

BEFORE THE ARBITRATOR

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: In the Matter of the Arbitration :
: of a Dispute Between :
: SOUTHERN DOOR EDUCATION ASSOCIATION :
: and NANCY SKADDEN : Case 20
: and : No. 44187
: : MA-6204
: SOUTHERN DOOR SCHOOL DISTRICT :
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Appearances:

Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, on behalf of the Association.
Mr. William G. Bracken, Director of Employee Relations Services, Wisconsin Association of School Boards, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. The parties jointly requested the undersigned, a member of the Wisconsin Employment Relations Commission staff, to hear the instant dispute. Hearing was held in Brussels, Wisconsin on September 21, 1990. No stenographic transcript was made. The parties concluded their briefing schedule on October 17, 1990. Based upon the record herein, and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties stipulated to the following issue at the hearing:

Did the District violate the collective bargaining agreement by suspending the grievant, Nancy Skadden?
If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE:

ARTICLE VI

U. Teacher Protection

New teachers shall serve a two-year probationary period during which time they may be nonrenewed without recourse to the grievance/arbitration process.

All nonprobationary teachers may be discharged, nonrenewed or disciplined for good cause.

FACTS:

Most of the material facts are not in dispute. The grievant, Nancy Skadden, is an eighth grade language arts teacher who has been employed by the District for eighteen years. During her tenure as a teacher, she has never before been disciplined. She had previously enjoyed a good work record and favorable teaching evaluations.

During early February of 1990, another teacher, Judy Jesse, drafted and distributed to fellow staff members the "lounge lizard list" primarily to inject some humor into the informal conversations in the teacher's lounge. The lounge lizard list consisted of 65 survey questions requesting the person filling out the list to name from the teaching staff the "best dressed woman (man)", "wild, wild woman (man)", "sexiest man (woman)", "swinging single male (female)-(couple)", "macho man", "young and hung", "most (least) respected", "most envied", "tells best dirty jokes", "best bun/male (female)", "best boozier", "party person" etc. She asked the teaching staff to turn in their picks to her by February 7, 1990.

On February 5, 1990, Skadden utilized the above list, at least in part, in her eighth grade language arts class. After investigating this matter, the District suspended her for one day. Skadden grieved her suspension which is the subject of the instant dispute.

POSITION OF THE PARTIES:

District

The District argues that Skadden violated several Board polices along with certain rules found in the teacher handbook. By using the list, the

District claims that Skadden (1) failed to promote a positive self-image in students; (2) failed to promote students' self-control; (3) failed to facilitate interactions between teachers and the students in a mutually respectful and friendly manner; (4) failed to demonstrate understanding and acceptance of different racial, ethnic, cultural and religious groups; (5) failed to provide a satisfactory learning environment for the students; (6) demonstrated her inability to use discretion in difficult situations; and (7) demonstrated extremely poor judgment and lack of sensitivity to sexual and addictive behaviors.

The District contends that use of the list is demeaning to the entire staff and detrimental to the relationship between students and teachers. It promotes disrespect on the part of students toward the teachers. According to the District, Skadden utilized the list for the major portion of the period, but whether or not this is the case makes no difference in the outcome. Nor is it relevant whether or not Skadden read all sixty-five categories to the students in asking for their nominees. Pointing out that Skadden admitted reading the terms "young and hung" and "party person", the District asserts that these categories were evidence of poor judgment on her part disputing Skadden's defense of naivete with respect to both terms.

In responding to Skadden's claim that her short term memory is affected by an automobile accident, the District argues that in testifying she was applying her sense of right and wrong as of the date of the arbitration hearing, and not as of the date on which the incident occurred. The District notes that Skadden never denied using the list; she is just not sure what she read.

The District stresses that which exact words were read are not relevant. Rather, the fact that she used the list at all is worthy of discipline. For Skadden, a veteran teacher, to stand in front of an eighth grade class and call out descriptions of other teachers, asking students to respond and then making a note of their answers, undermines the total educational effort of the District. The District strenuously contends that she should have known better and should now face the discipline imposed for her action.

In response to the Association's assertion that the lounge lizard list is part of the curriculum, the District argues that this claim is so farfetched that it becomes inane. The District also maintains that it followed the disciplinary procedure contained in the teacher handbook. It claims that for such a serious offense, the discipline should commence at the fourth or fifth step. Moreover, according to the District, imposition of a mere verbal or written warning in this case would not work because no written plan of assistance would remedy the problem. As such, a written warning does not convey the proper sense of the seriousness of Skadden's transgression. In conclusion, the District urges the arbitrator to refrain from substituting her judgment for that of the District in deciding the penalty. It requests that the discipline imposed be sustained.

ASSOCIATION:

The Union states that Skadden's unrefuted testimony establishes (1) that the "lounge lizard list" was discussed for ten minutes, not the entire period; (2) that the only term that she would have used that might have been objectionable was "young and hung"; (3) that this term was not discussed in class as it did not generate any vocal response from the students'; and (4) that she did not understand what this term meant at the time she read it to the class.

The Union avers that use of the lounge lizard list or staff rating list is educationally sound and encourages the development of critical thinking skills in the middle school age group. According to the Union, Skadden testified that she did not use any of the terms on the list that carried sexual, derogatory, drug or alcohol abuse connotations and the District did not dispute this testimony. The District, it asserts, has failed to establish by the preponderance of evidence that the suspension is justified.

Assuming for the sake of argument that some form of discipline is warranted, the Union maintains that a one-day suspension is excessive. It relies upon Skadden's long tenure and unblemished employment record and upon the fact that the District has not followed its own progressive discipline policy. Claiming that the incident is not of a grave nature, the Union argues that by-passing the first four steps is unwarranted. Moreover, Skadden has not acted maliciously but rather made an error in judgment. She should not be "hung" for not knowing the meaning of "young and hung". The Union strenuously argues that the District has not proved that Skadden is guilty of wanton and willful disregard of the District's interests or her duties and obligations to her students. She did not deliberately violate or disregard any rule or policies of the District.

In conclusion, the Union asserts that the District has failed to establish just cause by any of the seven standard tests. According to the Union, there is no substantial evidence that the grievant is guilty as charged. It notes that the only other evidence where a teacher was disciplined for inappropriate remarks was a letter of reprimand. "Young and hung" pales in

comparison to the language for which the reprimand was received. The Union urges the Arbitrator to look at the grievant's (1) past disciplinary record; (2) her overall job performance; (3) her length of service; and (4) the appropriateness of the penalty imposed.

It requests that the grievance be sustained, Skadden made whole and the suspension removed from her file. If some form of discipline is found to be appropriate, the Union contends that a dated verbal warning (Step 1) is appropriate.

DISCUSSION:

The parties' do not agree on the time Skadden spent utilizing the "lounge lizard list" in class. The undersigned accepts the Association contention that the list was utilized for about ten minutes at the conclusion of class. It is evident from Skadden's testimony that her utilization of this survey was unplanned and impromptu in nature, taking up the balance of the class period. Contrary to the Association's assertions, it has failed to prove that utilization of such a list was educationally sound or in any way related to appropriate middle school language arts curriculum. The idea that said list was utilized as a tool to develop critical thinking skills is rejected where here the students were merely asked to shout out or respond with "off the top of their heads" candidates for the categories read by Skadden.

The District is correct in its assertion that said activity was inappropriate on Skadden's part and probably had a negative effect on teacher-student relations. In analyzing the District's reasons for imposing the discipline, the District has failed to provide evidence that Skadden (1) failed to promote a positive self-image in students and (2) failed to demonstrate understanding of different racial, ethnic, cultural and religious groups. It has, however, established that by using the lounge lizard list, Skadden (1) failed to facilitate interactions between teachers and students in a mutually respectful and friendly manner; (2) demonstrated her inability to use discretion in difficult situations and (3) demonstrated extremely poor judgment and lack of sensitivity to sexual and addictive behaviors. The survey was drafted to poke fun or inject some form of humor into peer relations among the staff. Its appropriateness for use even among teaching staff peers is questionable. Certainly many of the categories result in the person filling out the survey drawing or making demeaning comparisons between teachers.

Although Skadden admitted that she used the list in class, at the hearing she claims that she did not read any of the terms on the list which she believed carried sexual, derogatory, drug or alcohol abuse connotations with the exception of the term "young & hung". Moreover, Skadden maintains that she did not understand what this term meant at the time she read it to the class. Skadden, citing short-term memory loss from a car accident, maintained that she could not be sure exactly which categories she selected to read to the class from the "Lounge Lizard List".

Based on this testimony, the Association claims that the District has failed to meet its burden in establishing that Skadden acted improperly in reading to her class from the list. The difficulty with the Association's position is the fact that Skadden has admitted reading the term "young & hung" and further admitted that she was unaware of the sexual connotations involved with such a term. Her judgment then, as to what categories contained sexual or alcohol and drug implications is more than suspect under the circumstances. Even a cursory review of the categories on the list which do not contain explicit sexual or drug and alcohol connotations reveals that most categories call for comparisons between members of the staff, many highly negative. For example, least respected, most envied, worst dressed male/female, most frugal, messiest desk, worst speller, most devious, least tactful, worst cook, most disorganized, most pink slips, most forgetful, biggest mouth, most sick days used, etc. The mere solicitation of teacher candidates for these categories from students does nothing to promote mutual respect in teacher student relations and achieves the opposite result by subjecting at least some teachers to demeaning comments and/or ridicule. The District has established a serious lapse in judgment on Skadden's part sufficient to warrant discipline.

An issue remains as to the severity of the discipline meted out to Skadden, i.e. whether the one-day suspension was too severe. The Association argues that the District did not follow its own progressive discipline policy and points to at least the one other incident of alleged disparate treatment in the meting out of discipline. It submits that if discipline is warranted at all, a verbal warning (Step 1) should have resulted. Generally speaking, the District's policy provides for two verbal warnings, a letter of reprimand accompanied with a written plan of assistance to resolve the employe personnel problem prior to the issuance of a one-day suspension without pay. Said policy, however, further states:

Note: There may be extenuating circumstances in the supervisor's judgement, when certain violations may be on a grave nature such that the initial steps may be by-passed. In these cases, he/she may move immediately to steps 3, 4 or 5.

The District submits that the instant case is just such an extenuating circumstance. The undersigned agrees. Superintendent Joseph Innis testified that he considered Skadden's use of the list to be a "grave situation" falling within said exception when the over-all impact of reading the list is assessed.

Because the note specifically provides that when, "in the supervisor's judgment" (emphasis added) certain violations may be on (sic) a grave nature", said supervisor may skip steps moving immediately to step 3, 4, or 5, the undersigned cannot conclude that the District did not follow its own discipline policy.

With regard to the incident cited by the Association, of alleged disparate treatment, it is true that said incident involves sexual innuendos which were much more serious in nature, but said incident is distinguishable in that it did not disrupt the District's goals of promoting positive student-teacher relationships nor did it create an atmosphere where teachers are demeaned and subjected to disrespect by the students. Accordingly the undersigned finds that the District may make a distinction in the level of discipline imposed in the two cases.

The essential argument presented by the Association is that the discipline is too severe given Skadden's previous employment record with the District. While the discipline imposed is not necessarily that which the arbitrator would have selected, nevertheless, because the District has not abused its discretion in making the determination, she declines to substitute her judgment for that of management.

Therefore it is my decision and

AWARD

1. That the District did not violate the collective bargaining agreement by suspending the grievant, Nancy Skadden for one-day.
2. That the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 7th day of December, 1990.

By _____
Mary Jo Schiavoni, Arbitrator