BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TOMAH AREA SCHOOL NON-TEACHING EMPLOYEES, LOCAL 1947-B, WCCME, AFSCME, AFL-CIO	Case 45 No. 41819 MA-5474
and	Case 47 No. 42274 MA-5640
TOMAH AREA SCHOOL DISTRICT	

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Tomah Area School Non-Teaching Employees, Local 1947-B, WCCME, AFSCME, AFL-CIO
Lathrop & Clark, S.C., Attorneys at Law, by Ms. Jill Weber Dean, on behalf of the Tomah Area School District.

ARBITRATION AWARD

Tomah Area School Non-Teaching Employees, Local 1947-B, WCCME, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and the Tomah Area School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The District subsequently concurred in the requests and the undersigned was appointed to arbitrate in the disputes. A hearing was held before the undersigned on August 9 and 10, 1989 in Tomah, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matters, with the briefing schedule ending November 28, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES:

There are two grievances involved, the Grievant's suspension and his subsequent termination were both grieved. The parties were unable to stipulate to a statement of the issues.

With regard to the suspension grievance, the Union states the issue as being:

> Did the Employer violate the collective bargaining agreement by suspending the grievant for three (3) days, without pay, from November 2, 1988 through November 4, 1988? If so, what is the appropriate remedy?

The District states the issues as follows:

1. Is the grievance procedurally arbitrable?

2. If so, did the District violate Article 14 of the collective bargaining agreement when it suspended the grievant without pay from 2 November 1988 through 4 November 1988?

3. If so, what is the appropriate remedy?

1/ The parties agreed to waive the time limit regarding the issuance of an award.

With regard to the termination grievance the Union states the issues as being:

> Did the Employer violate the collective bargaining agreement by terminating the grievant's employment effective March 28, 1989? If so, what is the appropriate remedy?

The District states the issues as follows:

1. Is the grievance procedurally arbitrable?

2. If so, did the District violate Article 14 of the collective bargaining agreement when it discharged the grievant effective 28 March 1989?

3. If so, what is the appropriate remedy?

The undersigned concludes that the District's statement of the issues more completely states the issues that, having been raised by the parties, are to be decided.

CONTRACT PROVISIONS:

The following provisions of the parties' 1986-1989 Agreement are cited:

ARTICLE 4 - GRIEVANCE AND ARBITRATION

Section 1. All matter pertaining to the interpretation, application and effect of this Agreement shall be subject to the grievance and arbitration procedure hereinafter set forth.

Section 2. The provisions of this Article are available to the Union and all employes covered by this Agreement.

Section 3. Steps in Procedure.

Step 1: In the event of a dispute, complaint or grievance arising under this Agreement, the employe(s) shall bring it to the attention of the Union Grievance Committee for investigation. If after investigation, it is determined that a justifiable complaint or grievance exists, the Union representatives shall present the complaint or grievance to the immediate Supervisor within thirty (30) calendar days after knowledge of the event giving rise to the grievance. The grieving employe(s) will be allowed to be present at this meeting. The immediate Supervisor shall within five (5) work days give response to the complaint or grievance.

Step 2: If the response of the immediate Supervisor is unsatisfactory, the complaint or grievance shall be reduced to writing and presented to the Business Manager within fifteen (15) days of receipt of the immediate Supervisors response. The Business Manager shall meet with the Union Representative and grievant(s) within five (5) work days of such notice. The Business Manager or his/her representative shall respond in writing within five (5) work days of such meeting of his/her disposition of the matter.

Step 3: If the response of the Business Manager or his/her representative is unsatisfactory, the matter may be appealed to arbitration.

Step 4 - Arbitration: Within ten (10) work days of the receipt of response in Step 3, the party appealing the issue(s) to arbitration shall give written notice of its appeal to the other party. The Wisconsin Employment Relations Commission shall be sent a copy of such notice, along with a request that the Commission appoint a member of its staff as an arbitrator to hear the case. The arbitrator shall hold a hearing on the complaint or grievance with both parties afforded an opportunity to present evidence on the matter. Within thirty (30) work days of the conclusion of the hearing, the arbitrator shall render a decision, which shall be final and binding upon both parties. The arbitrator shall not have authority to alter, modify, or add to the terms and provisions of this Agreement.

Section 4. The parties shall share the expense, if any, of the arbitration; but the parties shall bear their own expenses in presenting their case.

Section 5. Time limits as set forth in this Article may be extended if mutually agreed upon.

Section 6. The Union District Representative or his/her designate may participate in any step of the grievance and arbitration procedure.

. . .

ARTICLE 6 - LEAVE OF ABSENCE

Section 1. Applications for leave of absence for personal reasons shall be made to the Employer in writing and reviewed by the Business Manager and the steward; the granting of any leave and the length of time for such leave shall be contingent upon the reasons for the request. The Business Manager may grant leaves of absence of fourteen (14) calendar days or less. Leaves of absence for more than fourteen (14) calendar days shall be discussed by the Business Manager with the Union. Any such request shall then be presented to the School Board or its duly authorized representatives with the recommendation. The action taken by the School Board or its representative with respect to the request shall be promptly conveyed to the Union. All leaves of absence shall be without pay. Persons hired to replace other employees will be "temporary". Temporary employes shall not be hired for more than ninety (90) consecutive days in one year.

. . .

ARTICLE 7 - UNION COOPERATION

Section 1. The Union agrees to uphold the rules and regulations of the Employer in regard to punctual and steady attendance, proper and sufficient notification in case of necessary absence and conduct on the job, and other reasonable rules and regulations established by the Employer as posted.

Section 2. The Union agrees to cooperate with the Employer in maintaining and improving safe working conditions and practices, in improving the cleanliness and good housekeeping in the school facilities and in caring for equipment and machinery.

Section 3. The Union agrees to cooperate in correcting inefficiencies of members which might otherwise necessitate discharge.

. . .

ARTICLE 8 - SENIORITY

. . .

Section 2. Any regular employe's seniority is nullified if he is laid off and not re-employed within one (1) year from day of layoff or if he quits or is discharged for good cause.

. . .

ARTICLE 11 - MEDICAL EXAMINATION

The Employer reserves the right to require any employe to submit to a complete physical and mental examination at the Employer's expense, if, in the judgement of the Employer, such examination is warranted. The Employer may lay off any employe found by such examination to be unfit for continued employment until such time as the employe can establish his ability to work.

The Employer shall have the right to adjust hours, wages, and other working conditions in case of any employe who, because of physical or mental disability, is unable to accomplish a day's work. Any adjustments made, however, shall be subject to the approval of the Union.

An employe may select his own medical examiner or physician at Employer's expense; and if the Employer feels there is a question concerning the report of such examiner or physician, the Employer may have the employe re-examined by a panel of physicians selected by the Employer at the Employer's expense.

. . .

ARTICLE 14 - DISCIPLINE AND DISCHARGE

The Employer shall not discipline or discharge any non-probationary employe covered by this Agreement without good cause. In the event a disciplined or discharged employe feels that the action taken against him was not for good cause, he may submit the question to the grievance and arbitration procedure contained in this Agreement within five (5) working days after the disciplinary action has taken place. If the matter cannot be resolved in the grievance procedure and it becomes necessary to arbitrate the matter, the Arbitrator shall have all powers necessary to remedy any such action found to be without good cause consistent with the terms and provisions of this agreement.

. . .

ARTICLE 16 - MANAGEMENT

Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or management, including but not limited to, the right to manage the operations of the Employer and direct the working forces, the right to hire new employes, to assign work, to determine the number and location of its operations, the services required therein, and the quality of such service including the means and processes of service and the materials used therein. This provision shall not be used to discriminate against any employe.

. . .

ARTICLE 18 - EMPLOYE DEFINITION, WORK DAY, WORK WEEK AND PREMIUMS

. . .

Section 2. The work day shall consist of eight (8) hours and the work week shall consist of forty (40) hours for full-time employes. This shall not be construed as establishing either a minimum or a maximum work day or work week. During the term of this agreement, reductions in hours shall not occur without a thirty (30) day notice to the employe, and employes with the greatest amount of seniority may exercise the right to displace employes with less seniority in the job category who have a greater number of scheduled hours, if qualified to do the work. For purposes of this section, job categories shall be defined as in Article 8, Section 1.

. . .

BACKGROUND

The District maintains and operates nine schools. The Grievant began his employment with the District approximately thirteen years ago, initially being employed as a groundskeeper under the CETA program. After approximately one year he became a regular full-time employe of the District doing custodial and maintenance work during the school year and grounds work during the summer. The Grievant eventually became a full-time custodian, although during the 1982-83 and 1983-84 school years he worked in a job that included custodial duties, food delivery duties and garbage pickup. The Grievant subsequently took a custodial position at the Senior High School, working the evening shift starting at 3:00 or 3:30 p.m.

A custodian's immediate supervisor is the principal of the school in which the custodian is working, with the District Business Manager being responsible for the overall supervision of the non-certified staff in the District.

On January 13, 1987 the Grievant was given a written notice from the Business Manager, Robert Fasbender, pointing out a number of areas he found deficient after inspecting a portion of the area for which the Grievant was responsible: womens' restroom - stools and mirrors not cleaned, mens' rest-room - stools not cleaned and urinals need scouring, sweeping of floors and the cleaning of blackboards and trays. A meeting was held with the Grievant regarding those problem areas. On January 29, 1987 the Grievant received a memo from the High School Principal, Norm Fjelstad, regarding problems with odors and stains in the urinals on the second floor with suggestions on how to remedy the problems.

During the summer of 1987 the Grievant received three written notices from Fjelstad regarding his failure to properly clean certain areas. On June 18, 1987 he was given a written notice regarding the failure to properly clean the univents and ceiling and wall vents on the second floor and directing him to clean them properly. On July 18, 1987, the Grievant received a written notice for failing to satisfactorily clean cupboards in Room 219. On July 30, 1987 he was given a written notice regarding a failure to reclean the univents as he had been directed previously and informing him that if he failed to comply with the directive to reclean them by August 6th, or if there was any future sloppy work, it would result in his being suspended without pay.

On September 11, 1987, the Grievant received an injury to his right arm when a door blew shut on his arm while at work. The Grievant was off work for approximately 90 days on a leave of absence due to the injury to his arm. The diagnosis on the injury was that a bone spur on the elbow had broken off and the Grievant would eventually need surgery on the arm; however, the Grievant chose to put off the surgery for the time being and returned to work in December of 1987. In October of 1987 the Grievant received his annual evaluation which noted as a "major weak point" his "occasional 'sloppy' work", but also noted as a "major strong point" his "willingness to cooperate."

In January of 1988, in anticipation of his position being reduced to six hours, the Grievant posted into a custodian position at the Junior High School where the incumbent, Velma DalSantos, had retired. The Grievant's hours were 3:00 p.m. - 11:30 p.m., Monday through Friday.

In March of 1988, the principal at the Junior High, Tom Hill, inspected the areas the Grievant was responsible for cleaning. On March 15, 1988, Hill gave the Grievant a written notice of deficiencies he found - drinking fountains, sinks, and toilets not cleaned adequately and the main hallway in the lower south wing had dust and debris. The notice ended with a warning that Hill would recommend a suspension without pay if the Grievant's work continued to be unsatisfactory and that it would be subject to spot checks.

The Grievant did not work in the summer of 1988 due to the injury to his arm the prior fall. In June of 1988, while being fitted and examined for new glasses, the Grievant was diagnosed as having the beginning stages of cataracts. The Grievant had his injured arm operated on at the Mayo Clinic that summer. He returned to work after Labor Day in September of 1988 in his position at the Junior High without medical restrictions on his work duties. His area of responsibility was increased by an additional study hall and two classrooms, but decreased by eliminating eight bathrooms that had been located in classrooms on the first floor.

On September 13, 1988 Hill gave the Grievant a written notice of areas he felt were not cleaned satisfactorily. Hill and the assistant principal, Pam Knorr, the Grievant and the Union President, Helen Johnson, met on September 14th to discuss the notice and the Grievant offered a number of explanations for the problems and also indicated he was having some trouble seeing with regard to the toilets and urinals. The notice warned that there might be further disciplinary action coming. Hill recommended to the Business Manager, Fasbender, that the Grievant receive a one day suspension without pay and, after meeting with Hill, Knorr, the Grievant and Johnson to discuss the situation, Fasbender agreed. The Grievant was notified of the one day suspension by letter of September 16, 1988 from Fasbender. The letter stated:

> Dear Mr. Wilcox:
>
> On the morning of 13 September 1988, Principal Hill inspected a number of the areas you are responsible for cleaning, as outlined in your custodial job description and cleaning check list. He found many areas that had not been cleaned satisfactorily. He summarized numerous deficiencies in a memo to you, a copy of which is enclosed.
>
> Later on that same day, Principal Hill and Assistant Principal Knorr provided you with a copy of this memo. Together, you toured the areas that had been previously inspected. After reviewing the condition of these areas and discussing the contents of the memo with you, Principal Hill told you that he would bring

the matter to my attention and that he expected to recommend disciplinary action, probably in the form of a suspension without pay, as a result of your unsatisfactory performance.

Principal Hill met with me on the morning of 14 September 1988. He discussed the memo with me and recommended that I impose a one (1) day suspension without pay because of repeated instances of unacceptable performance of your job responsibility.

I arranged to meet with you, Principal Hill, and Assistant Principal Knorr that same afternoon. Helen Johnson, your union president, also attended this conference at your invitation. During the course of our discussion, you admitted that you failed to clean some areas altogether - such as the hallway by the weight room, the back and main stairs to the locker room, and the entire stage area -- and that you had used inappropriate cleaning techniques and had done an inadequate job of cleaning other areas.

You pointed to no factor preventing you from achieving satisfactory performance and stated that the supplies and equipment provided by the District were adequate. Moreover, Helen Johnson stated that in your prior conference with her, you agreed that you had neglected some of your duties and that your performance needed improvement.

I told you that I would review your file and would consult with District Administrator Hinden and with the District's legal counsel before making a final decision about what discipline to impose. I informed you, however, that I might well decide to suspend you without pay. Helen Johnson asked whether you could be given a period in which to demonstrate improvement before deciding whether a suspension was warranted. Principal Hill stated that the suspension remains his recommendation because this was only the most recent in a long series of unsatisfactory reports about your performance.

I have reviewed your file and I have come to the following conclusion: (sic)

1. Your performance, as reflected in Principal Hill's memo of 13 September 1988, was seriously deficient.
2. Unsatisfactory performance of your custodial duties has been brought to your attention on numerous occasions in the recent past. For example, your file shows reports of deficient performance on 13 January, 18 June, and 8 July 1987. Your annual performance evaluation for 1986-87 states that your supervisor talked continually to you about the need to improve your "sloppy" work.
3. When you were granted leave of absence in the fall of 1987 for a work-related injury, you were reminded that the District expected your performance to improve upon your return. Nevertheless, on 15 March 1988, not long after you were back on the job, your performance was written up once again. Principal Hill concluded this report with the following warning, "If your work continues to be unsatisfactory, verfied by random 'spot checks' . . . I will recommend that you be suspended from work without pay."
4. This record demonstrates that written exhortations and reprimands have been ineffective in eliciting satisfactory performance.

For these reasons, I have decided to suspend you without pay for one working day. Your suspension will take place on Monday, 19 September 1988, as Principal Hill informed you on my behalf on 15 September 1988.

You will be expected to return to work on Tuesday, 20 September 1988. Upon your return, the District expects you to perform all of the duties set out in the custodial job description and cleaning check list on a regular basis, to apply appropriate cleaning techniques routinely, and to maintain the areas for which you are responsible in acceptable condition with consistency. Short-term improvement followed by a lapse back into

careless and sloppy performance will not be tolerated by the District. Principal Hill will be monitoring your work periodically. Repetition of deficient performance will lead to more severe disciplinary action, which could influence termination of your employment with the district.

Principal Hill, Assistant Principal Knorr, and I are convinced that you are capable of doing a satisfactory job. We hope this action will motivate you to demonstrate the ability we believe you possess, as well as the effort that is necessary in order to do good work.

If you have questions about anything contained in this letter, please do not hesitate to get in touch with me.

Very truly yours,

Robert Fasbender
Business Manager

The Grievant served the suspension on September 19, 1988 and returned to work. The suspension was not grieved.

Between 6:45 a.m. and 7:45 a.m. on September 23, 1988, Hill and Knorr inspected the areas the Grievant was responsible for cleaning, and later that day Hill issued the Grievant a written notice listing the areas Hill felt had not been satisfactory and indicating further discipline may be forthcoming. The Grievant refused to discuss the matter with Hill without a Union representative present and a meeting was arranged for the following Monday, September 26, 1988. On the morning of September 26, 1988 Hill and Knorr inspected the Grievant's area and found it unsatisfactory. That afternoon Hill, Knorr, the Grievant and the Union's President, Helen Johnson, met to discuss Hill's September 23rd notice. The meeting was tape recorded by Hill. Hill and Knorr had collected examples of the things they had found in the Grievant's areas, e.g., dust balls, gum and candy wrappers, broken pencils, etc., and showed them to the Grievant and Johnson at the meeting.

Knorr inspected the Grievant's area on the morning of September 27th and found it satisfactory and that afternoon Hill and Knorr met with the Grievant and complimented him on his work and asked him to explain the change. The Grievant indicated he had cleaned the stairs using the "braille method". Knorr sent the Grievant a memo dated September 28th indicating that her inspection on September 27th had shown that his work had improved and that it was expected that his future efforts would be of the same quality.

On October 4, 1988 Hill sent Fasbender a recommendation that the Grievant be suspended for five days. Knorr and Hill performed further inspections of the Grievant's area and on October 6, 1988 Knorr sent the Grievant a written notice that inspection of his area on October 5th showed his work to be unsatisfactory and indicated further discipline would be forthcoming.

On the evening of October 12, 1988 Fasbender and the Grievant inspected the latter's area and it was found to be satisfactory. Fasbender inspected the area again around 1:00 a.m. on October 18, 1988 to determine whether someone was "sabotaging" the Grievant's area. At Fasbender's request, Knorr then inspected the area before school that day and found the area to be in the same condition as Fasbender had found it, i.e., satisfactory. By memo of October 27, 1988 to the Grievant, Fasbender notified him that he was receiving a three day suspension without pay November 2-4, 1988. Fasbender's memo stated, in part, that:

I have now reviewed your file, and I have come to the following conclusions:

1.) You have not offered any reasonable excuse to Mr. Hill or myself for the deficiencies noted on 23 September, 26 September, or 6 October 1988.

2.) You have pointed to no specific factors preventing you from achieving the consistent satisfactory performance levels as observed on 27 September, 12 October, and 17 October 1988. There is evidence that you are capable of understanding and following appropriate cleaning techniques.

3.) My inspections on 12 October and 17 October failed to generate any evidence of sabotage.

4.) At the meeting of 20 October 1988 you stated that you felt Mr. Hill was not lying about his inspection or manufacturing the materials he has as evidence

in his envelopes.

5.)Despite the fact that some of the items mentioned in the write ups of 23 September, 26 September, and 6 October 1988 may appear "picky" to you and your union representative, I feel the inspections do indicate deficient cleaning methods and are, therefore, warranted. Again, you have offered no evidence to explain away your bad performance.

I have come to the conclusion that Mr. Hill has suggested a five (5) day suspension because of the short term improvement after your one (1) day suspension on 19 September 1988. It appears to have been inadequate in bringing about continued adequate cleaning of you (sic) work areas. Your work record demonstrates that written exhortations and reprimands along with a one (1) day suspension have been ineffective in eliciting satisfactory performance.

Although I do not feel there are any mitigating circumstances in your record to suggest leniency, the most recent inspections of 12 October and 17 October give me some cause for optimism that you are devoting more effort and are taking your responsibility more seriously. I am therefore, willing to reduce Mr. Hills' recommendation for a five (5) day suspension to a three (3) day suspension. Despite the fact that I have not chosen to impose the five (5) day suspension as Mr. Hill recommended, you should be aware that, as we discussed, continuation of deficient performance will lead to termination of your employment with the District.

For the reasons pointed out above, I have decided to suspend you without pay for three (3) days. Your suspension will take place on 2 November through 4 November 1988.

You will be expected to return to work on Monday, 7 November 1988. Upon your return, the District expects you to perform all of the duties set out in the custodial job description and cleaning checklist on a regular basis, to apply appropriate cleaning techniques routinely, and to maintain the areas for which you are responsible in acceptable condition with consistency. Short-term improvement followed by a lapse back into careless and sloppy performance will not be tolerated by the District. Principal Hill and Assistant Principal Knorr will be monitoring your work periodically.

Principal Hill, Assistant Principal Knorr, and I are convinced that you are capable of doing a satisfactory job. We hope this action will motivate you to demonstrate the ability we believe you possess as well as the effort that is necessary in order to do a good job.

If you have questions about anything contained in this letter, please do not hesitate to get in touch with me.

Sincerely,

Robert T. Fasbender
Business Manager

The Grievant served that suspension and a grievance was filed on the suspension on November 29, 1988.

In the week following his suspension the Grievant was injured on the job. While helping push back bleachers hydraulic fluid splashed in his face and he tried to wipe it out of his eyes. He was diagnosed as having a corneal abrasion and was off work until November 21, 1988, when he returned without limitations.

On December 6, and again on December 9, 1988, three juveniles broke into the Junior High School and stole some items and vandalized the rooms they had access to; however, they did not have access to those areas for which the Grievant was responsible.

By letter of December 13, 1988, Fasbender denied the Grievant's suspension grievance. The Union's Staff Representative, Daniel Pfeifer, sent the following letter dated December 24, 1988, to Fasbender, with a copy to the Wisconsin Employment Relations Commission and to the president of the Union:

December 24, 1988

Mr. Robert Fasbender, Business Manager
Tomah Area School District
Lincoln Avenue
Tomah, WI 54660

Re: William Wilcox Grievance

Dear Mr. Fasbender,

This will serve as notice that Local 1947-B is dissatisfied with the District's response in relation to the above captioned grievance. The Union intends to proceed to arbitration.

Sincerely,

Daniel R. Pfeifer
Staff Representative

Hill and Knorr inspected the Grievant's area on the morning of December 8, 1988 and found it was not cleaned satisfactorily and issued the Grievant a written notice of December 12, 1988 listing the problem areas. A meeting was held on December 16, 1988 between Hill, Knorr, the Grievant and Johnson to discuss the December 12th notice. During that meeting the Grievant indicated he had trouble reading the items on the notice.

On January 25, 1989 Hill and Knorr inspected the Grievant's area and found it to be unsatisfactory. The Grievant was given a written notice dated February 2, 1989 listing the deficiencies found on the January 25th inspection. By memo of February 6, 1989, Hill recommended to Fasbender that the Grievant be discharged.

Fasbender arranged for the Grievant to see an opthamologist for an examination with regard to his eye problems, the Grievant choosing to be examined by Dr. Burnes. Fasbender sent Dr. Burnes a letter prior to the examination indicating that the purpose of the examination was to determine whether the Grievant's eyesight would permit him to do a satisfactory job of cleaning his areas. The letter asked that the doctor submit a written report that would answer the following questions:

1.) When Mr. Wilcox is given a write-up of his job performance, he claims he cannot read the information on the printed sheet. Yet he will point to specific items on the list and read them verbatim. Is his vision such that he cannot read printed materials?

2.) Does he need new eye glasses? Will glasses correct his vision problems?

3.) Does his vision preclude him from doing an adequate job of cleaning such things as the following:

a.) dust from the tops of towel dispensers, urinals, etc.
b.) dust, candy wrappers, gum, etc. from the balcony seating area

c.) dust, pieces of paper, dirt, etc. from classroom carpets
d.) spots/streaks on mirrors, urinal tops, sinks, etc.
e.) dirt on steps and in the corners of steps
f.) stains, smears, streaks on porcelain sinks, toilet fixtures, urinals, etc.
g.) cleaning of stainless steel drinking fountains

4.) Mr. Wilcox claims he has cataracts that need to be removed. When will these cataracts need to be removed? Are these cataracts related to the hydraulic fluid he got in his eyes while at work?

5.) He claims the glare off the water in the toilets and urinals prevents him from seeing any water stains. Does his cataracts/vision prevent him from doing an adequate job of cleaning these areas? Does he need polarized lenses to be able to clean these areas?

6.) We feel that proper cleaning techniques, regardless of vision problems, would adequately clean these areas? Can the District expect him to adequately clean the above mentioned areas by using the equipment and techniques the District has provided to him and all custodians?

On February 20, 1989 a meeting was held between Hill, Knorr, the Grievant and Johnson to discuss the Grievant's performance. Dr. Burnes responded to Fasbender's request with the following written summary dated February 21, 1989, sent to Fasbender:

Dear Mr. Fasbender:

Mr. William Wilcox was seen for an ocular evaluation on February 21, 1989. Enclosed is a copy of that ophthalmic examination.

I will attempt to answer the questions that you have written in your letter of February 17, 1989. Mr. Wilcox does have bilateral posterior subcapcillar cataracts which will give him some difficulty with contrast and glare, but to this date he is still seeing 20/30 in both eyes for distance and 20/30 for near. This should be adequate to help him with most printed materials. At this point, he does not need new eye glasses as the refraction I obtained was only minimally different from what he is wearing. In answer to question 3, he may have some difficulty seeing small areas of dust, but things like candy wrappers and paper should be within his visual perusal. Because of some difficulty with glare, polarized lenses may help him to clean the areas where he will see glare off of water and urinals.

Although Mr. Wilcox does have cataracts, I feel they are too early to be removed at this time. I do not feel that they are secondary to hydraulic fluid in the eyes.

I hope that this information will assist you in attending to Mr. Wilcox's needs. If I can be of any further assistance, please do not hesitate to contact me.

Best personal regards,

Keith C. Burnes, M.D.
OPHTHALMOLOGY

Pfeifer sent the following letter dated February 20, 1989 to the Commission regarding the suspension grievance:

Re: Tomah Area School District
(William Wilcox Grievance)

WERC:

Please find enclosed a REQUEST TO INITIATE GRIEVANCE ARBITRATION which results from a dispute between the Tomah Area School District and the Tomah Area School Non-Teaching Employees, Local 1947-B, WCCME, AFSCME, AFL-CIO.

Also enclosed are the grievance, the Employer's response, the collective bargaining agreement and the twenty-five ($25.00) filing fee.

Please contact the parties to establish a time and place for the arbitration hearing.

Sincerely,

Daniel R. Pfeifer
Staff Representative

Fasbender was copied on the letter.

On March 3, 1989 Fasbender sent the Grievant the following letter:

Dear Mr. Wilcox:

Principal Tom Hill has submitted to me a report dated 6 February 1989 concerning performance of your custodial duties. Because he found that your cleaning has continued to exhibit numerous deficiencies, despite prior written warnings, a one-day suspension, and a three day suspension, Mr. Hill has recommended that I discharge you from your duties.

In support of his recommendation, he has provided me with copies of his memos to you dated 8 December 1988 and 2 February 1989. He has also provided me with a transcript of the meeting he held with you, Assistant Principal Knorr, and Helen Johnson, your union representative, at which your performance -- as demonstrated by the condition of your areas on 8 December 1988 -- was discussed.

As you are aware from our conversations and my letter of 17 February 1989, the District has requested you submit to an eye examination to determine if your vision is affecting your job performance. As per our communications, I indicated that I will withhold any decisions regarding discipline for the unsatisfactory job performances until I have the results of Dr. Burn's (sic) eye examination.

I have now received Dr. Burn's (sic) report and am ready to make a decision regarding what disciplinary action, if any, should be taken. If you wish to talk with me about the results of the eye examination and the unsatisfactory job performances indicated above before I decide whether additional disciplinary action is warranted, please get in touch with me no later than noon on Tuesday, 7 March 1989, to arrange a time for a meeting. You are welcome to bring a union representative to the meeting, but if I have not heard from you by noon on Tuesday, I will assume that you do not wish to meet, and I will proceed to make my

decision on the basis of Principal Hill's report, his supporting documentation, Dr. Burn's (sic) report, and your overall employment record.

Sincerely,

Robert T. Fasbender
Business Manager

On March 23, 1989, Fasbender met with the Grievant, Johnson and Pfeifer to discuss the Grievant's performance and the Grievant and the Union representatives were given copies of Dr. Burnes' report of February 21st. At that meeting the Grievant and the Union representatives offered a number of possible reasons for the problems that had been found in the Grievant's areas.

By letter of March 28, 1989, Fasbender notified the Grievant that he was being terminated, effective that date. In his letter Fasbender summarized the events, as he saw them, since September of 1988 and made the following responses to the "justifications" that the Grievant and/or Union had offered for the problems in the Grievant's areas:

Justification 1. You had indicated that there was an average of a two week delay from the time of the write-ups until the time you had an opportunity to discuss these with Mr. Hill and Ms. Knorr.

Response: Other than the hearing for the 25 January 1989 inspection, I feel the follow-up meetings have been scheduled as expediously as possible. Any delays are largely due to the fact that these meetings must be scheduled so that you may have a union representative present.

Justification 2. It was pointed out that Mr. Hill and Mrs. Knorr do their inspections between 6:45 a.m. and 7:45 a.m. It was noted that students are in the building as early as 6:30 a.m.

Response: Mr. Hill has informed me that students are not allowed in the building at 6:30 a.m. Mr. Hill has also informed me that when they do inspect your work areas the gym area is the first area they check before students enter the gym area. From the gym area they proceed to the locker room areas and the southwing areas.

Justification 3. You informed all present that Mr. Hill expects you to clean the balcony after all students and spectators are gone from that area. Some nights it may be as late as 9:00 p.m. before you can start your cleaning. This does not allow you enough time to do a thorough job of cleaning.

Response: It must be pointed out that the 8 December 1988 inspection was chosen to specifically avoid any of these conflicts.

Justification 4: You indicated that there has been a change of policy in that night custodians can help with snow shoveling. This is an interruption to your cleaning schedule.

Response: Mr. Hill has informed me that this is not a change in policy. He even pointed out that your predecessor, Velma Dal Santo assisted with snow shoveling.

Justification 5. You had indicated that the balcony is poorly lighted thereby making it difficult to do an adequate job of cleaning. You indicated that you have turned in work requests but nothing has been done. It was also suggested that when Mr. Hill and Mrs. Knorr do their inspections in the morning, the lighting is different.

Response: In reviewing all of the work orders I have, I have failed to find one that requests better lighting in the balcony area. In checking with the maintenance supervisor, he does not recall ever seeing a work order as you described. The lighting conditions in the balcony are the same as they have been for the last several years. It did not affect the job performance of your predecessor. Furthermore there have been several inspections showing that this area has been adequately cleaned thus showing you have the techniques and ability to do an adequate job.

The focus of these justifications seems to be addressing only the balcony area. They do not deal with your cleaning deficiencies in the classrooms, restrooms, locker rooms, stairways, and lobby areas. Even if the balcony area could be excused based on your justifications, which I do not find to be adequate, it does not excuse the poor quality of work existing in the other areas.

Your work record demonstrates that written exhortations and reprimands along with suspensions have been ineffective in eliciting satisfactory performance. The bottom line is that in spite of letters, conferences, suspensions, etc. your performance has not improved. You were warned in the 27 October 1988 letter that "Short-term improvement followed by a lapse back into careless and sloppy performance will not be tolerated by the District" and that "continuation of deficient performance will lead to termination of your employment with the District."

It is not a question of whether or not you can do an adequate job of cleaning. You have demonstrated that you have the techniques and abilities to perform satisfactorily on several occasions as revealed by the inspections of 27 September 1988, 12 October 1988, and 18 October 1988. In checking out the above mentioned justifications, I found your areas to be adequately cleaned on 18 March 1988 (sic). In my letter of 27 October 1988 I reminded you that you had indicated that you had not changed your cleaning techniques since you were first written up on 13 September 1988. As I have indicated before, short term improvement followed by lapses of sloppiness would not be tolerated.

I have now reviewed your file, and I have come to the following conclusions:

1.) You have not offered any reasonable excuse to Mr. Hill or myself for the deficiencies observed.

2.) You have pointed to no specific justifiable factors preventing you from achieving consistent satisfactory performance levels. There is evidence that you are capable of understanding and following appropriate cleaning techniques.

3.) Despite the fact that some of the items mentioned in your write ups may appear "picky" to you and your union representative, I feel that the inspections do indicate deficient cleaning methods and are, therefore, warranted. Again, you have offered no evidence to explain away your bad performance.

In the past I felt there were mitigating circumstances in your record to suggest leniency. However, I now no longer feel there are mitigating circumstances to suggest a need for leniency in dealing with Mr. Hill's

> recommendation to dismiss you from your duties. In view of the fact that you have not met the requirements for the job of custodian with the Tomah Area School District, you are hereby notified that as of 28 March 1989 you are terminated as an employee of the Tomah Area School District.

The Grievant's employment was terminated on March 28, 1989 and a grievance was filed April 17, 1989 with regard to the termination. By letter of April 21, 1989, Fasbender notified the Grievant that his grievance was denied. Pfeifer sent the following letter to Fasbender on May 3, 1989:

> Re: Bill Wilcox Discharge
>
> Dear Bob,
>
> It is my understanding that you have denied the grievance in relation to the above captioned issue. Local 1947-B hereby notifies the Tomah Area School District of its intent to arbitrate the Wilcox discharge.
>
> Sincerely,
>
> Daniel R. Pfeifer
> Staff Representative

Pfeifer sent a copy of his letter to the Commission.

On May 25, 1989, Pfeifer sent the following letter to the undersigned, with a copy to the District's attorney:

> Re:Tomah Area School District
> (William Wilcox Discharge)
>
> Dear Mr. Shaw,
>
> Please find enclosed a REQUEST TO INITIATE GRIEVANCE ARBITRATION in relation to the above captioned matter.
>
> As you have been assigned to hear the William Wilcox suspension on June 6, 1989, the parties hereby request that the instant issue be heard in conjunction with the Wilcox suspension issue.
>
> I believe that you already have a copy of the collective bargaining agreement. Enclosed is a copy of the grievance and the twenty-five dollar ($25.00) filing fee.
>
> Sincerely,
>
> Daniel R. Pfeifer
> Staff Representative

The parties proceeded to arbitration on the grievances before the undersigned. At the hearing in these matters the District raised the issue of procedural arbitrability in both grievances based on the alleged failure of the Union to timely request that the Commission appoint an arbitrator to hear the matter. The Union objected to the District's raising the issue of procedural arbitrability at that point. The parties were directed to brief the issue with the understanding that the undersigned would address the issue of procedural arbitrability first.

Also at hearing, the parties stipulated that in the past when Pfeifer sent in notices of intent to arbitrate, such as those sent on December 24, 1988 and May 3, 1989 to Fasbender with a copy to the Commission, the Commission has responded by notifying him it cannot process his request until he submits the $25.00 filing fee. They also stipulated that neither the District, nor its attorney, notified the Union of its position that the arbitration requests were not timely until the hearing.

POSITIONS OF THE PARTIES

DISTRICT

The District first asserts that with regard to both the issues of procedural arbitrability and the merits, the District bears the burden of proof, but that the quantum of proof required in both cases is the "preponderance of the evidence" standard.

The District notes that there were a number of exhibits to which one party or the other objected during the hearing and makes a number of arguments regarding their admissability. The District notes that under state statutes and administrative code, arbitrators are not bound by the rules of evidence. Elkouri and Elkouri, How Arbitration Works, is cited for the proposition that

where the arbitrator is not required by the contract to comply with the rules of evidence, strict observance of such rules is not required and it is for the arbitrator to determine the weight and credibility of the evidence presented. The fact that the arbitrator may conduct a de novo review of administration's decision to discipline an employe, does not mean that hearsay evidence must be discounted. While in conducting such a review the arbitrator may accept evidence in addition to that relied upon by the administration, the arbitrator is also entitled to review the documents that the administration relied upon for its decision. It is contended that school administration is expressly authorized to rely upon hearsay evidence. Citing, Racine Unified School District v. Thompson, 107 Wis.2d 657 (Ct. App. 1982), where the court concluded that school administration may rely upon hearsay evidence in making disciplinary decisions with regard to employes. The court also held that because staff would have little reason to fabricate evidence, absent specific allegations of bias, hearsay statements of staff are sufficiently probative to serve as a basis, at least in part for disciplinary actions. It is asserted that, in this case, there is no allegation of bias on the part of administrators in connection with either grievance. Thus, the arbitrator is entitled to rely on the same evidence upon which the administration relied in making its decisions. Next, the District asserts that evidence should be liberally admitted in arbitration, as the parties must be given adequate opportunity to present their case. Thus, even though hearsay evidence may deny the opposing party the full opportunity for cross-examination, that fact is not given overriding consideration in arbitration. Citing Elkouri and Elkouri, at pp. 301, 316 and 318. Further, absent evidence of bias on the part of supervisory staff, the testimony of administrative staff is normally credited over that of the grievant where it conflicts.

The District asserts that as to those exhibits that it presented regarding the Grievant's early disciplinary record and discipline issued to other employes, they are relevant in refuting the Union's argument that the District has padded the number of deficiencies by including insignificant entries on the list of complaints regarding the Grievant's work and in refuting the Union's assertion that the performance standards were raised shortly before the Grievant's discharge. Those exhibits also demonstrate that the District has communicated its performance standards to its employes. It is also asserted that District Exhibits 1 through 13 fit the statutory definition of both "records of regularly conducted activity" and "public records and reports", and thus constitute a well recognized exception to the hearsay rule in that they are records of a public agency kept in the course of regularly conducted activity of the agency.

With regard to the Union's assertion that the records of early discipline are stale, the District notes that the parties' Agreement does not place any time limits on how far back the administration can look for evidence to justify the discipline. The parties did not bargain such limits and the arbitrator has no authority to add such limits to the Agreement. Further, an employe's work history is relevant in determining if the discipline imposed is appropriate. It is further relevant in this case where the Grievant claims he has been a model employe and that his recent problems are due to a sudden decline in his eyesight. The District addresses these arguments to the exhibits that it submitted with regard to the transcripts of prior meetings and asserts that those transcripts were properly admitted. The transcripts of the meeting between the administration and the Grievant and his union representative are evidence of the administration's fair investigation of the Grievant's performance problems and of the investigation of the explanations he offered for his inability to meet his performance standards. The transcripts also contain statements by the Grievant and his union representative admitting that he neglected his duties. Contrary to the Union's allegations, the transcripts do not constitute hearsay. The District asserts that "a statement is not considered hearsay if it is offered against a party and is his own statement or that of his agent concerning a matter within the scope of the agency." Citing Sec. 908.01(4)(b)(1) and (2), Stats. It is also argued that as to District Exhibit 33, the transcript of the September 26, 1988 meeting, there are substantial indicia of reliability in that the Grievant and the Union representative were aware the meeting was being taped and nevertheless participated in the meeting, and all parties to the meeting were present at the arbitration hearing and available to testify if they felt the exhibit was not accurate. It is asserted that the same is true of the other exhibits that were transcripts of meetings held with the Grievant.

With regard to Union Exhibit 1, the letter of July 26, 1989 from Dr. Lenth and his ophthalmologic examination of the Grievant on that date, the District asserts that the exhibit is totally irrelevant to a suspension occurring in November, 1988 and the discharge in March of 1989. Only the information available to the District at the time of the disciplinary decisions is relevant. Dr. Lenth's statement offers no opinion about the status of the Grievant's eyesight at the time of discipline. The District asserts that if the document is relevant at all, it is only as to remedy, i.e. it is noted that the Grievant testified that he is currently unable to perform the job for which he is seeking reinstatement.

Concerning the issue of procedural arbitrability, the District takes the position that the arbitrator lacks jurisdiction to reach the merits of the

grievances on the basis that the Union has failed to comply with the procedural requirements in the parties' Agreement. In support of its position, the District asserts that the grievances should be dismissed for failure to observe the clearly expressed conditions precedent to arbitration. Adherence to the grievance procedure advances peaceful and constructive employment relations and benefits all parties alike; however, this may be jeopardized if the grievance procedure is not carefully followed. Hence, arbitrators require the parties to not only use the grievance procedure, but comply with its formal requirements. According to the District, compliance with those requirements is a condition precedent to the assumption of jurisdiction by arbitrators. Citing, Elkouri and Elkouri, p. 198. It is asserted that such a conclusion arises from a longstanding rule that arbitration is a matter of contract and a party cannot be compelled to submit to arbitration a dispute it has not agreed to submit. If compliance with specific time limits is a condition precedent to the use of arbitration machinery, and the time limits are not met, there is no agreement to arbitrate and the arbitrator has no jurisdiction to proceed. Citing Article 4, Section 3, Step 4, it is asserted that in this case the Agreement contains express time limits. The Agreement provides that the time limits may be extended if mutually agreed upon, however, Fasbender testified that the Union never requested an extension at any step. The District asserts that time limits improve labor-management relations by preventing problems from festering, by safeguarding against stalling and the pressing of stale claims, and by permitting violations to be corrected quickly and inexpensively. More importantly, enforcing time limits reinforces the bargaining process by insuring that the parties have the benefit of their bargain. The District asserts that failure to comply with clearly expressed time limits for processing grievances generally results in dismissal of the grievance. Citing, Elkouri and Elkouri, p. 193; School District of Wisconsin Rapids, Christenson, (10/78).

In response to the Union's assertion that the District did not timely raise its objection to procedural arbitrability, the District asserts that the record shows that the District has routinely challenged procedurally defective grievances and there is nothing in the record to indicate the Union could rely on the District to overlook the missed deadlines. Since the response of the Business Manager is the last step in the procedure over which the District has control, there is no contractual mechanism for the District to contest the failure to comply with the time limit for appealing to arbitration prior to the arbitration hearing. Further, the right to contest arbitrability is not waived by failing to raise the issue prior to the arbitration hearing. Citing, Elkouri and Elkouri, p. 220.

The District asserts that the language of Article 4, Section 3, Step 4 of the Agreement, the bargaining history of that provision, common sense and the plain meaning of the wording make it clear that the ten day time limit applies with equal force to both the sentence in which it appears and the following sentence. The latter provides that the Commission "shall be sent a copy of such notice, along with a request that the Commission appoint a member of its staff as an arbitrator to hear the case." The District reviews the bargaining history of the provision in question from the parties' 1968-69 agreement to the present, and asserts that it shows a progression of eliminating indefinite time gaps and inserting definite deadlines for all steps in the grievance arbitration process. Given that the agreements have always had absolute time limits for initiating arbitration, have placed strong emphasis on expeditious arbitration, and have uniformly added deadlines throughout the grievance process, it is inconceivable that the parties provided deadlines for every step before and after the request for an appointment of an arbitrator, save this one step. The District also asserts that the plain language of the provision supports its interpretation that the ten day deadline applies to the request for an appointment of an arbitrator as well as the notice of appeal to arbitration. It notes that while neither copying the Commission on the notice nor requesting an arbitrator is expressly subject to the ten day requirement, the Union has routinely sent the Commission copies of its notices within the ten day time limit. It is argued that such conduct evidences that the Union recognizes that the ten day limit applies to the copy of the notice/request sentence as well. The plain language states that the request is to be sent "along with" the copy of the notice of appeal. Given the ordinary meaning of the term "along with", i.e., "together with", the only reasonable interpretation is that the ten day limit applies with equal force to both the notice of appeal and the request for an arbitrator.

The District also contends that the Union has not offered a rational basis to excuse its failure to meet the time limits. First the Union asserts that the notice of appeal serves both as a notice to the District and as a request for an arbitrator to the Commission. The Union's assertion is not based on the language of the agreement or the conduct of the parties, but on the conduct of the Commission. The Commission, not being a party to the agreement, is not charged with interpreting its terms and how it responds to the Union's correspondence is irrelevant. The Union's argument is also belied by its second explanation, i.e. that its practice of scheduling union meetings on the first Monday of the month, at which it authorizes expenditures, somehow excuses its failure to comply with contractual time limits. Johnson's testimony indicates that the Union considers the notice and request for arbitration as distinct elements in the process. Her testimony shows that despite having sent the notice of appeal to the District, the Union could not

proceed to request the appointment of an arbitrator from the Commission unless the members voted to authorize the expense. Thus, the notice to the District does not serve as the Union's request for appointment of an arbitrator to the Commission. Further, the Union's practice of scheduling meetings must defer to the contractual requirements if there is a conflict. Secondly, the Union's asserted meeting schedule does not explain its failure to comply with the contractual time limits. The District notes that as to the suspension grievance, the Union's notice of intent to arbitrate was dated December 24, 1988 and there is no explanation as to why the request for arbitration was not sent until February of 1989. Regarding the discharge grievance, under the asserted meeting schedule, the Union meeting did occur between the District's third step denial of the grievance and the Union's notice of intent to arbitrate; however, no meeting date fell between the sending of the notice May 3, 1989, and the sending of the request for an arbitrator, May 25, 1989.

With regard to the merits of the grievances, the District takes the position that it had "good cause" to suspend, and subsequently discharge, the Grievant because he was unable to consistently meet the District's standards for keeping his areas clean and safe and in a sanitary condition. In support of its position, the District first asserts that it has satisfied all seven elements of "cause" identified by Arbitrator Daugherty in Enterprise Wire. The District asserts that it gave the Grievant forewarning of the probable consequences of his failing to meet the District's standard for custodial performance. Those performance standards were clear and were clearly communicated to the Grievant. The record indicates that as early as 1979 the Grievant was provided with detailed feedback regarding the strengths and weaknesses of his performance. In more recent years the Grievant, as a custodian, was provided with job descriptions and cleaning check lists that detailed his specific daily and weekly job responsibilities. Before assuming his last two positions, the Grievant was given a personal briefing by the principal in charge who would be supervising his work. In his last position the Junior High School Principal, Tom Hill, went so far as to demonstrate the proper cleaning techniques to the Grievant. Further, the Grievant made a point of telling his supervisors that he knew exactly how to do his job. Each time the Grievant fell below the District's standards he was appropriately notified and warned of the probable disciplinary consequences of failing to improve his work. Given his own personal experience, the Grievant had to know that the District meant exactly what it said when it warned him of the consequences of failing to meet the standards. The District cites as an example, that during 1981-82 and 1982-83 school years, the Grievant received written warnings regarding his attendance and performance problems, and when he failed to correct these problems he was suspended for four days in December of 1982. As to the problems for which he was suspended and discharged in these cases, the exhibits in the record indicate that he was given express warning of the likely consequences for his failure to improve.

Secondly, the District asserts that the standards for custodial performance were reasonably related to the orderly, efficient, and safe operations of its schools. The District cites the need to maintain clean and sanitary restrooms and to remove litter and debris from stairways and hallways and other areas of pedestrian traffic.

Third, prior to imposing the discipline, the District made a good faith effort to determine whether the Grievant was responsible for the "substandard conditions" observed in his areas. The District contends that the record demonstrates that the Grievant was consistently provided with documentation of the observed deficiencies in his work and that he and his union representative were permitted to discuss all of the allegations before the administration decided upon any discipline. Meetings were held with the Grievant and his union representative to discuss the noted deficiencies and to give him the opportunity to explain them. The investigation was not limited to one individual administrator, Hill also received and considered the reports of Assistant Principal Knorr as to her inspections of the areas, before he recommended the discipline. Before he acted on Hill's recommendation for a five-day suspension, Fasbender met with the Grievant and Johnson to discuss the problems. Fasbender and Knorr also investigated in an attempt to verify whether there was a basis for the Grievant's suggestion that someone might be sabotaging his work. It is asserted that the same scenario was repeated in reaching the decision to discharge the Grievant. Steps were taken to insure that the Grievant had a fair opportunity to clean his area, by scheduling inspections of his area on mornings that did not follow evening events the night before and prior to any students entering the building. The fact that on some occasions the inspection showed that areas were adequately cleaned, demonstrated that the Grievant was capable of doing the work when he wanted to. The Grievant offered numerous explanations for the substandard conditions in his area, i.e., that the persons involved in the break-ins at the Junior High were responsible for some of the trash, that the foul odor in the bathrooms was coming from behind the walls, that the students were not picking up after themselves, that there were too few garbage cans and that he needed a longer cord for his vacuum cleaner, and that he was blinded by the glare from the mirrors and the porcelain in the bathrooms. The Grievant never suggested that he could not well see well enough to do his job and stated he could see the type of debris that Hill and Knorr found. He offered no consistent explanation for the substandard performance, however, before Fasbender acted on Hill's

recommendation for discharge, he sought to obtain a professional evaluation of the Grievant's eyesight before making his decision. The report of the doctor selected by the Grievant indicated that as of February 21, 1989, the cataracts did not seriously interfere with his eyesight and were not ready to be removed. The Grievant's vision was found to be essentially normal, 20/30 in both eyes when corrected by his eyeglasses. This was essentially the same as in June of 1988 when he had received his new set of glasses. The report showed the Grievant's vision was adequate to perform his custodial duties in a satisfactory manner. Fasbender held a meeting with the Grievant and his union representative before making his decision and at that meeting five new justifications for the Grievant's performance were offered. Fasbender investigated those justifications in the following week and concluded that none of them constituted a valid explanation for the Grievant's performance. On that basis, Fasbender notified the Grievant that he was terminated.

Next, the District asserts that the investigation described above was conducted in a fair and objective manner. It is asserted that the record demonstrates that the administration had no bias toward the Grievant and cites examples of instances where the District allegedly has gone out of its way to treat him fairly in the past. Further, the record demonstrates that Hill went out of his way to investigate the Grievant's performance problems thoroughly and objectively. Regarding the foul odors in the restrooms, Hill investigated the explanations offered by the Grievant, regardless of how improbable they might have sounded. Further, neither the Grievant, nor the Union, questioned the fairness of the administration throughout the investigation.

Fifth, the District contends that its investigation produced "substantial evidence" that the Grievant's poor performance was due to his own neglect, inefficiency, and poor cleaning techniques. The District notes in that regard, that the Grievant did not grieve his one day suspension in September of 1988 for poor performance. Further, he had admitted failing to carry out some of his duties at times and having used inappropriate techniques at his evaluation conference in September, 1988. The excuses that the Grievant offered for the substandard condition of his cleaning areas was investigated by the administration and no evidence was found to support those excuses. Also, because the Grievant's record demonstrated that he had similar performance problems in the past at different schools, it would have required a District-wide conspiracy by others to sabotage his areas. While some of the excuses might have explained the condition of the areas at some time, his areas were found in non-acceptable condition fairly frequently. The administration found little evidence to support the Grievant's theories for the foul odors and conditions of the restrooms. Further, other employes responsible for cleaning similar areas failed to have those types of problems. The District also asserts that there was no such problems in those restrooms when cleaned by the person in the position prior the Grievant. The testimony of Fjelstad and Hill demonstrate that there is a direct correlation between the Grievant being responsible for cleaning those areas and the unacceptable condition those areas were found to be in, as indicated by the fact that they were found to be acceptable when cleaned by his predecessors, successors or substitutes.

Regarding the Grievant's assertion that a sudden decline in his vision caused his problems, the District asserts that while he developed cataracts during the course of his employment, the information available at the time the District made its decision to suspend and subsequently to discharge the Grievant, was that his eyesight was well enough to perform his duties in a satisfactory manner. The status of his eyesight in July of 1989, months after the disciplinary actions in question were taken, is not relevant. The District notes that the Grievant applied for a driver's license in July of 1988 and stated at the time that he did not need glasses for driving. The Grievant was able to fill out forms with normal type size in July of 1988 and his eyesight was not offered as an excuse for his performance problems with Principal Fjelstad in 1987 and Principal Hill in the Spring of 1988. It is also asserted that the report of Dr. Lenth also indicates that there was no substantial reduction in the Grievant's visual acuity until February of 1989 at the earliest. All of the inspections upon which the decisions to suspend and discharge the Grievant were based occurred prior to that date. Further, those types of performance problems were present long before the cataracts began to develop or were discernible in July of 1988. The Grievant's occasional mention of having trouble seeing dirt in areas of high contrast or glare were inconsistent with other excuses he offered, e.g., the white spots on the stairwell that it was obvious the Grievant could see when brought to his attention. While at times at the meetings he would indicate that he could not read the inspection reports, he would then proceed to read passages from those reports. Further, the times when he did perform acceptably demonstrate that he was capable of performing up to District's standards. The Grievant never claimed his eyesight was so poor that he could not perform his job adequately. The record also demonstrates that in the past when the Grievant felt he was not physically capable of performing satisfactorily, he asked to be excused from work. Hence, it would be reasonable to conclude that if he felt his eyesight prevented him from working satisfactorily, he would have sought a medical release, such as he did in November of 1988 when he got hydraulic fluid in his eye.

The District asserts that Dr. Burnes' report in February of 1989

indicated that the Grievant was capable of satisfactorily performing his job. Under the parties' Agreement, the District may layoff an employe found to be unfit for continued employment as a result of a medical examination until the employe can establish his ability to work. As the report showed that the Grievant's eyesight was essentially normal and he was fit to perform his duties, it would not have been appropriate to exercise the disability layoff under Article 11. Further, neither the Grievant, nor the Union, ever suggested that a disability layoff would be in order or that the Grievant was unable to perform his job because of his eyesight. After the Union received Dr. Burnes' report it came up with a new list of justifications for the Grievant's performance, demonstrating that the vision problem was just another excuse.

Sixth, the District asserts that it has applied its custodial performance standards evenhandedly and without discrimination. The District cites evidence as to prior warnings and discipline the Grievant received in the past and also as to discipline imposed upon other custodians for not meeting the District's standards. It also asserts that in each instance the Grievant was given fair warning as to the consequences of future work that was sloppy or filthy. The District also notes that a custodian was discharged in 1979 for problems the District asserts are similar to those included in the Grievant's inspection reports. Unlike that prior custodian, however, the Grievant received prior suspensions before being discharged. Thus, if anything, the Grievant was afforded more procedural protection than that prior custodian. The record also demonstrates that only employes who have been found to be unfit for continued employment have been placed on disability layoff by the District. Since the Grievant was performing his duties on a daily basis at the time he was discharged, and Dr. Burnes' report indicated he was able to perform his duties, the District did not discriminate against the Grievant with regard to its application or non-application of Article 11.

Lastly, the District asserts that the degree of discipline administered was reasonably related to the seriousness of the Grievant's performance and his long record of unsatisfactory service. The District asserts that the Grievant was given ample opportunity to correct his performance, but that he continued to exhibit the deficiencies. Those deficiencies could potentially have serious effects on the health and safety of students and teachers at the Junior High School. Even after the Grievant was given a one day suspension, his work did not improve and the same was true after he received a three day suspension. It is asserted that where corrective discipline has been used to no avail and circumstances suggest that such discipline will not rehabilitate the grievant, arbitrators have refused to interfere with the employer's decision to discharge. Citing, Elkouri and Elkouri, p. 673. Given the Grievant's failure to correct his performance in the light of all the written warnings and suspensions, the District had no reason to believe that a lessor penalty would have been effective or that his performance would have improved if given another chance. Further, the Grievant is not an employe with an exemplary work record that would mitigate his poor performance.

With regard to remedy, the District asserts that as the prior reports and suspension were not grieved or rebutted by the Grievant, the one day suspension and the prior inspection reports remain an appropriate part of the Grievant's personnel file, regardless of the Arbitrator's decision as to the three day suspension. As to the Union's request that the Grievant be reinstated to his former position and made whole, the District asserts that any unemployment compensation received by the Grievant subsequent to his discharge should be taken into account, as should any additional sources of income that occurred during that period. More importantly, as to reinstatement, the Grievant admitted that he cannot perform the duties of the custodial position.

UNION

With regard to procedural arbitrability, the Union first takes the position that for the District to wait until the arbitration hearing to raise the issue is "surprise". The parties stipulated that neither the District nor its attorney notified the Union of the District's position until the hearing. The Commission's procedure requires that it must seek concurrence from the opposing party in order to proceed to arbitration of a grievance. Since an arbitration date was scheduled for the suspension grievance, the District must have concurred with the arbitration request and did not raise the issue of arbitrability at that time. The District must have also concurred in the request for arbitration of the termination, again without raising the issue of arbitrability. The Union asserts that by waiting until the arbitration to raise the issue, the District waived any objection it might have with regard to timeliness. This is especially so in light of the fact that had the District raised its objection when the suspension grievance was being filed, the Union would have been able to rectify the situation prior to sending the notice on the termination grievance. The Union notes the parties' stipulation that in the past when Pfeifer has sent in documents such as Joint Exhibits 4 and 12, the response from the Commission has been to notify him in writing that they cannot process his request at the time until they receive the $25.00 filing fee. Based on the stipulation, the Union takes the position that the Commission considers such letters to be requests to arbitrate and that, therefore, the Union has met its burden under Step 4 of the grievance procedure. Further, as Johnson's testimony shows, the Union's constitution

requires that any expenditures must be approved by the Union body as a whole, and meetings do not necessarily occur during the time period cited in Step 4. Hence, the $25.00 filing fee could not be submitted during that time period. Thus, the Union asserts that the two grievances were submitted in a timely fashion and are arbitrable.

Regarding the merits, the Union takes the position that the suspension and termination were without just cause and requests that the grievances be sustained and that the Grievant be returned to his former position and made whole along with deleting references to the incidents from any and all of his personnel files. In support of its position, the Union cites Fjelstad's testimony that complaints about the Grievant were infrequent between 1984 and 1987 and Fasbender's letter which, in part, stated "it is true that Bill's work has exhibited deficiencies for many years. However, I believe it is fair to say that his performance has deteriorated substantially in recent months." According to the Union, the "recent months" referred to commenced in September of 1988. Based on the testimony cited above, the Union asserts that any testimony or exhibits referring to activities prior to September, 1988 are irrelevant and stale and should not be considered.

Next, the Union asserts that the complaints starting in 1988 are particularly relevant because of the Grievant's discovery that summer that he had cataracts and he informed both Fasbender and Hill of that fact. The letter of February 21, 1989 from Dr. Burnes indicates that the Grievant had cataracts and said the cataracts would "give him some difficulty with contrast and glare." The doctor went on to state that he felt it was too early to have them removed at that time. Based on that letter, the Union asserts that the District knew of the Grievant's vision problems and knew that there would be a continuing problem due to it being too early to have the cataracts removed. The letter of Dr. Lenth in July of 1989 verifies that the Grievant's vision was significantly impaired at that time due to the cataracts. Dr. Lenth stated that he felt cataract surgery would be indicated at that time and that it was his understanding that the Grievant desired to have that surgery and that he was being scheduled for a pre-op examination. Noting that a number of the problems cited with the Grievant's work involved the cleaning of urinals, toilets and sinks, the Union asserts that the medical statements indicated that the Grievant could have trouble with contrast and glare, and that given the nature of the lighting and reflection on porcelain, his vision problems could have been the cause of the problem. Also, the fact that the Grievant got down on his hands and knees to clean the toilets demonstrates his desire to do a good job.

The Union also asserts that the two blue and white objects found in the water fountain, which the District described as clearly visible, were in fact "very minuscule in size." As to the odor in the boys' restroom in the south wing, the Grievant testified that the odor was due to a damaged drain pipe and that when it was replaced the odor did not remain. As to the odor in the bathroom in the locker room, the Grievant testified that he was told to pour something down the drain for the odor. The Union takes issue with the District citing the Grievant's reference to the white spots complained of as demonstrating his ability to see, as the Grievant testified he knew of the spots because he had previously tried to remove them. As to the gym and balcony areas complained of, both Fasbender and the Grievant testified that those areas did not have adequate lighting. The problem with the paper in the desks in the study hall was due to a misunderstanding, the Grievant understanding that the teachers would take care of that and have the students clean out the desks.

It is contended that the Grievant had the largest area to clean of any of the custodians in the building and that the alleged problems with his work began in September of 1988, approximately the same time that he discovered that he had cataracts. The District was made aware of the Grievant's vision problems and knew that there would be subsequent problems due to the cataracts. Rather than imposing the suspension and termination, i.e. punishment, the District had the alternative of using Article 11, to impose a disability layoff. Given that desirable alternative to termination, which would have allowed the Grievant to remain on layoff until his medical condition could be resolved, the District should have utilized that option.

DISCUSSION

I. Procedural Arbitrability

The Union has objected to the District's waiting until the arbitration hearing to raise the issue of procedural arbitrability in these cases. However, the basis of the District's objection is that in each case the Union allegedly did not request appointment of an arbitrator within ten work days of Fasbender's Step 3 denial of the grievance. The next step in the grievance procedure is the arbitration step. While it would have been preferable for the District to notify the Union of its objections at some point prior to the hearing, by not doing so it did not waive its right to raise what in essence is a jurisdictional issue at the hearing. As to the procedural issue, the District asserts that the ten work day time limit in Article 4, Section 3, Step 4, applies to both the notice of intent to arbitrate and the request for

appointment of an arbitrator. According to the District, since the Union only sent the notices of intent to arbitrate within the time limit and did not send its requests for appointment of an arbitrator till later, it failed to meet the contractual time limits and the grievances are not procedurally arbitrable. The language relied upon by the District reads as follows:

> **Step 4 - Arbitration**: Within ten (10) work days of the receipt of response in Step 3, the party appealing the issue(s) to arbitration shall give written notice of its appeal to the other party. The Wisconsin Employment Relations Commission shall be sent a copy of such notice, along with a request that the Commission appoint a member of its staff as an arbitrator to hear the case. . . .

The Union makes no argument that the ten day time limit does not apply, rather, it asserts that its notice of intent to appeal the grievance to arbitration has been treated by the Commission as also constituting a request to arbitrate, and that, therefore, by copying the Commission it complied with the requirements of Step 4. As the District argues, however, it is the parties' intent, as expressed in their Agreement, that prevails and not how the Commission perceives the notice. The wording in Step 4 refers to "such notice, along with a request that . . ." (Emphasis added) That wording indicates the parties did not perceive the notice as also being tantamount to a request for appointment of an arbitrator. Although it would be possible to draft a notice of intent to appeal to arbitration that also included a request for appointment of an arbitrator, the notices in these cases did not include such a request and in fact the requests for appointment of an arbitrator were sent subsequent to the notices. Further, the parties' stipulation regarding the Commission's response to the receipt of such notices shows that the Union representative was aware that the Commission would not treat such notice, by itself, as a valid request for arbitration. It is therefore concluded that the sending of the notices of intent to appeal the grievances to arbitration did not completely satisfy the requirements of Step 4.

The above conclusion; however, does not necessarily lead to the conclusion that the instant grievances are not arbitrable. This is so for several reasons. First, by timely sending its notices of intent to appeal the grievances to arbitration, the Union complied to a substantial extent with the procedural requirements of Step 4. Secondly, the manner in which the Union made its requests for appointment of an arbitrator did not result in an unreasonable delay in proceeding to arbitration in either case. Third, the District elicited testimony that it had in the past enforced the time limits in the grievance procedure by objecting to grievances that were not processed in a timely fashion. There is no evidence that prior to these cases the District ever objected to the Union's not sending the request for appointment of an arbitrator with its notice of intent to arbitrate. Given that the Union substantially complied with the requirements of Step 4, its failure being more of a technical nature, and there being no evidence that the District ever put the Union on notice that it would require strict adherence to the requirements of Step 4, the District will not be permitted to surprise the Union in these cases. The Union is, however, put on notice of the District's position with the objections raised in the instant cases. It is further noted that Article 4 does not expressly provide for any penalty, nor does it provide that the grievance is to be considered dropped or settled, for failure to comply with the time and/or procedural requirements. Under the circumstances here, the undersigned will not infer such a forfeiture in these cases.

For the foregoing reasons, it is concluded that the grievances are procedurally arbitrable.

II. Merits

In their respective briefs the parties addressed objections they had to the admission of certain exhibits. The Union objects to evaluations and disciplinary notices received by the Grievant prior to September of 1988 as irrelevant, discipline imposed on other employes as irrelevant, and the transcript of the meeting of September 26, 1988 as hearsay. The undersigned has concluded that those exhibits are relevant to these proceedings. The prior evaluations and previous disciplinary notices the Grievant received are relevant to determining whether the Grievant's problems with his cleaning work predated his developing cataracts. Discipline imposed on other employes who did sloppy cleaning work, as the Grievant is alleged to have done, is relevant in determining whether the Grievant has been singled out for more severe punishment than others have received. As to the transcript of the September 26, 1988 meeting at which Hill, Knorr, the Grievant and Johnson were present, all of those persons were present and testified at the hearing and, thus, were available for cross-examination and to testify as to the accuracy of the document. The District objected to the letter and report of Dr. Lenth as irrelevant since it post-dated the Grievant's termination. However, since it does go to the Grievant's vision problem, it is sufficiently relevant to be considered.

Suspension

The Grievant has grieved a three day suspension without pay he received from November 2 through November 4, 1988. Prior to that suspension the Grievant had received a one day suspension without pay on September 19, 1988 for having failed to clean or to properly clean areas for which he was responsible. He was notified of that suspension by Fasbender's letter of September 16, 1988, which, in part, stated:

> You will be expected to return to work on Tuesday, 20 September 1988. Upon your return, the District expects you to perform all of the duties set out in the custodial job description and cleaning check list on a regular basis, to apply appropriate cleaning techniques routinely, and to maintain the areas for which you are responsible in acceptable condition with consistency. Short-term improvement followed by a lapse back into careless and sloppy performance will not be tolerated by the District. Principal Hill will be monitoring your work periodically. Repetition of deficient performance will lead to more severe disciplinary action, which could influence termination of your employment with the district.

The one day suspension was not grieved.

Early in the morning of September 23, 1988, the Grievant's immediate supervisors, Hill and Knorr, inspected his areas and found them to be worse than before. Their unrebutted testimony was that they purposely chose that date because there was no activity scheduled for the prior evening that might have interfered with the Grievant's ability to properly clean certain areas, such as the stage area. According to Hill and Knorr, it appeared that the areas were not cleaned at all. Hill's September 23rd memo to the Grievant listed the following problems:

-lobby area rugs not vacuumed
-lobby area not swept - papers, pen, pencil, gum wrappers and candy wrapper found
-lobby area drinking fountain - dirty
-south stairs to cafeteria - dusty and dirty
-south stairs to balcony - dusty and dirty, landing area with cement chips
-north stairs to gym - dusty and dirty
-north stairs to balcony - dusty and dirty, candy wrappers and papers
-balcony area - under seats not swept - candy wrapper, papers, and cough drops found
-stairs to stage area - improperly swept, dusty and dirty
-stairs to locker room - dusty and dirty, wrappers and chunks of gym (sic) found
-stage area - not swept - many pom pon strings, plastic tubing, candy wrappers found
-locker room floor - dusty and dirty, candy and gum wrappers found
-locker room bathroom - toilet still had cleaner poured in it, sink not cleaned, urinal was dirty and had a rather foul odor
-locker room drinking fountain - dirty
-Mr. Oliver's office - floor not swept - found papers and strings, sink not cleaned - very dirty
-locker room washer and dryer room - large pieces of dust on floor
-south wing boys bathroom - first, second, and third stools not cleaned, window ledge still contains cement chips, etc., sinks dirty, urinals not cleaned properly
-south wing girls bathroom - toilets not cleaned, sinks dirty
-south wing fireplace room - not vacuumed, many footprints left there
-south wing drinking fountains - not cleaned, found gum and plastic in one, dust all over the other

Subsequent inspections by Hill and/or Knorr on September 26th and October 5th found the areas had not been cleaned satisfactorily, but inspections on September 27th and October 12th and 17th found the areas satisfactorily cleaned.

The Union asserts that the problems with the Grievant's performance were directly related to vision problems caused by his having cataracts. The Union also notes that the Grievant had the largest area to clean and asserts that some of the objects found were minuscule in size. Further, as to problems with odors in the bathrooms, the problem was due to a corroded pipe in one case, and the Grievant did what he was told in another, i.e., he poured something down the drain.

The reasons offered for the Grievant's work performance have varied from the size of his area to vision problems due to his having cataracts, to possible sabotage of his areas, to misunderstandings, to admitting he did not clean an area. As to the size of his area, there is no indication the Grievant felt his area was too large to clean properly during his shift. As to possible sabotage, Fasbender testified that on one occasion he accompanied the Grievant on a tour of his area at the end of his shift and found it satisfactory, and that on another later occasion he inspected the Grievant's area at 1:00 a.m. and had Knorr inspect it early that morning and both found it satisfactory. Thus, there is no evidence in the record of sabotage. While it is not clear what was responsible for the foul odors in the bathrooms and it might have been misunderstood who was to clean the study hall desks, there were numerous other problems cited.

The Union asserts that those other problems that existed were due to the Grievant's vision problems caused by his having cataracts - especially in the bathrooms where he was likely to have problems with contrast and glare. The record, however, indicates that the Grievant received similar complaints and warnings about his work in 1987 when he was at the High School and earlier in 1988 after he had transferred to the Junior High. Contrary to the Union's argument that those prior warnings are "stale" or irrelevant, those prior warnings indicate that the problems with the Grievant's work performance predated his vision problems. Further, they indicate that these complaints occurred under two different supervisors in different buildings. It is also noted that the Grievant was diagnosed in the summer of 1988 as having the beginning stages of cataracts, but that the Grievant did not feel at the time that his vision was impaired. The record indicates that he applied for renewal of his driver's license on July 29, 1988 and indicated on the application form that he did not need glasses for driving. Although some of the items Hill and Knorr cited and/or collected could be considered somewhat hard to see, others such as crushed pop cans, a clump of pom pon strings, yellow T-shirt, candy wrappers, pencils, etc., would not be difficult to see. Possible vision problems might explain a sloppy job of cleaning toilet stools, sinks or urinals, but would not explain a failure to clean them at all, as cited in Hill's memo of September 23, 1988. It also would not explain the Grievant's ability to at times do a good job of cleaning, such as was found on September 27th and October 12th and 19th.

Given that an inadequate or incomplete cleaning performance had been an ongoing problem with the Grievant since at least 1987, the numerous notices and warnings he received regarding his performance, including the one day suspension in September of 1988, and the lack of a reasonable explanation for his poor performance, it is concluded that the District had just cause to suspend the Grievant without pay on November 2, 3 and 4, 1988.

Discharge

The Grievant was terminated from his employment with the District on March 28, 1989. According to the District, this was due to his continued poor work performance despite the warnings and suspensions.

The record indicates that on December 18, 1988 and January 25, 1989 Hill and Knorr found problems with the Grievant's cleaning similar to those for which he had been suspended in September and November. Again, some of the items found lying on the floors could be described as hard to see, especially if the lighting was not good, e.g. dust balls, mop strings, but other objects such as pop cans and large wads of paper would not ordinarily be hard to see or discover. It is also noted that the Grievant does not deny that Hill and Knorr found such items in his area, nor has he asserted that they were planted there by management.

The Union's primary contention is that because of his vision problems being the cause of his inability to adequately perform his work, the Grievant should have received a layoff under Article 11, rather than having been terminated. The same arguments raised by the Union as to the suspension apply to the discharge as well.

With regard to the Grievant's ability to see well enough to adequately perform his work, the record indicates that after Hill recommended the Grievant be terminated, Fasbender requested that the Grievant submit to an eye examination with a doctor of his choice pursuant to Article 11 of the Agreement. The Grievant chose a Dr. Burnes to do the examination, the same doctor the Grievant had seen when he got hydraulic fluid in his eye. Fasbender sent Dr. Burnes a list of questions regarding the Grievant's ability to see well enough to read, to see spots and stains, dust, candy wrappers, paper, and the possible effects of glare on his ability to see. The results of Dr. Burnes' examination was summarized in his February 21, 1989 letter to Fasbender; which, in part, stated:

> I will attempt to answer the questions that you have written in your letter of February 17, 1989. Mr. Wilcox does have bilateral posterior subcapcillar cataracts which will give him some difficulty with contrast and glare, but to this date he is still seeing 20/30 in both eyes

> for distance and 20/30 for near. This should be adequate to help him with most printed materials. At this point, he does not need new eye glasses as the refraction I obtained was only minimally different from what he is wearing. In answer to question 3, he may have some difficulty seeing small areas of dust, but things like candy wrappers and paper should be within his visual perusal. Because of some difficulty with glare, polarized lenses may help him to clean the areas where he will see glare off of water and urinals.
>
> Although Mr. Wilcox does have cataracts, I feel they are too early to be removed at this time. I do not feel that they are secondary to hydraulic fluid in the eyes.

While Dr. Burnes' report indicated some possible problems with seeing small areas of dust and possible problems with glare, it indicated he should be able to see such things as paper and wrappers. Thus, the Grievant's failure to pick up or sweep candy wrappers, pop cans, or wads of paper are not explained by his vision, nor does it explain his not cleaning the sinks or toilet bowls. The report did not indicate that the Grievant was unable or unfit to perform his duties and also did not indicate that the Grievant's vision problems would be the likely cause of many of his problems performing his work. Thus, a layoff under Article 11 would not appear to have been appropriate at that time. The fact that the Grievant's vision problems may have grown during the ensuing five months when Dr. Lenth examined him does not mean the District should not have relied on Dr. Burnes' report.

The record in these cases shows that the Grievant's performance problems predated his vision problems, that the District gave the Grievant numerous warnings about his performance and the possible consequences if it did not improve, that the District investigated the explanations the Grievant offered for the problems and found them to be unsubstantiated, and that the District followed progressive discipline in imposing the termination. It is, therefore, concluded that the District had good cause to terminate the Grievant.

On the bases of the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievances are arbitrable.

2. The suspension grievance is denied.

3. The termination grievance is denied.

Dated at Madison, Wisconsin this 21st day of February, 1990.

By _____
David E. Shaw, Arbitrator