

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:	Case 36
of a Dispute Between	:	No. 41922
	:	MA-5503
PLYMOUTH EDUCATION ASSOCIATION	:	
	:	Case 38
and	:	No. 42207
	:	MA-5607
PLYMOUTH JOINT SCHOOL DISTRICT	:	
	:	

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Appearances:

Ms. Priscilla Ruth MacDougall, Staff Counsel, Wisconsin Education Association Council, on behalf of the Plymouth Education Association and Doreen Salkowski.  
 Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Paul C. Hemmer, on behalf of the Plymouth Joint School District.

ARBITRATION AWARD

Plymouth Education Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission designate a staff arbitrator to hear and decide the instant disputes between the Association and the Plymouth Joint School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the requests and the undersigned was designated to arbitrate in the disputes. 1/ A hearing was held before the undersigned on August 21 and 22, 1989 in Plymouth, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by March 15, 1990. A dispute arose as to the Association's request to submit additional evidence upon which the undersigned ruled on March 27, 1990 denying the request. Based upon the record and the arguments of the parties, the undersigned makes and issues the following Awards.

ISSUES

The parties could not agree on a statement of the issues and agreed the Arbitrator would frame the issues to be decided.

The District would state the issue as being:

"Did the School District violate Section 6.2.5 of the 1987-89 Collective Bargaining Agreement when it decided not to renew the individual employment contract of Doreen Salkowski for the 1989-90 school year? If so, what is the appropriate remedy?"

The Association would state the issue as follows:

Has the District met its burden of proving that it had just cause to suspend and/or fire Doreen Salkowski?

The Arbitrator concludes that the issues to be decided may be stated as follows:

- 1) Did the District have just cause to suspend the Grievant, Doreen Salkowski, without pay October 31 and November 1, 3 and 4, 1988? If not, what is the appropriate remedy?
- 2) Did the District have just cause to nonrenew the Grievant's teaching contract? If not, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1987-1989 Agreement are cited:

4. MANAGEMENT RIGHTS CLAUSE

4.1 The Board of Education, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including by without limiting the generality of the

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1/ The parties agreed to combine the cases.

foregoing, the right:

4.1.1 To the executive management and administrative control of the school system and its properties and facilities;

4.1.2 To hire all teachers, and subject to the provision of the law, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such teachers;

. . . .

4.2 The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board of Education, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and Laws of the State of Wisconsin, and the Constitution and Laws of the United States.

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## 6. INDIVIDUAL TEACHER RIGHTS

### 6.1 Discipline Concept

6.1.1 The employer will employ the practice of progressive discipline which may include, but not limited thereto, warning, oral or written, reprimand, probation, suspension with or without pay, dismissal.

6.1.2 All teachers shall be informed of the rules of the employer and that a violation of the rules shall subject a teacher to disciplinary action.

6.1.3 Discipline shall be appropriate to the offense of the teacher. Discipline shall be progressive.

6.1.4 The employer shall conduct a fair and objective investigation to determine the accuracy of allegations against a teacher.

### 6.2 Discipline Procedure

6.2.1 For an infraction of a work rule or any other action of a teacher not likely to result in suspension or discharge, the administrative staff may conduct its disciplinary function in an informal manner.

6.2.2 For an infraction of a work rule or other action of a teacher which could result in suspension or discharge, the Superintendent or designee shall schedule a conference with the teacher to discuss the reasons for the pending disciplinary action.

The teacher may have an option of a private conference with Superintendent or designee or may choose to be represented by others, including P.E.A. representatives if the teacher so chooses. The teacher must also be present unless excused by the Superintendent or designee.

The P.E.A. shall be notified in writing that a discussion of the pending disciplinary action is being considered. Such notice does not require information concerning the time or place, the reasons for the action or the identification of the individual or

individuals involved.

6.2.3 The above procedure shall not prevent the Superintendent or designee from immediately suspending a teacher when such action is commanded by an emergency or urgent circumstances.

6.2.4 If the teacher is not satisfied with the action taken at step one, two, or three above, he or she may arrange for a private conference with the Superintendent and other interested parties including P.E.A. representatives.

6.2.5 No teacher shall be disciplined, reprimanded, non-renewed, dismissed, or suspended without just cause.

Teachers employed after June 30, 1982 shall serve a probationary period of two (2) consecutive school years during which time the teacher may be non-renewed for reasons which are not arbitrary or capricious.

During the first year of probation the non-renewal of teachers hired after January 4, 1988 shall be subject only to Section 118.22, Wis. Stats.

### 6.3 Personnel Files

6.3.1 A teacher may review the contents of his/her personnel file in the presence of the Superintendent or designee.

6.3.2 The teacher may have a representative of the P.E.A. present during the above review.

6.3.3 The teacher may make copies, at the teacher's own expense, of the information contained in the teacher's personnel file.

6.3.4 The following material shall not be available for the teacher's review or inspection: personal references, academic credentials and other similar documents received prior to the teacher's initial employment with the Plymouth School District.

6.3.5 All material in a teacher's personnel file initiated by the Plymouth School District authorities shall be available for the teacher's inspection.

6.3.5.1 No material referring to a teacher's instruction, conduct, character or personality shall be placed in his/her personal file unless the teacher has had an opportunity to review the material. The teacher shall acknowledge the opportunity to review the material by signing the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such material and the answer may be reviewed by the Superintendent or designee and shall be attached to the copy to be filed.

6.3.5.2 Anonymous letters shall not be included in the file.

### 6.4 Teacher Evaluation Procedure

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6.4.2A teacher on probation will be evaluated at least annually. Teachers who have completed probation shall be evaluated at least every three (3) years.

6.4.3The above paragraph does not preclude more frequent evaluations if deemed necessary by the administration to improve the quality of the instructional program.

6.4.4If deficiencies are found, it shall be the responsibility of the administration to make recommendations for the removal of each specified deficiency and the responsibility of the teacher to take the steps necessary for improvement.

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7. VACANCIES, TRANSFERS AND REASSIGNMENTS

A vacancy is defined as an open position which is to be filled, caused by a termination, transfer or creation of a new position. Such vacancies are limited to covered positions as defined in (2.1) of this agreement.

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7.8This provision for notification of assignment does not in any way prevent the Board or Administration from assigning a teacher at any time to whatever duty in the school district is in the best educational interests of the students and the school district in general.

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12. FRINGE BENEFITS - INSURANCE

12.1Sick leave

All teachers covered by this agreement will be granted sick leave as follows:

12.1.1Twelve (12) days sick leave per year accumulative to a maximum of eighty-four (84) days.

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12.7UNPAID LEAVES. Teachers on an unpaid leave of absence (excluding disability) shall be eligible for health and life group insurance coverage only. Teachers shall make payments to the District for group health and/or life coverage on the 15th day of the month preceding the month of coverage. However, the District shall provide paid coverage for the months of June, July and August.

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13. LEAVE OF ABSENCES

13.1Without Compensation.

13.1.1A teacher may be granted a leave of absence for a period not to exceed one (1) year upon the recommendation of the Superintendent and the approval of the Board of Education.

13.1.2The conditions under which a teacher may return from a leave of absence shall be determined by the Board of Education upon the recommendation of the Superintendent. This should be done at the time request is granted, reduced to writing and signed by both parties.

13.1.3 Requests of leaves of absences may be approved or disapproved for periods of time not to exceed one (1) month by the Superintendent.

13.1.4A teacher will be granted a leave of absence when called to serve in the military service. Application for continued employment must be made within ninety (90) days of discharge.

13.1.5 Approved leave of absence.

13.1.5.1 A teacher on an approved leave of absence will return at the same experience step of the salary schedule achieved at the beginning of the leave of absence providing all other conditions of advancement are fulfilled.

13.1.5.2 Credits earned during an approved leave of absence through study, or other Board approved educational work, shall be accredited to the teacher in determining classification on the salary schedule.

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#### BACKGROUND

The Grievant graduated from Silver Lake College in 1978 with a B.A. degree in Elementary Education and Special Education with a concentration in the area of learning disability. She is certified in grades 1-8 for elementary education and K-12 for learning disability.

Among the school facilities maintained and operated by the District are Fairview, Cascade and Parkview (elementary schools) and Riverview (6th-8th grade). From 1978 to 1985 the Grievant was employed as a Learning Disability (LD) teacher by the Sheboygan County Handicapped Children's Education Board and taught in the Plymouth School District in that capacity. From 1978-1980 the Grievant taught at the elementary and middle school level, teaching part of each day at Riverview, Cascade and Parkview schools. From 1980-1984 she taught full-time at Riverview and for the 1984-1985 school year taught grades K-5 at Parkview and grades 6 and 7 at Riverview.

The Grievant was employed by the District as a First Grade teacher at Fairview for the 1985-1986 school year, and employed in that capacity at Fairview until she was nonrenewed from her employment with the District. Susan McFarlane was the Principal at Fairview for the 1985-1986 school year, and Amy Flood has been the Principal there at all times material since then. There are approximately twenty-five teachers at Fairview. The teachers' workday is 8:00 a.m. to 4:15 p.m. and students are in the classroom at 8:55 a.m.

The Grievant had been quite overweight, but lost approximately 125 pounds during the spring and summer of 1986. During that time the Grievant appeared to her fellow teachers to be weak and in poor health and at one point a fellow teacher at Fairview, Nancy Tiede, insisted that the Grievant see a physician and drove her to the Plymouth Clinic where she saw a doctor.

The Grievant returned for the 1986-1987 school year and on September 9, 1986 the Grievant had difficulty teaching with Flood observing her teary-eyed in the classroom. On September 11, 1986 the Grievant again had difficulty teaching and was helped by Flood. On September 12, 1986 the Grievant came to the room of Tiede, a Second Grade teacher at Fairview, shortly before the children came in and was crying and told Tiede she needed help. Tiede and Flood and another group of teachers later took the Grievant to Sheboygan Memorial Hospital to see a doctor. On September 15, 1986 the Grievant told Flood she could not teach, but that she did not want to go home. A substitute teacher was obtained for the Grievant that day. Following the school day on September 16, 1986, there was an "intervention" with the Grievant initiated by the school psychologist, Woythal, and which included the Grievant's mother and sister, Flood and a small group of teachers. They expressed their concern about her due to her having spoken of suicide and her depression. They tried to convince the Grievant to seek help on an in-patient basis and were successful. Arrangements had been made to take the Grievant to St. Agnes Hospital in Fond du Lac and some of them drove the Grievant to the hospital. The Grievant was at St. Agnes Hospital as an in-patient for approximately three

to four weeks and was off work until October 5, 1986. On October 6, 1986 she returned to work, but spent her evenings at St. Agnes. On October 9, 1986 a nurse at St. Agnes called Flood and told her the Grievant would be late arriving at school and the Grievant arrived at approximately 9:00 a.m. On October 27, 1986 the Grievant had a doctor appointment and was replaced by a substitute teacher. On November 7, 1986 the Grievant arrived at approximately 8:40 a.m. after stopping at Riverview School to talk to friends who were teachers there, Bonk and Bartz. On November 11, 1986 the Grievant had difficulty teaching and was assisted by Flood. On November 12, 1986 at 10:45 a.m. the Grievant requested a substitute, she later changed her mind and asked to resume teaching but was replaced by a substitute. On November 12, 1986 it was decided by Flood to cancel the Grievant's parent-teacher conferences and she was informed of this on November 13th by Flood and the Superintendent, with the Grievant's pastor and another teacher, Helen Schultz, present. Flood told the Grievant her performance was unsatisfactory and they encouraged her to seek help and she agreed to request a leave of absence. Flood accompanied the Grievant to her doctor appointment that evening and they both agreed upon returning that she should seek another doctor. Flood called St. Mary's Hill Hospital in Milwaukee and arranged an appointment with Dr. Patel. On November 14, 1986, after Tiede's last parent-teacher conference, Tiede and Bartz drove the Grievant to St. Mary's Hill (SMH) where she met with Dr. Patel and was admitted as an in-patient.

On November 17, 1986, Flood sent the following letter to the Grievant:

Dear Doreen:

This is to confirm that a conference was held with you on November 13, 1986 to discuss the subject of your unsatisfactory performance in the classroom.

For example, on Friday, November 7th you were 40 minutes late for work without calling. When I asked you why, you said you "couldn't face the kids today." I did contact Dr. Moore that day to express my concern for you.

On Tuesday, November 11th I spent the afternoon in your classroom. At times your voice would crack and the tears would start, and you were unable to carry on with the lesson.

On Wednesday, November 12th at approximately 10:45 a.m. you asked for a sub. One was called. When I talked to you at 11:30 a.m., you said that you hadn't slept for days, that you felt in a daze, and you said you weren't doing the kids any good. Fifteen minutes later you asked if I could call the sub back, that you thought you could do it. I told you no, the sub would be in.

At this conference, you agreed that your performance had been unsatisfactory, and you asked for a leave of absence through November 30, with the option of extending it.

Please be advised that your leave can and will be extended if necessary. However, when you come back, you will be expected to perform your job 100%.

By the following letter of November 20, 1986, the Superintendent advised the Grievant that her request for a leave of absence (LOA) had been approved:

Dear Ms. Salkowski:

We have received your request for a medical leave of absence beginning November 13, 1986. You are granted such leave under the sick leave provisions of your contract. Our records indicate that you have used all of your sick days so this will be unpaid leave. We are willing to work with you to distribute this loss of pay over the months ahead. Should you desire some special arrangement please indicate this to Mrs. Flood upon your return.

We believe your health is the primary consideration now. Take what ever time you and your doctor feel are necessary under this leave. Contact Mrs. Flood or me if you have further questions.

Sincerely,  
Paul C. Brandl

On November 24, 1986, Flood, Tiede, Bonk and Bartz attended a meeting at SMH with the Grievant and a social worker.

By letter of November 24, 1986, the Grievant requested that her LOA be extended to December 23, 1986 and was advised by letter the next day that her request was granted. By letter of December 19, 1986 the Grievant requested that her LOA be extended until January 23, 1987 and was notified the request was granted.

On January 15, 1987, the Superintendent and Flood sent Dr. Patel the following letter:

Dear Dr. Patel:

As administrators in the Plymouth Public Schools and the supervisors of Ms. Doreen Salkowski we will need written assurance that Ms. Salkowski is ready to return to work and that you as her health professional will attest to her readiness and recommend her return.

The tentative date set for her return is January 23, 1987. We want to assure you and assure Doreen that her return on that date is not significant. Because her health condition had resulted in poor performance prior to treatment the critical point now is her readiness to perform her teaching duties. When she returns her performance must be satisfactory, that is important.

There has been some rumor that she would like to return one-half time. This we will not be able to accept. She is teaching a first grade and the students should have the same teacher all day on a regular basis.

We also want you to know that Doreen has a long term disability insurance that will begin to pay her 66 2/3% of her salary beginning on February 10th. If you do not feel she is ready to take over the classroom on a full-time basis this financial support is available.

As far as Ms. Salkowski's job is concerned, you can assure her that it will be there for her at any time up and including waiting until August of 1987. The main point at this time is that we as professional educators do not want her to return until she is ready to be successful.

If you have any questions please contact us . . .

By letter of January 21, 1987, the Grievant requested an indefinite extension of her LOA and indicated her hope that she would be returning to work within the next two to three weeks. Her request was approved by the Superintendent's letter of January 29, 1987.

On January 26, 1987, Flood, Bonk and Tiede met with the Grievant and Dr. Patel at the request of Flood and the others to find out if the doctor felt the Grievant was ready to return and to find out how they were suppose to treat her.

By letter of February 12, 1987, the Grievant advised the Superintendent that she planned to return to work on February 18, 1987. The Grievant visited her class on February 13th and in fact returned to work on February 18th.

While at SMH the Grievant was diagnosed as having "major depression, recurrent, with melancholia" and an "atypical eating disorder." A number of anti-depressant medications were utilized, but discontinued due to their negative side effects. Upon her discharge on February 16, 1987, the recommended aftercare was that she continue outpatient therapy with Dr. Patel and continue to attend support group meetings on Thursday evenings at SMH.

Flood observed the Grievant in the classroom on March 19, 1987 as part of her evaluation and considered her performance "fine." On April 22, 1987 the Grievant called Flood at home before school and told her she needed extra time and came to school late.

On the evening of April 29, 1987 the Grievant attempted suicide, changed her mind and called Dr. Patel who told her how to disgorge the medication she had taken. She called Flood at approximately 6:30 a.m. the next day and said she needed a substitute. Flood left a note at the school for her secretary to call a substitute for the Grievant and saw Tiede in the school parking lot as she was leaving for a meeting and mentioned her concern about the Grievant.

Tiede asked if she could check on the Grievant and Flood gave her permission to go to the Grievant's house. Upon getting no response at the door, Tiede let herself into the house and found the Grievant in her bedroom asleep and awoke her fearing she was unconscious. Tiede and Schultz drove the Grievant to her appointment with Dr. Patel that evening. The Grievant requested a substitute on May 1, 1987.

On June 1, 1987, prior to the noon hour, the Grievant told Flood she had not slept, that she was not doing anyone any good and would like a substitute for the afternoon and one was called. On June 11, 1987 the Grievant received her evaluation for the 1986-87 school year. That evaluation indicated two scores for many of the areas evaluated, one score for the beginning of the school year and one score for after she returned from SMH, with the former reflecting that Grievant "needs improvement" in those areas and the latter reflecting "competent" or "competent plus." In some areas the Grievant received one score for the entire year, receiving a "competent plus" or "competent" in all of those with the exception of "needs improvement" in the area of "self control." Under the section headed "Narrative of Supervisor," Flood stated on the evaluation:

Doreen has the potential to be an outstanding teacher. Superb lesson plans, an attractive classroom, and a sincere interest in each of her students were always evident in Doreen's teaching this year. I observed clear presentations of material, good use of positive and negative reinforcement of students, and excellent monitoring of individual students' understanding.

There were numerous occasions this year when Doreen did not perform at the level which is expected of her, including:

1. Failure to attend work on a regular and consistent basis;
2. Difficulty in presenting prepared material;
3. Difficulty in controlling her emotions in the classroom;
4. Inconsistency in reacting to actions of her first graders;
5. Inconsistency in establishing and maintaining effective communications with parents; and
6. Inconsistency in participating in school and system-wide committees and extra duties. \*

\*The above enumerated examples are reflected on the front page of this evaluation.

In summary, Doreen has great potential as a teacher, and has previously demonstrated her ability to perform to these expectations. However, this year several areas of unsatisfactory performance have been observed. Doreen needs to attend work on a regular and consistent basis, and she needs to perform at the level expected and at which we know she can. Failure to do so may lead to disciplinary action up to and including non-renewal and/or discharge.

The Grievant attached a response to the evaluation in which she noted the difference in her performance between the period before she sought treatment and the period after she returned. She also noted that her use of sick leave was due to her having been "physically quite ill. . ." and two or three occasions where she could not "hang on" emotionally and had to go home. She also stated that:

I feel I also need to mention that there was not one parent complaint through this whole situation. The parents were very supportive and were happy to see me return. Also, my principal made it clear to me that she did not feel that the children had been adversely effected by my performance before my leave or by my three month absence. She also told me that she felt there was absolutely no comparison between my performance at the beginning of the year and the job I did after my leave. I had hoped more of these positive comments would have been included in the evaluation.

The Grievant also took issue with Flood's use of "numerous occasions." The Grievant was admitted to SMH on July 16, 1987 for treatment of "major depression, single episode with melancholia" and "Bulimia." She was discharged from SMH on July 31, 1987 with the same continuing aftercare with Dr. Patel and



with Dr. Nock, the latter being in charge of the therapy group she attended.

On August 21, 1987 Flood met with the Grievant to advise her as to what was expected of her, that what had happened the previous school year would not be acceptable the coming school year and that failure to correct it could result in discipline or dismissal. Notice of the conference was sent to the Association's president at the time.

On August 31, 1987, Dr. Patel sent a letter to the Superintendent requesting that the Grievant be permitted to attend group therapy sessions at SMH on Thursday afternoons from 3:30-5:00 p.m. The Grievant was permitted to leave school at 2:45 p.m. in order to attend those group therapy sessions on Thursday afternoons, and since the students are in school until 3:45 p.m. arrangements were made for the Grievant to leave early. The Grievant attended the group therapy sessions on Thursday from June of 1987 until sometime in April of 1988.

The Grievant was absent on October 15 and 16, 1987 for illness. On October 28, 1987 Dr. Patel had the Grievant admitted at SMH due to her having evidenced suicidal tendencies during her therapy session with him. The Grievant was discharged from SMH on October 31, 1987 and the diagnosis at that time was "Post-traumatic stress disorder, chronic history of major depression, history of an eating disorder." By that time the Grievant was diagnosed as having "post-traumatic stress disorder" stemming from her having been sexually assaulted as a high school student and the depression and eating disorders were considered part of that syndrome. The Grievant did not miss any school during that stay at SMH as it coincided with the state teachers' convention.

On February 4, 1988, the Grievant came to school with a sore on her forehead. Flood covered the Grievant's class while she had a teacher aide take the Grievant to a local physician to have the wound treated. The Grievant returned from the doctor and finished the day, but did not attend the group therapy session that evening due to the injury. The Grievant called in the next day asking for a substitute due to a headache from her injury. On February 15, 1988 the Grievant reported to Flood that her keyboard had been stolen from her classroom closet. Upon hearing approximately a month later that it had been returned, Flood asked the Grievant about it and she confirmed the keyboard was back.

In mid-March of 1988 the Grievant reported to Flood that she had received an anonymous telephone call with the caller threatening to tell parents of Grievant's students that their children's teacher was receiving psychiatric care. This was followed by anonymous letters to the Grievant and some parents of her students stating the Grievant was receiving psychiatric care. The Grievant showed the letter to Flood and a number of parents called Flood upset at the letters, i.e., that someone would do that to the Grievant, and teachers the Grievant had told about the letters were also concerned that something be done. Eventually Flood began to suspect that the Grievant herself sent the letters and called Dr. Patel to ask him about it on March 23rd. On March 24th Flood confronted the Grievant about her suspicions and the Grievant denied she sent the letters and was upset with Flood for thinking it. The Grievant did not teach that afternoon and a substitute was called. The Grievant attended her session with Dr. Patel that evening. At 8:00 a.m. the next morning Flood and the Superintendent met with the Grievant and her Association representative, Schultz, and informed the Grievant that she was being suspended for four days for sending the letters. The Grievant at first again denied sending the letters and then admitted it. There is a dispute as to whether the Grievant was aware of what she was doing when she sent the notes or whether it was dissociative behavior that was part of her post-traumatic stress disorder. The Grievant was given, and served, a four day suspension without pay and was sent a letter in that regard on March 25, 1988 wherein it noted she had been warned "that future misconduct could result in termination of your contract." Flood told the Grievant and another teacher who knew what had happened, Tiede, not to tell anyone else that the Grievant was herself responsible for sending the letters.

On May 25, 1988 there was a meeting regarding the mainstreaming of a multiply handicapped child the next school year and placing the child in the Grievant's classroom. The Grievant was pleased that she was selected. In June of 1988 the Grievant received her evaluation for the 1987-88 school year. That evaluation indicated "competent" or "competent plus" in all areas except "parent-teacher communications," "supportive to administration" and "ethics." In regard to those three areas Flood stated on the evaluation:

- \* Although the above superb evaluation is true, this report would not be complete without mention of one extremely undesirable happening. A letter-writing incident admittedly done by you was highly unethical and certainly unsupportive of administration, not to mention the damage it would have done to parent/teacher

relationships were it discovered. Let it be noted that a suspension was served, and notification received that further such action may result in dismissal.

That one incident aside, ethics and administrative support have been fine, with parent/teacher communications being far above average.

Next year you will have the opportunity of initiating Fairview's writing lab. I know that you will do whatever it takes to make this program a success! I also encourage you next year to continue to reduce the number of extra hours you put in, as you are capable of continuing excellent teaching without that time.

Doreen, you are an extremely caring, insightful, dedicated professional and excellent addition to our staff!

In mid-September of 1988 the Second Grade teachers at Fairview, Schieble and Tiede, and the Chapter I Reading teacher came to Flood with concerns regarding the scores on the standardized reading tests (SRA) achieved by the Grievant's students. The test had been given in May of 1988 and it was concluded that the scores did not comport with the students' actual individual reading levels. One of the teachers told Flood she had heard that the Grievant had not timed the SRA test when she gave it. Flood went to the Superintendent and the Director of Instruction with her concerns. Flood subsequently found out that what the teacher had reportedly heard was in regard to another test that was not supposed to be timed. No satisfactory explanation was found for the SRA scores achieved by the Grievant's students. A letter was put in the Grievant's personnel file stating why it was felt the scores were erroneous and the negative consequences to the District and students of that fact and noting the Grievant's "inability" to provide a plausible explanation of the faulty results. The Grievant had responded to the administration's concerns with a letter stating she followed all of the directions and procedures for administering the tests, that she was unable to explain the test results, and that she had expressed her concerns "last spring" when the results had come back.

There was also a meeting in mid-September attended in the morning by Flood and the Grievant and others to discuss the plan for the handicapped student's transition to Fairview. On the ride back to Fairview the Grievant told Flood she was having second thoughts about having the student in her classroom because she had had trouble working with physically handicapped students in the past. The Grievant advised Flood that she was not up to going back to her classroom and the substitute that had been covering her class remained. The Grievant stayed at school to draft a letter regarding the student and returned to her classroom after the lunch hour.

On October 30, 1988, a Sunday, the Grievant experienced extreme mood swings and had periods of crying uncontrollably. She ultimately went to a local hospital where the doctor gave her the choice of being admitted or staying with a friend. The Grievant stayed with Bartz that evening and arrived at school early on Monday, October 31st. There is a dispute as to exactly what happened that morning, i.e., the extent to which the Grievant was crying and whether she was observed crying by other staff and students. The Grievant concedes she was crying when she was in Hughes' room, that another teacher, Marsh, saw her "teary-eyed" in her room, and that she asked the secretary, Erbe, to get her a substitute for that day when Erbe came in at 8:00 a.m. The Grievant did not leave the school until approximately 10:30-10:45 a.m. that day. Flood was not present at school on October 31st. On November 1st the Grievant again arrived at school early. Flood came somewhat later and was told by a teacher and Erbe what had happened with the Grievant the previous day. Flood talked to Hughes and another teacher about it and then went to check on the Grievant. Flood found the Grievant in her classroom and the Grievant told Flood she had been looking for her to ask for a substitute for the day. A substitute was called and the Grievant left when the substitute arrived, approximately 9:15 a.m. There is again a dispute as to whether the Grievant was crying or teary-eyed. The Grievant went to an eye doctor that day and returned to school that afternoon to ask Flood if she could go to another appointment with the eye doctor during school hours the next day. The Grievant met Flood in the parking lot and Flood gave her permission to go to the appointment and told her to arrange for an aide to cover her class. The Grievant was wearing an eye patch over one eye at the time. The Grievant came to school the next day, November 2nd, wearing the eye patch and made arrangements to leave for her appointment at 11:20 a.m. The Grievant went to the appointment; however, it took longer than anticipated. When the Grievant was late returning to school, Erbe called the doctor's office and was told the Grievant was still in with the doctor. The Grievant then called the school to say she would be late. When she did return she told Erbe she had

conjunctivitis and would need a substitute for the next day because it was contagious. She finished teaching that day and Erbe called Flood, who had gone home ill that morning, to obtain Flood's approval to call a substitute for the Grievant and Flood approved it. A staff meeting had been scheduled for 8:00 a.m. on November 3rd. The Grievant came to the staff meeting wearing dark glasses and Flood asked her why she was there. The Grievant responded that she wanted to be at the staff meeting. The Grievant asked to speak with Flood after the meeting to discuss the Writing Lab. The Grievant asked Flood what she could do to help get it off the ground. Flood had felt that the Grievant was originally positive about the Writing Lab, then negative at a meeting in October, and was again switching her position on the Lab. Flood told the Grievant her mood swings and her coming to school and then leaving were unacceptable and that she should resign, and the Grievant left. The Grievant called Flood at 6:30 a.m. the next morning and asked Flood to arrange for a substitute for her that day. Flood had a difficult time finding a substitute and had three cover the Grievant's class in the course of that day.

On November 7, 1988, an in-service day, Flood and the Superintendent met with the Grievant and Schultz and told the Grievant she would be suspended for four days without pay for her conduct in the prior week. Flood sent the Grievant the following letter on that date to confirm the suspension:

Dear Ms. Salkowski,

This is to serve as documentation of your unsatisfactory performance on Monday, Oct. 31, Tuesday, Nov. 1, and Wednesday, Nov. 2, 1988.

On Monday, October 31 at 8:00 a.m. you asked the school secretary to call you a sub because you were unable to teach. However, you remained in the building until approximately 10:45 a.m. You not only appeared distraught, but at times you sobbed uncontrollably. In addition to the many staff members who saw and/or spoke with you, many students saw you in this condition as well.

On the morning of Tuesday, Nov. 1 you showed up for work once again acting out of control. At 8:45 you said you were unable to control yourself and that a sub was needed. The lateness of your request caused the students in your classroom as well as staff members to see you in this condition.

You received prior permission from me to leave for lunch 15 minutes early on Wednesday, Nov. 2 for an 11:30 a.m. eye doctor appointment. Your students have lunch from 11:45 a.m. to 12:30 p.m. With my knowledge you secured an aide to cover your absence before lunch. When it was 12:55 p.m. and there was as yet no sign or word from you, the secretary called the eye doctor's office to learn you were still there. Several staff members assisted in covering your students until it was learned they were to be in class with the art specialist. After the secretary had called the doctor's office, you called school to say that the appointment ran late. At the time of your call you were already 25 minutes late for class. This is unacceptable!

Your unsatisfactory job performance is affecting students as well as staff members. As stated in your 1987 evaluation, you are expected to attend work on a regular and consistent basis, and to perform at the level expected. If you are sick and are unable to teach, you are to follow the procedure for getting a substitute without coming to school.

Your negative attitude, mood swings, and unpredictable behavior have seriously threatened your credibility and relationships with fellow staff members.

The validity of information you provide at professional meetings has been questioned by colleagues. And now your impressionable first grade students have been subjected to and affected by your irrational behavior as well.

As you well know, both the district and I have been most supportive during the past two plus years. You have been granted numerous leaves, as well as excused one hour and forty-five minutes early once a week for

three-quarters of last year. You have been told to take the time you need, but that you will be expected to perform your job 100% (see letter of Nov. 17, 1986).

Your unsatisfactory performance has severely damaged your effectiveness as a teacher on staff at Fairview Elementary School. As a result of these unprofessional actions, Mr. Brandl and I have agreed that you will be suspended without pay for four days beginning Tuesday, Nov. 8, 1988. Any future misconduct or unsatisfactory performance will result in my requesting dismissal.

You will return to the classroom on Monday, November 14, 1988.

Amy L. Flood  
Principal

It was subsequently decided that the Grievant would be docked four day's pay for the four days of sick leave she had taken the previous week and her sick leave restored because parent-teacher conferences were scheduled for the week she was originally to be suspended. The Grievant had also requested that she be her own substitute while on suspension. The suspension was grieved and is one of the issues before the Arbitrator.

On November 8, 1988, at Flood's request, the Superintendent came to Fairview after school to speak to the staff and essentially to tell them that they were focussing too much of their attention on the Grievant's problems and to mind their own business. A group of teachers then came to the Grievant's room and some of them told her that they could not believe her anymore, some that she should resign, some that they were tired of seeing her come to school with bumps, etc., that they felt "burned out" trying to help her and felt they had been manipulated by her.

The Grievant attempted suicide on January 8, 1989, but vomited the medication and alcohol and was ultimately brought to SMH and admitted. Dr. Patel was out of the country and she was admitted and diagnosed by Dr. Nock. The Grievant was discharged on January 12, 1989. Dr. Nock's diagnosis at the time was :

"Axis I: Major depression, recurrent moderate post traumatic stress disorder, chronic and delayed

Axis II: Borderline personality disorder"

The Grievant was absent on sick leave January 9-13.

Also in January of 1989, Flood and the Superintendent made their decision to recommend the nonrenewal of the Grievant's teaching contract with the District. By letter of January 10, 1989 the Grievant was given "Preliminary Notice of Consideration of Non-Renewal." By the letter of March 28, 1989, the Grievant was advised she was being nonrenewed for the following reasons:

- 1.Repeated failure to maintain personal composure in the presence of students and faculty members.
- 2.Record of unreliable work attendance.
- 3.Mailing parents anonymous notes, critical of Doreen Salkowski, written in a manner likely to alarm and cause needless concern on the part of the parents and students.
4. Conduct resulting in loss of credibility and a diminished capacity to work effectively with other staff members.
5. Absence from work on an unreasonable and unacceptable number of occasions.
6. Failure to correct unsatisfactory attendance record and work performance after extensive remedial and therapeutic measures.

The Grievant's nonrenewal was subsequently grieved. The parties attempted but were unable to resolve their dispute and proceeded to arbitration on the suspension and the nonrenewal before the undersigned.

#### POSITIONS OF THE PARTIES

District

The District first takes the position that it had just cause to nonrenew the Grievant. The District makes a number of assertions in support of its position. First, the District asserts that the Grievant repeatedly failed to maintain personal composure in the presence of students and faculty members and had an unreliable record of work attendance. The District asserts that the incidents should not be looked at in isolation, but rather as a pattern of deficiencies occurring and continuing through three of the four years of the Grievant's employment with the District. Cited are instances beginning in September of 1986 and ending in January of 1989 where the District alleges that the Grievant either lost composure in front of students or other staff, was absent, came late to work or came to work and had to leave.

Second, the District asserts that the Grievant engaged in conduct which resulted in a loss of credibility and a diminished capacity to work effectively with other staff. It is asserted that over an extended period of time the Grievant received a substantial amount of encouragement and support from other members of the staff and her principal, Amy Flood, but that through her conduct she lost credibility with the staff and diminished her capacity to work effectively with them. According to the District, things got so bad that in November of 1988 it was required that the Superintendent meet with the faculty in order to "redirect" them from the Grievant and her problems and that the faculty felt compelled to confront the Grievant. The District asserts that under those circumstances, the Grievant can no longer function as an effective member of the District's professional staff.

Third, the District cites the Grievant's having prepared and sent anonymous notes critical of herself to parents of her students and which were likely to cause alarm and needless concern on the part of parents and students. The District asserts that such conduct was highly unprofessional and that the explanation for her having engaged in the incident, i.e., that she was in a dissociative state, is not to be believed. In the alternative, if she is capable of engaging in such behavior without knowing it, that in itself would constitute just cause for her nonrenewal. The District asserts it should not be required to have to bear the risk of waiting to see if other such incidents will occur.

Fourth, the District asserts that the Grievant was absent from work on an unreasonable and unacceptable number of occasions. The District cites a number of arbitration awards for the proposition that chronic excessive absenteeism, even when such absence is due to illness, is just cause for a discharge due to the adverse impact on the employer's business.

Fifth, it is asserted that the Grievant's conduct has had an adverse impact upon her teaching. The District notes that in the social assessment of the Grievant in December of 1986 at St. Mary's Hill Hospital she listed among her problems that of functioning as a teacher. Further, her parent-teacher conferences in the fall of 1986 had to be cancelled, and when she returned from her leave of absence she was allowed to attend group therapy on Thursday afternoons necessitating her leaving school at 2:45 p.m. before the school day was finished. The District asserts that the Grievant's leaving early was also such a concern of her students that they advised their parents of the fact. The District also asserts that the record demonstrates that even though extraordinary efforts were made on the part of the staff to allow the Grievant to attend her group therapy sessions, she did not do so. Further, the Grievant attributed her personal characteristics to her students in assessing their needs and problems and then changed her opinions regarding those students within short periods of time. This happened to such an extent that the school psychologist and other teachers no longer consider the Grievant's opinions to be reliable. The District also asserts that the Grievant's absences and conduct have impacted negatively on the students. Students of that age need consistency, firmness and a sense of security which the Grievant has been unable to provide. Parents of students who testified on the Grievant's behalf acknowledged that their children had come home at times concerned about the Grievant's welfare because of things they had heard or because of her unexplained absences from the classroom. The District asserts that the Grievant's doctor, Dr. Nock, declined in the course of his testimony to conclude that the Grievant is functional but did testify that the Grievant's problems could interfere with certain aspects of her life and that it was possible that certain student behavior could cause problems for her. The District also cites the testimony of the Elementary School Counselor, Faye Hughes, and the School Psychologist, Connie Woythal, as indicating the problems with the Grievant's continuing to teach. The District further asserts that the Grievant's coming to school in November of 1988 while she had a contagious eye disease, the problems with the SRA test, along with the previous letter-writing incident, as all having had negative impact on the Grievant's performance as a teacher and also on her students.

Next, the District contends that the results of the "close medical supervision" provided the Grievant has to date been unsatisfactory, and that

assigning the Grievant to another school under continuing medical supervision would be an unacceptable option. The District asserts that the Grievant has been diagnosed as suffering from a number of emotional problems and other problems associated therewith. Dr. Patel acknowledged that his original diagnosis of depression and anxiety was in error and that he has subsequently concluded that the Grievant suffers from post traumatic stress disorder. Dr. Baker and Dr. Nock have diagnosed the Grievant as suffering from borderline personality disorder, although Dr. Nock later disagreed with Dr. Baker in that regard. Both Dr. Patel and Dr. Nock testified that such a diagnosis has a very negative prognosis in that there is no cure for a personality disorder and that it requires psychoanalysis over many years. Even assuming that Dr. Patel is correct that the Grievant's problems are the result of her being the victim of a sexual assault while in high school, there could be other underlying events as well. All Dr. Patel could testify to was that if the underlying event is resolved, then the secondary symptoms of anxiety and depression should be resolved as well. Essentially, the District cites the testimony of Dr. Patel and Dr. Baker as indicating that there is no assurance that the Grievant will not continue to evidence such behavior. Both Dr. Nock and Dr. Patel testified that the time period for treating the post-traumatic stress disorder could vary anywhere from three to ten years or six months to six years. The District asserts that no employer can reasonably be expected to tolerate continuation of unacceptable conduct for a period of years, especially given the uncertainty of the outcome of the treatment, assuming a correct diagnosis.

The District also contends that it is highly probable that assigning the Grievant to another school will only result in the continued unacceptable behavior impacting on a new group of teachers. The District cites Dr. Patel's testimony regarding how members of the Fairview faculty were involved in the support system with the Grievant and that he subsequently became aware that it was not working well and concluded that the Grievant should form a support system that did not involve her colleagues. However, developing such a support system will take time. Dr. Patel also testified that the needs of the Grievant were so overwhelming that people who tried to support her felt helpless and drained by the experience. Dr. Patel also testified that the Grievant has been difficult to support and that she reinforces her sick role resulting in concern on the part of people around her and that he is now working on that problem in therapy with the Grievant. Both of the doctors noted the need for the Grievant to develop another support system outside the school, and Dr. Patel testified that if the Grievant were to become involved with another group of teachers she would have to be very careful of the support she derived from them. The District asserts that the record indicates that the Grievant has a history of turning to an ever widening group of faculty for support and that her conduct has adversely impacted on the other faculty members. Therefore, the interest of everyone concerned would be ill served by placing the Grievant in another school affording her the opportunity to develop another faculty support system. This is especially true in view of the size of the District and the likelihood of reoccurring contact with the teachers who were part of her original support system.

The District also asserts that the Grievant has not received, and continues to not receive, the therapy she needs. Beginning in September of 1987 the District permitted the Grievant to leave early on Thursday afternoons to participate in a specialized therapy group. However, Dr. Nock testified that the Grievant's participation was limited and her attendance irregular. The District notes that Flood testified that the Grievant advised her that participation in that therapy group was very painful and that she did not wish to participate. The District opines that perhaps it is not coincidental that the Grievant came to school with an untreated head injury on February 4, 1988, after claiming to have fallen, and decided not to participate in the therapy that day as a result of the effects of the fall. This was the first occasion of which the District was aware that the Grievant did not attend the therapy on the appointed days. However, in April of 1988 the Grievant discontinued her participation and as of the date of the arbitration hearing she had not resumed. Dr. Nock testified that he wants the Grievant to return to the therapy group because of her needs; however, the Grievant testified she was instructed to call Dr. Nock when she was ready to resume the therapy, but after 17 months the Grievant had not yet concluded she is ready. Similarly, the Grievant testified that she had been advised by her physicians to participate in family counseling therapy, but as of August of 1989 she had not determined that the time was appropriate for such therapy. The District asserts that Dr. Nock's testimony raises the question of where the Grievant was on those Thursday afternoons when she was released early to attend her therapy. The District asserts that Dr. Nock testified that he had been led to believe by the Grievant that her colleagues discouraged her and criticized her for attending the therapy and that her schedule prevented her from attending. It is apparent from the record that even though it was untrue, Dr. Nock accepted the Grievant's explanation for her irregular attendance. It is contended that there are forms of therapy available to the Grievant, but she has elected not to accept the treatment, and without that treatment she has attempted suicide.

While the Grievant asserts she should be permitted to return to the classroom

under close medical supervision she must consent to such treatment. Thus, she determines what the nature of that close medical supervision will be. Given the District's lack of control and the lack of assurance that the Grievant will participate in necessary treatment, the requirement of "close medical supervision" is meaningless. Lastly in this regard, the District asserts that in spite of notices of the problems with the Grievant's conduct, her physicians have failed to address the impact of the Grievant's illness on her employment. Thus, in spite of all the time and expense devoted to her treatment, the Grievant's work performance problems have not been corrected and there is no evidence that further treatment will result in an end to that unacceptable behavior in the near future.

With regard to putting the Grievant on notice, it is asserted that the Grievant was given fair warning as to the consequences of her continued unacceptable work performance. At the conference with the Grievant in November of 1986, where she was advised that the parent-teacher conferences had been cancelled, she was urged to seek help, but she was also advised that she would also have to perform her job at a hundred percent when she returned. Her evaluation for the 1986-87 school year noted her need to perform at the expected level and that disciplinary action, including nonrenewal or discharge, could result from failure to do so. Also cited is the conference held in August of 1987 where Flood advised the Grievant that her conduct of the previous school year would not be acceptable in the 1987-88 school year and could result in discipline including nonrenewal, and the March 25, 1988 suspension letter issued to the Grievant as a result of the anonymous letters sent to parents. Further, the letter issued to the Grievant on November 7, 1988 advising her of her suspension for unsatisfactory performance similarly noted that "any future misconduct or unsatisfactory performance will result in my requesting dismissal." Thus, it is contended the Grievant was afforded clear warning as to the consequences of her unsatisfactory conduct, but that nonetheless she failed to conform to the expected standard.

The District argues that the testimony of the parents who testified on behalf of the Grievant was qualified and entitled to little weight. It is asserted that they had little knowledge as to the Grievant's mental health and her unsatisfactory work behavior, and their endorsement of the Grievant was qualified and conditioned upon the Grievant's accepting and continuing appropriate treatment. Given that qualification, it is likely that if they were fully aware of the circumstances, their testimony would have been substantially different, if they would have testified at all.

With regard to the suspension in November of 1988, the District asserts that it had just cause to suspend the Grievant. The District cites the Grievant's performance over the period of October 31 through November 4, 1988 and asserts it was unacceptable. On October 31, 1988 she arrived at school appearing tired, worn, drawn and as if she had been crying and asked the secretary to obtain a substitute for her. The testimony of other teachers and the Grievant indicates that she cried in the presence of other staff that morning, and that despite there having been a substitute obtained for her she stayed at school until 10:30 or 11:00 a.m. that morning. Under the circumstances it is highly probable that the Grievant was observed in that condition by students passing through the hallways or in the office. On November 1, 1988 the Grievant again reported to school early, but informed Flood shortly after 8:00 a.m. that she was "not going to make it" and asked for a substitute. Testimony indicates that the Grievant's eyes teared up while talking to Flood in her classroom with students entering and that she also cried in the presence of another teacher that morning. It is asserted that on November 2, 1988 the Grievant returned to school 35 minutes late from a medical appointment without notifying the school or making other arrangements for students until after the secretary called the doctor's receptionist to inquire as to why the Grievant had not returned. This necessitated other staff members having to cover the Grievant's class until she returned. When the Grievant did return she requested a substitute for the next day because she had developed a contagious eye disease. Although such a substitute was arranged for the Grievant, she nonetheless appeared at school on November 3rd and attended a staff meeting. On November 4th the Grievant again called Flood and requested that a substitute teacher be engaged for that day. The District asserts that conduct has been preceded by a history of other similarly unacceptable work behavior which had resulted in remedial measures being taken to help her and repeated warnings. Despite that, the Grievant continued to engage in such unacceptable behavior in the time period in question, demonstrating that she had done little to resolve her work performance problems or to assure the District that she would continuously perform her duties in an acceptable manner. Noting the previously cited prior warnings, the District asserts that the Grievant was given fair warning of the likelihood of further disciplinary action if she failed to attend work on a regular and consistent basis and to perform at the expected level. Thus, the District concludes that it had just cause to suspend the Grievant for that period.

In its reply brief, the District asserts that the Association's argument

that the Principal and a number of teachers from Fairview should have been transferred to another school in order to permit the Grievant to remain, inherently supports the District's position. The argument acknowledges the harmful and disruptive impact the Grievant has had on other members of the staff. If the Grievant's satisfactory work performance depends on the transfer of other members of the faculty and administration, then just cause exists for her nonrenewal. The District also takes issue with any allegations that the Principal or other members of the staff were responsible for the Grievant's problems. Her loss of credibility and diminished capacity to work effectively with other members of the professional staff has a substantial basis in fact and cannot be attributed to anyone other than the Grievant. The District also asserts that there were a number of instances in 1986 as well as on October 31, 1988 where the Grievant cried in front of other staff or students or where she was able to be observed by students. The evidence indicates that only one other teacher and the Principal cried at school and the circumstances of their doing so were completely different from those of the Grievant. No other member of the staff or administration have cried at school for no apparent reason or with the frequency of the Grievant or has been unable to continue to work as a result. Thus, the case does not involve disparate treatment of the Grievant compared to the administration or other staff. Also, the argument that the Grievant was not warned is completely without merit given the repeated and consistent warnings she received. The District also asserts that contrary to the Association's claims, there is nothing to support the conclusion that the letter-writing incident was the climax of her illness or that she no longer engages in dissociative behavior. Rather, the evidence indicates that additional incidents are likely and does not support the conclusion that the Grievant is cured or even on the way to recovery. The District also takes issue with the assertion that the Grievant's evaluations have been consistently positive, rather, it is asserted that they have contained strong criticisms. Flood testified that part of the basis for the positive evaluations was her attempt to give the Grievant something about which to feel good. Flood was more concerned with the Grievant's interest than with the District's ability to take disciplinary action. On that basis the Grievant's 1987-1988 evaluation is qualified. Lastly, the District contends that the Association's assertion that holding the Grievant accountable for her irregular attendance and above average absenteeism is violative of the District's duty to bargain in good faith and is interference with union activity, is not based on any offered legal authority and is not supported by the circumstances and must be rejected.

#### Association

The Association first asserts that the Grievant is an outstanding teacher whose teaching has not been affected by the fact that she suffers from post-traumatic stress disorder. In support of its contention the Association relies on the evaluations of the Grievant by Flood and Susan McFarlane, the principals who have evaluated the Grievant since her employment in the District, as well on the Grievant's evaluations for the years that she worked in the District, but was an employe of the Sheboygan County Handicapped Children's Education Board. The Association asserts that for all practical purposes the Grievant has been a teacher in the District since 1978. The Association also cites the testimony of parents of the Grievant's former students as indicative of the high regard in which the parents hold the Grievant. It is asserted that the attitude shown to the Grievant by these parents is anything but one that would indicate she had caused "needless concern on the part of parents and students." The Association cites the Grievant's evaluation for the 1986-1987 school year as showing that by the end of that year she was back up to her par of teaching.

With regard to the District's accusation that the Grievant repeatedly failed to maintain personal composure in the presence of students, the Association asserts there is no evidence in the record that shows that the Grievant ever lost her composure in front of students. With the exception of her being teary-eyed one time in her classroom in 1986, there is no evidence to indicate she has cried or that anyone has ever seen her lose her composure in a classroom. The record does indicate however, that other teachers have cried in front of each other and in front of students without being criticized. It is asserted that Flood admitted to having cried in front of teachers and with the Grievant. The Grievant is being criticized for crying in front of students when there is no evidence that she ever has and when others who have cried have not been criticized.

The Association takes the position that the District did not have just cause to suspend or fire the Grievant as a teacher in the District. The Grievant was suspended for four days in November of 1988 for her "unsatisfactory performance" on October 31st, November 1 and November 2, 1988. In her letter of November 7, 1988 Flood accused the Grievant of sobbing "uncontrollably" and of remaining in the building after a sub had been called for her and appearing distraught and being seen by many students in that condition. The Association also notes that by its letter of March 28, 1989, the District stated six reasons for the Grievant's nonrenewal.



According to the Association, the District is legally bound to prove that it had just cause to suspend and to nonrenew the Grievant. In that regard, the Association asserts that the District did not even remotely meet its burden. It asserts that it is well established arbitral law, set forth in a long line of cases by Arbitrator Daugherty, that the employer has the burden of proving that it met the seven-step requirement of proving just cause. The "common law of just cause" set forth in the Daugherty decisions requires that in order to determine whether there is just cause so as to justify employer disciplinary action against an employee depends on whether there is a "no" answer to any one of the seven standards. The Association also asserts that the parties' Agreement has articulated a number of these standards. Section 6.1.2 provides: "All teachers shall be informed of the rules of the employer and that a violation of the rule shall subject a teacher to disciplinary action." Section 6.1.3 provides: "Discipline shall be appropriate to the offense of the teacher. Discipline shall be progressive." The Agreement also requires fairness and objectivity. Section 6.1.4 provides: "The employer shall conduct a fair and objective investigation to determine the accuracy of allegations against a teacher." Section 6.3, Personnel Files, provides that any derogatory comments and documentation about an employee must be put in the teacher's file so that the teacher may respond. The Agreement also provides for teachers to be evaluated more frequently than usual if there are perceived teaching performance problems. Section 6.4.3 provides: "The above paragraph does not preclude more frequent evaluations if deemed necessary by the administration to improve the quality of the instructional program."

As to the seven standards of just cause, the Association asserts that the District did not meet any of those standards. First, with regard to forewarning it is asserted that the Grievant was not warned that she could be fired because of her personal problems, rather, she was lead to believe by Flood and the small clique of teachers that she could confide in them about her problems. The record indicates that those teachers approached the Grievant many times more than she approached them to discuss her problems and to the extent she did confide in them or let her feelings be known, the Grievant thought she was accepting their offered support. Further, the Grievant was not forewarned that taking unpaid leave of absence in 1986 and 1987 and using sick leave pursuant to the Agreement over the three years in question would be used against her for her nonrenewal. She was granted her leaves of absence without pay and utilized her allotted sick leave pursuant to the parties' Agreement, as was her contractual right, and the Agreement does not provide for any penalty for their use. The Association asserts that the District cannot now try to fire the Grievant for absences due to its own action in granting her leaves. The record indicates that the Grievant never used more than her allotted sick leave in the years in question after the 1986-87 school year, and that in any given year she used less sick leave than other teachers did. It is asserted that the District's contention that the Grievant can be nonrenewed on the grounds that she was absent too frequently by using her contractual sick leave is a violation of its duty to bargain in good faith with the Association and its duty not to interfere with union activity. With respect to the mailing of the anonymous letters, the Grievant accepted a four-day suspension for those actions and she was never forewarned that she would have to pay a double jeopardy for that action. Since she never did anything like it again, the matter should be considered closed and not brought up again to justify further punishment. As to crying, the Grievant has admittedly cried in front of some of the teachers; however, other teachers and Flood have cried in front of her as well as in front of some students. None were ever forewarned that they could be fired for crying and none of them were, with the exception of the Grievant.

As to the relation of the rule or order supposedly violated to the orderly, efficient and safe operation of the employer's business, the Association asserts that it is difficult to ascertain just what rule the Grievant allegedly violated. If it is an attendance rule, an absence policy that is beyond what is bargained in the contract is a per se invalid rule. If it is a no-crying rule, the District has tolerated crying from the Principal and other teachers and therefore has repudiated that rule. If it is a "no mental illness" rule, it is asserted that it is in violation of the medical leave provision in the Agreement and Section 4.2 which expressly states that the Agreement must conform to the laws of the State of Wisconsin and the Constitution and laws of the United States. It is asserted that mental illness is a handicap under both state and federal laws which impose a duty and responsibility of accommodation on an employer.

With regard to the District's effort to discover if a rule was broken, the Association asserts that Flood imposed her suspension of the Grievant in November of 1988 by a letter and the information on which it was based was not Flood's observations or a result of her talking to the Grievant, rather, it was based principally on the word of Tiede. According to the Association, the District has not proved at all that the Grievant ever cried in front of students or that she ever cried "uncontrollably" in the fall of 1988 as Flood's

letter alleged. Further, when Tiede testified, even she did not say that the Grievant had been crying on October 31, 1988. Under the parties' Agreement, the District had the right to observe the Grievant to ascertain her demeanor in the classroom, but did not do so after the incident in the fall of 1988 or at anytime during the year in which it nonrenewed her. The evaluations of the Grievant do not evidence any problems with the exception of the tearful eyes in 1986. Next, the Association asserts that there was no fair investigation made by the District. Flood was not capable of looking at the situation objectively and finding an administrative solution to the problems, such as a transfer. Instead, she allowed herself to be part of a "gossipy group," rather than requiring that bargaining unit members put their complaints in writing so that they could be put in the Grievant's file so she could respond to them in accord with Section 6.3 of the Agreement. The Association also asserts that there is not sufficient evidence that the Grievant in fact engaged in the conduct alleged.

As to even handed and nondiscriminatory application of the rules and penalties, it is asserted that when the Grievant called in sick and then went to school or came to school and went home sick, it was held against her to the point of being suspended and nonrenewed. Citing the testimony of teachers Saueressig, Bodura, Marsh and Kaufman, the Association asserts that when other teachers did the same they were not even criticized. Also, when the Grievant utilized the provisions of the Agreement for paid and unpaid medical leave, it was held against her; however, no one else was penalized for using leave. It was held against the Grievant when she cried in front of other teachers; however, when other teachers and Flood did the same thing nothing was put in their files. Others have cried in front of students without being criticized, while the Grievant has been criticized for it to the point of being suspended and nonrenewed. The Association asserts that the anti-discriminatory standard is closely related to the forewarning requirement in that if others are not punished for engaging in the same conduct, there is no forewarning to the employe who is.

The Association contends that as to whether the degree of discipline is justified, the state and federal laws prohibiting discrimination on the basis of handicap and requiring accommodation are closely related to the requirement that the degree of discipline under a just cause standard be related to the offense. The Association cites a number of arbitration awards as showing that arbitrators have found for employes fired for emotional problems if their prognosis is favorable. The testimony of the Superintendent is cited as indicating the existence of numerous positions in other buildings which the Grievant or the other teachers could have filled by way of accommodation. The Association asserts that if the Grievant was guilty of anything, it was of being mentally ill and confiding in Flood and a small group of teachers. If that violates any rule or policy, the degree of punishment in this case is "highly inappropriate."

The Association contends that by suspending and then nonrenewing the Grievant instead of transferring her or the small clique of teachers to another building, the District imposed discipline "grossly out of proportion to the offense" of the Grievant's being ill. It is asserted that Wisconsin's Fair Employment Act imposes a statutory duty of accommodation on employers with handicapped employes and the state Court of Appeals has interpreted such accommodation to include a transfer. Citing, McMullen v. LIRC, 148 Wis. 2d 270 (1988). Thus, besides having a contractual responsibility to accommodate the Grievant, the District had a legal duty to do so. Noting the Arbitrator is not being asked to interpret the Fair Employment Act, the Association would point out the interrelation between the requirement of appropriate discipline and the requirement of accommodation. The Association concludes that the discipline imposed on the Grievant was highly disproportionate to her offense of having been a victim of a sexual assault and the resulting illness of the post-traumatic stress disorder.

In its reply brief, the Association first asserts that the District has spent a great deal of time discussing the 1986-87 school year. It is conceded that the Grievant had trouble teaching and was ill in the fall of 1986 and was hospitalized. She took an approved leave of absence for several months during that school year. While she was admittedly seen with tears in her eyes in the classroom in the fall of 1986, there is no evidence whatsoever that she cried in front of students at that or any other time. The Association also asserts that Flood did not document all the crying she accuses the Grievant of doing and presumes that all she has to do is say that it happened. The fact that the Grievant was ill in 1986-87 is not justification for nonrenewing her three years later. Next, the Association asserts that there is no evidence of the excessive absences of which the Grievant is accused. She was absent in 1986-87 pursuant to her contractual rights and the District has conceded that she has not gone over her allotted sick leave since that school year. While she has exceeded average sick leave use, that is not in itself a violation of the contract and other teachers have had more absences than she has and yet not been disciplined. Also, the Grievant may not be nonrenewed because she used

the sick leave guaranteed her by the contract. The Association also takes issue with the assertion that her coming to school when she cannot teach is a basis for suspending and nonrenewing her. Other teachers have done so without being disciplined and the District has produced no written or unwritten rule, policy, or contractual provision that establishes how sick leave is supposed to be reported. Similarly, the Grievant's coming to school with a debatably contagious eye disease is no different from what Kaufman testified that she has done when she is ill and yet not been criticized for it. As to the anonymous letters in 1988, the Grievant has already served a four-day suspension for that matter and it cannot be used to fire her a year later.

The Association also reiterates its assertion that there is no evidence in the record that the Grievant has ever cried in front of students beyond having tears in her eyes in 1986 and one time when she smashed her finger in a closet door. Other teachers and Flood have admitted to crying in front of others and have not been criticized. The Association asserts that the District has the burden of proving its case against the Grievant, the Grievant does not have to disprove the District's allegations. Flood's letter to the Grievant accusing her of crying uncontrollably in the fall of 1988 was based on what she was told by Tiede and Hughes; however, they did not testify that they saw her crying uncontrollably on that day and Tiede did not even testify she saw her crying that day. As to the District's assertions that the Grievant has been dishonest and manipulative, the Association asserts that characterization is unjustified. The Association cites a number of areas where individual teachers indicated that they did not believe the Grievant's explanations for how she received a head wound, why she had to wear an eye patch, that she had a hormonal problem or as to her not being aware she authored the anonymous letters. The Association notes the evidence from the Grievant's doctor regarding the eye patch and the testimony of her physicians that to people not trained in mental illness some behavior might seem manipulative. As to the anonymous letters, there is testimony from the doctors that dissociative behavior is a common symptom of certain mental illnesses. It is also asserted that the Grievant has not engaged in such behavior since the climax of her illness in 1988.

The Association also takes great issue with the accusation of the District that the Grievant did not regularly attend her group therapy sessions on Thursday afternoons and asserts that there is no testimony to that effect in the record. Dr. Nock testified with regard to the Grievant's not being able to continue the sessions because the District would not allow her to. The Association also requested that it be allowed to submit a letter from Dr. Nock and from the Grievant to clear up that matter if there is any doubt. The Association further asserts that the Grievant was not accused of not attending the sessions at the time of her nonrenewal or at the arbitration hearing so that she would have had the opportunity to respond. With regard to the District's assertion that it is "very possible that she will decide never to participate..." the Association asserts that the Grievant's testimony indicates that if anything, she is working very diligently to overcome her illness.

With regard to the District's assertion that the testimony of the parents should not be credited, the Association contends that the District used allegations that parents had asked not to have their children in the Grievant's class without giving any names or anything in writing to prove that. However, these parents came forward and testified in praise of the Grievant. Further, it is common in cases involving the termination of a teacher that there be parental complaints which the District uses against the teacher; however, the fact that in this case not one complaint has ever been lodged against the Grievant as a teacher should not only be recognized, but given great weight.

Finally, the Association argues that the Grievant should be reinstated with either the small clique of teachers being transferred or the Grievant being transferred to another building. The accusation that the Grievant cannot function well with other teachers is belied by the testimony of the four teachers who testified on her behalf. This indicates that many teachers do like and work well with the Grievant and all three doctors are on record that the Grievant can continue to teach.

#### DISCUSSION

Since the basis for the four-day suspension the Grievant received in November of 1988, and which is also in issue, is also a part of the District's basis for nonrenewing her, it will for the most part be discussed in the context of the nonrenewal.

The District has stated six reasons for the decision to nonrenew the Grievant's teaching contract in the March 28, 1989 letter notifying her she had been nonrenewed:

1. Repeated failure to maintain personal composure in the presence of students and faculty members.

2. Record of unreliable work attendance.

3. Mailing parents anonymous notes, critical of Doreen Salkowski, written in a manner likely to alarm and cause needless concern on the part of the parents and students.

4. Conduct resulting in loss of credibility and a diminished capacity to work effectively with other staff members.
5. Absence from work on an unreasonable and unacceptable number of occasions.
6. Failure to correct unsatisfactory attendance record and work performance after extensive remedial and therapeutic measures.

There is no dispute that the Grievant had problems in the 1986-87 school year, although there is some dispute as to whether the Grievant actually cried in the presence of her students or was at most "teary eyed." Contrary to the Association's assertion, the Grievant was warned both in her evaluation at the end of that school year and at a conference at the start of the 1987-88 school year that one of her problems was "difficulty in controlling her emotions in the classroom" and that failure to perform at the expected level "may lead to disciplinary action up to and including non-renewal and/or discharge." The determination to be made then is to what extent did the Grievant continue to have problems in this regard after the 1986-87 school year and up to the time it was decided to recommend her nonrenewal (January, 1989).

For the 1987-88 school year the District cites February 4, 1988, when the Grievant came to school with a head wound, and her crying in front of Flood, the Superintendent and Schultz on March 25, 1988, when she admitted she had sent the anonymous letters and was told she was suspended without pay for four days. In her evaluation of the Grievant for the 1987-88 school year Flood noted only the letter writing incident as a problem and described the rest of the evaluation as "superb." The District does not explain how the Grievant's coming to school with a head wound was a loss of composure.

For the 1988-89 school year the District first cites September 13, 1988, when on the return trip to Fairview from a meeting regarding the handicapped student the Grievant informed Flood that she did not know if she was up to having the student in her class and did not think she could teach that day. She did teach the afternoon portion of the school day and although her emotions may have gotten the best of her for awhile, there is no evidence she lost her composure. This incident goes more to "attendance" than "composure." The District then cites the events of October 31 and November 1-4, 1988, part of which are also the bases for the Grievant's suspension. In its arguments in this case the District combined failure to maintain composure with its argument that the Grievant had an unreliable record of work attendance. It appears that of those days, October 31st and November 1st are the days that the District alleges the Grievant failed to maintain her composure in front of students and/or staff.

With regard to October 31st, Flood testified she was not at school that day and relied on what others told her with regard to the Grievant's composure on that day. The Grievant conceded she cried in the presence of teacher Susan Haydock on both October 31st and November 1st and may have had tears in her eyes while she talked to the School Counselor, Faye Hughes, as well as when teacher David Marsh was in her room the morning of October 31st. Hughes testified the Grievant was "crying," but did not describe to what extent. Marsh testified that the Grievant appeared "close to tears" and had "tears in her eyes." The secretary at Fairview, Claire Erbe, testified that the Grievant appeared "very tired, worn, drawn" and as though she had been crying when Erbe saw her in the office on the morning of October 31st. The Grievant remained at school until approximately 10:30-10:45 a.m. on that day, even though the substitute arrived around 9:15 a.m. With regard to November 1st, Flood testified the Grievant appeared to have been crying when Flood came to her room that morning and the Grievant testified that tears came to her eyes while Flood was talking to her and that students were coming into her room at that time. Erbe testified that when she saw the Grievant at about 8:30 that morning she appeared tired and worn, but did not appear as though she had been crying. The Grievant left as soon as the substitute teacher arrived at 9:15 a.m. It appears then that the Grievant cried (Haydock) or had tears in her eyes (Hughes, Marsh, Flood) in front of other staff and was possibly seen by students at some of those times.

Thus, as to the Grievant's alleged failure to maintain her composure in

front of students and staff since the 1986-87 school year, there have been three incidents. The incident in the 1987-88 school year when the Grievant cried during a disciplinary conference, and the two days in the 1988-89 school year when she cried or was teary-eyed in front of some staff and was possibly seen by students. In none of these incidents is there evidence the Grievant was crying or sobbing uncontrollably with others present. There is testimony from Flood that she cried at the intervention with the Grievant in the fall of 1986 and that she cried at school over the death of one of the students. Hughes testified that she had cried in front of both other staff and students over the death of that student. Neither were criticized for their conduct in that regard. It seems that there are occasions when it is permissible for a teacher to cry at school, e.g., upon the death of a student, but that it may not be permissible for a teacher to cry for her/his own personal reasons. Perhaps that would be appropriate if the teacher was frequently breaking down and crying at school, but three times in two years does not constitute the repeated loss of composure the District alleges. Further, the Grievant testified that her physical and emotional state on October 30 and 31 and November 1, 1988 was something different than she had experienced previously, and that she was told that it was likely due to her having just stopped taking the hormone medication she had been taking to regulate her menstrual period. The testimony of the Grievant, Hughes and Marsh indicates that is the reason the Grievant gave Hughes, Marsh and Haydock for her state on the morning of October 31st. Dr. Patel testified that the Grievant does not have an anxiety disorder so that it would be unlikely she would have an "anxiety attack" such as she had at that time. He also testified that he suspected that part of the reason for the anxiety attack was the change in the Grievant's medication at the time. It is noted that when the Grievant was admitted at SMH, both in the fall of 1986 and the summer of 1987, one of the physical problems noted was "menstrual irregularity," and there was mention of possibly restarting an "estrogen therapy" when she was at SMH the first time. Thus, it is possible, if not likely, that the Grievant's emotional state was due to a problem with her medication, i.e., temporary, rather than an ongoing symptom of her mental illness.

Given the relatively few incidents during the 1987-88 and 1988-89 school years, the nature of the incident in March of 1988 in this regard, and the possibility of an organic cause for her emotional state around October 31, 1988, the undersigned cannot conclude that these were situations that would fall within the type of ongoing or frequent loss of composure the District had been concerned about in the 1986-87 school year. This is further borne out by the fact that two teachers who work at Fairview testified they have never seen the Grievant cry or lose control and several, including Flood, have only seen her cry or tear-up once when students were present.

Next, the District cited as a basis for the Grievant's nonrenewal a "record of unreliable work attendance." The District also subsequently cites as another basis "Absence from work on an unreasonable and unacceptable number of occasions." The two reasons are so closely related that most of the incidents of absence cited for the former reason are included in the count of absences for the latter reason, and they will therefore both be discussed in this section of the discussion.

To a large extent the Grievant's alleged unreliable attendance has to do with the Grievant coming to school and then requesting to leave, rather than just calling in and asking for a substitute early in the morning. Also cited is the Grievant's attendance at group therapy on Thursday afternoons during the 1987-88 school year when she was allowed to leave early to attend those 2 writing lab sessions. The District again cites instances in the 1986-87 school year and the record indicates that on a number of occasions that school year the Grievant was unable to complete the school day and a substitute had to be called for her or she was late arriving at school due to her emotional state. A problem with regular attendance was also one of the areas cited in the Grievant's evaluation for that school year and she was warned that failure to correct the problem could result in discipline, including dismissal. The question again becomes, assuming there was a problem in 1986-87 in this area, 2/ did the Grievant continue to have these problems in the subsequent years.

The record indicates that during the 1987-88 school year there was one instance, March 24, 1988, where the Grievant indicated she could not finish the day and a substitute had to be called. That was the day Flood first confronted the Grievant with her suspicion that the Grievant was sending the anonymous letters and the Grievant asked for a substitute for the rest of that day. 3/

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2/ The Arbitrator notes that days when the Grievant did call-in ahead of time to tell Flood she would not be in are also cited by the District, i.e., April 30 and May 1, 1987.

3/ The Grievant was not paid for one-half that day and, hence, the suspension was in fact four and one-half days.

The District also cites the next day, March 25, 1988, as an instance where the Grievant could not finish the day, but Flood's testimony indicates that she and the Superintendent had already decided to suspend the Grievant starting that day as soon as they had their conference with her regarding the letters. The Grievant served a four-day suspension - March 25, 28, 29 and 30. The District also cites February 4 and 5, 1988 in this regard. On February 4th the Grievant came to school with an open head wound and Flood had a teacher aide take the Grievant to the clinic for treatment. There is no indication that the Grievant requested that be done and she returned to finish the day. Flood testified that the Grievant called her the evening of February 4th or the morning of February 5th to request a substitute for February 5th due to having a headache from her head injury. That would have been in conformance with the procedure the District has complained the Grievant failed to follow.

With regard to the Grievant's leaving early on Thursday afternoons for the group therapy sessions, that was done with the District's knowledge and permission. As with the LOA in 1986-87, having permitted the Grievant to take that time off, the District may not then use it as an independent basis for disciplining her. While it might well be relevant in some respects, the fact that the Grievant took the time off on Thursdays is not in itself an appropriate basis for discipline. The District, however, has questioned where the Grievant went on those afternoons based on Dr. Nock's testimony that her attendance at group therapy was very irregular. The Grievant has been in several different groups at different periods and Dr. Nock appeared somewhat confused about the time periods. Dr. Nock's testimony does not indicate whether he was referring to the break in attendance after April of 1988 or other periods after that. The point is troubling; however, it was not a basis for the District's actions and is relevant more with regard to the Grievant's willingness to obtain treatment.

As to the 1988-89 school year, the District first cites September 13, 1988. The record indicates that upon returning from a meeting regarding the transition of a handicapped student from another school to Fairview, the Grievant told Flood she was not sure she could cope with having the student in her class and did not think she could teach that day. After spending the rest of the morning drafting a letter regarding the student, the Grievant did teach that afternoon. The District then cites the October 31 - November 4, 1988 period. The record indicates the Grievant did first come to school on both October 31st and November 1st and then request that a substitute be called. On November 2nd the Grievant was approximately thirty-five minutes late returning from an appointment with an eye doctor. The secretary at Fairview, Erbe, testified that she called the doctor's office at 12:45 p.m., ten minutes after the time the Grievant was to have been back at school, and was told the Grievant "was finishing up with the doctor" and should be back "shortly." The Grievant called a few minutes later to tell Erbe her appointment had run late and she would be back at school in a few minutes, and she was. Flood conceded that other teachers had been late returning from doctor appointments and were not disciplined for it. After returning from the doctor appointment, the Grievant asked Erbe to obtain a substitute for her November 3rd because she had conjunctivitis and was contagious. Flood subsequently approved that request. The Grievant came to school for the 8:00 a.m. staff meeting on November 3rd and left school after meeting with Flood. The Grievant called in early the morning of November 4th and requested a substitute for the day. Thus, out of those five days cited, only two were instances where the Grievant first came to school and then decided she could not teach, i.e., October 31st and November 1st. The Grievant followed what the District asserts is the proper procedure regarding absence notice with regard to her being absent and needing a substitute on the other days. The fact that the Grievant attended the staff meeting on November 3rd may be relevant to other allegations regarding the Grievant's conduct, but is not relevant with regard to a charge of unreliable attendance at work. Therefore, in the two years following the 1986-87 school year the Grievant came to school and then indicated she could not teach on four occasions, 3/24/88, 9/13/88, 10/31/88 and 11/1/88. It is noted that both Marsh and Kaufman, two teachers in the District, testified they have had to leave school due to illness and were not disciplined for it.

The Arbitrator is also not quite sure what the District's complaint is about the Grievant's coming to work and trying to make it, rather than just conceding she cannot and staying home and calling in sick. It appears that part of the problem from the District's perspective is that when the Grievant comes in to work and then decides she is unable to teach, it is difficult to find a substitute for her, and that more importantly, students and staff might see her looking tired and worn or crying or that her students might feel confused by her appearance and then absence. The Arbitrator can understand the first part of the problem and can also understand that young students might be upset seeing their teacher or any adult for that matter, crying. It is not clear; however, as to why students or staff would be any less affected by seeing a teacher who has come to school with the flu, looking obviously tired and miserable, and then decided he/she is just not up to it and gone home.

There is no indication that teachers who do so are criticized for coming to school and then going home sick and both Marsh and Kaufman testified they had done so without criticism and Flood conceded that happens. It seems that the District is really questioning the Grievant's judgement and suggesting that she ought to stay home and call in if she has any doubt that she is up to teaching that day. That might be appropriate if the District required the same of its other teachers, but it appears it does not.

The District also states as a basis for nonrenewal that the Grievant has been absent from work on an "unreasonable and unacceptable number of occasions," and again relies primarily on the 1986-87 school year. The record indicates the Grievant was absent alot in 1986-87, using both sick leave (12 days) and an extended leave of absence without pay (66.5 days). The Grievant was given notice at the end of that school year and at the start of the next that in the future her attendance, among other things, had to be up to par. It is noted in this regard that, with the exception of the time at the end of the 1986-87 school year when the Grievant told Flood she was not doing anyone any good and wanted to go home, the District is not asserting that the Grievant was in fact able to come to school and teach on the days she was absent. A review of Employer Ex. 7, the attendance records for the entire staff for the school years 1985-86, 1986-87, 1987-88 and 1988-89, indicates that the Grievant exceeded the average use of sick leave in each of the four years, but that with the exception of 1986-87 when she was one of four who used twelve days, the Grievant was not the highest user of sick leave in any of those years. In the years 1987-88 and 1988-89 the Grievant was charged with five days of sick leave used and in each of those years was barely over the average used, 4.86 and 4.47, respectively. That does not constitute excessive absence, especially when the high user for those years was 13.5 days and 11 days, respectively. It is also noted that Flood testified that the absences considered in 1988-89 for her nonrenewal were the four days she took in the fall of 1988 that were subsequently converted to a suspension. At that point the average use for the year was not known and four days was below the prior year's average. Also, without reviewing all of the staff listed the Arbitrator was able to find at least four other teachers who exceeded the average sick leave usage in each of those four years (R. Beaver, Becker, Jansen and K. Stoltenberg) with two (Beaver and Becker) exceeding the Grievant's usage in three out of the four years. There is nothing in the record that would indicate those teachers have been warned or disciplined for exceeding the average sick leave usage in any year. Further, the Grievant had markedly improved her attendance in 1987-88 and it was not noted as a problem for her that year. In 1988-89 the Grievant had claimed four days of sick leave prior to the decision to recommend her nonrenewal, but those days were converted to a suspension. Her absences were not as great in number as some other teachers during the years in question and her attendance had significantly improved compared to the 1986-87 school year. There is also no dispute that the Grievant was unable to teach on those days and the District has offered no reasonable basis, if one exists, for treating absence due to symptoms of mental illness differently than absence due to physical illness. 4/ In either case the employe is absent from the work place and that is the employer's primary concern.

Thus, the Arbitrator cannot find a sufficient basis in the record for finding either a record of unreliable attendance or an unacceptable number of absences. There certainly is no basis for finding "chronic or excessive absenteeism." It appears instead that the Grievant has been held to a standard in those areas that is not applied to the rest of the District's staff.

The third reason the District cited for the Grievant's nonrenewal is the Grievant's mailing of the anonymous letters to parents of her students. The District asserts the Grievant's explanation that she was not aware she did this is not credible, or if it is, such a condition is cause for discharge. Regardless of whether the Grievant was aware at the time that she was responsible for the letters, she has served a four-day suspension without pay for that incident and it cannot now serve as an independent basis for her nonrenewal. Rather, the matter is relevant at this point only as to the Grievant's overall work record with the District.

The fourth reason cited for the decision to nonrenew the Grievant, and also mentioned in the November 7, 1988 letter of suspension from Flood, is "conduct resulting in the loss of credibility and a diminished capacity to work effectively with other staff members." The conduct alluded to consisted of the Grievant coming to school on February 4, 1988 with a bump/sore on her forehead that appeared to be untreated, and similarly with a bump on her head in September of 1988, her appearing at school the afternoon of November 1, 1988 and the next morning with a cotton patch over her eye, her appearing at the staff meeting on November 3, 1988 with dark glasses, changing her mind at times with regard to having the handicapped student in her classroom and as to

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4/ It also appears that not necessarily all of the Grievant's absences in 1987-88 were due to her mental illness.

whether the Writing Lab project was a good idea, her reporting her keyboard stolen, the invalid SRA test results, her negative comments at a staff meeting regarding the District goal of addressing the needs of "at risk" students, her sending the anonymous letters, her inability to properly evaluate a student in working with the school counselor, writing inappropriate notes in the students' cumulative files, her causing divisiveness among the staff, "manipulating" members of the staff who had tried to help and support her initially, and essentially behaving such that the teaching staff felt they could no longer believe her to the point they felt compelled to confront her on November 11, 1988 after the Superintendent had addressed them.

Beginning with the head wounds, the Grievant testified as to how she received them and despite the suspicions of some of the teachers who testified for the District, there is nothing in the record to refute the Grievant's explanations. Testimony from Flood and others was that the wounds appeared to have been untreated, i.e., they were oozing. The Grievant testified that one wound was an abrasion on the hairline and that she had done what she could to treat it, and that the other was more of a bump and bruise. Perhaps the Grievant should have put a band-aid or a patch over the wounds, but given the inclinations of Flood and this group of teachers, it seems unlikely that they would have felt any better about it if she had. They had similar feelings about the Grievant appearing at school with a patch over one eye, i.e., that she was just seeking their attention and sympathy. The reports of the eye doctor that the Grievant saw on November 1st, however, indicate he patched her right eye upon diagnosing a corneal abrasion to that eye. (Association Ex. 7) Thus, those persons' suspicions that the Grievant placed the patch on her eye just to garner attention were unfounded. As to the dark glasses worn by the Grievant the next day, it is not unusual with an eye injury for the eye to be sensitive to light. Again the problem appears to be more with other persons' perceptions of the Grievant's conduct than with the conduct itself.

The same holds true with regard to the complaints that the Grievant changed her mind about a number of things. There does not appear to be anything unusual or outrageous about the Grievant's explanation for why she changed her mind about the handicapped student and the Writing Lab. When faced with the impending arrival of the student she realized what a challenge it would be and questioned her own ability and the school's to meet the student's needs. She subsequently overcame her doubts and by all accounts in the record did well working with the student. The Grievant testified that she had a concern shared by others that once the schedule for the Writing Lab was developed it would interfere with another part of the curriculum and she voiced her objections in that regard. Apparently the Grievant agreed with Flood that the intensity of her objections was greater than was appropriate and that is one of the reasons the Grievant attended the staff meeting on November 3rd, even though she was on sick leave that day, i.e., so that she could apologize to Flood and tell her that she would do her best to make the Writing Lab work.

The record indicates the Grievant in fact did so. The Arbitrator is not clear as to why the District feels that changing one's mind or making one's objections known in appropriate fashion at meetings is misconduct or even objectionable conduct.

There is no indication in the record as to why the Grievant changed her mind about a student she had evaluated in consultation with the School Counselor, Woythal, and it is possible the Grievant erred in that case. It is also possible that the Grievant had a tendency at times to superimpose some of herself on her students in assessing their needs and abilities, but in neither case was this brought to the Grievant's attention. Woythal testified that she did not take her observations that she felt the Grievant was doing these things to Flood or anyone in the administration, yet Flood's letter of November 7, 1988 lists as a complaint that "the validity of information you provide at professional meetings has been questioned by colleagues." There is, however, no indication that Flood ever approached the Grievant before then to warn her of the need to do better in this regard or to give her an opportunity to respond to those complaints.

With regard to the report of the stolen keyboard, all that appears in the record is that it was reported stolen and then reappeared. Flood presumed the Grievant had made up the story to get attention, but there is no evidence to support the presumption. It is just as possible that the Grievant had misplaced the keyboard and then found it. At any rate, there is not sufficient evidence to find that the Grievant had intentionally mislead Flood about the keyboard being stolen.

The invalid SRA test scores are cited by the District in its brief as another example of the Grievant's conduct resulting in loss of credibility; however, Flood testified it was not a basis for the decision to nonrenew the Grievant, it was simply part of the Grievant's personnel file. The Grievant denied that she failed to time the tests, but could not explain the results and indicated such in her letter to the Superintendent in the fall of 1988. The Grievant was not disciplined with regard to the test results, ostensibly



because the District felt it could not prove the Grievant was responsible for the invalid scores. They apparently still cannot and the matter is disregarded.

The District also cites the notes the Grievant put in the cumulative files of some of her students as being inappropriate. Both the Grievant and Kaufman testified that teachers have not been told what is or is not appropriate to place in those files and there is nothing to indicate this was ever brought to the Grievant's attention prior to her nonrenewal.

With regard to the Grievant's sending the anonymous letters, it is possible that some of the teachers who found out the Grievant sent the letters have been unable to accept such behavior as part of her mental illness and question her truthfulness. Regardless of their doubts, the Grievant has already been disciplined for that conduct.

As to "manipulating" certain teachers and causing divisiveness, certain teachers testified they felt the Grievant had manipulated them by engaging in attention seeking behavior and by eliciting their sympathy. The allegation of attention-seeking behavior has already been discounted to a large degree and looking for sympathy is simply not a basis for discipline. Further, it appears from the record that most of these individuals initially offered their support to the Grievant out of genuine concern for her well being and then, as everyone seems to have concluded, "burned out" and withdrew their support. It also appears that after withdrawing their support they became preoccupied with the Grievant and critical of her to the point that her wearing a patch over her injured eye was perceived by them as suspect behavior. Tiede blamed the Grievant for a falling out she had with a friend and for what she perceived to be the staff's view of her as "privileged" because she knew something and could not tell them and the Grievant would not help her by telling them she wrote the anonymous letters. That is not a basis for discipline. Further, Flood testified that she told the Grievant not to tell anyone she wrote the letters. The Grievant may not then be criticized for complying with Flood's directions because of another teacher's misperception as to why the Grievant did not ease her situation with the rest of the staff. As to the divisiveness, Marsh testified that he felt it was more of a problem of cliques at the school than of anything the Grievant has done and that it predated the Grievant's problems.

The record indicates there was a group of teachers who, as noted previously, were preoccupied with the Grievant and that they frequently approached Flood with their concerns about the Grievant, her appearance, her ability to make it through the day if she looked tired or worn, as well as questioning things she did - things that likely would not have been questioned or criticized had they been said or done by someone other than the Grievant. With the exception of the SRA test results, these "complaints" were not brought to the Grievant's attention prior to her suspension and nonrenewal. After reviewing the lengthy record in this case, the Arbitrator feels compelled to conclude that after the 1986-87 school year the administration and a small group of teachers at Fairview simply "burned out" and could no longer cope with the Grievant's illness, as explained by Doctors Patel and Nock in their testimony. In essence, in offering to be the Grievant's "support group" in the 1986-87 school year they assumed a burden that was greater than they realized and they ought not be criticized for eventually withdrawing from that commitment; however, neither should the Grievant be blamed for having accepted their offered support. It also appears from the record that after the 1986-87 school year the Grievant approached them less frequently for help (Tr. 658-59) or to discuss her problems, rather, it appears most of the discussions about the Grievant were had amongst themselves and Flood. There may be a problem with having these teachers work with the Grievant, but that problem is more with their perceptions of the Grievant and her illness, than it is with the Grievant. Perhaps if they had not been so concerned with the Grievant on a daily basis, it would not have seemed like such an ongoing problem. Moreover, it appears that once outside that group there is not a problem. Two teachers, Saueressig and Bodura, testified they worked with the Grievant at Fairview and have worked with her on committees and on the PTO Board. Marsh also does not seem to have a problem working with her.

The District has also asserted that the Grievant's conduct impacted adversely on her teaching. Many of the allegations the District makes in support of its assertion have been addressed in the portions of the discussion dealing with the Grievant's alleged excessive absence from work and her loss of credibility and will not be further addressed at this point. The District also cites concern on the part of the students with the Grievant's well being and about where she was when she was absent or had to leave early. That appears to be the likely case when any teacher is absent and the District has not shown how or why the Grievant's illness somehow creates more of a negative impact in that regard than any other illness or injury a teacher might suffer. The Grievant also cannot be held responsible for rumors students might have heard about her or the administration's decision not to explain her absences. It is

particularly noted that the Grievant received a "superb" evaluation for the 1987-88 school year, the only problem area noted being the letter writing incident, and that when Flood observed the Grievant in the classroom during the 1988-89 school year no problems were noted. Flood's explanation for the lack of negative comments in her 1987-88 evaluation of the Grievant rings hollow. The record indicates that Flood was not reluctant to bring performance problems to the Grievant's attention. Even when the Grievant was first admitted to SMH Flood's letter of November 17, 1986 advised the Grievant her performance had been unsatisfactory and that she would be expected to perform "100%" when she returned. Flood reiterated her concern with the performance problems in her 1986-87 evaluation of the Grievant and again at the conference with the Grievant in August of 1987.

The District has questioned the Grievant's ability to continue to teach in the classroom without continuing problems or incidents. The District has asserted that assigning the Grievant to another school would likely result in continued "unacceptable work behavior" on her part which could impact on a new group of teachers. The District cited testimony of Dr. Patel as indicating that the needs of the Grievant were so overwhelming people felt helpless and drained supporting her, that the Grievant had always been difficult to support and that she often reinforces her sick role. The actual testimony cited is as follows:

QDoes she need as much support as she needed before?

ANot as much support as she did during her first two admissions. I believe she has really come a long way and has made significant improvement. And that quality of support system -- I think before her needs were such that people felt very helpless and over-whelmed, and I could see that it could be very draining for anyone to be able to continue to show concern and at the same time be objective.

And I believe that the colleagues that has (sic) offered a lot of support in the past just wore out. I guess to a certain extent they felt helpless. But I think she has really made significant progress and is a lot more healthier now than I have ever known her, and I hope that aspect of her health and being capable of -- being functioning is capable of withstanding the stress that she has been going through in the past three or four months is a sign to me of improvement. I think that aspect could be related to next year or whenever she goes back to work.

QSo if she goes into another group of teachers you don't think she would go to them for support?

AI think she would have to be very careful of the support she derives from them. Especially if she is so needy, I think that could create a lot of mixed feelings.

QWhat can she do then?

AI think she has learned to do that elsewhere. I think that is the healthy way to get support. She already has a support system established through her group therapy and some people in Milwaukee. I assume that she would also continue to develop support systems based on some of the healthy activities that she is into. I have no question that that would occur over a period of time.

(Tr. 22-23)

QSo to get back to what you testified before, if a group of the teachers said they were burned out, frustrated, angry, in supporting Doreen, would you consider that to be sincerely felt?

. . .

(Objection)

Q(By Mr. Hemmer) Would you consider that characteristic of someone who enters a support arrangement such as

with Doreen?

AI think people do get exhausted and feel over-whelmed and would be very skeptical of what they do if they really feel that their need for the level or the intensity of the support that the person needed over a period of time is -- I mean the person is not better, so they in some way become skeptical of what everyone is doing.

(Tr. 33)

QNow I will change the question. Was May of '89 the first time you realized that some of these faculty members and administrators might have been burned out, angry, frustrated?

AI became aware of that too, but it was -- I had the intensity that that was -- I became much more aware -- very acutely aware -- I was aware that there were some people who had offered to support her or be a support system for her before things had not been going well, and she had always been -- it has been difficult for Doreen as well as the person who is providing the support, a double bind kind of situation, and that is something that has been addressed. Doreen has brought that up for quite some time before that meeting.

QWould you recommend that some of these other faculty members now also receive some treatment counseling to work through their feelings?

. . . .

(Objection)

Q(By Mr. Hemmer) Is the characteristic of the support system of someone suffering from a disease of this type, is that what you recommend for other people in this situation, parents or someone else?

AWell, I think -- this is hypothetical -- this is strictly hypothetical -- I think it is helpful -- and the parallel that I am drawing would be , say any chronic medical or psychiatric condition, for example, anorexia. We routinely advise parents and close friends or boyfriends or girl-friends to be part of the open-self-help kind of support group, where if they have doubts about what they are doing, and very often parents do, and I would suspect that some of her colleagues would have just very mixed feelings about what they are doing; are they helping Doreen, hurting Doreen -- I think that is something that can be therapeutically depressed -- not necessarily if a (sic) individual has to enter therapy, but I think that has to be out in the open so that they know what their reactions are and I think to have somebody in a similar position and have a direct chance to hear from somebody like Doreen.

I think one of the problems in situations like that is Doreen may be put in a sick role and people feel comfortable relating to her as a sick, vulnerable individual, and not quite recognizing the healthy aspect of it.

Now Doreen might do some things that reinforces that sick role that people continue to worry about it, but I hope they could also see the other part. I think that would be very over-all beneficial to everyone, including Doreen, if they just have some meetings. I think something like that occurred facilitated by Doctor Nock.

(Tr. 37-39)

Although the District may have a legitimate concern in this area, the District has overstated its case. Dr. Patel's testimony does indicate that providing support for the Grievant can take its toll on a person who is not trained to deal with mental illness; however, he also indicated that he felt the Grievant has made significant improvement and no longer needs the same level of support as she needed initially. The Grievant and her two psychiatrists testified that the Grievant is now working on developing a support group outside the work place. It is also noted that the teachers in question at Fairview had volunteered their support and the fact that providing the support became too much for them should not be held against the Grievant.

The District has asserted that it is possible that the Grievant would again engage in behavior similar to the letter writing incident and other behavior it considers to be "attention seeking." For the most part the District relies on the report of Dr. Baker, wherein he reports his diagnosis of the Grievant as having a "borderline personality disorder," and the inability of the Grievant's doctors to guarantee that the Grievant will not engage in such behavior in the future. Dr. Baker notes in his report that his diagnosis is based on his one and one-half hour interview with the Grievant in June of 1989 and a review of her medical records and personnel records. His diagnosis was "Traits of a borderline personality disorder" and both Dr. Patel and Dr. Nock disagreed with that diagnosis, although Dr. Nock made a similar diagnosis in January of 1989. Both Dr. Patel and Dr. Nock testified that the symptoms of post-traumatic stress disorders are very similar to those of border-line personality disorders, but that they believe that the Grievant has a post-traumatic stress disorder and that the underlying traumatic event is being treated. Both agree it will take time and that treatment should continue, but that the Grievant is able to continue to teach and that it is unlikely she will engage in dissociative behavior again. The District has engaged to a large extent in speculation as to what behavior the Grievant could possibly engage in in the future and whether she would continue treatment. As the Grievant's doctors noted, there are no guarantees, but speculation is not a sufficient basis for termination.

The Arbitrator is unable to find a basis in this record for sustaining the alleged bases for either the four-day suspension imposed in November of 1988 or the decision to nonrenew the Grievant's teaching contract with the District. The District held the Grievant to standards with regard to personal composure and attendance at work that it did not require the rest of its staff to meet. That is especially true as to the alleged problems with the Grievant's attendance subsequent to the 1986-87 school year. The Grievant has already been disciplined for the incident regarding the anonymous letters and has not since engaged in conduct of that type, and the incident may not now be considered an independent basis for her nonrenewal. The allegation of "conduct" resulting in loss of credibility, etc., has been held to be unfounded and more of a problem of others' perceptions instead of the Grievant's conduct. The last stated reason for the nonrenewal, the failure to correct unsatisfactory attendance and work performance, cannot stand given the foregoing conclusions.

Based upon the foregoing, the record and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. That the District did not have just cause to suspend the Grievant without pay on October 31 and November 1, 3 and 4, 1988. Therefore, the District is to make the Grievant whole for the pay lost and is to deduct the four days from the Grievant's accumulated sick leave.

2. That the District did not have just cause to nonrenew the Grievant's teaching contract. Therefore, the District is to immediately offer the Grievant reinstatement as a teacher in the District 5/ and to make the Grievant whole for any lost salary and benefits she would have received under the parties' Agreement, but for the District's having nonrenewed her teaching contract.

Dated at Madison, Wisconsin this 17th day of July, 1990.

By \_\_\_\_\_  
David E. Shaw, Arbitrator

5/ The Association has requested that the Grievant be reassigned to another school building or that certain teachers be transferred from Fairview and the Grievant reinstated at Fairview. The Arbitrator is not convinced that is necessary, but will leave it up to the District to decide whether to place her at Fairview or another school.

