints about the same teacher, this tells me there is something wrong. It was suggested by me that you sit down and start evaluating yourself to find out why these people are complaining.

Your reply to these accusations was that you needed more specifics. You did admit, however, that you were aware that some parents were upset with your performance as a teacher. In response to a query from Miss Cepaitis you indicated you found the students here more disrespectful than in other places you have taught. I countered that they are showing disrespect for you, and not for the other teachers on the staff...another indicator that something is amiss.

II. Cooperation with Staff

It is my observation that you have alienated yourself from the other members of the staff. I see almost no association between you and the other teachers, either socially or professionally. This kind of relationship can only lead to a lack of cooperation within the school. This appears to be what has happened, as I am seeing no educational exchange between you and the other two teachers in the science department. This kind of breakdown can only be detrimental to the successful operation of the school and the academic progress of the students.

Your reply, again, was that there were no specifics mentioned. Specificity on the nature of one's personal relationship with another must lay within the nature, and the make-up, of the individuals involved. Once again, it would behoove you to self-examine your own personality in an attempt to determine why you are unable to establish cooperative relationships with your professional peers.

III. Unorthodox Behavior

Three illustrations of unorthodox behavior were discussed which, by their very nature, should not have had to be discussed with any teacher who is concerned about the attitude of his students toward him. It should not have been necessary for me to tell you not to smoke in your classroom. Your students were aware of it - they told me so. It is beyond my comprehension why a grown, educated person would eat wood ticks and other insects before a class of students. Even more incomprehensible is the logic of stuffing a live frog into one's mouth as a class watched. Actions such as these can only help to compound the disrespect the students already have toward you as a teacher. And, again, it should not be necessary for me to counsel you about this type of behavior, or to request that you cease doing it.

Your reply was that you were smoking in your room because of a hassle some of the teachers were giving you about smoking cigars in the faculty lounge. As far as I know you have since ceased this behavior. You indicated you could show the students that there were no harmful germs on these insects and frogs. However, a trained science teacher should be aware that some of the most harmful diseases in the world are carried by insects and transmitted to humans. You are mandated as a teacher to make students aware of kind treatment to animals (118.01 (6) Wis. Stat.) Placing a live frog in your mouth certainly cannot be classified as kindness to animals. You finally admitted that the last two (the insects and the frog) were deviant behavior.

IV. Misrepresentation When Hired

During the time you interviewed for the present position, you indicated to me, as well as to the superintendent, that you would be willing to accept coaching assignments should you be hired. Not only did you tell me this personally, but you also indicated this in your resume and on your application form. You were also aware that these coaching assignments were in football and basketball. When you were assigned to the football coaching position, you protested the assignment telling me this was the sport you liked least and knew the least about. As a result, you approached the assignment with little enthusiasm and had to be talked to about leaving your team at the end of practice sessions with no supervision, and went out running instead, while leaving the responsibility to the other coach. You eventually resigned this position after one season and had to be replaced by another teacher.

The basketball appointment was accepted with a little more enthusiasm, however your supervision did not improve, and you had to be reprimanded once again for leaving your team unsupervised while you ran in the halls, and again for leaving a room unlocked with players' clothes in it. There was some improvement in this area, however, you appeared to lack enthusiasm for basketball during the second year and eventually asked to be relieved of this responsibility also. At the close of the 1979-1980 school year you eventually resigned as basketball coach.

I feel you misrepresented yourself to the school district by enhancing your chances of being hired by promising to coach, and then by leaving all coaching completely within a two-year time span.

Your reply was that you had undergone a personality change since you were making progress with your alcohol problems, and that your excitement for coaching had fizzled in football.

V. Neglect

Some of the events in this area were previously discussed in the present conference, e.g., leaving your teams unsupervised after practice so that you could go running. You have been reminded to get to class and/or homeroom on time; talked to about leaving a room unlocked with players' clothing in it resulting in the theft of some players' property; and reprimanded for leaving a ballgame supervision to inspect the new elementary school construction.

Your final response was that you thought I was going out of my way to single out bizzare behavior on Mr. Berby while ignoring all of the things the other teaches are doing. I countered that all of the information presented by me was either voluntarily given to me by students, parents and by the other faculty members in the junior high as concerns complaints and lack of cooperation. There is no conceivable way I could go about determining whether other members of the staff eat insects in front of their students, or place live frogs in their mouths while students watch. I didn't cause you to do poorly in handling your coaching assignments, or do anything to cause you to resign them. And, finally, if I had not been in the right place at the right time the areas of neglect mentioned would probably never been known.

The above mentioned articles outline what I believe to be deficiencies in your performance as a teacher in Tomahawk Junior High School. It is my contention that they are of a serious enough (sic) nature to be just cause to recommend that you be nonrenewed as a teacher in the School District of Tomahawk for the 1981-1982 school year.

Persuant (sic) to Article 14 (b) of the Master Contract between the School District of Tomahawk and the Tomahawk Education Association, you are being given written notice and reason in writing that nonrenewal is being considered. Therefore consider this to have been the first of the three meetings required by the contractual agreement.

You are reminded that you have the right to reply to this letter and that your reply will be attached to all copies of the letter and placed in your file.

(42) That Berby made the following written response to Hendrick:

November 21, 1980

Mr. Donald Hendrick, Principal
Tomahawk Junior High School
Tomahawk, WI 54487

Dear Mr. Hendrick:

This is in answer to your resume letter of November 19, 1980.

I. Complaints

- a. I am not aware of any parents who have complained about my performance as a teacher.
- b. Every day I can hear examples of how our students show disrespect to other teachers on our staff.
- c. What are the complaints about? Who is complaining?

II. Cooperation with Staff

- a. I often and regularly am involved in social discussions with Miss Cepaitis, Mr. Overhaug, Miss Sattelberg, Mr. Brehm, Mrs. Dreger, Mr. Pobuda, Mrs. Ley, Mrs. Kenney, Mr. Zillman, Mrs. Swanson, Mrs. Theiler, Mr. Erickson, etc.
- b. Miss Sattelberg and Mr. Zillman seem to me to be very good teachers and I enjoy their cooperation with regard to equipment, films, room use, etc.

III. Unorthodox Behavior

- a. Last year I went to you and asked you if there would be anything wrong with my smoking cigars in my classroom during my preparation hour because the smoke irritated a couple of staff members. You could not think of a reason why I shouldn't! The students were aware of it, but did they really complain? I smoked in the classroom once and both of the teachers who were against my smoking cigars are not on the staff this year. Who complained?
- b. I did not put wood ticks, insects or frogs in my mouth in front of a class. Who complained? Did they really complain?

IV. Misrepresentation When Hired

- a. I approached the football season of 1978 with enthusiasm and did not leave my team to go out running as you stated.
- b. When I was reprimanded for non-supervision and running (3 basketball practices - during shower time) I corrected the situation immediately.
- c. One of my players, in spite of my specific instructions left my classroom un-locked. The result was your verbal reprimand of Mr. Pobuda and myself in front of our basketball teams.
- d. At the time of my interview, I looked forward to running an intramural football program and coaching basketball. I am aware of other coaches who have asked to be released from coaching and some have been turned down. I am not to blame for your releasing me from coaching assignments.

V. Neglect

- a. Your reminder to get to homeroom or class on time came as part of an evaluation of the 1978-79 school year. I rectified the situation.
- b. Our response to Mr. Brehm's and my non-supervision during a softball game can and should be read. They are in our files.

On Examination, the only items that I can respond to are numbers I and III. To have the opportunity to improve in these areas, I need to know the specifics: Who complained? were the complaints legitimate? How can I use the complaints to become a better teacher?

(43) That following the November conference, Hendrick sent letters to parents he believed were unhappy with Berby: the following is representative of the letters sent:

December 5, 1980

Dr. and Mrs. David Imm
Deer Park Road
Tomahawk, Wisconsin 54487

Dear Dr. and Mrs. Imm:

I am writing with regard to complaints that I am hearing about Mr. Berby's performance as Bob's science teacher in Tomahawk Junior High School. It is my understanding that you are one of more than a dozen parents whose complaints I have had reported to me.

I am attempting to rectify this situation, but I am meeting with little success thus far. When I have voiced my concerns about the complaints to Mr. Berby, I have been told there are none, and that I have no proof of any complaints. This is basically true because I have no concrete evidence that the complaints are real -- only heresay.

The only means I have of accumulating concrete evidence concerning complaints of this nature is to have a record of them. Therefore, I am asking for your assistance.

If you feel you have a legitimate complaint about Mr. Berby's performance, I would be highly appreciative if you would set your complaints in writing, sign it and send it to me. Please be assured that he will not be aware of who signed the complaint so as not to jeopardize your child in school. If it becomes necessary to present him with the complaints, it will be done with a copy of the complaint with your signature left off the copy.

I need your help in this matter. I truly hope I can count on your cooperation for the benefit of our school. If you have any questions concerning this request, feel free to call me at 453-5371.

Thank you.

(44) That on January 20, 1981 another conference involving Berby, Hendrick, Cepaitis, and Gene Degner, UniServ Director, transpired. During that conference Hendrick read copies of letters, written by parents of Berby's students, critical of his performance; that Hendrick kept the identify of the letter authors confidential; and that some of the letters had been solicited by Hendrick; that Hendrick wrote the following letter, summarizing the conference:

January 29, 1981

Mr. Ron Berby
Tomahawk Junior High School
Tomahawk, Wisconsin 54487

Dear Mr. Berby:

This is a resume of the conference held in my office on January 20, 1981. Present at the conference besides you and I was the building representative of the Tomahawk Education Association, Miss Barbara Cepaitis and Uniserv representative Mr. Gene Degner. The purpose of the meeting was to continue discussion of some of the same areas of concern that were brought up at the conference on November 12, 1980.

I. Complaints

In your November 21, 1980 memo you indicated you were not aware of any parental complaints even though a group of 8 or 9 parents met with you in April 1980 to voice concerns about your performance as a teacher. Further you were read and presented copies of six letters from parents of good students, each expressing a variety of complaints about you as a teacher of their children. Also, a letter from Mr. Winkler indicated he had received numerous complaints about you. A letter from Mr. Zillman, written as a parent and a teacher, expressed more of the same. You were made aware of complaints from students questioning your grading rationale: marking correct answers wrong and determining a grade by counting words of essay answers and dividing by ten. These letter complaints (students) came to me after our first conference.

II. Cooperation With Staff

The previously referred to letter from Mr. Zillman indicated you do not enjoy a cooperating spirit between members of your department. Mr. Overhaug's letter refers to a similar lack of cooperation during your tenure as a coach in football and basketball.

III. Unorthodox Behavior

It is apparent that there is evidence of continued types of behavior which could be categorized as out of the realm of normal. The grading techniques are one example, as is your drinking a can of near beer in the faculty lounge from a Kingsbury can which looked, for all practical purposes, like an ordinary can of beer. It was explained to you that this type of behavior initiated a number of faculty responses, none of which were positive.

At the close of the conference, it was pointed out that sufficient time had lapsed between the initial conference and the present conference, and yet there appears to be little or no progress in the improvement of your performance as a teacher in Tomahawk Junior High School. It was pointed out to you at this time, also, that a third conference would be set up with the superintendent at the earliest possible date. This will likely occur during the week of February 2, 1981.

You are reminded that you have the right to reply to this letter and that your reply will be placed in your file.

(45) That the Tomahawk School Board conducted an evidentiary hearing, on March 9, 1981, relative to the non-renewal of Berby's teaching contract; that Mr. Berby was in attendance with his Union representative; that witnesses were called by the Administration and by Mr. Berby and his representatives; that Attorney John Priebe who had no relationship with any party to the proceeding, was hired by the District to, and did, make evidentiary rulings.

(46) That following the March 9 hearing the School Board determined to non-renew Mr. Berby, and did so by the following letter:

March 13, 1981

Mr. Ronald Berby
634 Arbutus
Rhineland, WI 54501

Dear Mr. Berby:

Re: Findings of the Tomahawk School Board relative to
the hearing held concerning the non-renewal of
Ronald Berby

A duly noticed meeting of the Tomahawk School Board was held on Monday, March 9, 1981 with all members present for a hearing at the request of Ronald Berby relative to the issue of whether or not Mr. Berby's contract should be non-renewed. Mr. Berby was presented with a resume of the charges lodged against him, was present at the hearing, and had representatives at the hearing who actively represented his interests and also testified in his behalf.

We, the School Board of the School District of Tomahawk, hereby unanimously find that the contract of Ronald Berby should not be renewed for the 1981-82 school year based upon the following facts adduced at the hearing.

1. Ronald Berby, on several occasions, has displayed forms of unordthodox (sic) behavior which constitutes unprofessionalism resulting in the loss of his credibility in respect with the students and thereby diminishing his ability to teach science in the Tomahawk Junior High School.
 - a. We find that you, on one or more occasions, put live frogs in your mouth;
 - b. We find that you put insects in your mouth and at least on one occasion, ate a wood tick;
 - c. We find that you smoked cigars in your room on at least one or more occasions;
 - d. On at least one, and probably numerous occasions, while running films or filmstrips in your classroom, you climbed up on filing cabinets in your room and either sat on them or curled up on top of them;
 - e. On at least one occasion you ran and jumped and cartwheeled around the front of your room attempting to explain to the students what it must be like for your child inside of your wife's womb;
 - f. At least in one incidence you took class time to discuss a personal occasion in your life when you were drunk and got hit in the face with a bucket;
 - g. On another occasion you took class time to tell the class for the entire class time how you had your front teeth knocked out.
2. We further find that you have neglected to fulfil your responsibilities and duties with respect to supervising students in the classroom halls, locker rooms, and dressing rooms.
 - a. You repeatedly failed to supervise students after football and basketball practice and on some occasions indulged in personal fitness activities including running in the hall. This is a direct violation of the rules and regulations of the school system;
 - b. You have on occasion failed to supervise the hall during the time period you have been assigned to do so;
 - c. On at least one occasion, you failed to supervise children on the playground, and in fact, at that time and place were caught and confronted in the area of the new elementary school, which was under construction at the time and which was a place some distance from where you should have been supervising school children.

3. We further find that due to numerous complaints concerning your conduct of classroom activities from parents and students that your handling of your classes has not resulted in an atmosphere conducive to good learning.
 - a. We find that you have not spent a majority of the time in your class teaching the subject to which you were assigned;
 - b. You spent considerable classroom time talking about experiences in your personal life which have nothing to do with the subject which you are teaching or were teaching at the time;
 - c. You have not promoted an atmosphere conducive to learning in that you have manifested an apparent inability to handle the questions of students on a regular basis either by virtue of your inability to do so or your neglect to do so.
4. We further find that some of your fellow teachers have complained about your lack of cooperation as a member of the faculty of Tomahawk Junior High School and have further testified as to your having an overall adverse effect on teacher morale in the Tomahawk Junior High School.
 - a. Teachers complained of unequal and unfair grading practices which you have participated in which contributed to an overall adverse effect on student morale;
 - b. Some teachers have continuously complained about your lack of cooperation with other teachers and your inability to accept and carry out some assigned duty tasks such as hallway supervision;
 - c. Some teachers have complained to the effect that they have received many complaints from students and parents about your conduct and feel that they can no longer defend that conduct as a teaching colleague.
5. We further find you have engaged in unfair, unequal practices in grading your students and have used questions on exams which are suspect, at best.
 - a. You have consistently manifested an attitude to the students and teachers which indicates that you have participated in unfair grading practices;
 - b. Numerous parents and students have indicated that you have interjected questions on your science exams which had nothing to do with science;
 - c. This type of practice is further broken down and hindered your credibility with teachers and adversely affected student morale in the Tomahawk Junior High School.

Sincerely,

Donald Daenicke, President

(46) That following the decision to non-renew his contract, Berby filed a grievance; that Gene Degner, UniServ Representative talked with Ralph Johnson, Superintendent of Schools about meeting without Berby; that Johnson indicated that it was all right for just he and Degner to meet inasmuch as Johnson could not reverse the School Board; that Johnson and Degner, but not Berby, met to discuss the grievance; that prior to the evidentiary hearing in this matter the District raised no procedural objection to proceeding on the merits.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

(1) That Ronald Berby is a municipal employe within the meaning of Section 111.70(1)(b), Wis. Stats.

(2) That the Tomahawk Education Association is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.

(3) That Unified Joint School District No. 1, City of Tomahawk is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.

(4) That the W.E.R.C. has, and will assert, jurisdiction, pursuant to Section 111.70(4)(a) Wis. Stats. over allegations that one party to a collective bargaining agreement has violated the terms of that agreement, where the collective bargaining agreement contains no provision for final and binding arbitration of grievance disputes.

(5) That by non-renewing the contract of Ronald Berby, the School District of Tomahawk did not violate the collective bargaining agreement between the parties and therefore did not violate Sec. 111.70(3)(a)5, Wis. Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

(1) That the Complaint is dismissed. 1/

Dated at Madison, Wisconsin this 2nd day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or

(Footnote 1 continued on Page 16)

(Footnote 1 continued)

order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

Ronald Berby was employed, as a teacher, by the School District of Tomahawk for a period of three years. Mr. Berby, a somewhat eccentric man, was non-renewed by the District on March 13, 1981, effective the end of the 1980-81 academic year. Berby grieved his non-renewal and exhausted the contractual grievance procedure, which has no provision for final and binding arbitration. As noted, on April 27, 1981 Berby and the Tomahawk Education Association filed a complaint of prohibited practice alleging that the non-renewal was without just cause, and therefore violated the terms of the collective bargaining agreement.

On May 18, 1981 Respondent School District filed a Motion to Dismiss or to make more Definite and Certain, which Motion was denied by Order, dated June 12, 1981. 2/ January 14, 1982 was the final day of the evidentiary hearing. On July 13, 1982 Respondent School District filed a Motion to Dismiss for lack of subject matter jurisdiction, citing Sec. 111.07(4), Wis. Stats. On July 29, 1982 the Motion was denied by Order. 3/

During the course of the hearing, a number of procedural matters were raised.

Exhaustion of Grievance Procedure

In its answer, and at hearing the District denied that the grievant had properly exhausted the grievance procedure, because he failed to meet with Superintendent Johnson. On its face, Article 7, par D. 2 (b) calls for the grievant, in person, to meet with the Superintendent. That did not happen here. However, it was Degner's uncontradicted testimony that Superintendent Johnson waived Berby's presence at the meeting and that the District never raised a procedural objection prior to the evidentiary hearing.

Under the circumstances I believe it would be manifestly unfair to dismiss this action for non-compliance with the grievance procedure. Superintendent Johnson indicated that Berby's presence was not required. Having done so, the District is not in any position to now point to Berby's absence and demand that his action be dismissed. As a practical matter, Superintendent Johnson was in no position to overturn the School Board's decision to non-renew Berby. Berby's absence from the grievance meeting had no substantive consequence.

Burden of Going Forward/Burden of Proof

The collective bargaining agreement has no provision for final and binding arbitration of grievances. In the absence of such a provision the Commission will assert its jurisdiction, under Section 111.70(4)(a), to hear allegations of municipal employer violation of a collective bargaining agreement.

In making out it's prima facie case the complainant demonstrated that there exists a collective bargaining agreement between the parties, that Mr. Berby is a member of the collective bargaining unit covered by the provisions of the collective bargaining agreement, that the collective bargaining agreement permits teacher non-renewal only for just cause, that Berby was non-renewed, that he grieved his non-renewal and thereafter exhausted the grievance procedure. The Complainant alleges that the non-renewal violates the contract because it is without just cause.

At the outset of the hearing, a dispute arose as to who had the burden of going forward and the burden of proof on the question of whether or not there was just cause for the non-renewal. I directed the District to go forward on the just cause question and further advised the District that it would have the burden of establishing the existence of just cause for the non-renewal. The District did

2/ Unified Joint School District No. 1, City of Tomahawk, 6/12/81, 18670-A.

3/ Unified Joint School District No. 1, City of Tomahawk, 7/29/82, 18670-B.

proceed but took immediate exception to the ruling, noted its objection daily, and in its post-hearing brief claim the Examiner erred in making them go forward on the just cause issue.

According to the Respondent the Complainant has the burden of establishing, by a clear and satisfactory preponderance of the evidence all allegations of the complaint, including the contention that there was no just cause for the non-renewal. Respondent cites Century Building Company v. W.E.R.B., 235 Wis. 376, 291 N.W. 305 (1940) for the proposition that the party who seeks to arouse the action of the Commission is the party who must bear the burden of proof.

Respondent acknowledges a number of WERC cases contrary to its position (Local 386, Allied Industrial Worker's of America, AFL-CIO v. Stolper Industries, Inc. (12626-A), Allied Industrial Workers of America, Local 232, AFL-CIO v. WERC, and Briggs & Stratton Corporation, 78 LRRM 2449, (1979)) but contends that the Commission erroneously directed Respondents to shoulder the burden of proof in those cases. Respondent also notes the existence of Reinke v. Personnel Board, 53 Wis. 2d 123 (1971), which obligates the State to bear the burden of establishing the existence of just cause for discharging a state employee. Respondent argues:

The Reinke Court relied upon State Statutes which control the discharge of a state employee. Those statutes mandate that a discharge must be based on "just cause". The Reinke Court ruled that the legislature intended, by creating this just cause standard, to place a burden upon the state. The just cause standard in Briggs, supra, Stolper and this case were not statutorily mandated. Rather, the standards were agreed upon by the School Board and their corresponding teachers. If these parties had intended for the just cause standard to place a burden upon the employer, then they surely would have created a system of binding arbitration through which decisions regarding termination would be made. The combination of a binding arbitration provision along with a just cause standard clearly places the burden of proof in such manners upon the employer. However, without the required binding arbitration as to this issue, there can be no implied acceptance of the burden of proof on behalf of the employer. The employer, by agreeing to the just cause standard contracts not to summarily, arbitrarily or capriciously terminate an employee. The employer agrees to have a reasonable basis for terminating the employee. This agreement has nothing whatsoever to do with the separate and distinct concept of burden of proof.

Respondent contends that the burden of proof must always rest with the party who would lose if no evidence was presented.

I believe the Respondent was properly required to go forward on the just cause issue and further that the Respondent bears the burden of establishing the existence of just cause for the non-renewal. The Respondent is correct in asserting that the Complainant must go forward and establish the allegations set forth in the complaint. The Complainant was required to establish its prima facie case before the Respondent was obligated to come forward with any evidence. Complainant did so by establishing the applicability of the contractual just cause standard to Berby's non-renewal. It was at this point that the burden shifted to the Respondent to both go forward and demonstrate the existence of just cause.

Under the common law, a Wisconsin employer was entitled to terminate an employee for any reason, or no reason at all. 4/ The effect of a contractual agreement not to terminate (including discharge or non-renewal) except for just cause imposes a substantial restriction on an Employer's otherwise unfettered rights in this area. The standard creates a presumption of continued employment

4/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. (2d) 540.

absent some cause for its termination. A burden is placed upon the employer to justify its actions. It appears that the District acknowledges this to be so where there exists final and binding arbitration, but not in its absence.

The District contends that the just cause standard is somehow transformed into an arbitrary and capricious standard without a contractual binding arbitration provision. Implicit in this contention is the conclusion that the burden of demonstrating arbitrary and/or capricious behavior rests with the Complainant and that Respondent is relieved of the burden he would bear under a just cause standard. I do not agree that any such transformation takes place. Section 111.70(3)(a)(5) Wis. Stats., makes it a prohibited practice for a Municipal Employer to violate the terms of a collective bargaining agreement. Sections 111.70(4)(a) and 111.07 Wis. Stats., empower the W.E.R.C. to hear and determine allegations of prohibited practices, including breach of contract claims. These powers, responsibilities, and obligations are created statutorily. By agreeing to final and binding arbitration of grievances the parties consent to have a third party arbitrator hear and finally determine disputes over the interpretation of the labor agreement. This has the effect of removing the W.E.R.C. as decision maker in light of the Commission's policy to defer its jurisdiction 5/ over contract violations where the parties agree to arbitrate such disputes.

The consent of the District is necessary to submit disputes to an arbitrator because arbitration is a creation of the contract. It is not necessary to the jurisdiction of the W.E.R.C. which is created by statute. The substantive standard agreed to by the parties and reflected in the contract is not altered by virtue of the forum in which the proceedings are held. Under a just cause standard of review an Employer is obligated to go forward and demonstrate the existence of cause. As noted, the Commission has historically required this. The Supreme Court has, in Reinke, endorsed the practice under procedurally identical circumstances. Grievance arbitrators, who deal with the overwhelming majority of discharge cases litigated under just cause provisions of labor agreements universally require the employer to proceed 6/ and to justify his termination decision. This requirement, that the Employer bear the burden of going forward and the burden of proof, on whether or not there exists just cause for the non-renewal is neither erroneous nor inappropriate. The just cause standard obligates the employer to retain an employee absent cause to remove him. This is an encumbrance upon the employer when measured against his common law rights. Unless cause is established, the employer is contractually precluded from non-renewing the employee. The employer must come forward and establish the existence of just cause, for without it he loses.

As a practical matter it was the employer's decision to non-renew. That decision is predicated upon certain facts and/or reasons deemed appropriate by the employer. The most orderly presentation of evidence requires the employer to lay out the basis of the non-renewal, confront the employee with the evidence, and thereafter provide an opportunity for rebuttal. To hold otherwise is to obligate the complainant to come forward and attempt to show that certain facts, claims, and testimony not yet in the record are either untrue or inadequate to warrant non-renewal.

Standard of Review

As noted, Respondent contends that the appropriate standard of review is limited to determining whether or not the District acted in an arbitrary or capricious fashion in non-renewing the Complainant. I believe this contention is without merit. The standard against which the action of the school board is to be measured is created by the parties in the collective bargaining agreement. The standard agreed to by the parties and set forth in the collective bargaining agreement is whether or not there was just cause for the non-renewal. Just cause is a term of art differing substantially from the arbitrary and capricious standard urged by the District.

5/ Racine Unified School District, 18443-B, 3/81.

6/ Elkouri and Elkouri, How Arbitration Works, 3rd Ed., BNA (1973) p. 621.

Section 111.07(3) Wis. Stats. requires the party on whom the burden of proof rests to sustain such burden by a clear and satisfactory preponderance of the evidence. Reading the statute and contract together I believe the District is obligated to demonstrate, by a clear and satisfactory preponderance of the evidence, that it had just cause to non-renew the complainant. 7/

Just Cause

In support of its case, Respondent called numerous witnesses, including administrators, teacher co-workers, students, and parents of students to testify.

Robert Garrow, a student who had Mr. Berby as a science teacher for the first one-half of 8th grade, testified that Berby's tests were confusing. Garrow testified that Berby spent 1/2 of the class time talking about non-science topics including running, marathons, and his family. Garrow, who participates in a number of sports, claimed that Berby held sports eligibility over his (Garrow's) head as a club to force the boy to do school assignments. Mr. Garrow missed a number of Berby's classes to go deer hunting and to play football (these absences are sanctioned by the school district) and that upon his return to class Berby refused to provide him with missed assignments, directing him instead to get them from classmates. He couldn't get the assignments from classmates and got a "0". Garrow testified to being disciplined, required to write a penalty essay, for raising his hand and asking a question in class. When he questioned the basis of the discipline, the penalty imposed was doubled.

On cross-examination Garrow indicated that he brought his complaints about Berby to Don Hendrick, the Junior High School Principal, to William Sullivan, Director of Guidance, and to his parents. Garrow also admitted that he had never missed a sports practice/event as a result of Mr. Berby. Garrow indicated that the first time he brought his concerns over the tests Berby gave to anyone's attention was at the discharge hearing conducted before the school board. With respect to missed classwork Mr. Garrow indicated that his classmates either wouldn't or couldn't give him missed assignments. These same classmates were able to provide the same information with respect to classes other than Berby's.

Robert Garrow's mother, Pat, testified that she was called by Berby, who advised her that her son was misbehaving. In response to the call she arranged, through Mr. Hendrick, to meet with Berby. In their meeting, Berby and another teacher, Sattleberg, told her that her son was misbehaving and had trouble with tests. Berby left before the discussion really ended because he was a member of a car pool.

Mrs. Garrow testified that Berby called her husband some time later and told him that Robert was cutting classes. The Garrow's learned that Robert had been thrown out of the class for misbehaving. Mrs. Garrow testified that her son was not learning in Berby's class. Upset over the situation she called the School Board President, Mr. Koth and complained. She also complained to Don Hendrick. At the Garrow's insistence, Robert changed Science teachers at mid year.

William Sullivan is the Director of Guidance, grades Kindergarten through 8th grade. One dimension of his job has Mr. Sullivan on the receiving end of complaints about teachers from parents, students and other teachers. It was Mr. Sullivan's testimony that he got more complaints about Berby than about all other teachers combined. Student complaints, numbering 5-6 per week centered on confusion over grading and testing. According to Sullivan, students came to him upset over the fact that there was a lack of Science being taught in Berby's class. Sullivan indicated that students told him that Berby spent substantial class time talking about personal matters unrelated to the subject matter of the class. Mr. Sullivan further testified to receiving complaints from parents and teachers.

7/ Stolper Industries, (12626-A), 10/74; School District of Whitefish Bay (16703-A), 6/80; Amery Jt. School District, (14140-A), 8/76.

On cross-examination Sullivan testified that he received complaints from approximately 1/2 of Berby's students. He further testified that he initially discussed complaints with Berby, but quickly discontinued doing so when he found Berby "unreceptive". Sullivan indicated that he brought concerns over Berby to Hendrick toward the end of Berby's first year of employment, and every 2-3 months thereafter. Sullivan testified that Berby had a negative effect on both student and faculty morale.

Sullivan related an incident, where he observed Berby walking down the hall encounter a student and, out of the blue, say "you think you're a little tough guy, don't you?" causing the student to express shock. Sullivan spoke with the student, who was still upset, the next day and told him not to allow the incident to bother him.

Lynn Coomans, a student, had Berby for science in both 7th and 8th grade. Coomans, an "A" or "B" student, testified that Mr. Berby spent 50% of the class time discussing personal matters, such as a former college roommate, an old girlfriend, and an incident where, while intoxicated, he was hit in the face by a bucket knocking out his two front teeth which fell into a pile of manure. According to Coomans, Berby spent a good deal of time talking about running and also showed slides of his wife, family, and vacation.

Coomans testified that students never knew how their exams would be graded. One grading system consisted of counting words, and assigning a grade based solely upon the number of words written. True-false exams were given with a "T" specifying true and a "0" specifying false. Coomans testified to having a true answer marked wrong because her "T" looked too much like a crucifix. According to Coomans Berby made up his own answers to test questions, and disallowed all others, including answers provided by the text. The example given by Coomans was; Question "Why does the smokestack of a ship sailing away from you disappear last?" The textbook answer involved the curvature of the earth. The Berby answer, according to Coomans, was because the bottom disappeared first. Only the Berby answer was credited.

According to Coomans, Berby refused to recognize her at times when she was the only student to raise her hand to answer a question. Coomans described an incident, which she witnessed, where just before the start of a Science class, Berby, for no apparent reason, ate some woodticks in front of the students. Coomans described another incident where Berby, teaching a section on reproduction, demonstrated how his wife felt during pregnancy/delivery by turning cartwheels, screaming, yelling, and jumping off the wall.

Coomans testified that she became discouraged, didn't work as hard as she might otherwise and didn't learn as much as she could have.

On cross-examination Coomans indicated that she brought her concerns to her parents every night, and that she brought those concerns to Principal Hendrick in the spring of 1980. At that time she told Hendrick that she didn't want Berby as a teacher again. She described Berby as weird, characterized her concerns as constituting a serious problem, and indicated that she just gave up and ignored Berby. She also testified to an incident where she raised her hand to ask a question. According to Coomans, Berby saw her with her hand raised, yet ignored her. She asked her question without recognition and was ignored. She then asked the girl next to her whereupon Berby advised her that she couldn't talk without permission and assigned her a penalty essay.

Coomans indicated that she did not testify about the wood tick incident at the hearing before the school board.

Howard Coomans, Lynn's father, testified that his daughter's attitude toward school, which he characterized as excellent, deteriorated under Berby. According to Mr. Coomans, his daughter, who never complained about her teachers, began complaining about Berby after one week in his classroom. She complained about Berby wandering off on tangents and claimed that she was confused and was not learning. According to her father she didn't want to go to Science and wasn't motivated to work.

Mr. Coomans testified his daughter's Science grade dropped from "A" to "C" between 8th grade semesters. The falloff was surprising since Lynn felt she was doing well and there had been no indication of a problem. The District has a

policy of teachers sending low slips to parents of students whose grades are falling in order to alert the parents of problems. No such slips were sent.

Jo Ellen Steinhafel had Mr. Berby for 7th grade Science. Steinhafel, normally an "A" student, gave testimony similar to that of Coomans relative to Berby's practice of devoting substantial class time to non-science related topics and grading some tests solely upon the number of words written. Steinhafel, like Coomans, experienced a drop in her grades, from "A" to "C". She, and her mother discussed the grade with Mr. Sullivan. Steinhafel testified that she was given a penalty essay when she picked up a pencil one of her friends had dropped on the floor, which brought her to tears. It was her testimony that she cried over Mr. Berby's class because she was scared.

LeAnne Steinhafel, Jo Ellen's mother, testified that her daughter, who normally liked school, didn't like Mr. Berby. According to Mrs. Steinhafel her daughter, who wanted to do well in school, was upset over Science class and cried in frustration. Mrs. Steinhafel called other parents and discovered that they were experiencing the same problems. When her daughter got a "C" she called Mr. Sullivan over the grade and the absence of any low slip warning. Steinhafel testified about the meeting of parents, students, administrators, and Mr. Berby which occurred early in 1980. During that meeting Berby indicated that he thought the slips were only for failing students and also acknowledged that he spent class time talking about non-science topics.

Robert Imm, normally an "A" student had Mr. Berby for a portion of seventh grade Science. Imm received "D" 's from Berby and transferred out of Berby's class at the request of his parents. Imm testified that Berby curled up on file cabinets while showing weekly films. He further testified that Berby invited members of his Science class to bring him a frog which he would eat. According to Imm a student brought Berby a frog during an outdoor recess period and Berby ate it, in full view of a number of students. He reiterated earlier testimony that Berby spent 1/2 the class time discussing non-science topics.

Robert Imm was given a number of penalty essays for talking out of turn. He also described a grading procedure whereby students graded one another's short answer exams. If a student was unsure as to whether the exam he was correcting had the correct answers he would ask Mr. Berby. According to Imm, Berby awarded answers of his a certain number of points and then asked whose exam was being corrected. When told it was Imm's he lowered the points to be given. Imm further testified that Berby told him he was sneaky and that he didn't like sneaky people.

On cross-examination Imm testified that he told Sullivan and his parents about his problems with Mr. Berby.

David and Sheila Imm, Robert's parents, both testified. Their testimony was that they asked to have their son removed from Mr. Berby's class because their son was extremely upset, didn't want to go to school, wasn't sleeping, had stomach aches, and was talking in his sleep. The Imm's attribute all of these symptoms to their son's experience in Berby's class. The balance of their testimony is best reflected in the following letter which they wrote to the District:

January 5, 1981

Mr. Donald Hendrick, Principal
Tomahawk Junior High School
Tomahawk, WI 54487

Dear Mr. Hendrick,

We are writing this letter in reference to Mr. Berby, a Junior High Science teacher. Our son, Bob, is currently a student of his and our daughter had him for science when she was in the eighth grade two years ago.

When our daughter was a student of his she complained about his teaching ability because she was learning nothing from him due to the fact that his lectures were totally

unrelated to the subject they were supposed to be studying. As a straight A student in science to this point, she became frustrated because she didn't know what he expected of her to retain her grade point. At the time we chalked it up to her inability to cope with a new way of teaching and we told her that she would have to adjust to many different methods of teaching in her academic career.

How foolish we were: Now we find history repeating itself.

Bob also complained that he was just wasting an hour sitting in Mr. Berby's class and all that he learned was from reading his science book.

I welcomed the opportunity to have a conference with Mr. Berby after receiving a progress slip two to three weeks after the start of school. I voiced my concern about his progress and his lack of enthusiasm when prior to seventh grade, science had always been one of his favorite subjects. He said that Bob was not working up to his ability at the beginning of school but showed some improvement. In reply to my questioning he stated that Bob was not a discipline problem. Since Bob has always been a good student in science, I asked Mr. Berby to report to us if his grades weren't up to par. I expressly asked him to notify us before things got out of hand and it was too late for him to raise his grade.

You can imagine my shock when I picked up Bob's report card and he'd received a D in science.

I spoke with Mr. Berby the day of parent conferences. I was upset and told him so and asked why he hadn't informed us of this. At first he said that he had one hundred and thirty five students and couldn't report to all the parents and usually they weren't concerned anyway. I repeated that I'd voiced my concern to him. He then stated that he should have informed us.

It's (sic) difficult for me to describe the conference. It's (sic) as if I was talking "at" him--there seemed to be no communication between us. There was no rapport and I went away feeling dissatisfied and that I'd gotten nowhere.

Since then we feel that Mr. Berby has taken retaliatory action against Bob. He told the basketball coach that he shouldn't be allowed to play because of his D in science. It has always been our understanding that only a failing grade kept you out of sports. He put him on detention the day of a game. Bob was asked to leave the room and is not allowed and someone else will ask and is able to go minutes later. All these are a multitude of small occurrences (sic) that frustrate a twelve year old.

We feel that Bob has all but given up and thinks that no matter what he does scholastically he will be judged unfairly by Mr. Berby and not measure up. He has no respect for the man and is now reached the point of 'grin and bear it'.

One wonders about Mr. Berby's teaching quality when a child's grades plummet only in his subject.

We are of the opinion that the teacher ability of Mr. Berby is questionable, that he has no concern for his students, that he lets his personal feelings enter into his dealings with the students and should not be allowed to teach children of such a vulnerable age.

Since we no longer feel that our problem can be handled on a parent-teacher level, we are asking you to step in and rectify the situation by dismissing Mr. Berby. If this is not possible we would like Bob to be placed in another class to save him anymore mental anguish.

Bob has no knowledge of this letter or our feelings about Mr. Berby.

Sincerely,

D. G. Imm
Sheila A. Imm
(Dr. & Mrs. David Imm)

Paul Hagen had Berby as a basketball coach in 7th grade and as a Science teacher in 8th grade. On direct examination Hagen testified that following basketball practice Berby left the players unsupervised while they showered. On cross-examination Hagen indicated that his testimony in that regard had never previously been solicited.

Hagen testified about study groups formed, under Berby's direction, by picking up teams. According to Hagen, those selected last felt bad. Grades were, in part, based upon group performance, a procedure which disturbed Hagen. Hagen testified that Berby frequently gave tests which were illegible. Berby read through the test once to clarify its contents, and thereafter, according to Hagen, refused to clarify terms or phrases whose clarification a student might have missed on the first go around.

Hagen testified that if he missed a class Berby would not supply him with notes that he had missed; requiring him instead to go to his classmates. On cross-examination Hagen indicated that he did not want other students notes, that he wanted his own, and that he did not get notes from others. Hagen testified that he and a friend had identical accumulated grade points one marking period, however he received a C+ while his friend got a B-.

Hagen testified that Berby walked down school halls "driving his tray" or flapping his arms like a bird. He further recounted an incident which occurred at an athletic banquet where Berby indicated that Jeff Foster, a student, had no athletic ability and would never be a good basketball player. According to Hagen, 50% of the class time was spent dealing with Science.

On cross-examination Hagen testified that he told his parents and Mr. Hendrick he was bothered by the study groups and by unfair grading prior to the School Board hearing.

Hagen's mother, Janet, testified that she received a low slip from Berby relative to her son's performance. Concerned, she went to see Berby, who told her that everything was alright because her son had turned it around, and thereafter terminated the conversation. According to Mrs. Hagen she told Mr. Hendrick that her son was frustrated with Berby's class and wrote the following unsolicited letter:

November 24, 1980

Dear Mr. Hendrick:

There is a problem in the Junior High that I am sure you are aware of but I must make my feelings known to you anyway.

I feel the teaching quality of Mr. Berby falls far short of what we want for our children at this level. Last year Paul had Mr. Zillman for science and I had nothing but good feelings and gratitude for that. I truly feel a great loss has been served to the students that have had Berby for 2 years. They have lost 2 years of one of the most important fundamentals we can teach our children.

His manner of testing and grading is most unusual. The test Paul has brought home have been difficult to read and often times impossible to understand what is expected or wanted as an answer.

Paul and I do feel fortunate that he was given an A- the first nine weeks, however I don't feel the grade is at all a reflection of the amount of science he has learned. He is frustrated at the inability of Mr. Berby to lecture and test accordingly.

Another observation that has been brought to my attention is that he will show negative feelings toward a student and will grade him accordingly. It seems there is never a positive approach to his instruction.

I don't feel I am being short sighted in my opinions as they have been openly discussed by parents of students and faculty as well. He is not held in the highest esteem by fellow teachers.

In short I guess the point I want to make is I want my son to be taught science. I want the approach to be positive and on the same level as other 8th grade science classes. I don't want him to go into high school without the proper background. Finally, I have a daughter coming up. I don't want her faced with this same problem.

What can we do?

Sincerely,

Janet Hagen

Mrs. Hagen indicated that she explained her specific concerns to Hendrick when she handed him the letter.

Nathan Nick, who had Berby for 8th grade Science testified that Berby's written tests were blurry and that once Berby had read through the test he refused to provide further clarification. According to Nick, Berby spent a substantial portion of the class period talking about marathons, college life, and Colorado. Nick testified that on one occasion a video tape on wildlife turned into a soap opera and then into Sesame Street, each of which the class sat and watched. Nick testified that Berby's explanations of unclear subject matter were of no help. Nick also testified about Berby driving his tray down the hall as if it were a car.

On cross-examination Nick indicated that he complained to his parents and to Mr. Sullivan about Berby, and that he testified about the tests before the school board. The video tape incident was not raised at the school board hearing because it occurred after that hearing. Nick testified that Berby would sit on file cabinets and curl up while showing films.

Patricia Nick, Nathan's mother, testified that on one occasion her son got a low slip. She went to see Berby a week later and was told that her son had completely turned things around. According to Mrs. Nick, her son, who never complained about his teachers, did complain about Mr. Berby. Mrs. Nick testified that she saw copies of tests Berby administered, and that the tests were illegible, contained ridiculous questions and didn't make sense.

Mrs. Nick wrote a letter to the district complaining about Mr. Berby. The letter was sent in response to the District letter requesting parents to put their concerns in writing. Mrs. Nick testified that her son complained that he was tested on non-science subjects raised in the lectures, that Berby acted strange, that Berby spent a good deal of time talking about marathons and other non-related topics, over and over. Mrs. Nick testified that she never showed the tests to Hendrick or the School Board, nor did she ever question the legitimacy of the tests with District representatives.

Tina Bellile had Berby for 7th and 8th grade Science. Bellile, an "A" student, testified that she was so upset over Berby's class that it brought her to tears on a number of occasions in 7th grade. According to Bellile she was given a "C" in the 3rd quarter of 7th grade, though there was no falloff in her work performance. When she questioned the grade, her first C, Berby told her she was not working up to her capability. Bellile testified to incidents where she correctly answered questions in class and was told she was wrong. She gave similar testimony with respect to correct answers given on written exams which were graded wrong. Bellile testified about illegible exams, about grades premised solely upon the number of words written, about the Jeff Foster remarks, and claimed that she didn't learn. Bellile testified that she confronted Berby with a correct answer marked wrong, and he responded by threatening to reduce her grade further.

On cross-examination Bellile testified that she couldn't understand the grading system, but that Berby kept students abreast of how they were doing grade wise, every 3 weeks or so. Bellile indicated that she complained about Berby to her mother after about two weeks in 7th grade and every day after that. She also brought specific complaints to Hendrick twice in 7th grade and again in 8th grade. She further testified that Berby was the first teacher she had who tested on non-textbook materials and that Berby's class represented the first time she had done extra-credit work.

Carmen Bellile, Tina's mother, testified that on 5 or 6 occasions her daughter cried about Berby's 7th grade science class. According to Mrs. Bellile teachers generally had praise for the kids in her daughter's group, but Berby constantly "cut them up". Mrs. Bellile sent a letter quite critical of Berby in response to a letter from Hendrick requesting concerned parents to put their concerns in writing.

Loni Bartz had Mr. Berby for 7th grade Science. She testified that she could not understand Berby's grading system, that he spent a good deal of class time talking about his life, his family, and his running, that he periodically showed the class slides, some of which were shots of himself or his family, and that she could not understand his explanations of material presented. She testified that she gave text book provided answers to test questions and that some of those answers were graded wrong. Bartz testified to being discouraged.

On cross-examination Bartz indicated that Berby didn't explain things so that she could understand them. She testified that Berby graded the class on a curve, that she didn't like it, and that no other teacher did it. She wanted to get out of Berby's class, and complained frequently to her mother.

Loni's mother, Nancy, testified that her daughter complained about Berby more and more as the year progressed. This was of concern to Mrs. Bartz since her daughter had not previously complained about her teachers. Mrs. Bartz never spoke to Berby or to any member of the administration though she wrote a letter critical of Berby in response to the letter she received from Mr. Hendrick.

Kris Albrecht had Mr. Berby for 7th and 8th grade Science. It was Albrecht's testimony that Berby once solicited money for a running organization on the promise that those who contributed wouldn't have to take a certain exam. On cross-examination Albrecht indicated that nothing ever came of this comment and that he had never previously mentioned this to anyone representing the school district.

Donald Hendrick testified about incidents where Berby left students unsupervised and about stories of Mr. Berby eating frogs and insects. He also testified about receiving parent and student complaints in the fall of 1980 relative to Berby's grading practices and tests. Those complaints prompted the November 8, 1980 conference. Another conference was held in January of 1981 where Berby was given copies of the parental letters with the names deleted. Hendrick indicated that he told Berby his conduct was unacceptable.

Richard Zillman is a Junior High School Science teacher whose daughter had Berby for Science. Zillman testified that he received a volume of parent and student complaints about Berby. The following letter reflects Zillman's response to Hendrick's request that he put his concerns in writing:

Jan. 19, 1981

Mr. Don Hendrick, Principal
Tomahawk Jr. High
Tomahawk, Wis.

To whom it may concern;

In reference to Mr. Ron Berby I must present my feelings first as a parent. In the school year 1978-1979 my daughter had Mr. Berby in 8th grade science. His method of teaching left her rather confused when she and her fellow classmates were graded on the basis of how many words they had written and not on whether their answers were correct or not. One day she came home very upset over the fact that Mr. Berby had marked her word definitions wrong even though they were copied word for word from the glossary of the science text being used. I confronted Mr. Berby on the following morning and he could offer no reason for not accepting the authors definitions, nor could he suggest any better ones.

As a fellow science teacher Mr. Berby has placed me in a rather precarious position for the past few years. Ethically one should defend their co-worker when ever possible to maintain discipline and respect from the students and cooperation from the parents. However, this becomes very difficult when one receives phone calls or is stopped on the street by irrate parents attempting to see what could be done about their child not learning much science for possibly two years in a row under the teaching of Mr. Berby.

The school year 1979-1980 was particularly difficult for me in that 7-VI was my home room and also the only 7th grade class that had Mr. Berby for science. Every morning and noon they got to see what my students were doing and wanted to know whether they would get to do it in their science class. I tried to explain that I did not know, but that it was possible. By mid year they stopped asking. From then on, all I heard were complaints about all Mr. Berby ever talked about was alcoholism, drug abuse, and marathon running.

In the past 15 years as a science teacher at Tomahawk I have worked with 5 other science teachers besides Mr. Berby. All of them were more cooperative to work with than Mr. Berby. I was always personally aware of what was happening in their classrooms as they were in mine. We worked closely at keeping all 7th grades, or 8th graders, at approximately the same place in the text although we sometimes placed more emphasis on one subject area than another. At this writing I would have to check Mr. Berby's lesson plans in order to find out what he has covered or where he is presently.

Sincerely,

Richard A. Zillman

On cross-examination Zillman testified that he witnessed plenty of hostility toward Berby including student remarks to the effect that they hated the man.

Al Overhaug testified about his working relationship with Berby. His testimony can be summarized by the letter he wrote:

November 25, 1980

To Whom It May Concern:

I have taught and coached in Tomahawk Jr. High School for the past 10 years. I feel that my working relationship with faculty and students, in most instances, has been good. The following is a recollection of my working relationship with Mr. Berby during the 1978-1979 Jr. High football and basketball seasons.

The experience I had working with Mr. Berby was not an enjoyable one. I found him very difficult to communicate with and not very cooperative. As my assistant coach he was to work with me in developing the young boys that participated in the programs. In most instances, he showed neither the will or desire to do this.

In football, his lack of enthusiasm and interest in the program was evident from the beginning. He often shortened practice (Thursday until 4:00) or left players in the school unsupervised so that he could run or go home. He stated that he knew nothing about football, yet he showed no willingness to learn.

In basketball, he often left his players (7th grade team) in the locker room alone while he ran in the halls. It finally got to the point where I had to speak with Don Hendrick about it when my suggestions about supervision were totally ignored.

Even then, the "locker room supervision problem" did not entirely go away. Although I did not record or document each instance, there were other times after practice and games where Mr. Berby did not share in the supervision of players.

In closing, his lack of involvement in these programs was very much in evidence during 1978-1979.

Sincerely,

Al Overhaug

Ed Winkler is a Social Science/American History teacher who taught in the room next to Berby's. Winkler testified that there were a lot of complaints about Berby which put him in a difficult position. According to Winkler, students coming out of Berby's class were frequently upset.

Barb Cepaitis, a teacher, testified that students were very upset over Mr. Berby, his tests and grading. As the complaining continued she began to believe the students. Cepaitis was Berby's union representative at the November 12 meeting with Hendrick. It was her testimony that Hendrick's November 19 letter accurately summarizes the November 12 meeting. Cepaitis testified that Berby explained his grading system at a meeting but even following the explanation she couldn't understand it. She testified that parents raised concerns relative to Berby with her at Parent-Teacher conferences. According to Cepaitis students had no respect for Berby, were hostile toward him, and frustrated with him.

On the night of the School Board hearing, Cepaitis resigned as Union building representative and proceeded to testify before the School Board.

Ron Berby gave extensive testimony. Called adversely, Berby admitted "driving his tray down school hallways, sitting, but not curling up, on a file cabinet, putting a live frog in his mouth, eating ticks, refusing to recognize certain students in class, occasionally counting words to arrive at grades, twice leaving students unsupervised in locker rooms, making mistakes grading tests, talking about his personal life (including a drunken episode where he lost teeth) to his Science classes. Berby acknowledged the existence of anger between he and some of his students.

Berby denied ever eating a frog. He denied that he ever reduced a grade because of who a student was. After being directed not to leave students unsupervised in the lockers he never did so again. Berby claims he never refused to answer student questions, never refused to clarify an ambiguous test, never threatened to take away points from a student who questioned his grading, never gave Garrow a penalty essay for asking questions about a test, never refused to give students materials they missed, never actually solicited contributions for a running event.

On direct examination Berby told his story. The man is a reforming alcoholic whose running is a therapeutic replacement for alcohol. He initially interviewed for a teaching job at Tomahawk and heard nothing. One day he happened to see Hendrick in Rhinelander and asked about the status of the job. Hendrick advised him that someone else had been hired. Later, in July, a friend called to tell him the Tomahawk newspaper listed him as a new teacher in the Tomahawk system. His first official contact from the District occurred in mid-August when he got a letter telling him when to report to work. His first year he coached intra-mural football. Berby claims that he worked at coaching football but felt uncomfortable with the sport and generally told people so. He expressed his dissatisfaction to Hendrick who said nothing. Ultimately he asked to resign from coaching football and was told, by Hendrick, that it would depend upon whether or not the District could secure a replacement. Berby first discovered that he was to be replaced as football coach the next fall when a Mr. Pobuda was introduced as the new football coach.

In January of 1978 Hendrick talked with him about reports that Berby was leaving the locker room to go run. Hendrick told Berby, who was coaching basketball, not to leave the boys unsupervised. Berby replied that it would not happen again, and his testimony is that it did not. It was Berby's testimony that Overhaug, who complained to Hendrick, never raised his concern with Berby.

During his first year at Tomahawk, Berby did not have his own classroom. Instead, he had a desk in the teacher's lounge and moved from room to room to conduct his classes. As a consequence of carrying his teaching materials from room to room he was, at times, late in getting to his classes. The problem was cured when Berby was given his own room.

Berby coached basketball again in 1979-80. His Junior High School students were forced to use the High School locker room. According to Berby there occurred incidents of theft and intimidation. Unhappy with the High School facility he allowed the boys to dress in his classroom, which was left unlocked. A watch was stolen and he was told to lock the room up. He told the boys that the last one out of the room should lock up. One day Hendrick came to the gym and told Berby that the door was open. After that Berby double checked the door to see that it was locked.

At the conclusion of the basketball season there was a basketball banquet held, during the course of which Berby spoke about each of the boys. He indicated that one boy, Jeff Foster, had little or no talent but made the most of what he had and was enthusiastic enough to stay with it. Although he intended the remarks to be positive they were evidently not taken that way. Berby discovered, during the School Board hearing on his non-renewal, that his comments hurt the boy.

After the basketball banquet Berby approached Hendrick and asked to resign as basketball coach. Hendrick told him to put his resignation in writing and that he (Hendrick) would give it to the School Board. Berby did so and heard nothing until September of 1980 when he heard that another teacher had the basketball assignment.

It was Berby's testimony that prior to the sequence of meetings leading to his non-renewal no one ever said anything to him about his grading practices. Berby further testified he sent a number of students to Hendrick for disciplinary reasons and never heard back with respect to what, if anything, was done.

Berby testified about the Library meeting. It was his testimony that a large number of students had their grades drop because of a generally poor attitude. During the day he got a note that two parents wanted to meet with him after school. A third name was later added. After school, Berby went to the Library where he was confronted by a dozen parents. Berby was seated in a chair with Hendrick and Sullivan behind him and with the parents, behind tables, in front of him. The parents were angry and wanted to know about his grading and teaching practices and also wanted to know why they had not been sent unsatisfactory progress reports. Berby, who felt intimidated, said that he should have sent the slips and agreed to keep parents informed about their children's progress on a weekly basis from then on. According to Berby, Hendrick summed up the meeting by saying that the parents were unhappy because they were unaware that their children's grades were declining and that Berby would rectify that. According to Berby nothing more was ever said about the incident.

Berby began smoking cigars in the teacher lounge. When a number of teachers complained Berby went to Hendrick and asked if he could smoke in his room. According to Berby, Hendrick responded that he knew of no problem doing so, and so Berby did. Hendrick subsequently advised Berby that students were complaining and Berby stopped. From that point he smoked in the teacher lounge if he was alone or if others present indicated they didn't mind.

Positions of the Parties

The District contends that it had just cause for terminating Berby. The District points to the termination letter as an articulation of reasons for the non-renewal. According to the District, Berby's unorthodox, bizzare behavior had a negative effect on the students. The District claims that Berby demonstrated an habitual neglect for the rules and that he simply couldn't teach. According to the District, if Berby's various actions are characterized as technique, they failed. The District contends that Berby's discipline was inconsistent, unfair, and unusual. The District argues that Berby failed as a role model for students who had little respect for him and that he had a poor relationship with other staff members. Finally, the District attacked Berby's grading practices as incomprehensible and wrong.

Complainant contends that the District lacked cause to terminate Berby; that it simply reacted to heat that was generated. According to the Complainant, the District sat on its hands and never advised Berby that he had problems. Complainant alleges that the District simply collected complaints and never attempted to investigate to see if they were valid. The Complainant labels the letter soliciting complaints as abominable and as evidence that Berby had already been judged. The frog/tick incidents are referred to as silly, non-culpable matters that Hendrick knew of but neither said, nor did, anything about. Complainant attacks the credibility and reliability of student testimony and says that teacher complaints are simply complaints. The real question is whether the complaints are warranted. According to the Complainant Berby is different, not dischargeable.

Discussion

The District, in its March 13, 1981 letter non-renewing Mr. Berby, set forth a long list of reasons explaining its decision. Similarly, at hearing, the District filled the record with details of incidents of conduct it regarded as unacceptable in a teacher. In essence, the District contends that Berby should not be in the classroom. The Complainant argues that much of the District's case is exaggeration or even fabrication, and to the extent that there are any real problems with Berby, they were never brought to his attention.

My review of the record leads me to the conclusion that it was the student and parental complaints that set the non-renewal process into motion. Previous conduct, such as that involving frogs, ticks, cigars, supervision of students, and classroom storytelling had occurred for some time and been ignored or condoned by the administration. Administration concerns relative to coaching had never been put squarely to Berby and those relating to the supervision of sports participants had been corrected. These concerns were tolerated until Mr. Berby's classroom teaching performance gave rise to parental furor.

I believe that Berby's classroom performance is at the center of this dispute, and for a variety of reasons I believe that Mr. Berby was deficient in the classroom.

I believe the record supports a conclusion that there were a number of technical deficiencies in Mr. Berby's teaching. His grading system was simply not adequate. He frequently made errors in grading his student's tests. The test documents were frequently unreadable, thus diminishing the credibility of the test. The practice of simply counting the words written in response to an essay question is unsupportable. I don't believe there is any educational justification for the practice, whose use is bound to frustrate the prepared students. Whatever the composite grading system was, it was not understood. Students didn't understand how they got their grades. Parents and other teachers could not understand the grading system either. Whether this was because the system was so complicated as to defy understanding or because it was never properly explained is not significant. The point is, grades are both a learning device and one which

measures comprehension and performance. If no one understands what has been graded, the value of the grade itself is lost. The fact that Mr. Berby misunderstood the low slip policy hurt him greatly in the eyes of the community.

Mr. Berby displayed very questionable judgment for a good portion of his tenure at Tomahawk. Leaving his students unsupervised at times was inappropriate. Drinking near beer in the faculty lounge was childish. Smoking cigars after receiving complaints reflects a persistent thoughtlessness towards others. Eating ticks and mouthing frogs in front of students was silly and uncalled for. While none of the specific judgmental lapses cited in this paragraph are, per se, grounds for discharge, they did serve to undermine a teacher obviously beleaguered in the classroom. For a teacher whose credibility vis a vis students, parents, teachers, and the administration was under scrutiny and attack to engage in this type of conduct is somewhat bewildering.

Mr. Berby did not maintain discipline in his classroom. This is evident from the testimony taken as a whole. Students did not understand the discipline meted out or the general disciplinary scheme. Some of the penalty essays written were insulting and derogatory toward Berby, manifesting gross disrespect for the man. Other teachers seemed not to understand Berby's discipline and the administration refused to support it. Even Berby admitted to failures in this area and to a rudeness and confrontationalism that exceeded his control.

Berby's methods were unusual. While he may not have spent 50% of his class time on extraneous matters, it certainly appears that a good deal of time was spent this way. Discipline and grading were problems. Berby's eccentricities magnified his problems. The consequence of all this is that the students were not learning. They were obviously discouraged and confused and many of them were upset. Parents wanted their children out of his classroom. Co-workers would not support him nor did they want to work with him. I believe the educational process failed. The public schools are in business to educate. That was not happening here.

I agree with the Complainant's contention that the Administration mishandled the matter. It was the responsibility of the Administration to bring many of these concerns to Berby and to attempt to correct perceived deficiencies as early as possible. This was not done. For the most part, the Administration did nothing until parental dissatisfaction forced action. Berby might certainly have expected more from the Administration. However, he was on notice of student and parental concerns because both students and parents made their views known directly. The same might be said of the faculty.

I further agree with the Complainant that some of the testimony, particularly that of some of the students, is incredible. I believe that some of the students fabricated their testimony because of their dislike for Berby. However I do not believe this alters the essence of the collective testimony advanced by the students.

In summary, I believe the District had just cause to non-renew the contract of the Complainant. While I do believe he was treated unfairly by the Administration and by some students, parents, and co-workers I believe that the educational consequences of his continuing in his position outweigh the inequities he has suffered.

Dated at Madison, Wisconsin this 2nd day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner