STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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, and (on the brief to the Commission), Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, Madison, WI 53708,
Bitney Law Firm, Ltd., Attorneys at Law, by Mr. W. W. Bitney, 225 Walnut Street, Spooner, Wisconsin 54801, appearing on behalf of the Respondent.

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

On May 26, 1983, Examiner Lionel L. Crowley issued Findings, Conclusions and Order with accompanying Memorandum in the above matter in which he found that Respondent District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by its suspension and discharge of teacher Spencer L. Joki.

On June 13, 1983 the above-named Complainant timely filed a petition for Commission review pursuant to Sec. 111.07(5), Stats. Briefing by means of initial briefs by each party and a reply brief by the Complainant was completed in the matter on October 11, 1983.

The Commission having reviewed the record, including the Examiner's decision and the petition for review, and having considered the parties' briefs, and being satisfied that the Examiner's Findings, Conclusions and Order should be affirmed in all respects,

NOW, THEREFORE, it is

ORDERED 1/

That the Commission affirms and adopts as its own the Examiner's Findings of Fact, Conclusions of Law and Order issued in this matter on May 26, 1983.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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

(Footnote 1 continued on Page 2)

(Footnote 1 continued)

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 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.

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

Background and History of Proceedings

In its Complaint, Complainant, hereafter referred to as NUE or the Association, alleged that the Respondent School District, hereafter referred to as the District, violated Sec. 111.70(3)(a)5, Stats., by failing to comply with the teacher evaluation procedure and just cause provisions of the parties' collective bargaining agreement as regards its suspension and subsequent discharge of junior high school teacher Spencer L. Joki, hereafter referred to as the Grievant. The agreement in question does not provide for final and binding arbitration, so the instant complaint was filed and processed following exhaustion of the preliminary steps in the contractual grievance procedure.

The District Superintendent had suspended Joki's employment with pay on February 19, 1982 after receiving a complaint that Joki had sexually propositioned one of his female seventh grade students, hereafter referred to as S, during a lengthy telephone conversation initiated by him on February 13, 1982. On March 24, 1982, following a hearing before the District School Board, Joki was informed that the Board had decided to terminate his employment effective immediately.

The Examiner's Decision:

In his Memorandum, the Examiner first addressed what he termed procedural matters. In response to NUE's argument that the contractual teacher evaluation provision requires that any complaint which might have an effect on a teacher's continued employment be in writing, the Examiner determined that the entire teacher evaluation provision was intended to apply to a teacher's classroom performance, and not to conduct outside the classroom. However, the Examiner concluded that the just cause provision protected employes rights to be made aware of any charges of alleged misconduct outside the classroom, though it did not require written notice of such complaints. Therefore, the Examiner concluded that in the instant case, which involved alleged misconduct outside the classroom as opposed to classroom teaching deficiencies, the requirement of a written complaint was not applicable.

The Examiner next addressed NUE's arguments that the Grievant was denied due process at the Board hearing in two respects: (1) that the hearing was held at the same time the Grievant was facing criminal charges arising out of this incident; and (2) that the District's legal counsel acted as advocate, hearing examiner and legal advisor to the Board. The Examiner found, and it is undisputed, that felony criminal charges were pending against the Grievant at the time of his hearing before the Board on March 24, and that the Grievant did not testify at the Board hearing on the advice of his attorney in the criminal case. Citing decisions of the federal Courts of Appeal, 2/ the Examiner reasoned as follows:

> 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

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2/ Hoover v. Knight, infra; 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).

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.

In response to NUE's second due process argument, the Examiner stated:

> First, due process does not require an independent unbiased decisionmaker. Secondly, in State ex rel. Wasilewski v. Bd. School Directors, 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. This is particularly true where the Grievant has recourse through grievance and arbitration procedures or a prohibited practice proceeding. (citations omitted).

Noting that at the Board hearing, the Grievant was present with representatives of his own choosing and was permitted to question witnesses, to present evidence, to call his own witnesses and to testify if he so desired, the Examiner concluded that the procedure utilized by the Board at the March 24, 1982 hearing did not deny the Grievant due process.

In determining whether the District had violated the contractual just cause requirement as regards the Grievant's suspension and subsequent discharge, the Examiner noted that the parties had each "cited arbitral authorities as to the burden of proof for misconduct that also constitutes a crime." He expressed his conclusion regarding what would more aptly be categorized as the applicable standard or quantum of proof as follows:

> 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.

The Examiner went on to conclude that the District was justified in suspending the Grievant with pay pending a full investigation of the charges against him because of the seriousness of the allegations and the District's rights and obligations to provide effective instruction, to protect students and to maintain the confidence of the community.

The Examiner further concluded that the discharge was for just cause. It was undisputed that Joki initiated the call, that he initially requested S to babysit for his children, and that he and S continued to discuss a number of topics including school subjects and a makeup examination, and that the conversation took at least forty minutes. The Examiner credited S's testimony that the conversation in fact lasted for approximately one hour, that the conversation continued about non-school subjects, and that the Grievant then twice told S that he wanted to go to bed with her. The Examiner concluded that S's testimony was clear, detailed, unequivocal and corroborated. He credited S's assertion that the phone call ended with S crying as observed and corroborated by several relatives in the house. The

Examiner further noted that there had been no prior animosity between the student and the Grievant, and that the Grievant's testimony that S had misunderstood him was not convincing. The Examiner also commented upon the Grievant's response to a meeting with S's father shortly after the telephone call. After learning of the conversation, S's father and grandfather went to the Grievant's home and asked him why he had spent an hour on the phone with S, and why he had asked her to go to bed with him. The Grievant's repeated response was "what's happening, what's wrong, what are you doing here". The Examiner noted:

> "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."

Having credited in full the student's version of the event, the Examiner concluded that such action by the Grievant was inimical to the welfare of his students and was just cause for discharge.

Petition for Review:

In its petition for review and supporting briefs, the Association challenges the validity of the Grievant's discharge but not his prior suspension. It does not take issue with the Examiner's conclusion that the teacher evaluation provision was not violated.

The Association asserts that the Examiner's factual conclusions are not supported by the record. Acknowledging that credibility is a key issue, the Association argues that the Examiner's conclusion that the Grievant propositioned one of his students in the manner found defies common sense though S's testimony may have been given in good faith. The Association characterizes the student's testimony that the Grievant suggested coming to her home immediately to sleep with her though she was ill and other members of her family were present as being wholly uncorroborated in the record and inherently improbable. The Association points in contrast to the Grievant's history as a good and even excellent teacher and his alternative explanation of the telephone conversation.

The Association also argues that the Examiner drew several impermissable inferences from collateral events, which he allowed to significantly affect his conclusions, rather than carefully analyzing the Grievant's credibility itself. For example, the Examiner inferred that the Grievant implicitly admitted his guilt in his interaction with the girl's father shortly after the telephone conversation by reacting in a confused but low key manner, rather than vehemently denying the father's accusations. Secondly, the Examiner discussed the Grievant's failure to offer a plausible alternative explanation for the girl's reaction, when in fact the Grievant did so in his first discussion about the event with the Superintendent. The Association also questions the Examiner's judgment that the absence of any past animosity or questionable interaction between the Grievant and the student supports the student's version of events. The Association notes that in several other complaint cases, the Commission has reversed an Examiner's credibility determinations where such findings were premised upon an improper inference not supported by the record. 3/

The Association also contends that the District's requirement that the Grievant defend himself against allegations of impropriety while criminal charges were still pending against him seriously impeded his ability to defend himself, such that the Grievant must be reinstated or given a new hearing. First, the Association maintains that the Grievant has a constitutional privilege against self-incrimination properly invoked in this type of proceeding. The Association contends that the Examiner erred in relying on several decisions of the federal Courts of Appeal which indicated that Fifth Amendment constitutional violations are not implicated when an employe is required to simultaneously defend himself in criminal and administrative proceedings. The Association would distinguish those cases from the present case because of the controlling importance of the credibility issue in this case: only the Grievant and the student have knowledge of the crucial elements of their phone conversation. Thus, the Grievant was com-

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3/ The Association cites Waunakee School District, Dec. No. 14749-B (WERC, 2/78) and School District of New Auburn, Dec. No. 15534-B (WERC, 11/79).

pelled to forego not merely his "most effective defense" but his only defense. The Association also notes that the District's counsel has indicated on the record that a refusal to testify should be considered as "some type of admission" and may have so instructed the Board.

Secondly, while acknowledging a lack of uniformity in the area, the Association contends that there is arbitral precedent to support the Grievant's claim that the District's actions in requiring him to defend his job while facing pending criminal charges denied the Grievant the necessary fair play implicit in the just cause provision. At the time of the Board hearing, the Grievant faced felony charges; at the time of the complaint hearing, the charges had still not been formally dismissed.

The Association also contends that the Examiner misallocated the burden of proof and essentially required the Grievant to prove his innocence. 4/ While the Association does not argue that the standard of proof in all discharges based on serious misconduct must be "proof beyond a reasonable doubt," it argues that a high degree of certitude should be present when the allegations are such that they would prevent a teacher from ever teaching again. Instead, the Association argues, the Examiner required the Grievant to prove the student was a liar, and he failed to consider inconsistencies in the student's statement or possible sources of confusion in her mind. The Association contends that the Examiner was unduly concerned about the consequences of his decision rather than the actual evidence in the case. 5/

As relief, the Association requests that the Grievant be reinstated with full benefits. However, even if the Commission concludes that the present record supports the Examiner's decision, the Association contends that the Commission should order a new hearing because the present record was developed while the Grievant was under the threat of criminal prosecution.

The District would have the Commission affirm the Examiner's Findings of Fact, Conclusions of Law, and Order. It argues that the Examiner's Findings of Fact are supported by the record. The record shows that S's testimony was specific, detailed and consistent, and that it is supported by other undisputed testimony and surrounding circumstances. In contrast, the District asserts, the Grievant's testimony was inconsistent and incomplete. The District contends that the Grievant's failure to deny the allegations on the night of the incident or to show any anger at the allegation is relevant and significant. The District again argues that the fact that there was no animosity between the Grievant and S is relevant since it shows that there was no reason for her to lie about the Grievant's actions.

The District challenges the Association's reliance on a "common sense analysis." Such an argument was made before the Examiner and properly rejected. Such an analysis, the District contends, would mean that the more illogical or outrageous an employe's action, the more difficult it would be to discipline such an employe. The Examiner's decision turns entirely on the credibility of two witnesses testifying to different versions of an incident. The Examiner observed the witness' appearance and demeanor, and his credibility determination should not be overturned.

4/ In its initial petition for review the Association alleged that the Examiner confused the requisite standard of proof in certain types of just cause cases with the level of proof required generally under Chapter 111. In its brief, the Association states that this issue is no longer critical to the resolution of the case because the Examiner's error was one of fundamental misallocation of the burden of proof rather than just application of the wrong standard.

5/ Similarly, in its petition, the Association alleges that the Examiner did not conduct the hearing in a fair and unbiased manner, but rather was unduly swayed by the complaining witness' emotional state. The Association cites no specific instance of the Examiner's conduct to substantiate these allegations.

In response to the Association's argument that the fact of pending criminal proceedings impeded the Grievant's ability to defend himself, the District makes several arguments. Neither the District nor the Examiner interfered with the Grievant's right to invoke the Fifth Amendment privilege against self-incrimination. The Grievant was not required to testify before the Board hearing, and voluntarily chose to testify at the complaint hearing, a hearing de novo. The Grievant never requested that the complaint hearing be adjourned or postponed until resolution of the criminal proceedings. In fact at the complaint hearing, the Grievant's representative testified that the criminal proceeding was scheduled to be dismissed. The collective bargaining agreement does not provide that the District is foreclosed from taking disciplinary action if criminal proceedings are pending. It would be unfair and unreasonable to prevent a school district from taking disciplinary action against a teacher, as provided for in the contract, for the months and even years involved in criminal proceedings.

The District also contends that the Examiner applied the appropriate standard or quantum of proof. The District first contends that standards of proof applied by arbitrators are irrelevant because the present proceeding was brought pursuant to Sec. 111.07, Stats., and subsec. (3) thereof provides, "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." The District argues that Layton School of Art and Design v. WERC, 82 Wis. 2d 324, (1978) makes it clear that the statutory standard of proof also applies even where the Commission is deciding complaint cases involving charges of misconduct involving moral turpitude.

The District appears to argue, in the alternative, that many arbitrators do not apply the criminal standard of proof beyond a reasonable doubt even where an employe is discharged for serious cause. Rather, they simply ask: is the employe guilty, and if so, is the act that he committed serious enough to justify the discharge? The District notes that the collective bargaining agreement involved herein does not require proof beyond a reasonable doubt for disciplinary actions. The District further notes that it did not discharge the Grievant because of an alleged violation of the criminal law, but rather because of the deleterious effect his actions had on his ability to perform his job duties.

In its reply brief, the Association objects that the District has mischaracterized its arguments concerning the inherent incredibility of S's allegations against the Grievant. The Association emphasizes that many legal and evidentiary rules are based on the common sense notion that people generally act in their own best interest and engage in thoughtful and logical behavior; therefore, allegations of illogical and self-defeating conduct should be closely scrutinized.

The Association also contends that the fundamental unfairness of the school board proceedings is relevent. First, from a legal perspective, just cause provisions specifically incorporate a requirement of fairness of the pre-discharge adjudicatory investigation. Secondly, the District itself, in its brief and at the complaint hearing, made reference to testimony developed at the school board hearing, and a transcript of that hearing was introduced into evidence in the complaint proceeding. In fact, the District's brief refers to testimony produced soley at the Board hearing. Therefore, the fact that the Grievant was unable to adequately defend himself at that stage has tainted the entire proceeding.

The Association also renews its request that the Commission indicate that, as a general rule, its Examiners should feel secure in their judgment before deciding that individuals charged with serious misconduct are guilty of the alleged offenses. It contends that Layton School of Art, supra is irrelevant to the present case because it did not involve interpretation of a collective bargaining agreement. In contrast, the Association asserts, in contract enforcement cases, the violation of state statute is merely derivative, while the parties' collective bargaining agreement is the primary source of violation.

The Association also objects to the District's injection of various factual statements in its brief for which there is no factual foundation in the record.

Discussion:

Burden and Standard of Proof:

The Commission concludes that the Examiner correctly allocated the burden of proof and applied the proper standard. However, because of the brevity of the Examiner's comments about the "burden of proof" and because the case involved an alleged breach of a just cause provision heard as a complaint, there may be some confusion as to whether the Examiner reversed the burden of proof and forced Mr. Joki to prove his innocence.

Section 111.07(3), Stats. provides in relevant part:

> Any such proceeding shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

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:

> "In an unfair labor practice complaint alleging that an employer has violated a collective bargaining agreement by taking action against an employe, 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/

While the Examiner did not expressly discuss who bore the burden of proof (i.e., burden of persuasion) in this case, we find it implicit in his memorandum that the District bore the ultimate burden of persuasion. Thus at page 11 of his memorandum, we find:

> "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."

It was the School District who was attempting to prove that fact, and not the Grievant. Therefore we conclude that the Examiner did not place the burden of proof upon the Grievant.

We further conclude that the Examiner applied the correct standard of proof in requiring the District to prove it had just cause for discharge by a clear and satisfactory preponderance of the evidence. In the absence of contract language which expressly articulates a different standard, the Commission has consistently applied the statutory standard ("clear and satisfactory preponderance of the evidence") to complaint cases alleging contract violations, including discharge cases. 7/

While the Association is correct in noting that Layton School of Art and Design v. W.E.R.C., supra, did not involve interpretation of a collective bargaining agreement, the Commission finds support for its present conclusion in that case. There the Court held that the Legislature validly provided one standard of proof for all allegations of unfair labor practices regardless of

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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).

7/ See cases cited in Footnote 6.

whether the unfair labor practice could also be prosecuted in another forum as a crime. Thus, in these circumstances, we do not believe it is necessary to examine arbitral precedent to establish the applicable standard of proof. The parties' election to use Sec. 111.70(3)(a)5 as their ultimate grievance procedure step implies adoption of the statutory standard absent express contract language to the contrary. That statutory standard of proof requires an examiner to decide, in a contract discharge complaint case, whether there is a preponderance of evidence of employe guilt that is clear and satisfactory, and whether the discharge penalty exceeded the employer's contractual authority in the circumstances.

Evaluation of the Record

We affirm the Examiner's Findings of Fact, and reject the Association's contentions that the record does not support those Findings, and that the Examiner erred in making several inferences.

The crucial Finding of Fact is 6, in which the Examiner finds that the Grievant did make the alleged phone call to S on February 13, 1982 and did in fact twice tell S that he wanted to go to bed with her. A review of the transcripts of both the hearing before the Examiner and the hearing before the School Board establishes that S's testimony has been clear, detailed, unequivocal and consistent in all important aspects. The transcript contains nothing that indicates that S was lying, or confused, or incapable of understanding the Grievant's statements. Further, we find that the Examiner's inferences were warranted. Given that there may be instances in which a student fabricates in order to discredit a teacher, it was reasonable for the Examiner to consider the past relationships between the Grievant and S, and to infer that if that relationship had been a positive one, S had no apparent motive to lie about the Grievant. The Commission does not agree with the Association's contention that the Examiner put too much emphasis on the Grievant's response to the accusations made by S's father the night of the incident. Even if the contention were valid, however, the inference involved was only one of several considerations upon which the Examiner based his conclusion as to the relative credibility of S and the Grievant.

The Association mischaracterizes the Examiner as having stated in his decision that the Grievant offered no alternative explanation of the crucial events. Rather, the Examiner stated, at Memorandum page 10, that "no other plausible explanation for her crying (on the telephone) has been proferred by the Grievant" (emphasis added). The Examiner further stated, at Memorandum page 10, that, "the Grievant's testimony was essentially little more than a bare denial. . . ." The Commission finds no flaws in the Examiner's decision making in this regard.

The Association's argument that the facts as found by the Examiner are "inherently improbable" does not outweigh the Examiner's credibility determinations based upon his evaluation of the testimony of the two key witnesses. The Examiner heard the same argument and did not find it persuasive in the context of the record as a whole. We agree with the Examiner that the District sustained its burden of proof (i.e., burden of persuasion) by adducing testimony from S and several witnesses who corroborated portions of her testimony. In essence, the Association is contending that the Examiner gave too much credence and weight to S's version of events. We do not agree with the Association in that regard. The Association also has not substantiated in any way its allegation that the Examiner was too concerned about the consequences of his decision, or swayed by S's emotional state. In sum, we do not find it approprate to disturb the Examiner's credibility determinations herein.

Concurrent Criminal Proceedings

The Grievant's Constitutional privilege against self-incrimination has not been impaired by the fact that the Grievant had to defend himself against these charges while criminal charges were pending. We share the Examiner's readings of the decisions by three different U.S. Courts of Appeal. 8/ Those cases held that,

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8/ See cases in Footnote 2.

absent special circumstances, 9/ an employe's Fifth Amendment priviledge against self-incrimination is not impaired or threatened when the employe must simultaneously defend himself in criminal and administrative proceedings. As long as the employe is not forced to testify, and as long as the employe's refusal to testify is not the sole basis for the disciplinary action, the civil proceeding can continue. Hoover v. Knight, supra, is directly on point since that appeal was precipitated by a hearing examiner's refusal to postpone an administrative hearing pending the outcome of related criminal prosecution.

In the instant case the Grievant was not required to testify in either proceeding, though he chose to testify before the Examiner. There is no evidence that the decision of either the District School Board or the Examiner was based solely or even primarily upon the Grievant's refusal to testify at the Board hearing. 10/ As the Examiner noted, the School Board relied upon the testimony of S, her parents and others in deciding to discharge the Grievant, and not merely on the Grievant's refusal to testify.

We reject the Association's contention that the instant case is factually distinguishable from those federal precedents. The Association argues that because the Grievant and S are the only two persons with knowledge of the alleged statements, the Grievant's need and right to remain silent meant that he had to forego his only defense and not just his most effective defense. The Association cites no cases in support of this line of argument, and we are not persuaded that the present case is factually distinguishable from the above-noted decisions of the Federal Courts of Appeal. All of the Association's arguments on this point are further weakened by the fact that the Grievant did testify before the Examiner in a de novo hearing. Thus, before the Examiner, the Grievant cannot be said to have foregone his only defense.

The Commission also rejects the Association's argument that the Grievant must be reinstated or given a new hearing because requiring him to defend himself while criminal charges are pending violates the right to fair play implicit in the just cause provision. There are few published arbitration awards which specifically deal with the issue of an employe's need to testify in discipline proceedings while criminal charges are pending for the same conduct. Such an issue is usually presented and addressed in the context of constitutional cases such as those discussed above. There are, however, many arbitration awards dealing with the more general question of an employer's right to discipline an employe while criminal charges are pending. These cases implicitly deal with the possible need to postpone discipline and subsequent arbitration proceedings pending the outcome of criminal proceedings. Most of these cases, including the majority of those cited by the Association, deal with employers who suspended or discharged employes solely because the employe had been arrested, indicted or charged for conduct that took place off the premises and during off-duty time. Usually the employer did not proceed with any independent investigation of the employe's conduct. Even in these cases, the arbitrators sometimes uphold the appropriateness of the employer's disciplinary action if it was shown that the criminal allegations have disqualified the employe from properly and efficiently rendering service to the employer.

9/ In Hoover v. Knight the Court discusses some possible exceptions to its holding such as situations in which the purpose of the civil action is merely to obtain evidence for a criminal proceeding, or if the government has not advised the employe of intended criminal charges, or if the employe has no counsel.

10/ In its brief the Association refers to a statement made by the District's counsel in questioning an Association witness at the complaint hearing. The District's counsel asks: "But when the Board conducts a hearing to make a determination of all the facts, isn't the fact that the person charged refuses to testify going to be construed as some type of admission on the part of the Board?" (T.43). The Association argues that this statement suggests that the Board may have been instructed to draw an adverse inference from the Grievant's refusal to testify. Without addressing the legal issue of whether an adverse inference can be drawn in a civil proceeding, the Commission finds this argument too attenuated and speculative to support the conclusion that the Board acted impermissibly.

In addition, a review of arbitral precedent does not establish that a just cause provision uniformly requires that disciplinary actions be postponed pending the conclusion of the criminal proceedings. Several arbitrators have specifically held that arbitrators can hear matters which overlap with criminal proceedings. 11/ There are, in fact, several arbitration awards that conclude that an indefinite suspension pending the outcome of criminal proceedings is itself unfair, and that an Employer has an obligation to investigate and take action. 12/ Thus, we do not conclude that arbitral precedent requires a rehearing. Rather, these cases support the view that a factual analysis must be made on a case-by-case basis to determine whether discipline should be imposed pending the outcome of pending criminal charges.

There may be circumstances in which disciplinary action or hearings should appropriately be postponed because of concerns with constitutional issues or contractual fair play. There are several factors in this case, however, which cut against the Association's position that reinstatement or at least a new hearing is now necessary because the District did not indefinitely suspend the Grievant pending the outcome of the criminal charges. Most important is the fact that the District did not act only in response to criminal charges for conduct unrelated to work performance. Rather it acted in response to a direct parental complaint to it about actions of the Grievant toward one of his students. Because of the nature of the complaint, the District clearly had a legitimate interest in taking appropriate responsive actions consistent with the results of its investigation.

It was also not an error in these circumstances for the Examiner to hear the complaint when he did. The record does not show that the Association ever requested a postponement of the complaint hearing. At the hearing before the Examiner, the Association stated on the record that the felony charges against the Grievant were initially reduced to a misdeamonor and that those charges would be dismissed at a scheduled time in the future. Thus, it is unlikely that the complaint proceedings significantly interfered with the Grievant's criminal defense.

Fairness of Prior Hearing

In its brief before the Examiner, the Association alleged that the March 24th hearing before the School Board denied the Grievant due process for a number of reasons, such as its timing and the role played by the District's attorney, and thus tainted the subsequent complaint hearing as well. The Examiner concluded that the procedure utilized by the Board at the March hearing did not deny the Grievant due process. In its petition for review the Association does not repeat its allegation that the Board hearing was a denial of due process because of the role played by the District's counsel. In its supporting reply brief to the Commission, however, the Association again remarks on the fundamental unfairness of the Board hearing. The Association's argument primarily focuses on the issue of concurrent criminal proceedings which has been addressed above; it does not make any additional arguments about the role played by the District's attorney and we find no basis for reversing the Examiner regarding any of those aspects of the case. The Association does argue that the issue of the procedural unfairness of the Board hearing has been re-introduced because the District's counsel refered to testimony from the Board hearing at the complaint hearing and in his written arguments to the Commission.

The Commission notes that the transcript from the Board hearing was submitted as a Joint Exhibit at the complaint hearing and is therefore validly part of the record. Nevertheless, we agree with the Association that the District's brief does contain several inappropriate comments. Several students and a parent testified at the Board hearing but did not testify at the complaint hearing.

11/ Continental Paper Co, 16 LA 727 (Lewis 1951); Plough, Inc., 54 LA 541 (Autrey, 1970).

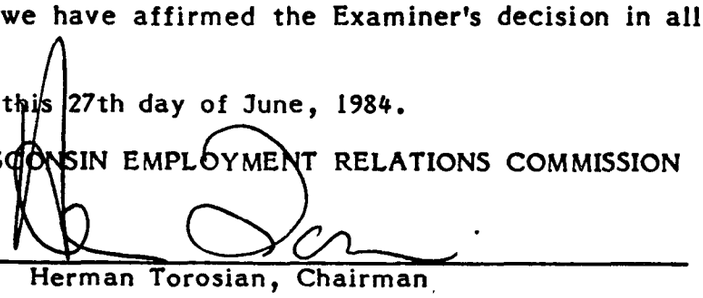
12/ Brown and Williamson Tobacco, 62 LA 1211 (Davis, 1974); Plough, Inc., 54 LA 541 (Autrey, 1970); and see discussion in Michigan Power Co., 68 LA 183 (Rayl, 1977).

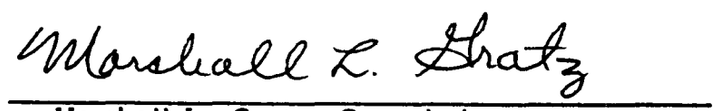
Their testimony went to several other allegations against the Grievant. After the Board hearing, a motion was made and carried that evidence of all other allegations against the Grievant not be considered. Thus, the Grievant was suspended soley for the allegation relating to S, and we have disregarded District's counsel references to those other allegations. In addition, District counsel's references on page 14 of its brief to several factors concerning the Grievant's criminal prosecution which are not matters of fact established in the record before us have also been disregarded.

For the foregoing reasons, we have affirmed the Examiner's decision in all respects.

Dated at Madison, Wisconsin this 27th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman


Marshall L. Gratz, Commissioner