

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 UNITED LAKELAND EDUCATORS :
 :
 and : Case 26
 : No. 42220
 : MA-5615
 ARBOR VITAE-WOODRUFF JOINT :
 SCHOOL DISTRICT #1 :
 :

Appearances:

Mr. Gene Degner, Executive Director, WEAC UniServ Council #18,
 P.O. Box 1400, Rhinelander, Wisconsin 54501, on behalf of the
 Association.
Mr. Ronald J. Rutlin, Mulcahy & Wherry, S.C., Attorneys at Law,
 P.O. Box 1004, Wausau, Wisconsin 54401-1004, appearing on behalf of
 the District.

ARBITRATION AWARD

The United Lakeland Educators, hereafter the Association, and the Arbor Vitae-Woodruff Joint School District #1, hereafter the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the District concurred, that the Wisconsin Employment Relations Commission appoint a staff member to hear and decide a dispute concerning the meaning and application of the terms of the agreement relating to discipline. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Woodruff, Wisconsin, on May 25, 1989; a stenographic transcript was prepared by June 16, 1989. The parties submitted written arguments by July 17, 1989, and waived the submission of reply briefs.

ISSUE

Did the Employer violate Article XIII of the collective bargaining agreement in its issuance of a letter of reprimand to the Grievant on February 16, 1989? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XIII - DISCIPLINE PROCEDURE

- A. Discharge shall be for cause.
- B. Suspension or reduction in rank shall be for reasons which relate to the orderly, efficient or safe operation of the school in accordance with procedures set forth below.
- C. Discipline shall be equivalent to punishment of the teacher and may include any directives by the administration which are the result of the acts of the teacher and not in accord with the orderly, efficient or safe operation of the school. Disciplinary matter shall be subject to the procedures as set forth below.

. . .

Procedural Prerequisites:

1. The Board, or its agents, if possible, will give the teacher written forewarning or foreknowledge of the possible or probable consequences of the teacher's actions.
2. The Board's reasons are related to the orderly, efficient or safe operation of the school.
3. The Board's investigation shall be conducted fairly and objectively.
4. The Board shall apply rules and penalties evenhandedly and without discrimination to all other teachers.
5. The degree of discipline shall be equal to the activity of the teacher which the employer feels has an affect on the orderly, efficient or safe operation of the school.

BACKGROUND

The Grievant, Elmer Eichstaedt, is a teacher with 13 years service in the District. This grievance concerns a letter of reprimand the District issued based on the Grievant's alleged conduct upon his receipt of a preliminary notice of non-renewal on February 16, 1989.

On December 23, 1988, the Grievant met with School Principal Nancy Penzkover, District Administrator Mary Holmquist, United Lakeland Educators (ULE) Director Gene Degner and ULE Representative Bruce Oxley to discuss a less than favorable evaluation which he had received. In reference to this written evaluation, the Grievant asked Penzkover, "Are you proud of yourself, Nancy?". Penzkover thereupon issued an oral reprimand to Eichstaedt, stating that "unprofessional behavior and comments of this nature were unacceptable".

On February 16, 1989, at or about 7:20 a.m., Holmquist delivered to Eichstaedt a notice of intent to non-renew his contract for the 1989-1990 school year. Eichstaedt, who had been aware of the likelihood that the District would take this action, did not appear angry or upset upon receipt of this communication.

Eichstaedt, ULE Director Gene Degner and Principal Nancy Penzkover were scheduled to begin a previously-scheduled evaluation conference of Eichataedt, at 7:30, in the principal's office.

What happened next is in dispute. The District contends that, sometime between receipt of his notice at 7:20 and the 7:30 meeting, ULE Representative Bruce Oxley entered the office area, at which time Eichstaedt, in a loud and boisterous voice and with visible anger, stated, "Well, I got it! I received my preliminary nonrenewal! Bruce, I received my preliminary nonrenewal!". Penzkover testified she clearly heard these comments despite being separated by a glass partition from the area in which Eichstaedt and Oxley were located, thus indicating that they were sufficiently loud and boisterous to disrupt the office secretary and embarrass several students who were present. Penzkover further testified that she observed Eichstaedt making similar comments to another teacher in the hallway, at which time she asked him to come into her office to discuss this matter. At that time, after determining that neither Eichstaedt or Degner offered an explanation for this conduct, Penzkover informed Eichstaedt she would be issuing a written reprimand.

The Association rejects this narrative, contending instead that the comments came after the 7:30 meeting, were made in a normal conversational tone in an adjoining hallway, and neither disrupted staff nor embarrassed students.

Eichstaedt grieved this matter on February 28, 1989, alleging it had been issued in violation of the disciplinary provisions of the collective bargaining agreement. In his Step 2 meeting with Administrator Marty Holmquist, Eichstaedt did not deny making the alleged statements, but contended they were protected as free speech. Holmquist denied the grievance, as did the Board of Education.

POSITION OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The Board failed to comply with its contractual obligation to provide "written forewarning or foreknowledge of the possible or probable consequences" for the acts alleged. Since the District gave no indication that the grievant was supposed to keep secret the fact of the preliminary non-renewal notice, the grievant must have had the right to make this fact known. There is just no way the grievant could have possibly known that this act of informing friends and colleagues of his preliminary non-renewal was wrong or against district policy. The District cannot get away with just calling the grievant's behavior "unprofessional".

The District failed to comply with the contractual requirement that its reasons for discipline be related to the "orderly, efficient or safe operation" of the school. Telling friends and colleagues about a preliminary non-renewal doesn't meet that definition.

Inasmuch as there was no investigation of this matter at all, the District failed to comply with its contractual requirement to conduct investigations fairly and objectively.

The District failed to comply with the contractual requirement that the degree of discipline shall be equal to the offense. The grievant's statement that he had been given a preliminary notice of non-renewal disrupted no activities, insulted no one, harmed no one, belittled no one, and apparently disturbed only one person -- the principal who issued the letter of reprimand. Since the only person adversely affected by the grievant's action was the principal, the appropriate discipline would have been for the principal to state to the grievant that she disapproved of his making the non-renewal known in her presence.

Also, there are such internal contradictions and inconsistencies in the testimony by the principal so as to indicate bias on her part against the grievant. Specifically she declared that an event which she did not witness (the delivery to the grievant of his preliminary notice) took place at a specific time; and she testified about the grievant causing a disruption, despite the lack of evidence to that effect.

Telling friends and colleagues that you have received a notice of intent to non-renew does not harm the orderly, efficient or safe operations of the District. The grievance should be sustained.

In support of its position that the grievance should be denied, the District asserts and avers as follows:

Because the grievant has not alleged that the District failed to comply with the procedural prerequisites for discipline pursuant to the contract, the grievant's sole defense is that the alleged offense -- the making of loud and boisterous statements in the office area in the presence of students and staff -- did not occur. In any event, however, the District did clearly comply with its contractual obligations. Specifically, the explicit District directive of December 23, 1988 did provide notice and warning that the behavior the grievant exhibited on February 16, 1989 constituted unprofessional behavior and would not be tolerated; the District did conduct a fair and objective investigation of the incident, and there is no evidence, or even an allegation, about arbitrary or discriminatory application of District rules and penalties for unprofessional conduct. The only issue, therefore, is whether or not the grievant did behave in the manner alleged; if he did, the written reprimand was necessarily

consistent with the provisions of the contract.

In considering whether the alleged event occurred, the applicable burden of proof is a preponderance of the evidence. The District has met this burden, as the evidence unequivocally demonstrates that the grievant engaged in unprofessional conduct contrary to explicit directives and the orderly, efficient and safe operation of the school.

Testimony by Principal Nancy Penzkover clearly establishes that the grievant, through his loud and boisterous behavior, disrupted the entire office area and set a poor example for students. Penzkover, who personally heard and saw the incident, has no reason to implicate the grievant in unfounded charges, and there is no reason to doubt her veracity.

There is, however, reason to doubt the testimony of the grievant and his witness, as self-serving, biased and lacking in credibility. It is an established principle that an employee's self-interest is a significant factor in determining questions of credibility; here, while Penzkover has no reason to state a falsehood, the grievant has a very obvious reason to deny a truth. Moreover, there are substantial internal inconsistencies in the grievant's story about when and where the events in question occurred. Likewise, there is evident bias and significant inconsistencies in the testimony of ULE representative Oxley. It is also noteworthy that it was not until the arbitration hearing that the grievant adopted as his defense a denial that the event occurred; previously, he had not denied that the event occurred, but simply contended his statements constituted "freedom of speech".

It is well-established that, absent extraordinary circumstances not here present, an arbitrator should not impose his discretion for that vested in the employer to determine the proper penalty to be imposed for misconduct.

That the District put the grievant on specific notice in December, 1988 that unprofessional conduct of the type he exhibited in February, 1989 would not be tolerated, provides further justification for the written reprimand.

Because the record evidence unequivocally establishes that the grievant's unprofessional conduct on February 16, 1989 adversely affected the orderly and efficient operations of the school, and because the grievant was forewarned that such unprofessional conduct would not be tolerated, this grievance should be dismissed.

DISCUSSION

There is clearly a material dispute about what really happened on the morning of February 16, 1989. The District alleges that, at or about 7:30 a.m., the Grievant, in a loud and boisterous voice, disrupted the school office setting by broadcasting the news of his preliminary non-renewal. The Association alleges that the quoted comments were uttered in only a normal voice, and not until about 8:00 a.m.

Clearly, someone's recollection is at variance with reality as it occurred. However, it is not necessary to resolve this question of credibility in order to decide this case.

For discipline to be upheld, it must not only be appropriate to the offense; moreover, the offense must be something which the employe was aware was such. The collective bargaining agreement herein makes this implicit premise explicit, providing that teachers will, if possible, be given "written forewarning or foreknowledge of the possible or probable consequences" of their actions. The District acknowledges this basic precept, in its contention that the Grievant "had been forewarned on December 23, 1988, that unprofessional conduct of the type he exhibited on February 16, 1989, would not be tolerated". Indeed, the District makes this point repeatedly, expressly resting the legitimacy of this discipline on the earlier oral reprimand by Penzkover.

I find, however, that the conduct in which the Grievant engaged on December 23, 1988 was materially distinct from that which he is alleged to have displayed on February 16, 1989. The episode in December was a closed meeting of the Grievant and his representatives with the administration; according to Penzkover's latter letter recapping this event, the offense was asking the principal, "are you proud of yourself, Nancy?", in reference to an unfavorable evaluation. As later explained by the principal, "I stated . . . that unprofessional behavior and comments of this nature were unacceptable." (emphasis added). As amplified in her arbitration testimony, it is clear that it was this comment -- an apparent personal challenge to her authority and

integrity -- that occasioned the oral reprimand:

Mr. Eichstaedt was sitting across from me. He stated during the meeting of reviewing the evaluation, he said, "Well, are you proud of yourself"; and he had said that to me; and I said, "Just a minute." I said, "I want to address that. I think that's inappropriate at this time, and my comments are made for improvement"; and so that was the first time I had talked to Mr. Eichstaedt about inappropriate behavior in the office area

Certainly, there is a kind of conduct so egregiously unprofessional that a prior warning would not be necessary for a teacher to be on notice that such activity would be contrary to the "orderly, efficient or safe operation of the school", and thus legitimate grounds for immediate discipline. For example, had the Grievant hurled obscenities or furniture, discipline would be appropriate. Here, however, there is no allegation that the Grievant said anything other than, "Well, I got it. The preliminary non-renewal. Bruce, I got a preliminary non-renewal.". Coming within a few minutes of the receipt by the Grievant of a preliminary notice indicating that his 13-year career with the District was likely coming to an involuntary end, such comments do not raise to the level of obvious and odious unprofessionalism.

In seeking to validate the discipline, the District contends that the Grievant caused disruptions to office personnel and embarrassment to students. Had the District produced at the arbitration hearing such persons to testify to that end, I might have found the discipline proper, notwithstanding questions about prior notice. However, in the absence of such affirmative testimony about the actual impact of the Grievant's actions, I cannot uphold this discipline.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance be sustained, and all references to the Letter of Reprimand of February 16, 1989 be expunged from the relevant file(s).

Dated at Madison, Wisconsin this ____ day of September, 1989.

By _____
Stuart Levitan, Arbitrator