STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. SHELL LAKE SCHOOL DISTRICT, Respondent.	:	Case XII No. 30444 MP-1386 Decision No. 20024-A

Appearances:

Mr. Robert E. West, and Mr. Alan D. Manson, Executive Directors, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Bitney Law Firm, Ltd., Attorneys at Law, by Mr. W.W. Bitney, 225 Walnut Street, Spooner, Wisconsin 54801, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators having, on September 29, 1982, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Shell Lake School District committed prohibited practices within the meaning of Sec. 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having, on October 20, 1982, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats.; and hearing on said complaint having been held before the Examiner in Shell Lake, Wisconsin on December 13 and 14, 1982; and briefs and reply briefs having been filed by both parties with the Examiner by April 21, 1983; and the Examiner having considered the evidence, briefs and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as the NUE, is a labor organization with its offices located at 16 West John Street, Rice Lake, Wisconsin 54868.

2. That Shell Lake School District, hereinafter referred to as the District, is a municipal employer operating a public school system with its principal offices located in Shell Lake, Wisconsin 54871.

3. That at all relevant times the District has recognized the NUE as the exclusive bargaining representative of certain of its employes including teacher Spencer Joki; that the District and the NUE were parties to a collective bargaining agreement in effect at all relevant times with respect to said employe which included a grievance procedure for the resolution of disputes arising thereunder, but which did not provide arbitration or any other means of final and binding resolution of such disputes; and that said collective bargaining agreement provided, in relevant part, as follows:

ARTICLE IX - TEACHER EVALUATION

> Observation of work performance shall be conducted openly and with full knowledge of the teacher. The purpose of such observations and evaluations is to guide the teacher in a positive and helpful way. Teachers shall have the opportunity to discuss the results of the evaluation with their immediate supervisor. Copies of all written reports of observation of

classroom performance will be given to the teacher. The teacher shall sign the evaluator's copy acknowledging that the written report has been discussed and that the teacher has full knowledge of its contents. Signing the report does not indicate that the teacher necessarily agrees with the evaluation.

Procedure:

A. During the first 3 weeks of school, the administration shall orient all new teachers regarding evaluative procedures and instruments.

B. New teachers shall be observed for the purposes of evaluation at least 3 times during the school year. These 3 initial observations shall occur prior to February 15. Experienced teachers shall be observed for the purpose of evaluation at least once every year.

C. A copy of each evaluation will be given to the teacher at the conclusion of the evaluation. A conference will be held with the teacher within 3 working days following the evaluation.

D. In the event that the teacher feels the evaluation was incomplete or unjust, the teacher may put objections in writing and have them attached to the evaluation report to be placed in the teacher's personal file.

E. Definite positive assistance shall be immediately provided to teachers upon recognition of "professional difficulties."

F. A teacher shall have the right, upon request, to review the contents of their personal file and to receive copies. At least once every 2 years a teacher shall have the right to indicate those documents and/or other materials on file which is believed to be obsolete or otherwise inappropriate to retain. Said documents shall be reviewed by the superintendent or designee and if, in fact, they are obsolete or otherwise inappropriate to retain, they shall be destroyed.

G. Final evaluation of a teacher upon termination of employment shall be concluded prior to severance, and no documents and/or other material shall be placed in the personal file of a teacher after severance.

H. Any complaints regarding a teacher, which may have an effect on the teachers evaluation or continued employment, that are made to the administration by any parent, student or other person shall be in writing and shall be promptly called to the teacher's attention. Said teacher shall have the right to answer any complaints in writing which shall be reviewed by the administrator and attached to the file complaint.

ARTICLE X - JUST CAUSE

No teacher who has taught in the Shell Lake Schools at least 2 years, shall be dismissed, non-renewed or disciplined before the Board without just cause and such action shall be preceded by:

A. The faithful execution of the evaluation procedure and the honoring of all teacher's rights included in this agreement and applicable statutes.

B. The forwarding of a written explanation for the action to the teacher and to the association, upon request of the teacher. All written information forming the basis for disciplinary action will be made available to the teacher, and upon request of the teacher, to the NUE.

C. If requested by the teacher, a hearing and/or private conference with the board. If in the first or second year, a teacher's performance is determined to be unsatisfactory, the teacher may be placed on probation. A written statement including the reasons for probation shall be given to the teacher, and upon the teacher's request to the NUE, a copy will be made a part of the teacher's personal record.

4. That Spencer L. Joki, hereinafter referred to as the grievant, was employed as a full-time certified teacher by the District since the fall of 1968; and that since then and for the 1981-82 school year, the grievant was a junior high school science teacher.

5. That on or about December 5, 1981, the grievant and his family moved to a new residence in Shell Lake, Wisconsin; that the grievant is married and has two sons who in February, 1982 were ages 2 years and 5 months respectively; that the grievant frequently needed a baby sitter for his sons; that S, a girl of about thirteen years of age, who lived across the street from the grievant's house, baby-sat frequently for the grievant; and that in the 1981-82 school year, S was a student in the grievant's seventh grade science class.

6. That on Saturday, February 13, 1982, at approximately 5:45 p.m., the grievant telephoned S and asked her to baby-sit that evening; that S informed the grievant that she was sick and could not baby-sit; that S had missed school the previous Tuesday, Thursday and Friday due to illness; that the grievant inquired about the nature of her illness and then talked about school matters; that at the beginning of the telephone conversation, S and her younger brother were at home alone; that shortly after 6:00 p.m., S's grandparents, an aunt, and a cousin arrived at S's home; that after they arrived, S indicated that she wished to talk to them and said goodbye but the grievant asked S to continue the conversation; that the grievant asked S what she thought of her science teacher; that when S replied that he was a good science teacher, the grievant asked, "What else?"; that the grievant told S that when she baby-sat in the summer, she could take the children to the beach and that he was looking forward to swimming with her; that the grievant told S that she didn't need to wear make-up; that the grievant told S that he wanted to go to bed with her, and when S said nothing, the grievant repeated this statement; that the grievant asked S if she thought that was bad and was she mad at him; that S was observed to be crying while on the telephone, whereupon S's aunt picked up the telephone extension and listened in; that the grievant stated to S that someone else was on the line and asked S to please not cry; that after a few minutes, S's aunt hung up the extension and then went to S and took the phone from her and asked the grievant what was going on and then hung up the phone; and that the entire telephone conversation lasted about one hour.

7. That S informed her aunt that the grievant had said he wanted to go to bed with S; that S's parents were contacted and this conversation was reported to S's parents; that S's father and grandfather proceeded to the grievant's house; that they were greeted by grievant who stated, "Hi. What's happening? What's going on?"; that S's father asked the grievant why he had spent almost an hour on the phone with S and why he had asked her to go to bed; that the grievant responded repeatedly with, "What's happening? What's wrong? What are you doing here?"; that the police were called and came to S's home; that S repeated what occurred to the police officer; and that at the officer's request, S wrote down her recollection of the telephone conversation.

8. That on the following day, February 14, 1982, S's parents advised the District's Superintendent about the telephone conversation; that on February 15, 1982, the Superintendent telephoned the grievant and asked him what had happened; that the grievant responded that he was trying to make arrangements for a baby-sitter for the following weekend and that S could either baby-sit at his house or her house and that it was possible for her to stay overnight rather than go back and forth; that on Friday, February 19, 1982, the grievant met with the Superintendent and indicated that everyone in the junior high area knew of the situation; and that at that meeting, the Superintendent suspended the grievant with pay by means of the following letter:

> Mr. Spencer L. Joki
> Shell Lake, Wisconsin 54871
>
> Dear Spencer:
>
> This letter will serve to inform you that you are hereby, effective immediately, suspended with pay from your teaching duties effective February 19, 1982 pending the results of an investigation of facts wherein you are alleged to have contributed to the delinquency of a minor.
>
> During this period of suspension the board will investigate the alleged incident and schedule a hearing, all in compliance with the district master agreement and consistent with your protected rights.
>
> Sincerely,
>
> Fred E. Johnson, Superintendent
> SCHOOL DISTRICT OF SHELL LAKE

9. That on March 3, 1982, the District's Board held a special meeting and considered the dismissal of the grievant; that the District's Board decided to continue the grievant's suspension with pay and to conduct an evidentiary hearing; and that on March 3, 1982, S and her parents submitted a signed written complaint concerning the grievant's February 13, 1982, telephone conversation with S.

10. That by a letter dated March 18, 1982, the District informed the grievant that a hearing would be conducted on March 24, 1982, regarding dismissal of the grievant; that the letter listed several allegations of misconduct in addition to the February 13, 1982 incident on which evidence would be taken; and that the grievant was informed that he had the right to counsel, to call witnesses, to submit evidence, to cross examine witnesses and to object to evidence presented.

11. That sometime prior to March 24, 1982, the grievant was charged with a felony in connection with the February 13, 1982, telephone conversation with S; that on March 24, 1982, a hearing was held by the District's Board of Education regarding the dismissal of the grievant; that the District's legal counsel called witnesses, presented evidence, ruled on objections and met with the Board when it considered the evidence presented; that the grievant at this hearing did not testify or respond to questions on the basis that the same matter was pending in a criminal proceeding; that the grievant was represented and was permitted to cross examine witnesses, make objections, present evidence and call witnesses; that after said hearing, the District's Board terminated the grievant on the basis that on February 13, 1982, the grievant attempted to induce S to go to bed with him; and that the termination was confirmed in writing by a letter dated March 26, 1982, to the grievant from the District's Superintendent.

12. That the grievant timely filed grievances on his suspension on February 19, 1982, and his discharge on March 24, 1982, and processed them through the contractual grievance procedure.

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

CONCLUSIONS OF LAW

1. That the grievant exhausted the grievance procedure set forth in the parties' collective bargaining agreement, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine the merits of the grievances.

2. That the suspension with pay of Spencer Joki on February 19, 1982, was proper and did not violate any of the provisions of the parties' collective bargaining agreement, and therefore, was not violative of Sec. 111.70(3)(a)5 of the MERA.

3. That the discharge of Spencer Joki on March 24, 1982, was based on just cause within the meaning of Article X of the parties' agreement, and therefore, was not violative of Sec. 111.70(3)(a)5 of the MERA.

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

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 26th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The issues raised by the complaint are whether the District failed to comply with the teacher evaluation procedure and just cause provisions of the parties' collective bargaining agreement when the District suspended and discharged the grievant on February 19 and March 24, 1982, respectively.

NUE'S POSITION:

The NUE contends that the District violated the evaluation and just cause provisions of the parties' collective bargaining agreement when it suspended and discharged the grievant. It points out that Article IX, Part H, provides that any complaint about a teacher (from a parent, student or other person), which may have an effect on the teacher's continued employment, must be in writing. It also refers to Article X which requires the faithful execution of the evaluation procedure prior to the imposition of any discipline. The NUE argues that the District violated these provisions because it suspended the grievant on February 19, 1982, based on an oral complaint received on February 14, 1982, which complaint was not reduced to writing until March 3, 1982. It contends that the suspension of the grievant prior to the receipt of the written complaint compromised the contractual system of justice and made it impossible for the grievant to obtain a fair hearing from the District's Board.

The NUE also contends that the grievant was denied due process at the Board's hearing on March 24, 1982. It submits that the grievant was denied a fair hearing because the District's attorney presented the Administration's case and also acted as the hearing examiner for the Board by presiding over the hearing, ruling on objections, and advising the Board during its deliberations. The NUE further contends that the Board's hearing was unfair because on the date of the hearing, the grievant was facing a criminal charge and, on the advise of his attorney in that matter, the grievant did not testify at the Board hearing. The NUE asserts that the District's timing of the hearing denied the grievant due process.

The NUE takes the position that the standard of proof required in this case is proof beyond a reasonable doubt because the allegations against the grievant involve a crime of moral turpitude, which, if sustained, will destroy the grievant's reputation and career. Under these circumstances, it insists that a greater standard of proof is necessary to sustain such a charge.

The NUE contends that the District did not have just cause to suspend and discharge the grievant. It notes that, for the most part, the facts are not in dispute except for the main charge that the grievant asked S to go to bed with him, which the grievant specifically denies. In essence, the NUE argues, the case comes down to the issue of credibility.

In support of the grievant's credibility, the NUE points out that the grievant has a 20 year distinguished record as a teacher; that he is a family man; and that the evidence established that he never did or said anything improper or inappropriate to S prior to the telephone conversation of February 13, 1982. It notes that the telephone conversation was between the grievant and S and there were no witnesses or other corroborative evidence as to what was said. While admitting that the length of the telephone conversation was unusual, it explains this by the varied items that were talked about and the length of time the grievant was trying to calm down an upset S. It maintains that there is a plausible explanation for S's being upset as she misunderstood the grievant and really thought she had been propositioned. It denies that S was propositioned and theorizes that the subsequent events have cemented her mistaken believe that she was. It argues that the grievant's response to the doorstep conversation with S's father on February 13, 1982, does not constitute an admission of guilt. It argues that the response to a shocking accusation by an irate and emotionally upset parent cannot be viewed as an admission. It further contends that the grievant's refusal to testify at the March 24, 1983, hearing was based on advise of counsel and cannot be used as evidence against him.

The NUE contends that the evidence supports a finding that the District violated the evaluation procedure and did not have just cause to discharge the grievant.

DISTRICT'S POSITION:

The District contends that it complied with the teacher evaluation provision of the parties' collective bargaining agreement. It takes the position that the purpose of this provision is to make certain that a teacher is made aware of any complaints against him. It points out that the Superintendent made the grievant aware of the complaint against the grievant on February 15, 1982, and the grievant has never alleged that he was unaware of the exact nature of the complaint against him. Additionally, the District maintains that the Superintendent hand delivered a written suspension with pay to the grievant on February 19, 1982, and a written complaint by S and her parents which was submitted on March 3, 1982, was given to the grievant's representatives before his dismissal on March 24, 1982, thereby complying with the teacher evaluation procedure.

The District submits that the instant case is not a criminal proceeding where the grievant's liberty is at stake and the applicable quantum of proof is that specified in Sec. 111.07(3), Wis. Stats., which is proof by a clear and satisfactory preponderance of the evidence. It argues that the discharge of the grievant was not based on his violation of the criminal laws but was because of the deleterious effect his conduct had on his ability to perform his duties.

The District contends that it had just cause to discharge the grievant. It argues that the evidence establishes that the grievant asked S to go to bed with him. In support of its position, the District points to S's specific, detailed and unwaivering recollection of the February 13, 1982 telephone conversation which she related moments after it, which she reduced to writing that same evening, and which she has consistently testified to numerous times including the hearing in this matter. It points to the grievant's lack of explanation for the length of the telephone conversation and S's crying on the phone. It argues that the grievant's response to the confrontation with S's father indicates that there was no misunderstanding between S and the grievant. It claims that the grievant manufactured his statement to the Superintendent two days later. It characterizes the grievant's testimony at the hearing as merely a general denial and notes that the grievant did not testify about any misunderstanding. It argues that S has no interest in falsifying her testimony or manufacturing false allegations against the grievant, whereas the grievant's job is at stake. It contends that an analysis of all the evidence clearly shows that the grievant did ask S to go to bed with him.

The District asserts that there is a rational nexus between the grievant's conduct and his job performance. It claims that a sexual proposition from a teacher to a 12-13 year old student transcends the standards of propriety expected in any community and as such adversely effects the ability of the teacher to teach. The District concludes that it had just cause to dismiss the grievant and requests that the complaint be dismissed.

DISCUSSION:

The collective bargaining agreement does not provide for final and binding arbitration and the grievances were processed through the final step of the grievance procedure. 2/ Therefore, the Examiner has asserted the jurisdiction of the Commission to determine the merits of the grievances. 3/

Procedural Matters

The first issue to be determined is whether the District violated Article IX of the agreement. Article IX, paragraph H, provides that any complaint made to the District which affects a teacher's continued employment must be in writing. On February 19, 1983, the District suspended the grievant with pay pending an

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2/ Exhibit 20.

3/ Shell Lake School District, (19554-A) 12/82.

investigation of the allegations against him. Article X of the agreement provides that faithful execution of the evaluation procedure must precede discipline meted out to a teacher. It is undisputed that a written complaint regarding the allegations against the grievant was not received by the District until March 3, 1982.

A general rule of contract interpretation is that the instrument must be construed as a whole and the meaning of a sentence or paragraph cannot be derived from it standing alone, but must be determined in connection with the other parts or provisions of the agreement. 4/ In this regard, paragraph H must be read in light of the other provisions of Article IX. The introductory paragraph of Article IX provides that the purpose of the observation of work performance and evaluation is to guide the teacher in a positive and helpful way. Subsequent provisions mandate a certain minimum number of observations each year and the procedures that follow these observations. Paragraph E specifies that definite positive assistance shall be given to teachers where "professional difficulties" are recognized. The obvious aim of the evaluation procedure is to identify and to correct any deficiencies in the performance of teaching duties. If these deficiencies are not corrected after execution of this process, then non-renewal or dismissal might be warranted.

While the evaluation procedure fulfills the aim of improving professional performance, it is not necessarily applicable to a teacher's misconduct. A teacher could be outstanding with excellent performance in the classroom, yet if the teacher, without any apparent reason, physically attacks the principal, discipline is appropriate without regard to the evaluation procedure.

Requiring that a complaint about a teacher's deficiency in the performance of classroom duties be in writing furthers the evaluation procedure by identifying the particular problem so that a method for resolving it can be identified and implemented. On the other hand, requiring a written complaint of misconduct would not necessarily lead to the same result. Certain students or parents may not know that a written complaint is required or they may be reluctant to put a complaint of misconduct in writing. Suppose for example, that a teacher is arrested and charged with selling drugs to students. Any involved student might be reluctant to make a written complaint and requiring the arresting officer to notify the District in writing seems to elevate form over substance. Requiring that every charge of misconduct be in writing may not be in the best interests of the teacher or District, particularly where the charge is spurious or unfounded.

In the context of the evaluation procedure, it strains the language of paragraph H to extend its application to misconduct, especially where the misconduct occurs outside the classroom setting. The provisions of Article X, paragraph B, are applicable to make the grievant aware of any charges of alleged misconduct. To require an addition complaint in writing seems redundant and not intended by the parties in light of paragraph B of Article X. The instant case involves misconduct outside the classroom as opposed to classroom deficiencies and, under these circumstances, the requirement of a written complaint under paragraph H of Article IX is not applicable.

The NUE contends that the grievant was denied due process at the District's March 24, 1982, Board hearing in two respects:

1. The hearing was held at the time the grievant was facing criminal charges arising out of this incident.

2. The District's legal counsel acted as advocate, hearing examiner and legal advisor to the Board.

It is undisputed that criminal charges were pending against the grievant on March 24, 1982, and the grievant did not testify at the Board hearing on the advice of his attorney in the criminal case. The NUE asserts that due process required a delay in the Board hearing. The Examiner is not persuaded by this argument.

4/ Elkouri and Elkouri, How Arbitration Works, (BNA, 1974) at 307-308.

In Hoover v. Knight, 678 F.2d 578 (5th Cir., 1982), a case involving a dismissal hearing of an employe who also had a criminal trial pending on the same charges, the court held that the employe was not denied any due process rights where the employe was not forced to waive the 5th Amendment privilege or face an immediate job termination, and where the employe's silence was only one of a number of factors considered in the dismissal. Here, the grievant was not required to testify or answer questions at the hearing. No threat was made by the District that the grievant's invoking the privilege would thereby result in his dismissal. The grievant was permitted to rely on his 5th Amendment rights. The District relied on the testimony of S, her parents and others in deciding to discharge the grievant. In light of these factors, the Examiner concludes that the grievant was not denied due process. 5/

The NUE contends that the grievant was denied a fair hearing because the District's counsel presented the case against the grievant and also acted as hearing examiner for the Board and then met with the Board during its closed deliberations. It argues that the District could have engaged a second attorney to act as a hearing examiner to lessen the appearance and likelihood of unfairness. First, due process does not require an independent unbiased decisionmaker. 6/ Secondly, in State ex rel. Wasilewski v. Bd. School Directors, 7/ the Wisconsin Supreme Court indicated that the type of Board hearing present in this case is not subject to all the procedural requirements of the Wisconsin Administrative Procedure Act. Just cause due process requires that a fair investigation be made into the substantive facts before a disciplinary decision is finalized. In other words, the nature of the Board hearing was investigative to determine the facts concerning the allegations against the grievant to determine whether there was misconduct and if so, what the appropriate discipline should be. The method used to determine the facts need not be formal or follow a certain procedure as long as it is reasonably reliable and fundamentally fair, so that the grievant is informed of the case against him and has the opportunity to give his side of the case for consideration by the Board. Due process does not require freedom from all procedural error, but does require freedom from procedural error prejudicial to the grievant. 8/ This is particularly true where the grievant has recourse through grievance and arbitration procedures or a prohibited practice proceeding.

It was not necessary for the Board to have legal counsel to conduct the Board hearing or to elicit testimony from witnesses. The Board could have called witnesses on its own and questioned them. The Board's use of its attorney to provide these functions does not make the procedure impermissible. The important factors in this case were that the grievant was present with representatives of his own choosing, was permitted to question witnesses, to present evidence, to call his own witnesses and to testify if he so desired.

Even if the Board had utilized two attorneys as suggested by the NUE, an argument of lack of impartiality could be made because both attorneys would be working for and be paid by the Board. The participation of the Board's attorney in the Board's deliberations arguably is similar to the drafting of Findings of Fact and Conclusions of Law by the Board's attorney in Wasilewski, 9/ but here, as there, there was no showing that the grievant was prejudiced by this conduct. A review of the transcript of the Board hearing indicates that of the several charges made against the grievant, the Board sustained only one, that he asked S to go to bed with him. The Examiner concludes that the procedure utilized by the Board at the March 24, 1982, hearing did not deny the grievant due process.

5/ Diebold v. Civil Service Commission, etc., 611 F.2d 697 (8th Cir., 1979) and United States v. White, 589 F.2d 1283 (5th Cir., 1979).

6/ Hortonville School Dist. v. Ed. Assn., 426 U.S. 482 (1976).

7/ 14 Wis. 2d 243 (1961).

8/ State ex rel. Wasilewski v. Bd. School Directors, 14 Wis. 2d 243 (1961) at 267.

9/ Id.

Each of the parties has cited arbitral authorities as to the burden of proof for misconduct which also constitutes a crime. Inasmuch as this matter is not an arbitration hearing but a prohibited practice proceeding under Ch. 111, Wis. Stats., the Examiner deems the appropriate burden of proof in this case to be a clear and satisfactory preponderance of the evidence.

MERITS:

The grievant was suspended with pay pending an investigation of allegations that the grievant had contributed to the delinquency of a minor. The grievant contends that the just cause standards of Article X were violated by the suspension. The allegations against the grievant were very serious. Shell Lake is a small community and by February 19, 1982, the allegations had become public information. The District has an obligation to provide effective instruction, to protect its students, and to maintain and enhance the confidence of the community. Permitting the grievant to continue to teach in spite of the serious allegations against him would certainly have a negative impact on the District. In similar circumstances, arbitrators have held a suspension to be proper. 10/ Such a suspension is not considered to be disciplinary in form or result and is not tantamount to a finding of guilt. On balance, the District's action in minimizing any possible adverse effects on it outweights the detrimental effect of the suspension on the grievant. Furthermore, the District suspended the grievant with pay, thereby relieving the economic impact associated with a suspension. Under all circumstances, the District was justified in suspending the grievant pending a full investigation of the charges against him. Therefore, the District did not violate the just cause provisions of Article X when it suspended the grievant with pay on February 19, 1982.

The grievant contends that he was discharged without just cause in violation of Article X. The District discharged the grievant for asking S to go to bed with him. The grievant denies that he made such a statement. A careful review of the evidence convinces the Examiner that the grievant did ask S to go to bed with him. S's testimony regarding the telephone conversation with the grievant on February 13, 1982, is clear, detailed, unequivocal and corroborated in many respects by the grievant. The length of the telephone conversation supports S's version of what occurred. 11/ The one hour call was unusually long for a request for a baby sitter, even if school subjects and events were discussed. A discussion of these items does not explain the length of the call. The general tenor of the conversation including questions about how she liked her science teacher and her not needing make-up further supports such a conclusion. S's crying on the phone near the end of the conversation establishes that she was greatly upset and no other plausible explanation for her crying has been proferred by the grievant. There is absolutely no reason for S to lie or to create a false allegation against the grievant. It seems unlikely that S had the ability to develop such a detailed falsehood about the grievant. There were no prior improper incidents of any kind by the grievant and there was no animosity between the two. S was a good baby sitter and a good student. Also, the grievant initiated the call and asked S to continue it even after she wanted to say goodbye. Even the grievant does not contend that S is being untruthful or that she made up the allegation. The grievant contends merely that S misunderstood him concerning a request about baby sitting the following weekend. The Examiner is not persuaded that a misunderstanding occurred. S testified that the grievant made the request, not once, but twice. The first time, S made no response and the grievant then repeated the statement that he wanted to go to bed with her. S was very clear that there was no misunderstanding. In contrast to the testimony of S, the grievant's testimony was essentially little more than a bare denial that he made the crucial statement. The grievant's response to S's father shortly after the telephone conversation belies any misunderstanding. S's father asserted that

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10/ Ampco Pittsburgh Corp., 75 LA 363 (Seinsheimer, 1980); State University of New York, 74 LA 299 (Babiskin, 1980); and City of Compton Fire Department, 65 LA 1115 (Rule, 1975). For a further discussion, see Elkouri and Elkouri, How Arbitration Works, (BNA, 1974) at 619 and cases cited therein.

11/ While the grievant testified that the call was approximately 40 minutes, the Examiner has credited S's testimony that the call lasted approximately one hour.

the grievant had asked S to go to bed with him. Surely, if this were the result of a misunderstanding, the natural reaction of the grievant would be to assert that this was a misunderstanding. The grievant's continued repetition of the same equivocal response is evidence that there was no misunderstanding. 12/ The Examiner concludes that the clear and satisfactory preponderance of the evidence establishes that on February 13, 1982, the grievant did ask S to go to bed with him.

In determining the appropriate penalty for the grievant's misconduct, the special relationship of a teacher with his students must be taken into account. Although the grievant's misconduct occurred outside the classroom, there is a direct relationship between such illicit conduct and the ability to effectively perform as a teacher in the District. 13/ The grievant's asking a seventh grade student of his to go to bed with him was clearly inimical to the welfare of the students and betrayed the trust the District placed in him. By this conduct, the grievant failed to conform to the standards expected of a professional teacher. His actions render him unfit to continue as a teacher in the District. The District had just cause to discharge the grievant for his misconduct and thus, it did not violate the terms of the parties' agreement. Therefore, the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

12/ See 4 Wigmore, Evidence, paragraph 1071 (Chadbourn rev. 1972) and Sec. 908.01(4)(b)(2), Wis. Stats.

13/ Unified Jt. School District No. 1, City of Tomahawk, (13766-A) 4/76.