

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 UNITED LAKELAND EDUCATORS :  
 :  
 and : Case 25  
 : No. 41930  
 : MA-5506  
 ARBOR VITAE-WOODRUFF JOINT :  
 SCHOOL DISTRICT #1 :  
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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

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 an impartial arbitrator to hear and decide a dispute concerning the application and interpretation of the terms of the agreement relating to discipline. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Woodruff, Wisconsin, on May 25, 1989. A stenographic transcript was prepared and delivered to the parties by June 16, 1989. The parties submitted written arguments by July 17, 1989, and waived reply briefs.

ISSUE

The parties stipulated to the issue as follows:

Did the Employer violate Article XIII 1/ of the collective bargaining agreement in its issuance of a one-day suspension to the Grievant?

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.
- D. Nonrenewal. After completing a two-year probationary period, no teacher shall be nonrenewed except for reasons which relate to the orderly, efficient or safe operation of the school and in accordance with the following procedures.

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1/ The transcript indicates that, at hearing, reference was made to Article VIII; the parties concur that the contract provision under review is Article XIII.

. . .

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 veteran (13 years) teacher with the District, assigned the past two years to the Middle/Junior High School. This grievance concerns a one-day suspension which the District imposed, based on events which allegedly occurred in Eichstaedt's social studies classroom on December 16, 1988.

The events of that day are in dispute. The parties agree only that, at some point during the class period, Eichstaedt invited Curriculum Director William Pollard into the room, were Eichstaedt introduced him as someone associated with a test given the previous day; that Eichstaedt had the students raise their hands to indicate the pass/fail ratio on said test; and that Eichstaedt led the class in an exercise reflective of the material on the test, relating to map-reading skills. Beyond that brief outline, the testimony of Eichstaedt and Pollard is in direct conflict -- Pollard asserts that Eichstaedt first asked for a show of hands of those who failed, and then, in an exercise on finding certain latitude and longitude placements, Eichstaedt focused on a particular student, embarrassing her until her face turned markedly red; Eichstaedt contends he asked for a showing of how many passed the test, and then addressed the exercise to the class as a whole, not any individual student.

Not in dispute, however, is the record of prior evaluations and discipline which Eichstaedt received directly related to his manner of dealing with individual students. 2/ That record shows a volume of written complaints (12 letters written on January 24 and January 25, 1988) from parents concerned and upset at Eichstaedt's teaching methods and style; a March 21, 1988 five-page, single-spaced letter to Eichstaedt from then School Principal James L. Hiltunen, outlining "several concerns" about Eichstaedt's teaching performance and setting forth "several directives which . . . must be implemented . . . to correct deficiencies . . . in your performance"; a May 13, 1988 "Letter of Severe Reprimand", in which Hiltunen held Eichstaedt to have breached the explicit directives of the March 21, 1988 communication, and warned Eichstaedt that further non-compliance could subject him to "further and perhaps more severe disciplinary action", including suspension without pay or dismissal; a June 10, 1988 letter in which Hiltunen commented that "some progress was made" in Eichstaedt's dealing with students, an area which he added "will continue to be monitored closely"; and School Principal Nancy Penzkover's report of a classroom observation she conducted on November 22, 1988, in which she wrote to Eichstaedt that her "greatest concern" was that he "negatively singled out students in the classroom".

Of particular interest and import are the following excerpts from the above-cited communications:

4. Dealing with Adolescents: Your classroom conduct has demonstrated a lack of awareness and

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2/ In the grievance, and at hearing, the Association did challenge both the content and process of this material. However, since no grievance was filed on these matters in a timely manner, this material stands as issued.

sensitivity to appropriate techniques in dealing with adolescent development and growth. You have belittled students in front of their peers, and have been insensitive to their individuality and needs.

Directives

In order to strengthen your ability to assist students in making a transition from lower elementary school to secondary education, you are directed to:

A. At all times deal with students individually and address individual needs in a nongroup setting.

(From the Hiltunen letter of March 21, 1988)

Specific problems occurred with your handling of students regarding the directives:

. . .

Your insensitivity to a student's individuality and needs was demonstrated when you asked for grades on a curriculum test from students orally with the entire group present.

. . .

Further failure to comply with such directives, allowing incidents of a nature similar to that described above to occur, or failure to meet other expectations of your position as social studies teacher at AV-W School may subject you to further and perhaps more severe disciplinary action, possibly including but not necessarily limited to suspension without pay, or dismissal.

(Letter of Severe Reprimand, May 13, 1988)

My greatest concern is that you negatively singled out students in the classroom . . . Students do become upset, at this age level, about being singled out and may react overtly. You need to adapt the way in which you address and treat students at once.

(Observation evaluation, November 22, 1988)

There is also little dispute about the events which followed Pollard's visit to Eichstaedt's classroom. After ruminating on the matter over the weekend, Pollard felt sufficiently concerned about what he perceived to have happened that he telephoned Principal Penzkover; she asked him to put his comments in writing, which he did on or about December 22, as follows:

Dear Ms. Penzkover:

On Friday, December 16, 1988, I met with you (Nancy Penzkover). After the meeting, as I went to Nona Berray's room, Elmer Eichstaedt stepped out into the hall and asked me to step into the room. He introduced me as the person who wrote the curriculum test. The students had taken the grade 6 Test 5, the curriculum test on latitude and longitude. Mr. Eichstaedt then asked all the students that failed the test to raise their hands. About eight students raised their hands. He explained that all the students could do the material the day before. He then told the students to take out their papers. Elmer then told the students to find 90 degrees north. He then stood over a student, a small blonde girl in the back seat of row two, and said things like, "you can do this", "put your finger on 90 degrees north". She turned very red and put her head down. He said, "don't be embarrassed, find 60 degrees W". He continued to point this out!

I left at that point.

On the afternoon of December 22, Penzkover called Eichstaedt in to discuss the Pollard letter. When Eichstaedt, after reading the letter, asked for time to reflect and collect his thoughts Penzkover recessed the meeting until the following morning. Also on that afternoon, Penzkover shared the letter with District Administrator Marty Holmquist, who then talked directly

with Pollard about the incident.

On the morning of the 23rd, Eichstaedt and his Association representative met with Penzkover and District Administrator Marty Holmquist to review the Pollard letter. Holmquist testified that Eichstaedt disagreed with Pollard's statement that he (Eichstaedt) had asked for a show of hands of those who had failed, saying he had asked for a show of hands of those who had passed, but that he otherwise did not expressly deny the rest of Pollard's accounting. Instead, Holmquist testified, Eichstaedt's response was a general and repeated statement that he could not recall or remember the incident. Penzkover confirmed, and Eichstaedt did not dispute, Holmquist's testimony as to the meeting of December 23.

On the afternoon of the 23rd, Holmquist issued the following Letter of Reprimand and Suspension without pay for Eichstaedt:

In the letter of expectation of March 21, 1988 you were notified that your classroom conduct demonstrated a lack of awareness and sensitivity to appropriate techniques in dealing with adolescent development and growth. It was noted that you have belittled students in front of their peers, and been insensitive to their individuality and needs. You were given several directives to clear up this problem, including 4.A, at all times deal with students individually and address individual pupils needs in a non-group setting.

On May 13, 1988 you were severely reprimanded in major part for failure to carry out this directive.

On June 10, 1988 some progress is noted toward this directive but the need for improvement is again noted.

In your November 22, 1988 evaluation Principal Penzkover noted that her greatest concern was that you negatively singled out students in the classroom. Under suggestions for improvement E Principal Penzkover directed that you need to be better aware of individual differences in the classroom.

Attached please find an account of an incident that occurred in your classroom on December 16, 1988 witnessed by Curriculum Director Pollard. You stated on December 22, 1988 that you cannot remember the incident except for thinking you asked for the people who passed. You were unable to otherwise recall the incident when asked on December 22, 1988. This morning you stated you did not recall making the statement to a student not to be embarrassed. I am accepting Dr. Pollard's account of the incident.

Embarrassment of a student should not occur in your classroom. You have been repeatedly directed for it not to occur. Again.

For you actions you are hereby suspended without pay for one day, Tuesday, January 3, 1989.

Further failure to comply with directives, allowing incidents of a nature similar to that described in Dr. Pollard's letter, or failure to meet other expectations of your position as social studies teacher at AV-W School may subject you to further and perhaps more severe disciplinary action, possibly including but not necessarily limited to additional suspension without pay, or dismissal.

Marty Holmquist /s/

Marty Holmquist  
District Administrator

On or about January 23, 1989, Eichstaedt and the Association grieved the one-day suspension. In addition to alleging violations of the contractual provisions about teacher evaluations and contending that the discipline did not relate to the orderly, efficient and safe operations of the District, the grievance expressly denied certain factual assertions made by Pollard, as follows:

The District accepted the word of William Pollard, Curriculum Director, in identifying the action of Mr. Eichstaedt on Friday, December 16, 1988, yet the

description by Mr. Pollard that he "stood over a student, a small blonde girl in the back seat of row two" and said things like, "you can do this"; however, for such recollection by Mr. Pollard, there is no small blonde girl in the back seat of row two. If the District Curriculum Coordinator cannot identify students any more accurately than that, the Curriculum Coordinator certainly cannot identify what was said in the room with any more accuracy. Such incident is not sufficient to suspend an employee without pay.

Subsequent to this grievance, the District undertook no further investigation as to the identity of the student whom Pollard said Eichstaedt embarrassed. According to Holmquist, the District was satisfied the event transpired as described by Pollard, and it did not wish to embarrass this student any further.

By agreement of the parties, this grievance was processed directly to the Board of Education, which, on February 13, 1989, voted to deny the grievance and uphold the one-day suspension.

#### POSITION OF THE PARTIES

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

The one-day suspension was based on allegations that the Grievant negatively singled out and embarrassed a particular, individual student. Yet not only is there no evidence that such embarrassment took place; there is no evidence that the student whom the complaining witness referred to (a "small blonde girl in the back of row two") even existed.

Moreover, circumstantial evidence suggests that the principal was seeking a way to substantiate her own bias that the Grievant had negatively singled out students. This discipline arose, in part, in context with a negative observation recorded by the principal on November 22, 1988, which report was apparently influenced because the Grievant was pre-selected as someone to receive an adverse evaluation.

The motives and credibility of the chief complaining witness, Dr. William Pollard, are also suspect. First, there is a major discrepancy between Pollard's arbitration testimony that he was concerned that the Grievant may have given the curriculum test without having waited the necessary two weeks after the lessons, and the fact that he never mentioned such concerns in his contemporaneous letter to the principal (contrary to his testimony, in which he stated -- falsely -- that he did make such mention). Also, Pollard's testimony that he was in the classroom to ten to 15 minutes is not supported by his recounting of events, a narrative which does not reflect a ten-to-15 minute time period.

The fatal flaw in the District's case is that it has alleged a specific offense against a specific individual, but it has never produced -- or even sought to produce -- the purported victim. The alleged offense is negatively singling out a student, not for a negative comment to the class at large. The District has been on notice since January 17, 1989, that the Grievant challenged a basic predicate to the discipline, namely the existence of a small blonde girl in the back of row two. Yet, to this day, the District has never made any attempt -- either through observation of the classroom, review of seating charts, or other acts -- to identify the student whom it alleges the Grievant victimized. And, since it has never identified the alleged victim, it has never ascertained whether or not she was indeed embarrassed; all we have is Pollard's testimony that, "I felt from my observation that she looked like she was very embarrassed". Such subjective, unsupported allegations are not sufficient to justify docking an employee a day's wages.

The contractual prerequisite for discipline is that the Board's reasons for imposing such be "related to the orderly, efficient or safe operations of the school". There is nothing in the record to indicate the alleged remarks of the Grievant had any adverse effect on such conditions.

The contract also requires that the Board's investigation "shall be conducted fairly and objectively". Here, however, the Board did not investigate at all, explaining its failure to establish the small blonde girl's identity by saying it did not want to embarrass the student further.

The contract further requires that discipline "shall be equal to the activity" of the teacher which the Employer feels impacts on the "orderly, efficient or safe operation" of the school. Simply asking students to find certain latitudes or longitudes does not have an adverse affect on such conditions.

Due to suspect motives on the part of the principal, conflicting testimony by the curriculum director, lack of an identifiable victim, failure by the District to comply with the contractual requirement implying that the charges here should have been brought by an individual student or parent rather than a third-party observer, conflicting testimony concerning the length of time the curriculum director was present in the Grievant's classroom, and the District's failure to establish how the alleged remarks affected the safe, orderly and efficient operation of the District, this grievance should be sustained.

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

There is neither dispute no allegation by the Grievant about the District's compliance with the contractual procedural prerequisites for discipline. The Hiltunen letter of March 21, 1988 and the severe reprimand of May 12, 1988 gave the Grievant full forewarning that his continued failure to comply with the directive about dealing with students individually would result in heightened discipline. And the opportunity the District gave the Grievant to respond to the Pollard letter -- the meeting with Administrator Holmquist at which the Grievant neither explained nor denied the allegations, merely stating he could not recall specifics of the incident -- shows a full and fair investigation.

Thus, the only issue in dispute is whether the Grievant did engage in the conduct as reported by Pollard. Under the accepted burden of proof of a preponderance of the evidence, the record clearly establishes he did.

The detailed and precise testimony by Pollard -- whose credibility is not cast into doubt by any evidence in the record -- unequivocally demonstrates that, contrary to an explicit district directive, the Grievant humiliated and singled out students in the classroom. Moreover, as shown by the parental complaints of January 1988, the Hiltunen letter that March, the severe reprimand that May, and the Penzkover evaluation in November, the conduct alleged is consistent with the Grievant's behavior in the recent past, and reflects a continuation of his inappropriate acts.

The Grievant has not denied that, if he indeed acted in the manner alleged, the one-day suspension was appropriate. His entire defense then is to deny that he ever embarrassed or singled out any students during the incident. His testimony is self-serving, biased, simply not credible and must be rejected.

As early as December 22, 1988, the Grievant was aware of the precise allegations being raised by Pollard; yet, at his pre-discipline meeting with Holmquist and Penzkover, the Grievant never challenged

Pollard's statements or his identification of "a small blonde girl in the back seat of row two", by merely -- and continually -- replied that he could neither remember nor recall any such incident. Given that he could not recall any details of the incident one week after its occurrence, the Grievant's detailed and specific testimony of denial at hearing lacks any credibility.

It is well understood that an arbitrator should not substitute his discretion for that vested in the Employer in determining the proper penalty to be assessed for employe misconduct. This is especially true when -- as here -- the employe was on full notice of the definition and result of further unsatisfactory conduct.

The evident unequivocally demonstrates that the Grievant, contrary to an explicit directive, humiliated students and singled one student out to the point of acute embarrassment. The District investigated the allegation fully and fairly before imposing discipline. The Grievant's denials are simply not credible. The penalty imposed was consistent with discipline the Grievant had previously received for similar conduct.

Accordingly, the grievance should be denied.

#### DISCUSSION

This contract, evidently based on the "Questions for Determining Just Cause in Employe Discipline" as codified by the distinguished Arbitrator Carroll R. Daugherty, provides explicit procedural prerequisites for the issuance of discipline. My task is to review the facts of this case, as measured against these contractual provisions.

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 action.

The District fully met this requirement, especially through the letter of March 21, 1988, the severe reprimand of May 13, 1988, and the evaluation of November 22, 1988. The Grievant was, or reasonably should have been, well aware of the likelihood of further discipline for failure to meet the District's stated expectations.

2. The Board's reasons are related to the orderly, efficient or safe operations of the school.

Again, I find that the District has met this standard. Parental complaints about inappropriate teaching methods are serious matters, made even more so when they constitute an apparent consensus (as reflected by the organized letter-writing campaign of January 23 and January 24, 1988). When such complaints are corroborated by first-hand observations by school administrative personnel they assume still greater importance. Given the fragile personal and social dynamics of the middle school setting, a rule requiring a teacher to deal with young students in a sensitive and aware manner is legitimately related to the orderly and efficient operation of the enterprise.

3. The Board's investigation shall be conducted fairly and objectively.

Because of the critical importance of this aspect to the outcome of this case, discussion is reserved until after review of the remaining items.

4. The Board shall apply rules and penalties evenhandedly and without discrimination to all other teachers.

This concept has not been implicated in this proceeding.

5. The degree of discipline shall be equal to the activity of the teacher which the Employer feels has an effect on the orderly, efficient or safe operation of the school.

I have already stated my conclusion that the rule which the Grievant is alleged to have violated was reasonably related to the orderly and efficient operation of school. The remaining issue, therefore, is whether the level of discipline was appropriate for this particular offense. I find that it was. The Grievant had, in just the nine months prior to the occurrence at issue, received an explicit directive, a letter of severe reprimand, and a critical observation evaluation -- all dealing with the precise issue of his manner of dealing with adolescents. Given this background, particularly discipline, a

one-day suspension for further failure to follow the warnings and directives is legitimate.

I now return, then, to what I find to be the most troubling aspect of this case -- the contractual requirement that the District's investigation "shall be conducted fairly and objectively".

As noted above, there is a pronounced correlation between the provisions of the collective bargaining agreement and the concepts codified by Arbitrator Daugherty. For that reason, it may be helpful to consider the aspect of the District's investigation in the manner set forth by Daugherty.

Daugherty divided his analysis of the Employer's investigation into two time periods -- before the discipline, and after the grievance. Given the particular facts here at issue, I find this analysis particularly helpful.

The first question is whether the Employer, before issuing the discipline, made an effort to discover whether the employe did in fact engage in the proscribed behavior. The District has met this test. Prior to issuing the one-day suspension, Administrator Holmquist met with the Grievant and his ULE representative, for the express purpose of discussing the allegation. The Grievant was even given a full day's advance notice of the meeting, to allow him time to prepare. Yet at that meeting, the Grievant did not expressly deny the incident, but instead merely stated that he could not recall the events alleged. Faced with a detailed account from the Curriculum Director both written and oral, and a vague demurrer by the Grievant, Holmquist was justified in making no further investigation at that time.

Daugherty's further analysis concerns the investigation taken during the pre-arbitration grievance process, specifically whether the adjudicator, through full and fair inquiry, obtained substantial proof of the employe's guilt. Here the record is much more troubling.

On January 17, 1989, Eichstaedt filed his grievance with Holmquist. In his statement, he specifically denied that there was any small blonde girl in the back seat of row two, as had been stated by Pollard in his description of the incident. Eichstaedt added, "if the District Curriculum Coordinator cannot identify students any more accurately than that, the Curriculum Coordinator certainly cannot identify what was said in the room with any more accuracy. Such incident is not sufficient to suspend an employe without pay."

Thus, as of January 17 -- 25 days after becoming aware of the allegation, two weeks after serving his day's suspension -- the Grievant explicitly denied a central element of the alleged offense.

By mutual agreement, the grievance was processed directly to Step 3, the Board of Education, which denied the grievance on February 13, 1989. The record does not indicate what investigation the Board undertook in the 25 days it had to review this matter. However, the record does affirmatively establish that the Board deliberately declined to conduct any investigation which involved interviews with the students involved.



Holmquist explained this decision at hearing as follows:

The only other investigation that we might have conducted would have been speaking with the students directly. I felt that they had been embarrassed enough and to bring attention to this would also not be necessarily in the best interest of improving Mr. Eichstaedt's performance to continue to dwell on it with students.

It is understandable that the District would not want to put young students in the uncomfortable position of informing on their teacher, either informally in an investigatory interview or in the formal setting of an arbitration hearing. Yet if such a legitimate concern wrought an unacceptable denial of due process upon the Grievant, this discipline should not stand.

It is axiomatic that a defendant has the right to confront his accusers, to challenge their testimony through the crucible of cross-examination. Here, however, it is not the putative small blonde girl who has accused the Grievant; it is Dr. Pollard. And the Grievant was afforded the ability to challenge Pollard's account, as early as the pre-discipline meeting with Holmquist, and as late as the hearing before the arbitrator. Moreover, the ultimate question is not whether this particular student felt embarrassment; rather, it is whether the Grievant negatively singled her out. Thus, the objective observation by Pollard is as valid as the subjective testimony of the student in question.

In assessing the conflicting testimony of the Grievant and his chief accuser, the record shows a disparity in their respective abilities to recall the events of December 16, 1988. A week after the alleged occurrence, the Grievant had no clear recollection of events; three weeks later, he issued a blanket denial, which, by the time of the arbitration hearing five months later, had grown into a detailed account of his movements and statements at the time in question. The accuser's recounting, in contrast, has remained constant, from his initial telephone call informing the principal of the event immediately thereafter, through his written account a few days later, and on to the arbitration hearing. And, while Pollard could well have been somewhat discomfited at being introduced to the class in question as someone associated with the highly unpopular curriculum test, I do not do not accept that such discomfort would induce him to exact revenge through a campaign of falsehood and perjury.

Undoubtedly, it would have been better for the District to have obtained independent corroboration of Pollard's account. Had this case involved an alleged offense reflecting moral turpitude, the District's failure to investigate further would likely have been a fatal flaw. However, given the nature of the offense, the conflicting testimony convinces me that the District has met its burden of proof.

Accordingly, it is my

AWARD

That the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 12th day of September, 1989.

By \_\_\_\_\_  
Stuart Levitan, Arbitrator