

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RONALD BERBY and TOMAHAWK
EDUCATION ASSOCIATION

Complainants,

vs.

UNIFIED JOINT SCHOOL
DISTRICT NO. 1, CITY OF
TOMAHAWK, BOARD OF EDUCA-
TION, UNIFIED JOINT SCHOOL
DISTRICT NO. 1, CITY OF
TOMAHAWK,

Respondent.

Case 22
No. 27883 MP-1212
Decision No. 18670-D

Appearances:

Kelly, Haus and Katz, Attorneys at Law, Lake Terrace, 121 East Wilson Street, Madison, Wisconsin, 53703-3422 by Mr. Stephen G. Katz, appeared on behalf of the Complainants.

Johnson, Weis, Paulson & Priebe, S.C., Attorneys at Law, 28 North Stevens Street, P. O. Box 1148, Rhinelander, Wisconsin, 54501-1148 by Mr. James Dana Weis, and Mr. James A. Johnson, appeared on behalf of the Respondent.

ORDER MODIFYING EXAMINER'S FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner William C. Houlihan having issued his Findings of Fact, Conclusions of Law and Order in the above matter on March 2, 1984, wherein he concluded, inter alia, that the above-named Respondent did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by nonrenewing Ronald Berby's employment contract for school year 1981-82; and the Examiner having therefore dismissed the complaint in this matter; and Complainants having timely filed a petition for Commission review of the Examiner's decision pursuant to Sec. 111.07(5), Stats.; and the parties thereafter having filed written argument, the last of which was received on June 11, 1984; and the Commission, having considered the entire record, the Examiner's decision, and the parties' briefs, being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified as follows and, as modified, adopted as the Commission's Findings of Fact, Conclusions of Law and Order.

NOW, THEREFORE, it is hereby

ORDERED 1/

1. That the Examiner's Findings of Fact 1-3 are affirmed.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final

(Footnote #1 is continued on Page 2.)

(Footnote #1 continued from Page 1.)

order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

2. That the Examiner's Finding of Fact 4 is modified to add the following provision from the parties' 1980-81 collective bargaining agreement:

ARTICLE 13
TEACHER EVALUATIONS

D. Initial aim of evaluation is to improve teacher performance. However, if performance is not improved through counseling, assistance, and direction by their supervisor, or supervisor's designee, to a level acceptable to the school board; these same evaluations can be used to establish grounds for non-renewal, withholding of increment, and dismissal.

3. That the Examiner's Finding of Fact 5-14 are affirmed.

4. That the Examiner's Finding of Fact 15 is modified to read as follows:

That during his tenure with the District Mr. Berby used a teaching technique of lecturing and teaching from the textbook, supplemented by the use of films and labs; that Berby told his students that they should expect to be prepared to be tested on materials from the textbook, films and/or his lectures; that the students were not clearly informed that where a conflict arose between information in the text and information from Berby's lecture, the latter governed; that for many of his students this represented the first experience with taking notes from lectures; and that no one in the District's administration discussed Berby's lecture practice with him or otherwise expressed concerns to him on this matter prior to the Board's March 9, 1981, nonrenewal hearing.

5. That the Examiner's Findings of Fact 16-19 are affirmed.

6. That the Examiner's Finding of Fact 20 is deleted.

7. That the Examiner's Finding of Fact 21 is renumbered 20 and is modified to read as follows:

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; and that Hendrick did not inform Berby that resigning as coach would adversely affect his employment status.

8. That the Examiner's Finding of Fact 22 is renumbered 21 and is affirmed.

9. That the Examiner's Finding of Fact 23 is renumbered 22 and is modified as follows:

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; and that no one in the District's administration expressed concerns regarding this practice at any point prior to the Board's March 9, 1981, nonrenewal hearing.

10. That the Examiner's Finding of Fact 24 is renumbered 23 and is modified to read as follows:

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 experienced significantly declining grades in the third quarter 1979-80 school year Berby did not send out unsatisfactory progress reports because he did not realize that he was required to do so under the circumstances.

11. That the Examiner's Finding of Fact 25 is renumbered 24 and is modified to read as follows:

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 in the third quarter 1979-80 school year.

12. That the Examiner's Findings of Fact 26-28 are combined and renumbered 25, and as combined the Finding is modified to read as follows:

That Guidance Counselor Sullivan arranged and attended a meeting between Berby and approximately 10-12 parents which was convened in March, 1980 in the school library after school; that Principal Hendrick and Superintendent Johnson were also present; that although Berby had been informed that a parent wanted to meet with him, he was unaware, until he walked into the room, that so many people would be at the meeting; that the room was set up such that Berby sat in a chair facing a row of tables behind which the parents were seated and Hendrick, Sullivan, and, for a while, Johnson sat behind Berby; that no one introduced Berby to the assembled parents, who asked him why they had not received unsatisfactory progress reports concerning the third quarter 1979-80 school year, what was his rapport with students in his class, and also questioned him about his grading and teaching techniques; that Berby answered all questions, acknowledged that he should have kept parents informed about their children's progress, and expressed a willingness to keep parents informed on a weekly basis from that point forward; that, thereafter, Berby did keep parents informed; that Hendrick gave an oral summary of the meeting at his conclusion, but neither he nor Johnson otherwise participated in the meeting; that after the meeting, Johnson complimented Berby on his handling a difficult situation; that no one in the District's administration subsequently discussed the problems raised by the parents in the meeting nor did the District evaluate Berby or otherwise take any remedial action with respect thereto; that at hearing Berby acknowledged that the fact that the parents were angry, made him feel that he was on "the hot seat" and that his job was in jeopardy; and that the children's grades improved in the fourth quarter of the 1979-80 school year reflecting improved performance.

13. That the Examiner's Finding of Fact 29 is renumbered 26 and is affirmed.

14. That the Examiner's Finding of Fact 30 is renumbered 27 and is modified to read as follows:

That, according to Principal Hendrick, he did not evaluate the teaching staff for the 1979-80 school year because the Berby and Brehm grievances were pending, and he feared that any evaluations during the pendency of such grievances would have been regarded as inappropriate under the circumstances.

15. The Examiner's Findings of Fact 31 and 34 are combined and renumbered 28, and as combined are affirmed.

16. That the Examiner's Findings of Fact 32 and 33 are combined and renumbered 29 and as combined, the Finding is modified to read as follows:

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; 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 during his prep time, while

students were not present; that students complained to Hendrick; that Hendrick asked Berby to stop smoking cigars in his room; and that Berby stopped.

17. That the Examiner's Finding of Fact 35 is renumbered 30 and is modified to read as follows:

That during his tenure at Tomahawk, Mr. Berby spent a substantial portion of class time talking about private/personel matters, including running, his famiy, and his past, which were largely unrelated to the subject matter he taught; and that the District raised its concerns relative to these practices, for the first time at its' March 9, 1981, nonrenewal hearing.

18. That the Examiner's Finding of Fact 36 is deleted.

19. That the Examiner's Findings of Fact 37-39 are combined and renumbered 31 and as combined that Finding is modified as follows:

That a number of students disliked Berby; that a number of students found it difficult to learn from Berby; that a 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; that a 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; and that the District neither counseled, assisted, directed or otherwise instructed Berby relative to these concerns, nor did the District investigate the veracity of said complaints.

20. That a new Finding of Fact 32 is created and shall read as follows:

That the following letter written by David and Sheila Imm, parents of one of Berby's students, reflects the frustrations expressed by a number of parents relative to Berby as a teacher:

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 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 (sic) grades plummet only in his subject.

We are of the opinion that the teacher ability of Mr. Berby is questionable, and 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)

21. That a new Finding of Fact 33 is created and shall read as follows:

That the following letter written by Richard Zillman, science teacher at Tomahawk, 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 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 graders, 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

22. That the Examiner's Finding of Fact 40 is renumbered 34 and is modified to read as follows:

That Berby's grading system was predicated upon a standard Bell shaped curve, applied by class; that it had a number of components; that it was not well understood by students nor by their parents; that 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; and that when asked, Berby answered questions concerning his grading practices.

23. That the Examiner's Findings of Fact 41-44 are renumbered 35-38 and are affirmed.

24. That a new Finding of Fact 39 is created and shall read as follows:

That in February, 1981, a third conference was held wherein Superintendent Johnson, Hendrick, Degner and Berby were in attendance, and that following the conference, the District administration recommended to the Board that Berby's contract should not be renewed for the 1981-82 school year.

25. That the Examiner's Findings of Fact 45 and 46 are renumbered 40 and 41 and are affirmed.

26. That the Examiner's Conclusions of Law are hereby modified to read as follows:

MODIFIED CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission has jurisdiction, pursuant to Sec. 111.70(4)(a), 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.

2. That by the failure of its agents to give Ronald Berby the counseling, assistance and direction mandated by Article 13-D and by failure to give Berby the notice and opportunity to remediate implicit in Article 14-A of the collective bargaining agreement, the District violated the collective bargaining agreement between the parties and therefore did violate Sec. 111.70(3)(a)5, Stats.

3. That by nonrenewing 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, Stats.

27. That the Examiner's Order shall be modified to read as follows:

MODIFIED ORDER

A. That Respondent, School District of Tomahawk, its officers and agents, shall immediately:

1. Cease and desist from failing to give its employees the counseling, assistance and direction mandated by Article 13-D and the notice and opportunity to remediate implicit in Article 14-A of its collective bargaining agreement with Tomahawk Education Association.

2. Take the following affirmative action which the Commission finds will effectuate the purposes of the Wisconsin Employment Peace Act.

(a) Make Ronald Berby whole for school year 1981-1982 only by paying to him an amount of money equal to all wages and benefits which he would have received, but for the non-renewal of his employment contract for school year 1981-1982,

plus interest 2/ less any amount of money that he earned or received that he otherwise would not have received, but for his non-renewal; and

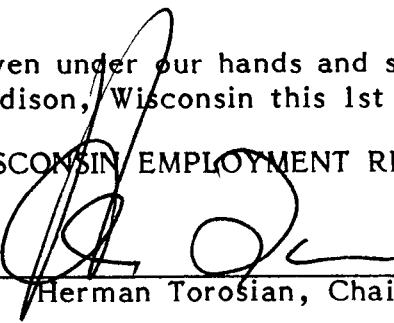
(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to steps Respondent has taken to comply with this Order.

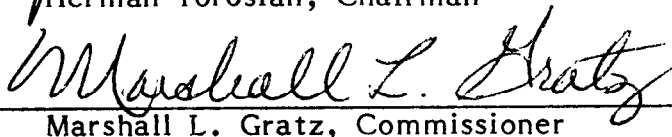
B. Except as noted above, the complaint shall be and hereby is dismissed.

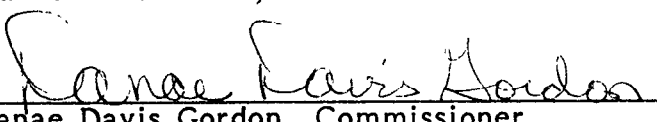
Given under our hands and seal at the City of
Madison, Wisconsin this 1st day of August, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

SCHOOL DISTRICT OF TOMAHAWK

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Ronald Berby has been a teacher for approximately 13 years and was employed as a teacher at Tomahawk Junior High School by the Tomahawk School District for three years commencing the 1978-79 school year and ending at the close of the 1980-81 school year. He taught 7th and 8th grade science classes. He also coached intra-mural basketball and football during school years 1978-79 and 1979-80, respectively.

In November, 1980, Tomahawk Junior High School Principal, Donald Hendrick, held a conference with Berby which was also attended by Tomahawk Education Association Building Representative Barbara Cepaitis. The purpose of the conference was to discuss Hendrick's concerns regarding Berby's teaching performance. The five areas of concern discussed were complaints received against Berby (from teachers, parents and students), cooperation with staff, unorthodox behavior, misrepresentation when hired (regarding willingness to coach) and neglect (of certain supervisory duties). A letter from Hendrick purporting to be a summary of the conference was sent to Berby on November 19, 1980, which, by its terms, constituted notice as required by Article 14-B of the collective bargaining agreement that Hendrick was considering recommending that the District not renew Berby's teaching contract for the following year. Berby responded by letter dated November 21, 1980. In his response Berby stated he was unaware of complaints regarding his performance as a teacher, and he denied (1) being uncooperative with staff (2) being culpable for requesting to be relieved of coaching responsibilities, and (3) being neglectful, other than in situations he had previously rectified. Berby requested specifics regarding complaints stating that he needed more information in order to improve in these areas.

In order to reply to Berby's request for specifics, between the November conference and a second one held in January 1981, Hendrick sent letters to various parents who had previously indicated dissatisfaction with Berby, requesting that they put their concerns in writing and promising anonymity. On January 20, 1981, a second conference involving Berby, Hendrick, Cepaitis, and UniServ Director Eugene Degner was held. According to a January 29, 1981, letter from Hendrick to Berby, six letters from parents of Berby's students and three letters from teachers were read and presented to Berby, all complaining about Berby's performance as a teacher. Hendrick also reiterated concerns relative to Berby's lack of cooperation with staff and his unorthodox behavior. Hendrick concluded his letter by stating:

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 upon 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.

A third conference was held sometime in February 1981, at which Superintendent Johnson, Hendrick, Degner and Berby were in attendance. Following that conference, the District Administration recommended that Berby's contract should not be renewed for the 1981-82 school year.

On or about March 9, 1981, at Berby's request, the Tomahawk School Board conducted an evidentiary hearing relative to renewal of Berby's teaching contract for school year 1981-82. By letter to Berby dated March 13, 1981, the Board informed Berby of its decision not to renew his employment contract. The Board cited numerous findings in support of its' decision which can accurately be

categorized into five general areas: unorthodox/unprofessional behavior, neglectful/supervision, uncooperativeness, classroom conduct, and unfair/unequal grading practices.

Berby, by his representative, filed a grievance concerning the Board's decision not to renew his contract on March 19, 1981. The grievance procedure contained in the applicable collective bargaining agreement did not provide for final and binding arbitration of disputes. On April 7, 1981, the Board voted to deny the grievance, whereupon, on April 27, Berby and the Tomahawk Education Association filed the instant complaint. Complainants alleged that the Board did not have just cause to nonrenew Berby's contract and that its decision therefore violated the parties' collective bargaining agreement and Sec. 111.70(3)(a)(5), Stats.

Hearing on said complaint was conducted in Tomahawk, Wisconsin on July 21, 22, September 8, 9 and 10, November 2, 3 and 4, 1981, and January 14, 1982, before Examiner William C. Houlihan, of the Commission's staff.

Examiner's Decision - Preliminary Issues

Several procedural matters arose during the hearing before the Examiner. First, the District, in its answer to the complaint and at hearing, denied that Complainants had exhausted the contractual grievance procedure prior to filing the complaint herein. The District asserted that Berby failed to meet with the District Superintendent as required by the contractual procedure. In response, Union representative Eugene Degner testified, without contradiction, that the Superintendent waived Berby's presence at the meeting. The Examiner determined that to dismiss the instant complaint on the basis of non-compliance with the grievance procedure, as argued by the District, would be manifestly unfair. He concluded that Berby's absence from the grievance meeting between the Union and Superintendent had no substantive consequence and, therefore, declined to dismiss the action on that basis.

Second, at the outset of the hearing, the District contended, contrary to the Union, that the Complainants had the burden of going forward and the burden of proving a prohibited practice had been committed. The District argued--before and during the hearing as well as in its post-hearing brief to the Examiner--that Complainants had the burden of establishing by a clear and satisfactory preponderance of the evidence all allegations in the complaint including their contention that the District did not have just cause to nonrenew Berby's contract. Citing, inter alia, Century Building Company v. W.E.R.B., 235 Wis. 376, 291 N.W. 305 (1940), the District argued that Complainants, seeking action of the Commission, must bear the burden of proof. Reinke v. Personnel Board, 53 Wis. 2d 123 (1971) is inapposite, the District averred, because the Court ruled that by statutorily mandating that the State have just cause to discharge a state employe, the Legislature intended that State bear the burden of proving just cause existed. The District asserted that other WERC cases contrary to the District's position on this issue 3/ were erroneously decided by the Commission.

The Complainants' position throughout on this issue has been that the District, the party taking the nonrenewal action, had the burden of going forward and proving "to the satisfaction of the Commission and the Examiner," that it had just cause under the contract for nonrenewing Berby's contract.

As to the burden of proof question, the Examiner held that Complainants met their burden of proof obligation when they established the applicability of the contractual just cause standards to Berby's nonrenewal and that the burden then shifted to the District to go forward and demonstrate the existence of just cause for the District's actions. The Examiner stated, at p. 19 of his decision "To

3/ The District cited Local 386, Allied Industrial Workers of America, AFL-CIO v. Stolper Industries, Inc., Dec. No. 12626-A (7/74), aff'd by operation of law, Dec. No. 12626-B (WERC, 10/75); and Allied Industrial Workers of America, Local 232, AFL-CIO v. Briggs and Stratton Corporation, Dec. No. 8570-C (WERC, 3/69), aff'd sub nom. Dec. No. 367-659 (CirCt Milw., 6/71).

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 nonrenewal."

Relatedly, the District contended that whether its action of nonrenewal was arbitrary and capricious is the appropriate standard of review. Complainants on the other hand argued the appropriate standard was clear and satisfactory preponderance of evidence. The Examiner ruled that, pursuant to Sec. 111.07(3) Stats., the District, who had the burden of proof, was required to sustain said burden by a clear and satisfactory preponderance of the evidence.

The Examiner's Decision Regarding Merits

The record developed at the hearing was voluminous, including 61 exhibits and a 1,367 page transcript of testimony from some of Berby's students and their parents, Director of Guidance William Sullivan, School Principal Donald Hendrick, four teachers, and Berby. One of the teachers, Richard Zillman had a daughter taught by Berby. Another teacher, Barbara Cepaitis, represented Berby in her capacity as Building Representative for the Association until the Board's nonrenewal hearing on March 9, 1981, whereupon she resigned her position as representative and testified relative to complaints she received about Berby. The Examiner quoted in his decision letters from parents (Imm and Hagen) and teachers (Zillman and Overhaug) as examples of negative assessments about Berby as a teacher.

While agreeing with Complainants that some of the testimony of some students was incredible and fabricated, the Examiner credited the essence of the "collective testimony advanced by the students." He also concluded that the record contained ample evidence that teacher/co-workers did not want to work with Berby and would not support him, that parents wanted their children out of Berby's classroom because they just did not think their children were learning science from him, and that the students disliked and disrespected Berby as a teacher. In the Examiner's view, such overwhelmingly negative feelings and reaction to Berby, were not generated out of any conspiratorial plot to get rid of Berby but rather, culminated from Berby's own poor teaching performance and repeated exercise of bad judgment. With respect to Berby's performance as a teacher, the Examiner, based on the record evidence presented to him, agreed with the District's conclusion that Berby was deficient in the classroom, and found that Berby's classroom performance was at the center of the instant dispute. He found Berby's grading practices were frustrating and inadequate. The Examiner cited examples including basing essay test grades solely on the number of words in the students' answers, administering tests that were sometimes unreadable, and frequently making errors in grading students' tests. He found that Berby did not maintain discipline in his classroom and that some of the penalty essays written by his students manifested gross disrespect for him. The Examiner further found that some teachers did not understand Berby's methods of discipline and that the administration refused to support his methods. Moreover, he noted that Berby "admitted failures in this area and to a rudeness and confrontationalism that exceeded his control."

The Examiner cited numerous record examples of Berby's lack of judgment throughout his short term at Tomahawk including instances in which he mouthed frogs and ate ticks in front of students, left students unsupervised, drank near beer in the teachers lounge, and spent a good deal of class time discussing personal/extraneous matters. In the Examiner's view, these judgmental lapses seriously undermined Berby as a teacher in the eyes of his students, parents, fellow teachers and the administration.

The Examiner agreed with Complainants that the District Administration ignored or condoned some of Berby's conduct and that the District generally mishandled the matter. Specifically, the Examiner noted that the District should have brought many of its concerns to Berby and afforded him an opportunity to correct perceived deficiencies as early as possible. The Examiner found that the District did virtually nothing until Berby's conduct gave rise to parental furor, necessitating action by the District. By the same token, the Examiner stated Berby was on notice of parental and student concerns because they made their views known to Berby directly and that the same might be true for Berby's co-workers.

Based on the entire record evidence and arguments of the parties the Examiner concluded that the District had just cause within the meaning of the parties' agreement for nonrenewing Berby's teaching contract and, therefore, that it did

not violate Sec. 111.70(3)(a)(5), Stats., by its non-renewal action. He further concluded that while he believed Berby was unfairly treated by the Administration and by some students, parents and teachers, "the educational consequences of his continuing in his position outweigh the inequities he has suffered."

PETITION FOR REVIEW AND PARTIES' POSITIONS
IN SUPPORT OF AND IN OPPOSITION THERETO:

The Complainants

In the Petition for Review and brief in support of said petition, (the latter incorporates Complainants' brief to the Examiner) the Complainants make four general arguments as to why the Examiner's Decision should be reversed. (Their claims of error with respect to specific Findings will be reviewed in the discussion of the merits section below.)

First, Complainants argue the Examiner's decision constituted an improper and erroneous subjective determination by the Examiner of Berby's fitness as a teacher. Here, Complainants assert that "it was improper for the Examiner to establish himself as an expert on grading, especially when Respondent failed to advise Berby of any grading difficulties (or to provide Berby an opportunity to remediate any difficulties) in the exercise of its role as Berby's employer." The Examiner's statements were based on the Examiner's own notions of what was good or bad teaching. However, whether the Examiner is an expert in teaching techniques was not established nor could he be cross-examined as to his expertise in teaching methodology. Fundamentally, the decision as to whether Berby was a good or bad teacher was for the professional, the District Administrator to make, not the Examiner. Complainants argue "the Examiner improperly stepped into the void left by the district's failure to do its job." Even though the Examiner acknowledged the District did not bring many of its concerns to Berby's attention and did not attempt to correct perceived deficiencies as early as possible -- as required under just cause -- the Examiner nonetheless erroneously concluded that Berby was an unfit teacher and therefore the District had just cause to dismiss him. According to Complainants, "Berby was deprived of the protections afforded workers protected by just cause language."

Second, the Examiner properly discounted incredulous testimony of some students as well as some stale student and parental complaints (concerning frogs, ticks, cigars, supervision of students and classroom storytelling.) The Examiner was correct in concluding that most of this conduct had occurred for some time, had been ignored or condoned by the administration or had been corrected by Berby. Having found that the District failed to meet "certain fairness tests (fairness tests which are part and parcel of just cause)", the Complainants contend the Examiner ignored his task and improperly let discredited parental and student complaints combined with evidence presented for the first time in the hearing conducted by the Examiner "provide him with a general view that Berby was failing as a teacher."

Third, Complainants assert that the Examiner failed to address their argument that Article 13-D of the parties' agreement was applicable to the instant situation.

Article 13-D - Teacher Evaluations - provides:

"Initial aim of evaluation is to improve teacher performance.
However, if performance is not improved through counseling,
and if continued action by the district is warranted, the district may

if provided by third parties rather than supervisors. Moreover, Complainants assert, contrary to the District and the Examiner's decision, that there was no outpouring of parental and student complaints. In this regard, Complainants further contend that except at the meeting held in the school library at the end of the third quarter of the 1979-80 school year, between Berby, several parents, Principal Hendrick and the District Superintendent, Berby was not warned of any such complaints. No serious objection was voiced by the parents to Berby's teaching practices once he explained himself. In fact, Berby took corrective action with respect to certain concerns raised at the meeting; he agreed to send unsatisfactory progress reports to parents of affected students and he agreed to abandon the "counting of words" grading scheme. More importantly, Complainants argue, at p. 7 of their brief that "the Principal did not admonish, warn, counsel or assist Berby with respect to any topic of that meeting. He didn't even evaluate Berby for the 1979-1980 year (tr. 1216). The Superintendent even complimented Berby on his handling of a difficult situation (tr. 1207)". Under the circumstances, the Complainants maintain, Article 13-D of the parties' agreement was not complied with by the District and the Examiner committed prejudicial error in not addressing whether non-compliance meant that the District did not have just cause for non-renewing Berby.

Four, Complainants contend that Arbitrator Carroll Daugherty's just cause test (commonly known as the "Daugherty test") enunciated in Enterprise Wire Co., 46 LA 359, 363-5 (1966) should have been applied herein, and that had it been, the Examiner could not have concluded the District had just cause to nonrenew Berby's employment contract.

Applying the Daugherty test, Complainants' maintain that (1) Berby was not forewarned nor did he have foreknowledge from his supervisors that his classroom performance placed his employment status in jeopardy; (2) since no rules or managerial orders are involved in this case, the Examiner erroneously implies Berby's conduct was violative of unknown rules; (3) the District failed to investigate any of the complaints for their truthfulness; (4) "a noninvestigation is by definition unfair and subjective; (5) the District, having failed to investigate Berby's conduct, did not have substantial evidence to support its action; (6) the District operated to "get" Berby; and (7) termination of employment on the basis of the evidence the District had was unjust.

In addition to the arguments in the above four general areas, Complainants renew arguments made to the Examiner that: (1) no complaints about Berby's teaching performance were raised after November 12, 1980, yet he was nonrenewed after the 1980-81 school year; (2) contrary to the District and Examiner's assertion, the evidence shows Berby effectively dealt with disciplinary problems in his classroom (the students who testified against Berby at the hearing were the same students Berby had to repeatedly discipline -- District administrators did not assist Berby with discipline and did not tell him his job was in jeopardy because of a lack of discipline -- Principal Hendrick rarely visited Berby's classroom); and (3) since Berby taught five courses each year, the small number of students who complained did not lend any support to the Examiner's conclusion that Berby was an unfit teacher.

In its reply brief in response to the District's brief, Complainants state (1) the record is devoid of any evidence of a remediation notice having been provided to Berby; (2) no administrator ever told Berby that he had teaching methodology problems which needed to be corrected; (3) no investigation of "complaints solicited against Berby" was conducted; and (4) matters such as teaching methods, and allocation of teaching time "between academic and non-academic subjects" were first brought to Berby's attention either at the March 9, 1981, Board hearing or during the instant prohibited practice hearing. In sum, Complainants argue that termination based on matters not raised until after termination cannot be for just cause.

Complainants request that the Examiner's Order of dismissal be reversed, that the Commission modify and amend the Examiner's Findings of Fact and Conclusions of Law in accordance with Complainants' view of this case and that the Commission order that (1) Berby be reinstated with full back pay and benefits plus interest on all sums owing, and (2) the District post an appropriate notice.

The Respondent District

Respondent District also incorporates arguments raised in its brief to the Examiner in its brief in opposition to the Petition for Review filed herein.

Specifically, the Respondent argues that the burden of proof lies with Complainants, not the District. Nevertheless, Respondent did go forward and proved to the Examiner by clear and satisfactory preponderance of the evidence that it had just cause to nonrenew Berby's contract, that Berby had reasonable notice of claimed deficiencies and Berby was afforded an opportunity to remedy said deficiencies. The Examiner was in the best position to determine credibility of the witnesses, he did so, and his Findings, Conclusions and Order are supported by the record and should not be disturbed by the Commission.

According to the District, the record demonstrates that students, parents, administrative officials, coaches, and teachers all complained directly to Berby. In fact, the District posits, many of these discussions were had with Berby long before the nonrenewal process commenced and were not conducted in the context of Berby losing his job if he did not improve. Thus, the District argues, the Examiner was correct in finding that Berby received reasonable notice of his deficiencies. The law does not require ongoing communications of such problems with Berby. According to the District, Berby had ample opportunity to correct the problems. The Examiner agreed, and his finding in this regard should be upheld.

Regarding Complainants' characterization of the Examiner setting himself up as an educational expert, such characterizations improperly interpret the Examiner's decision. In the District's view, the Examiner is entitled to, and should rely on the opinions of education professionals in determining whether Berby is an incompetent teacher as was alleged by Respondent District. The District cites testimony of Principal Hendrick and Mr. Sullivan, the guidance counselor, as well as other teachers in this regard. The District states that Berby "testified directly that the complaints that he received from parents, the administration and others made him think that his job was in jeopardy long before any nonrenewal process was started."

With respect to applicable just cause standards, the District, in its brief to the Examiner, took the position that the Daugherty test is inapplicable. However, in response to the Petition for Review, the District asserts in the alternative that the decision of the Examiner clearly applies the Daugherty test and that he concluded just cause does exist. The District maintains that while the Daugherty test cannot be strictly applied in a case involving teacher incompetence, all elements of that test have been met herein. In this regard, the District argues (1) the School District provided Berby with explicit and implicit rules on proper conduct expected of teachers; (2) these rules were reasonably related to the orderly and efficient operation of the school district and the District could reasonably expect conformity from Berby; (3) standing alone the oral complaints received by the District about Berby would have constituted sufficient investigation, however, the District, after Berby requested documentation of said complaints went further and solicited letters verifying oral complaints; (4) said investigation was fair and objective under the Daugherty test; (5) substantial evidence of Berby's incompetency was presented both at the original nonrenewal hearing and to the Examiner; (6) and (7) the only appropriate remedy for a clearly incompetent teacher is nonrenewal, and that remedy was handed out in a fair fashion herein.

The District asserts that there is ample evidence in the lengthy record to support its contention that Berby did not meet the minimal standards required by the District of all teachers. The District contends that it had just cause to nonrenew Mr. Berby because his "unorthodox and bizarre behavior" caused him to lose the respect of his students, because he habitually failed to supervise his students and for all the reasons set forth, in detail, in the District's letter of nonrenewal to Berby dated March 13, 1981 (District's brief to Examiner at 23-36). The Examiner so held, and his decision should be affirmed as being amply supported by the record evidence.

In response to Complainants' assertion of error regarding consideration by the Examiner of evidence presented for the first time at the prohibited practice hearing, the District argues it is entitled to rely on evidence supporting the basis on which the nonrenewal was imposed even if such evidence was not known at the time of nonrenewal. Moreover, this issue is moot because "the evidence presented to the examiner was substantially identical to the evidence upon which Mr. Berby's nonrenewal was based."

The District points out that only one student testified in support of Berby and that no teachers or administrators supported him. "If the evidence offered by

the District consisted only of 'Berby haters' then Mr. Berby should have produced the Berby supporters to testify in his behalf." According to the District, there are no Berby supporters.

In the District's view, the following penalty essay written by Brian Bronsted (one of Berby's students) succinctly summarizes Berby's problems as a teacher in Tomahawk Junior High School:

"End of Year - 1980 Mr. Berby
Mr. Berby the essay man once again
here I am. Thank Got it's the end
of the year and next year you won't be
here. No more marathons and tennis
shoes. No more folson prison blues.
Home movies by the ton. Take them
home to wife and son.
Science we never did learn
your salary - did you earn?
essay, essay is all we hear
til it shounded (sic) like another bird
Do you think we are so dumb
we don't know what you came from?
We know all your family history
more than the science you were to teach me
This year one lesson was taught
to be a teacher whether or not
you are qualified or do you care
whether we can go on and earn our share
very little did we learn from you
except not to follow in your shoe
popularity contest you'd never won
you certainly were never fun
so from here wherever you go
don't say we didn't tell you so
that you must change your ways
or you'll have all bitter days
you bald headed fart!
So long, It's been good
experience knowing you."

(Resp. Exh. 29)

DISCUSSION - PRELIMINARY ISSUES

The District renews its claim that the burden was on Complainants to prove its allegations that the District's action of nonrenewal violated the parties' collective bargaining agreement and thereby violated Sec. 111.70(3)(a)(5), Stats.

We find the Examiner correctly allocated the burden of proof herein. We agree with the Examiner that Complainants first had to establish a prima facie case of applicability of the just cause provision in the parties' agreement to Berby's nonrenewal. Having established such a prima facie case, the District was obligated to go forward with evidence of just cause for its actions and to then prove by clear and satisfactory preponderance of the evidence that it acted with just cause. The issue of appropriate allocation of the burden of proof, i.e., burden of persuasion, in cases such as the instant case, was addressed by the Commission in School District of Shell Lake 4/ as follows:

In most complaint cases, it will be the Complainant who bears the burden of proof. However, the Commission has recognized that the statutory language does not require that this will always be the case:

4/ Dec. No. 20024-B (WERC, 6/84) aff'd sub nom., Northwest United Educators vs. Wisconsin Employment Relations Commission and the School District of Shell Lake, Case No. 84-CV-238 (CirCt Barron, 2/85).

"In an unfair labor practice complaint alleging that an employer has violated a collective bargaining agreement by taking action against an employee, e.g., discipline, suspension, discharge, etc., where the employer, in defense thereto, alleges that the 'just cause' provision in the collective bargaining agreement permits such action by the employer, the employer has the burden of establishing, by a clear and satisfactory preponderance of the evidence, that there was just cause for its action, provided the Complainant first establishes a prima facie violation of the collective bargaining agreement involved." 6/

6/ Horicon Joint School District, Dec. No. 13765-A (6/76), amended and revised on other grounds, Dec. No. 13765-B (1/78); See also, Stolper Industries, Inc. Dec. No. 12626-A (10/74); see also Abbotsford Joint School District, Dec. No. 11202-A (3/73).

We conclude the Examiner correctly directed the District prove it had just cause to nonrenew Berby's employment contract by satisfactory preponderance of the evidence. Although not contested on review, we also affirm the Examiner's procedural determinations with respect to non-compliance with the contractual grievance procedure and the appropriate standard of review.

DISCUSSION - MERITS OF GRIEVANCE

I. Introduction

What follows is an extensive review of the parties numerous arguments in support of and in opposition to certain of the Examiner's Findings of Fact. Some of the Examiner's Findings have been modified herein consistent with the rationale accompanying said Findings.

Upon review of the massive record herein, and, for the reasons more fully set forth below, we reach the following ultimate conclusions.

First, we conclude that by the failure of its agents to give Berby the counseling, assistance and direction mandated by Article 13-D and by failing to give Berby the notice and opportunity to remediate implicit in Article 14-A of the collective bargaining agreement, the District violated the collective bargaining agreement between the parties and therefore did violate Sec. 111.70(3)(a)5, Stats. As the remedy for the District's procedural violations, we have ordered the District to make Berby whole by paying him back pay for school year 1981-82, subject to the traditional offsets including the duty of mitigation.

Second, in the unusual circumstances of this case, we have concluded that, notwithstanding its procedural deficiencies, the District neither violated the agreement nor Sec. 111.70(3)(a)5, Stats., by nonrenewing Berby's teaching contract. Accordingly, we have affirmed the Examiner's basic conclusion to this effect. We agree with the Examiner, that despite the procedural failures by the District, reinstatement of Ronald Berby is not appropriate. For, we conclude that even if the District would have complied with the procedural requirements of

complaints against Berby; lack of notice, counseling, assistance, and opportunity to remediate; the alleged failure by the District to investigate the veracity of complaints received; and the import of the District's failure to evaluate Berby for school year 1979-80.

We affirm Examiner's Findings of Fact 1-3, 5-14, 16-19, 22, 29, 31, 34, and 41-46; we modify and affirm Examiner's Findings of Fact 4, 18, 21, 23-28, 30, 32-33, 35, 37-40, and we delete Findings 20 and 36. We have also added Findings relative to the District's failure to investigate, counsel, assist Berby and afford him an opportunity to improve his performance, and to include letters from parents and a teacher.

A. Examiner's Finding 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.

Complainants' Position:

That the record does not show Overhaug considered such running to be a severe problem; and any such activity occurred at a point in time where it was improper to be considered in the nonrenewal decision, having been resolved long prior thereto.

Commission Analysis:

Mr. Overhaug (tr. 706-707) testified that he talked to Berby about students on Berby's basketball and football teams being unsupervised in the halls and that he finally went to Hendrick about the problem. He testified that "it has to get very bad" before he would go to the Principal about a fellow teacher and that prior to Berby, he had never gone to Hendrick about problems with teachers (tr. 1004, 1006). Principal Hendrick testified that he confronted Berby about his failure to supervise his teams after Overhaug reported to him that Berby was running (jogging) in the halls when he was supposed to be supervising his teams (tr. 801). In fact, Hendrick discussed the matter with Berby after the first incident and wrote a memo to Berby ordering him to supervise students until they are dismissed (Resp. Ex. 11). We conclude this finding is factually accurate and therefore affirm it as written.

B. Examiner's Finding 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.

Complainants' Position:

That the record does not reflect that Berby's class was the first experience for "most" of his students taking notes from a lecture and fails to acknowledge the fact that Berby's lecture technique had neither been criticized nor discussed with Berby by Respondent during his tenure at Tomahawk.

Commission Analysis:

We agree with Complainants that the District did not discuss its concerns relative to Berby's lecture technique at any point prior to its March 9 hearing. However, our analysis of this Finding does not end there.

We believe the Examiner's inclusion of this Finding is relevant as to the Board's assertion that Berby engaged in unequal and unfair grading practices. The record reveals that Berby expected students to be prepared to be tested on anything in the textbook, films shown in class, and subjects mentioned by Berby in his lectures. (tr. 1156.) Moreover, Berby testified that when confronted by

Zillman regarding Zillman's daughter's grade on a terminology test, he told Zillman that "if there were definitions in the textbook that I thought were inadequate, I pointed out whatever definitions would supercede the definitions in the book. Given the choice the ones I have given are what I want." (tr. 1300.) It is not clear that Berby explained this practice to his students before they took various tests. (tr. 728) It is clear that students and parents were confused about which governed, the textbook or Berby's lecture and generally about what Berby expected from the students on tests. (tr. 816.) From that we find Berby did not clearly inform his students where a conflict arose between information in the text and information from Berby's lecture, the latter governed.

Thus, we have modified Finding 15 to make clear that (1) Berby informed his students of his expectation that they be prepared to be tested on materials from the textbook, films and/or his lectures; (2) students were not clearly informed, up front, that where a conflict arose between information in the textbook and Berby's lecture, the latter governs; and (3) neither the District nor its agents discussed Berby's lecture practices with him or otherwise expressed concerns to him prior to the Board's March 9 nonrenewal hearing.

C. Examiner's Finding 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 recurred 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.

Complainants' Position:

That the Finding of Fact fails to note that Berby was not responsible for the failure to lock his classroom door and was forced by exigent circumstances to not be present in the classroom because he had to supervise the students in the gym; and that therefore this incident bears no relation to and cannot form any basis for Berby's nonrenewal.

Commission Analysis:

Berby testified that (a) he instructed his team's basketball players to use his classroom to change clothes before and after practice primarily because of prior problems of security when the team had used the high school locker room, (b) he was informed by another coach that Hendrick wanted Berby to keep his classroom door locked at all times after a student's watch had been stolen from Berby's classroom which had been left unlocked, (c) subsequently, Berby instructed his team to make sure that who ever was the last to leave the classroom should lock the door and turn out the lights, (d) subsequent to that instruction, Hendrick, in front of all players, told Berby and the other coach that he again found the classroom door unlocked and to make sure it did not happen again and (e) he never was told he was in trouble over the above incidents (tr. 1178-1181).

The "exigent circumstances" referred to by Complainants apparently pertains to Berby's testimony that he was in the gym setting up equipment for basketball practice and thus presumably unable to ensure his players actually locked the door after leaving classroom. However, Berby also stated that after Hendrick's above remarks during practice, Berby "double-checked every time. I couldn't trust anyone after that." (tr. 1180-1181.)

We conclude, in the circumstances, that the Finding is accurate as written. As the person in charge, Berby, not the students, was responsible for securing his classroom. Further, the fact that after Hendrick's instructions Berby made sure his classroom was locked shows that exigent circumstances would not have prevented him from securing his classroom in the situations involved and in our view he should have known of the need to do so. We therefore find no error in the Examiner's Finding 19.

D. Examiner's Finding 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 nonrenewal hearing before the School Board, in March of 1981.

Complainants' Position:

That Berby's comments regarding Foster were not properly brought to his attention prior to the nonrenewal process when Berby could have done something about the problem; and that this incident could not form any proper basis for Berby's nonrenewal.

Commission Analysis:

We are deleting this Finding because this incident was not cited by the Board as a basis for the Board's decision to non-renew Berby's teaching contract.

E. Examiner's Finding 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 coach assignment, which is how he learned that he would not have that assignment that year.

Complainants' Position:

That the Finding of Fact fails to note that Hendrick did not timely object to Berby resigning as basketball coach and that Berby was never informed that his resignation as coach placed his employment in any jeopardy or was considered by Respondent to be improper conduct.

Commission Analysis:

We agree with Complainants that the record shows that Hendrick did not forewarn Berby that resigning as basketball coach placed his job in jeopardy and that Hendrick did not timely object to Berby's resignation. Yet, Hendrick cited Berby's resignation as one of the reasons nonrenewal was being considered (Finding of Fact 41, Hendrick letter to Berby dated November 19, 1980). We have modified this Finding to reflect the latter fact.

F. Examiner's Finding 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.

Complainants' Position:

That the Finding of Fact fails to properly note that Berby did not consider the entire class to be confrontational, but only certain members of the class.

Commission Analysis:

At the instant hearing, Berby was asked "What was your 7th Grade class like in the 1979-80 school year?" His response was "There was a lot of difficulty. It never rose to the level that it did in 8-3 that same year. The confrontations were never so harsh, but they were surprising to me the confrontations I had with that 7th Grade group, and they were a bright 7th Grade group." (tr. 1200.) (emphasis added) Based on this testimony we reject Complainants' assertion that the Examiner should have noted "that Berby did not consider the entire class to be

confrontational, but only certain members of the class." Berby testified with respect to certain students in his 7th Grade class only after being asked to give specific examples of problem students (tr. 1200-1201). We therefore find no error in this Finding as written.

G. Examiner's Finding 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 received; that he did not permit extra credits for extra projects during one grading period in the 1979-80 academic year; and that a number of students experienced substantial declines in their grades.

Complainants' Position:

That the Finding of Fact fails to note that Berby's practice with respect to extra credit assignments had not been criticized by Respondent at any point in time and Berby was never informed that there was anything wrong in his practice in that area.

Commission Analysis:

Although this claim is recurring with respect to other Findings and is dealt with in Modified Finding 31, we agree that it is appropriate to amend this Finding to reflect the fact that no one in the District's administration complained about Berby's practice in this regard prior to the March 9, 1981, nonrenewal hearing.

H. Examiner's Finding 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.

Complainants' Position:

That the School District of Tomahawk's policy regarding unsatisfactory progress reports only required such reports where students' grades were dropping with respect to grades they had previously received, and the only time period in which this problem arose for Berby was during the third quarter of the 1979-80 school year, was an isolated occurrence, and was immediately rectified when brought to his attention.

Commission Analysis:

In our view, these matters are adequately dealt with in Findings 24, 27 and 28. Finding 24 states that unsatisfactory reports are issued "under circumstances where a student is not working up to his or her capability," thereby including the period when "grades are dropping with respect to grades they had previously received." Findings 27 and 28 accurately reflect that Berby met with concerned parents, the Principal, the Guidance Counselor and District Superintendent to discuss these concerns and thereafter Berby agreed to and did keep parents informed about their children's grades. The only omission is as to when this all occurred. We have therefore modified Finding 24 to reflect that students experienced declining grades in the third quarter 1979-80 school year.

I. Examiner's Finding 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.

Complainants' Position:

That this incident only occurred during the third quarter of the 1979-80 school year, was an isolated occurrence, was rectified immediately upon Berby being informed of the problem, and the parents were upset with the fact that they had not received unsatisfactory progress reports and not because of the low grades themselves.

Commission Analysis:

The purpose of unsatisfactory progress reports--which are sent to parents in advance of final report cards--is ostensibly to give parents forewarning and an opportunity to correct any problems prior to issuance of final report cards.

In our view, the record supports the Examiner's Finding that parents were not only concerned about not receiving unsatisfactory progress reports, but also the fact that their children's grades had significantly dropped during the third quarter 1979-80 school year. For, some parents who testified stated that their children were A and B students and they were upset to find out, through receipt of report cards, that their grades had dropped to C's or worse in Berby's science class. (tr. 263, 311-312, 559, 571.) We amend the finding to note that the drop in grades occurred in the third quarter 1979-80 school year.

Because Findings 27 and 28 already acknowledge that Berby expressed a willingness to and actually did issue unsatisfactory progress reports after being confronted about the problem, we decline to amend Finding 25 on this point, as suggested by Complainants.

J. Examiner's Findings 26, 27, 28

(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 about the meeting.

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

Complainants' Position:

The Examiner failed to note that Berby answered the questions and inquiries put to him by the parents and alleviated their concerns. Further, the Examiner failed to note that the Superintendent and Principal failed to participate in this meeting in any respect and failed to advise or warn Berby that the meeting placed Berby's employment status in any jeopardy whatsoever. Further, Respondent failed to inquire of Berby concerning any of the problems which had been raised by the parents during the course of the meeting and thereafter did not pursue any remedial or evaluation activities with respect to Berby's teaching performance.

That the Examiner failed to note that Berby's informing parents of their children's grades subsequent to the meeting alleviated the parents' concerns, that the children's performance during the fourth quarter of the 1979-80 school year exceeded the quality of their

performance during the third quarter of that year, and that following the library meeting, Superintendent Johnson complimented Berby on his fine handling of a difficult situation.

Commission Analysis:

Complainants do not take issue with Examiner Finding 26. However, we address Findings 26-28 and Complainants' related arguments at the same time because all three Findings relate to the spring library meeting.

We have modified these Findings by combining them into one Finding and by rewriting them to better reflect the record evidence as to facts concerning the library meeting. As to Complainants' specific concerns we reach the following conclusions.

First, the record supports Complainants' contention that Berby answered questions put to him by the parents in the meeting. However, the record does not support Complainants' additional argument that parents' concerns were thereby alleviated. It is true their concerns about not receiving unsatisfactory progress reports were remedied by Berby's sending said reports after the meeting. However, a review of the entire record -- including letters from parents to Hendrick written subsequent to the meeting, continued oral complaints by parents to Sullivan, Cepaitis and Hendrick, and testimony at the Board hearing -- satisfies us that many of the parental concerns regarding Berby's classroom performance, grading and teaching techniques, were not alleviated by Berby's answers to questions raised in the meeting. (tr. 367, 368, 428, 491, 575; Resp. Exhs. 3, 4, 7.)

Second, the remaining Complainants' arguments as regards (1) the District's failure to discuss with Berby the problems raised in the meeting and the absence of remediation or evaluation; (2) the fact that neither Hendrick nor Johnson meaningfully participated in the meeting; and (3) that the children's grades improved in the fourth quarter of school year 1979-80, are all sustained by the record evidence. Our modified Finding 25 reflects these facts.

K. Examiner's Finding 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.

Complainants' Position:

That a finding that Hendrick failed to evaluate the teaching staff for the 1979-80 school year allegedly because of the Berby and Brehm grievances is incredible, not supported by the record and in effect amounts to discrimination against Berby because of his protected activities; and, most importantly, was an opportunity lost by Respondent to correct any perceived difficulties it had with Berby's performance and must be considered as proof that Respondent actually had no difficulties with Berby's performance which warranted being called to Berby's attention.

Commission Analysis:

At the Examiner hearing, Hendrick stated the following with respect to why Berby was not evaluated for the 1979-80 school year:

This was the spring of the year that Mr. Berby, and the other teacher as I alluded to earlier were -- they had left their supervisory responsibilities and went into the construction site. This resulted in a grievance placed by Mr. Berby, and the other teacher against me indicating partially in fact that I was being unfair to them, and the grievance was initiated by -- not by the Faculty Grievance Committee. It eventually was thrown out by the Faculty Grievance Committee because they had not followed the procedures outlined in the master contract.

. . .

There were no -- because it got to be a pretty sticky situation for a while. Until it was finally thrown out I did no formal evaluations on any of the faculty that year. If I would have done one on Mr. Berby, and the other teacher involved, it would have been derogatory in respect to their performance, and I thought in my mind at the time there would have been a cry of prejudice of some sort because of the prior incident of the supervision, and so in my own mind or my own judgment I felt it would be best to give no evaluation as to anyone. I would have been picking on certain individuals so to speak. (tr. 805.)

Finding 30 shows that the Examiner credited Hendrick's uncontroverted testimony as to why he did not evaluate Berby for school year 1979-80. The record shows that the Berby and Brehm grievances were pending and that parents, students, and teachers were continually complaining about Berby in spring 1980. We conclude that the Examiner's credibility finding is appropriate and supported by the record. However, we amend it to make clear that its contents are attributed to Hendrick's own testimony. In doing so, we do not agree with the validity or wisdom of Hendrick's approach, but only set forth Hendrick's motives and reasoning in the matter.

We discuss the import of the District's failure to evaluate Berby more fully below wherein we conclude that Article 13-D (Teacher Evaluation) of the collective bargaining agreement required the District to assist, counsel, direct and evaluate Berby's performance. We also remedy the District's failure to do so.

Complainants also contend that the Commission should infer that the District's failure to evaluate Berby means it really did not have any problems with his performance as a teacher. This argument ignores the record evidence. Complaints relative to Berby's conduct from parents, teachers and students had increased in school years 1979-80 and 1980-81. (tr. 867, 868) The record is replete with examples of Berby's poor judgment and idiosyncratic grading practices. (tr. 671-672, 698, 710, 726-728, 768, 824.) Many of Berby's problems with regard to supervision and discipline occurred in the last two years i.e., 1979-80 and 80-81. (tr. 683, 701, 786, 816, 1198.) While we believe Berby should have been evaluated for school year 1979-80, the fact that he was not does not mean the District had no problems with his performance. For, the District clearly did. We, therefore, reject the inference Complainants would have us draw. The Finding is amended to attribute Hendrick's motives and reasoning to Hendrick, and is otherwise affirmed.

L. Examiner's Findings 31 and 34:

(31) That during the spring of 1980 Berby accompanied 7th and 8th grade students in their separate trips to 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.

(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.

Complainants' Position:

That the Examiner's Finding of Fact fails to note that the incidents in question occurred in the presence of only a small number of students, were done in jest, failed to have a significant impact upon Berby's effectiveness as a teacher, and did not constitute acts of serious enough nature to warrant nonrenewal.

That the Finding of Fact fails to note that there was no detriment to Berby's teaching performance because of this incident.

Commission Analysis:

We have combined Finding 31 and 34 because they both deal with the same subject: toads. In our view, these findings are accurate as written and are substantiated by Berby's own testimony:

Q Did there come a time during that -- during either of those days when you had an occasion to put a toad in your mouth?

A Yes.

Q Which day was it?

A The second day.

Q What time during the day did that occur?

A Early afternoon I believe.

Q And when -- what was going on at the time? Strike that. How many students were in your presence at that time?

A I don't know for sure. I remember there was around three or four students.

Q Was this a group that did come to your station?

A This was part of the group that was at my station.

Q And how did it come about that you put a toad in your mouth?

A When that group first came, there was -- there was time until the other group arrived. That was in the morning. There was some talk of someone they had known who had swalled a minnow live, and there was laughter and kidding about that kind of thing. I told the students that I didn't do that sort of thing, but that I could put a toad in my mouth. They of course thought that was pretty funny. Someone during that particular time had -- someone in that group may have looked for a toad, but anyway that's how it was presented.

. . .

Q How did in come about in the afternoon that you put a toad in your mouth?

A Evidently during lunch someone in our group notified another group about that. So, someone brought me a toad in the early afternoon group.

Q What was said, and what happened?

A Someone said I got a toad, and let's see you put it in your mouth.

Q What did you do?

A I put it in my mouth.

Q How did you do that?

A I had done a similar kind of think at a boys' camp that I worked in Rhinelander in 1979 on a dare, and basically I handled the toad until it urinated, then I rinsed it off with pond water, and then I put it in my mouth.

Q How far did you put it in?

A All the way.

Q The whole thing?

A Yes.

Q Then what happened?

A I kept it in my mouth for perhaps five to ten seconds, and then I took it out.

Q Now did there come a time on either of those days when you put ticks in your mouth?

A Yes.

Q When did that happen?

A Later that same afternoon.

Q Under what circumstances?

A Similar to the circumstances with the frog. It was on a dare. Someone suggested that I couldn't do that, and I did.

Q What did you do?

A They gave me a couple of ticks, and I ate them. They were wood ticks.

Q What was the reaction of the students?

A Similar to the frog. In some cases there was laughter. For the most part there was laughter. I can't remember how many students were present then. There was one, or two people that may have used the word weird.

. . .

Q Why did you do it?

A I don't have a good justification for it. It was silly. I did it on a dare.

. . .

Q During the fall of 1980-81 did you have occasion to ever put a toad in you mouth again?

A I believe it was late September.

Q When did school begin that year?

A Early August. Pardon me. Late August I mean.

Q And in September what happened?

A Two 7th Grade boys right at the end of noon hour brought a toad into my classroom. The same boys I believe asked me about the incident the previous spring. They brought the toad into the classroom. Nobody else was in the classroom. I went through the same procedure with the toad except I rinsed him off with tap water from the lab sink and gave it back to one of the students and told him to put it back where he got it, and to make sure it was safe.

Q When during the day did that occur?

A Right at the end of the noon hour.

Q How many people were present in the classroom?

A Besides myself two people.

. . .

Q (By Mr. Katz) Did the subject -- did that incident in late September -- did the late September incident come up in conversation in the classroom again at any time?

A In the classroom?

Q Yes.

A I think so. I believe so, yes.

Q Do you recall on how many occasions?

A I think that someone from the 8th Grade class asked me if I had really done that after the two boys had told him about it, and I agreed that I had done it.

Q Why did you do it on that occasion?

A I was dared, and I did it, and again I don't have a real justification for it. I wasn't teaching a lesson. (tr. 1223-1230.)

Whether Berby put a toad and wood ticks in his mouth in the presence of "a small number of students" or many students is irrelevant, since eventually word spread among his students that he performed these acts. After the first incident, other students dared Berby to repeat the acts, which he did. Clearly, Berby by his actions subjected himself to student ridicule thereby affecting his credibility and effectiveness with his students.

The Examiner did not find that these incidents, alone, were sufficient basis for nonrenewal of Berby's contract. However, he did conclude and we affirm that they are part of a series of examples of the exercise of poor judgment by Berby. We evaluate the significance as regards the District's inaction below.

M. Examiner's Findings 32 and 33:

(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.

Complainants' Position:

That Berby's smoking of cigars immediately ceased when his fellow teachers asked him to stop and, nevertheless, there is no rule prohibiting such activity in the teachers' lounge. This incident could in no way form the basis for nonrenewal action; it being a totally nonculpable act.

That the Examiner implies that Berby smoked cigars in his classroom in the presence of students when the record fails to support such a finding. In fact, the record shows that Berby smoked the cigars when he was alone in his classroom. Berby ceased the practice when asked by

Hendrick to do so. Because Berby had received Hendrick's prior permission to smoke cigars in the classroom, it is improper to consider this incident as any basis for the nonrenewal action.

Commission Analysis:

Findings 32 and 33 have been combined into one Finding since both deal with the subject of Berby's smoking cigars. We agree with Complainants that under the circumstances involved, Berby's smoking cigars in the teachers' lounge and in his homeroom were nonculpable acts and should not have been held against him. However, we deem it appropriate to include a Finding on this matter since it was one of the bases cited by the Board for nonrenewing Berby. We have amended the Finding to more clearly reflect that Berby smoked cigars in his classroom, during his prep time, and out of the presence of his students.

N. Examiner's Finding 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.

Complainants' Position:

That the record reflects that Berby did not spend a substantial amount of class time talking about private matters. Moreover, Berby's recitations of private or personal matters were usually connected with the subject matter he was teaching and were provided as anecdotes to stimulate student interest in the material being taught: a practice also utilized by other teachers. At no relevant time during Berby's employment had Respondent ever advised, counseled or directed Berby to cease his practice in this regard. The Examiner's conclusions are based upon the incredible testimony of students possessing an ulterior, vindictive motive for their prevarication and exaggeration.

Commission Analysis:

There was conflicting testimony as to how much classroom time Berby spent discussing private/personal matters and whether said discussions related to the subject matter being taught. Complainants argue (1) Berby did not spend "a substantial amount of class time" on such matters; (2) said discussions "were usually" connected to subject matter being taught; (3) Berby was never advised, counseled or directed to cease said practice and (4) "The Examiner's conclusions are based upon the incredible testimony of students possessing an ulterior, vindictive motive for their prevarication and exaggeration."

We find the record supports the Examiner's Finding. Students, parents, the guidance counselor and other teachers complained about the amount of class time Berby spent discussing unrelated personal matters. Berby admitted spending class time on unrelated personal matters (tr. 667-668), admitted talking about running a maximum of six times per year for each of his 7th and 8th grade classes (tr. 762), and admitted spending one half of a class period on such matters as running, his family "and things that didn't pertain to the subject matter at hand" in three years, a total of 10 times (tr. 763). While some students' testimony that Berby spent up to 50 percent of class time (about 3-5 days every other week) on non-related subjects is probably exaggerated, the fact is that many students complained to their parents, the Principal, the guidance counselor and to the Board (at the March 9 hearing) that Berby spent too much time on non-related and personal matters (e.g., tr. 43-46, 215, 231, 233, 233-A, 253-256, 286-287, 315, 322, 402, 494). Only Berby testified that, except on a few occasions, his discussion of such subjects related to science (tr. 1257, 1260). In sum, we see insufficient basis for disagreeing with the Examiner's implicit credibility finding, i.e., more heavily weighting students', parents' and teachers' testimony rather than Berby's on the amount of time Berby spent discussing personal matters.

We do, however, agree with Complainants that Berby was never directed to cease said practice. Moreover, it appears from the record that the first time Berby was made aware that the District had a problem in this area was at the Board's March 9, 1981 nonrenewal hearing. We have therefore modified Finding 35 to reflect same.

O. Examiner's Finding 36:

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

Complainants' Position:

That Respondent had not seen Berby's tests or ever discussed those tests with him or his students at a point prior to the prohibited practice hearing and thus could not have formed a basis for his non-renewal. Furthermore, providing tests which are difficult to read is a minor problem which could have been easily rectified had Respondent ever brought the nature of the alleged problem to Berby's attention and, in any event, only affected a small number of the tests actually given by Berby.

Commission Analysis:

We are deleting this Finding because this incident was not cited by the Board as a basis for the Board's decision to non-renew Berby's teaching contract.

P. Examiner's Findings 37 - 39:

(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.

Complainant's Position:

That the record does not contain credible testimony of a substantial number of Berby's students and there is no way in which the Examiner could logically base a conclusion regarding a substantial number of students founded upon the incredible testimony of the few students who did testify. Further, Respondent never conducted an investigation among Berby's students, evaluated Berby's classroom performance, or counseled or directed Berby to change his performance in any fashion whatsoever. Respondent's failure to undertake these tasks should have been reflected in this Finding of Fact and the Examiner's failure to properly note Respondent's inaction severely prejudiced Berby's due process rights. Whether the students who testified were right or wrong was a task for Respondent to determine at a point in time when "just cause" precepts would have required the teacher to be provided notice of, and an opportunity to remedy, any perceived problems.

That the record fails to establish any basis for the Examiner's conclusion that the number of parents who complained was "substantial". The Finding of Fact fails to note that most of the complaints were generated in late fall, 1980, after Hendrick solicited such complaints and they dealt with events which occurred during the 1979-80 school year, specifically the third quarter. The Examiner failed to note that the 1980-81 school year did not give rise to independent complaints not relating back to the 1979-80 school year. The Finding of Fact fails to note that the Respondent did not investigate or discuss the nature of the complaints with Berby and did not apprise him of the deficiencies in his performance found by Respondent after investigation of the parental complaints. Berby was neither forewarned nor counseled with respect to the appropriateness or inappropriateness of his teaching techniques.

That the Finding of Fact fails to note that the teachers who testified against Berby had not timely informed Berby of the nature of their problems with him, many had not so informed Hendrick and the record fails to provide any substantive evidence that Berby was either uncooperative or antisocial in a fashion impacting upon Respondent's mission and, in any event, any such characteristics on Berby's part would not warrant nonrenewal. The record further establishes that neither Hendrick nor any other administrator ever advised Berby of the specifics of what he was doing wrong so he might correct his conduct.

Commission Analysis:

We review the Examiner's Findings 37-39 and Complainants' arguments in opposition to them together because they all deal with dissatisfaction expressed relative to Berby's teaching performance.

The record supports Complainants' contention that the District failed to evaluate, counsel, assist or direct Berby with respect to perceived problems with Berby's classroom and teaching performance. Moreover, it is clear that the District did not investigate the substance of complaints lodged against Berby other than to solicit written positions from affected parents. Modified Finding 31 sets forth these facts. The impact of the District's failure to investigate, assist, counsel and direct, will be addressed later in this memo wherein we review the Examiner's basic conclusions of law.

We have also amended the Findings to include letters from parents (David and Sheila Imm) and a teacher (Zillman). We find these letters to be illustrative of the substantial alienation expressed by students, parents and teachers as regards Berby's classroom and teaching performance.

Specifically, we find that the record shows that a number of students disrespected Berby as a teacher. The record establishes that somewhere between 6 and 12 students actually complained to either their parents, the school guidance counselor or the principal, during Berby's 3-year tenure at Tomahawk (tr. 54, 233, 279, 281, 336, 402, 541.) Students complained that Berby counted the number of words in essays to determine the grade (tr. 216, 235-236, 278 334). Students complained that they did not understand Berby's grading practices (tr. 216, 235, 273,) and that he spent too much class time discussing personal matters, e.g., jogging and family affairs (tr. 273-274, 331, 402). Some students generally thought Berby was weird. (tr. 73, 76-77, 233A.) Significantly, most students who complained felt they did not learn much about science from Berby (tr. 52, 281-282, 287, 402).

Parents testified that their children were unhappy with Berby as a teacher, that many felt they were not learning science, that Berby's teaching methods were ineffective and that if the District administration did nothing to remedy the situation they wanted their children out of Berby's class (tr. 262, 378, 434, 494-495). Many of these parents attempted to discuss their concerns with Berby directly, and of those who met with Berby, most came away dissatisfied with the results of the conversations (tr. 367-368, 491). Some parents acknowledged that the one and only time they raised their concerns directly with Berby was at the spring library meeting. Although they appeared to be satisfied with Berby's promise to send unsatisfactory progress reports, many of these parents showed continuing dissatisfaction with Berby as a teacher either in their letters or in testimony at the Board's nonrenewal hearing and at the instant prohibited practice hearing. (tr. 909.)

Berby's fellow teachers also complained about him as a colleague. Some found him anti-social and generally uncooperative (tr. 894, 927, 1044, 1089). Others expressed concern that so many students expressed hostility towards Berby, and consistently complained they were not being taught science in his class. (tr. 979, 981, 1020, 1022, 1040). Barb Cepaitis (formerly Union Building Representative), testified at hearing that at first she basically ignored students complaints about Berby, primarily because in her view, junior high school students are typically volatile and tend to exaggerate (tr. 1082). However, as time went on, the same things repeated themselves, and she later began to believe the students' complaints (tr. 1082). She did not discuss these complaints with Berby directly, rather she talked to Hendrick about them. She believed it was Hendrick's responsibility to do something about the concerns raised by parents and students. She testified that at some time just before the Board's hearing, in the fall of

1981, an entire class of Berby's came to her classroom ready to emotionally explode. She stated that, after consulting Hendrick, she conducted a "controlled discussion" during which the students vented their frustrations about Berby. Cepaitis served as moderator. Students renewed complaints lodged earlier, including Berby's grading and testing practices and not knowing what was expected of them by Berby (tr. 1080-81). She spoke of being most uncomfortable at parent/teacher conferences wherein about 10 parents complained to her about Berby. (tr. 1086, 1105). Cepaitis resigned as Union Building Representative on the night of the Board's nonrenewal hearing because she felt she could no longer perform duties as building representative objectively.

In light of the foregoing, we are satisfied that the Examiner carefully and aptly weighed the abundant testimony from parents, teachers and students in determining that there was substantial hostility and frustration with respect to Berby as a teacher. Because the numbers of students, parents and teachers who felt strongly enough about Berby's deficiencies to actively complain may or may not be fairly characterized as "substantial", we have eliminated that disputed characterization from our modified Findings. Nevertheless, the record amply supports the Examiner's Findings that Berby's classroom and teaching practices engendered significant alienation and disrespect among his peers and his students. We are persuaded in that regard because parents, students and teachers persistently complained, generally about the same matters, in various ways and at various times throughout Berby's short, three-year tenure as a teacher at Tomahawk Junior High School. That parents and teachers would not only orally complain but also put their concerns in writing when asked and testify at two hearings on the matter, convinces us that those concerned obviously wanted some action taken by the District administration. They wanted Berby removed from the classroom.

The fact that most of the complaints were raised and/or generated from incidents occurring in the 1979-80 school year does not alter a conclusion that parents, teachers, and students were very upset. For, as Cepaitis testified, their concerns did not abate even by the time of the Board's March 9, 1981, nonrenewal hearing. Hendrick also stated that he received complaints regarding Berby's performance from parents and students during the 1980-81 school year and that the January 15, 1981 conference was prompted by additional complaints lodged between November, 1980 and January, 1981. (tr. 811-812, 819, 824.) We have amended the Findings to more accurately reflect when certain events took place.

We affirm the Examiner's findings 37-39, as modified to conform with the above analysis of the facts.

Q. Examiner's Finding 40:

That Berby's grading system was predicated upon a standard Bell shaped curve, applied by class; that it had a number of components;(sic) 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.

Complainants' Position:

That the record fails to reflect that the students did not understand Berby's grading system and that, to the contrary, the record shows Berby informed his students of the nature of his grading practices and each student's grade standing. Respondent at no point in time ever evaluated, counseled or assisted Berby with respect to his grading practices. He was never told that any facet of his grading system was inappropriate and not desired by the School District. Moreover, the record fails to support any conclusion that any component of Berby's grading system was educationally unsound or evaluated as such by Respondent. Respondent at no point prior to the prohibited practice hearing ever discussed Berby's grading practices with him and thus failed to offer him notice of or the opportunity to remedy any perceived problems in that area. It was improper for the Examiner to establish

himself as an expert on grading, especially when Respondent failed to advise Berby of any grading difficulties in the exercise of its role as Berby's employer.

Commission Analysis:

Complainants' contentions regarding lack of notice and opportunity to correct perceived problems with Berby's grading practices are addressed later in this memo. As we previously mentioned (in our discussion regarding Examiner's Findings 37-39) however, there is ample evidence to support the Examiner's Finding that students, parents, and, for that matter, teachers were confused and did not understand Berby's grading methodology. Some were even confused after Berby explained his methodology. For example, Berby testified that he told his students that they could expect to be tested on subjects covered in lectures, the textbook or films. Berby also explained that he credited answers from lectures where they differed from what was set forth in the textbooks (tr 728). It is not clear that Berby informed his students before they took various tests that where information imparted through lectures differed from that in the textbook, Berby wanted students to give answers based on information derived from his lectures. Some students and parents expressed frustration with having answers correct as far as the textbook, marked wrong by Berby in reliance on his lectures. In the circumstances students could not be expected to know that answers given on tests from the text would be deemed wrong, absent forewarning by Berby.

On balance, we conclude this Finding is accurate, except that it should also note that Berby, when asked, provided answers to questions regarding students' grade standings including reasons why their grades dropped in the third quarter 1979-80 school year.

R. Examiner's Findings 41-42:

Finding 41 contains a letter dated November 19, 1980 from Hendrick to Berby stating the purpose and discussion had at November 12, 1980, conference wherein Hendrick, Berby and Cepaitis were present and Finding 42 is Berby's written response to said letter dated November 21, 1980. The former, which the Examiner found accurately reflected what Berby was told, sets forth the following five areas of concern relative to Berby's teaching and classroom performance: Complaints (from students, parents, parents to teachers and teachers to Hendrick); cooperation with staff; unorthodox behavior; misrepresentation when hired; and neglect. Berby's response asked for specifics regarding complaints, contended he fully cooperated with staff, denied most of the examples of unorthodox behavior, denied culpability regarding representation when hired, and contended the examples of alleged neglect had either been corrected or were otherwise previously responded to.

Because of the length of these documents and because we affirm the Examiner's Findings for reasons set forth below, we do not repeat the documents here.

Complainants' Position:

That the November 19, 1980 correspondence from Hendrick to Berby is not an accurate recitation of the events concerning the November 12, 1980 conference and in effect failed to advise Berby of the specifics of any problems connected with his teaching performance in a fashion which would allow him to correct those problems.

That the Finding of Fact (42) fails to note that Hendrick did not respond to any of the information or assistance requests made by Berby in his letter of November 21, 1980.

Commission Analysis:

Barbara Cepaitis attended the November 12, 1980 conference in her capacity as the Association's building representative. It was her uncontroverted testimony that Hendrick's November 19, 1980, letter accurately reflected events which transpired at the November 12, 1980 conference (tr. 1084, 1105). Moreover, we note that Berby's own response of November 21, does not claim the November 19 letter was inaccurate. We affirm Finding 41 as accurately reflecting the November 12 conference.

We also find that said correspondence does contain some "specifics" relative to the District's problems with Berby's performance as a teacher and that those specifics not mentioned therein are set forth in Hendrick's January 20, 1981, letter to Berby (See Finding 44 and discussion regarding same below.) The record shows that after Berby requested more specific information regarding the nature of complaints against him, Hendrick wrote to parents requesting that they put their concerns in writing. Finding 43 contains an example of a letter requesting this information.

While we affirm Examiner's Findings 41 and 42 as accurately reflecting what Berby was told on November 12 and how he responded on November 21, we find merit in Complainants' concern that Berby was not afforded an opportunity to correct many of the problems. We conclude, for reasons set forth below, that the contract required that Berby be counseled, assisted, and directed about perceived problems with his performance and that he should have been given an opportunity to correct problems, as soon as possible.

S. Examiner's Findings 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 (sic) 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.

Complainants' Position:

That Hendrick sent letters soliciting complaints against Berby to parents who had been involved in the library meeting which occurred after the third quarter of the 1979-80 school year and was an after-the-

fact attempt on his part to build a case against Berby based upon conduct which had occurred during the prior year. Berby was not timely warned, counseled, assisted or placed on notice in any way that his job was in jeopardy because of complaints which he might have an opportunity to alleviate through improvement in his performance.

Commission Analysis:

We affirm this Finding as accurately exemplifying the type of letter Hendrick sent to parents who had previously complained orally, requesting that they put their concerns about Berby's performance in writing. We do not view Hendrick's efforts as building a case against Berby, rather he attempted to respond to Berby's request for specifics regarding those complaints. Nevertheless, as noted below, we do not consider the procedure followed by Hendrick to have been a sufficient investigation of the complaints involved.

T. Examiners' Finding 44:

This Finding contains Hendrick's letter to Berby dated January 29, 1981, summarizing the second of three conferences relative to Berby's performance held January 20, 1981. The letter reiterates District concerns about complaints, unorthodox behavior, and cooperation with staff. It states that at this conference, Berby was provided copies of six letters from parents and two from teachers as examples of specific complaints received regarding Berby's performance. Hendrick concludes the letter by pointing out, that in his opinion, there had been little if any improvement in Berby's performance between the two conferences (November, 1980 to January, 1981) and that a third conference (as required under the contract for nonrenewal) would be scheduled with the superintendent at the earliest possible date.

Complainants' Position:

That the Finding of Fact fails to note that Hendrick did not raise any serious concerns relative to Berby's performance during the time period after the November 12, 1980 conference and instead focused solely upon events which had occurred prior to the November 12 conference, mainly during the 1979-80 school year, and constituted nothing more than a rehash as opposed to a serious attempt to advise Berby of any continuing difficulties with his teaching performance. Hendrick's letter specifically referenced the fact that all of the complaints from parents and teachers were related to the period prior to November 12 and failed to support any finding that Berby's alleged performance failure continued during the 1980-81 school year. The record fails to support any notion that "little or no progress in the improvement of (Berby's) performance" had occurred since the initial conference on November 12, 1980.

Commission Analysis:

The letter from Hendrick contained in this Finding is identical to one sent to Berby on January 29, 1981, summarizing the January 20, 1981 conference. We agree with Complainants that the record does not prove Hendrick's contention in his letter that there was little or no progress in Berby's performance between the first and second conference. While Cepaitis and Hendrick testified that they received complaints about Berby during the 1980-81 school year, no specifics are mentioned (tr. 811-812, 819, 824, 1094-95). However, Zillman's letter (set forth in Finding 33) was written on January 19, 1981, after the first conference. It seems to us, that if Berby's performance had improved, letters such as Zillman's would not have been written after January 1981, or at minimum said letters would have stated that while Berby's classroom performance was poor in the past, he had recently improved in these areas.

We conclude the finding should be affirmed, as amended to add Zillman's letter. We address Complainants' arguments as regards the District's failure to give Berby requisite counseling, assistance, direction and an opportunity to correct problems below, at pp. 78-79.

III. Review of Examiner's Conclusion of Law 5 and Order

The only Conclusion of Law in dispute is Conclusion of Law 5 which reads as follows:

(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.

Having reached the above conclusion, the Examiner dismissed the complaint in its entirety.

Complainants' arguments in this case essentially boil down to a contention that the District did not have just cause to nonrenew Ronald Berby's teaching contract for the 1981-82 school year because (1) the District did not comply with the contract and fundamental just cause precepts requiring notice, counseling, assistance, direction and an opportunity to correct perceived problems in Berby's performance, (2) the District failed to investigate the veracity of any of the complaints, (3) the District and the Examiner erroneously relied on stale complaints in deciding nonrenewal was appropriate and (4) the District failed to evaluate Berby for school year 1979-80, which is the year most of the events complained of took place.

In our view this case presents an exceptionally difficult set of circumstances: on the one hand we have a teacher who in three short years was able to generate confusion, alienation and frustration among his students, their parents and his co-workers, based upon his bizarre teaching and classroom practices. On the other hand, the District which employed him as a teacher did virtually nothing to timely correct this teacher's unacceptable behavior and failed to counsel, assist or direct him as to what constituted appropriate, professional conduct for a teacher at Tomahawk.

The record supports the Examiner's assessment that for a good portion of his tenure at Tomahawk, Ronald Berby persistently exhibited poor judgment and disregard for his responsibilities as a teacher of junior high school students.

Repeatedly leaving his students unsupervised, eating ticks and mouthing frogs, spending excessive amounts of class time discussing unrelated personal matters and counting the number of words on essays to compute grades are examples in the record evidencing Berby's serious lack of judgment and irresponsibility.

Some of Berby's students, their parents and, for that matter, fellow teachers did not understand his grading methodology, even after he explained how he arrived at certain grades. For example, at the Examiner hearing, Berby stated that the reason some students' answers on exams were marked wrong even though the same answers were in the text books was because the correct answers were derived from his lectures. Assuming his lecture answers were correct answers, there is no indication in the record that Berby ever told the students up front that the exams would be based on his lectures and not the text books. The record shows that students often complained that they did not know what Berby expected of his students and that this was a major complaint expressed to Principal Hendrick, guidance counselor Sullivan and other teachers.

Apparently, Berby had a severe discipline problem with several of his students. For, the record shows that students frequently were required to write penalty essays. Student Brian Bronsted's penalty essay (set forth in the summary of the District's position at p. 16) is an example of the level of hostility and alienation felt by many of Berby's students.

A few parents (Garrow, Steinhofel, Imm) and teachers (Overhaug, Zillman, Winkler) brought many of their concerns directly to Berby. None of them were satisfied that their efforts successfully altered Berby's behavior. Others believed that confronting Berby would be futile. Contrary to Complainants, we find that despite Berby's sending unsatisfactory progress reports after the spring library meeting in 1980, many of the 8-12 parents who attended that meeting remained frustrated with Berby as a teacher. It seems unlikely that a satisfied parent or teacher would subsequently put his or her concerns in writing without qualification, as these parents did. Moreover, students continued to complain

that they were not learning science from Berby. They complained to other teachers, their parents and school Principal Hendrick.

In sum, we find the record evidence to be clear and convincing that in the Examiner's words, "Berby's classroom performance was at the heart of this dispute and that he was deficient in the classroom."

Our analysis does not end here. For, as the Examiner noted in his memorandum and as we have emphasized in Modified Finding 31 and elsewhere in our Findings, much of Berby's unprofessional classroom conduct and teaching techniques was ignored and/or condoned by the District's administration. There is no satisfactory explanation in the record as to why the District failed to meaningfully investigate and/or attempt to correct the conduct complained of by so many concerned individuals. For those reasons we have concluded that the District violated the agreement and Sec. 111.70(3)(a)5, Stats., by failing to give Berby the counseling, assistance and direction mandated by Article 13-D and by failing to give Berby the notice and opportunity to remediate implicit in Article 14-A of the parties' collective bargaining agreement. Just cause precepts require that Berby be put on notice of deficiencies by District supervision and be given a reasonable opportunity to correct his performance. This was not done. The District's assertion that Berby was afforded such an opportunity between the November and January 1980 conference is unpersuasive.

Nevertheless, we are satisfied that even if the contractually prescribed rights had been accorded Berby, the District would still have had a contractually adequate basis for nonrenewing Berby's contract. We reach this difficult and unusual conclusion for two basic reasons.

First, we find the record to be replete with examples of Berby's poor judgment and inappropriate behavior which no employee need be warned is unacceptable. Berby's lack of judgment manifested itself both in bizarre behavior (mouthing toads and eating wood ticks) and in nonsensical educational techniques (grading papers by counting the number of words). The fact that Berby ceased certain specific behavior when warned does not yield a conclusion that his judgment was improving. 5/ The record demonstrates that Berby continued to behave and teach in a manner which the District could reasonably conclude evidenced the lack of basic judgment it expected from its teachers. We are satisfied that the counseling, assistance and direction contemplated by the parties' contract could not reasonably be expected to cure the basic judgmental flaws possessed in such abundance by Berby.

Second, the record demonstrates that Berby's teaching performance had so substantially alienated parents, students and fellow staff members that the District could reasonably conclude his credibility as a potentially effective teacher had been irreparably harmed. The record credibly demonstrates the contempt which students had for Berby, the anguish of parents who saw their children's education suffer, and the inability of fellow teachers and even the union representative to remain silent about Berby's inadequate performance. The pervasive nature of the discontent satisfies us that Berby was not the victim of a conspiratorial plot hatched by a small group of parents and students to drive an innovative teacher from the community. Instead, it seems clear that Berby was victimized by his own inadequacies and judgmental lapses. These roused all segments of the educational community to such an extent that the natural human inertia created by the desire to avoid conflict was obliterated in such a way that the District's supervision could no longer maintain its previous irresponsible disregard of Berby's obvious deficiencies.

Given the foregoing, we conclude that Berby's nonrenewal did not violate the parties' contract and have affirmed the Examiner's conclusion in that regard. However, to remedy the breach of contract relative to Berby's procedural rights under Article 13-D and Article 14-A, we have ordered the District to pay Berby back pay for school year 1981-82 subject to the traditional offsets, including the

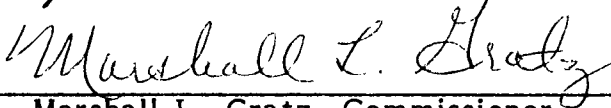
5/ For example, incidents of failing to supervise students, failing to send unsatisfactory progress reports in violation of school policy, and cigar smoking were ultimately corrected, and the cigar smoking was a nonculpable act in any event.


duty of mitigation. While we are aware that this remedy is somewhat unusual, 6/ we believe it clearly falls within the scope of our broad remedial authority 7/ under Sec. 111.07(4) Stats., incorporated by reference in Sec. 111.70, Stats., and effectuates the purposes of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 1st day of August, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

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- 6/ While unusual, our remedy herein is not unprecedented. For example, in Safeway Stores, Inc., 64 LA 563 (1974), a case involving the discharge of an employe, Arbitrator William B. Gould found that the grievant's conduct was not correctable, but that the employer committed procedural due process violations in the course of dismissing the grievant. Gould stated at p. 569 of his opinion that:

Ordinarily . . . I would order reinstatement and arguably some back pay in such circumstances. In light of the considerations noted above, I do not believe that reinstatement is appropriate under these circumstances. I recognize the fact that an Award of this kind is somewhat unusual and is arguably controversial. Yet, the Award seems to me to be the only appropriate answer in light of contractual considerations as well as the testimony and evidence submitted. In the United States, with the advent of modern labor legislation and labor arbitration, we sometimes lose sight of an important element which our friends across the Atlantic emphasize to a much greater extent. Reinstatement should not be awarded as a matter of course. In a situation such as this one other remedies are more appropriate . . . The only appropriate remedy is back pay minus interim earnings, for the four months immediately following her dismissal on May 7, 1973, with six (6) percent interest.

- 7/ Wisconsin Employment Relations Commission v. City of Evansville, 69 Wis.2d 140, 158-159, 166-167 (1974).