BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SOUTHERN EDUCATION ASSOCIATION	Case 21 No. 44188 MA-6205
and	
SOUTHERN DOOR COUNTY SCHOOL DISTRICT	

Appearances:
Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, appearing on behalf of the Association.
Mr. Robert Butler, Staff Counsel, Wisconsin Association of School Boards, Inc., appearing on behalf of the District.

ARBITRATION AWARD

The District and the Association above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discipline grievance of Bob Kinziger.

The undersigned was appointed and held a hearing on October 4, 1990 in Brussels, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs and reply briefs, and the record was closed on November 23, 1990.

STIPULATED ISSUES

1. Was the grievant disciplined for just cause?

2. If not, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS

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ARTICLE VI CONDITIONS OF EMPLOYMENT

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, non-renewed or disciplined for good cause.

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FACTS

Grievant Bob Kinziger had been employed by the District as a physical education teacher for 21 years when, in February, 1991, he was given a two-day disciplinary layoff for injuring a student. Kinziger filed a grievance contesting that the discipline was without just cause.

The background facts are largely undisputed. On February 8, 1990, the sixth period class lasted from 12:35 to 1:05 p.m. Among the students in the class was C, a fifth grade student who early in the class kicked a volleyball into the gym lights. Kinziger disciplined C for this by instructing him to sit out of the volleyball practice for 20 minutes. At the end of the class Kinziger told the students to line up, and told them all not to jump on the mats because they were getting torn. A moment later Kinziger saw C and another boy, S, jumping on the mats. Kinziger ordered C and S to remain behind. As the rest of the class left, Kinziger asked C and S why they did that, and he testified that they snickered. According to Kinziger's uncontradicted testimony, he then told the boys that if they had that much energy they could run around the volleyball standards, which were about 45 feet apart. Kinziger then sat in the bleachers while the boys ran eight to ten laps around the volleyball standards. He testified that the boys laughed and "goofed around" and that he then told them they would run a race and the winner could go back to class while the loser would have to run one more. Kinziger testified that he had the boys run to the half court line and back in the 74-foot long gym. S won the race, and was sent on to his next class. C was told to run another sprint, but according to Kinziger, he just jogged. Kinziger told the boy to run one more and to "hustle". C ran faster this time, and was told to go to class. Kinziger testified that C looked okay at the time he left.

There is no dispute that some 20 minutes later, C was taken from his next class to the nurse because he was unable to sit or stand upright. Nurse Linda DeKeyser testified that she was called in about 2:45 p.m. to see C, and found him lying down and having muscle spasms. Teacher's aide Robin Paye, a trained emergency medical technician, testified that she had previously been to see C, and had found him shaking, hyperventilating, and having muscle spasms in his arms and legs. She testified that he could neither stand up nor walk, and could not speak a complete sentence. She put ice packs on his arms and checked his blood pressure, which was high. C himself testified that he was carried to the health room by the math teacher, and that he had trembling spasms in his feet and legs. He testified that the following day he felt sore.

Principal Gary Langenberg testified that he made the determination to discipline the grievant because of the child's condition and because he felt that Kinziger's actions constituted corporal punishment, for which Kinziger had previously been disciplined. Langenberg testified that he believed that making a child run excessive numbers of laps could fall within the reference to "prolonged maintenance of physically uncomfortable positions" in Section 118.31(1), the Wisconsin State Statute prohibiting corporal punishment in schools. Langenberg testified that no complaint was made by C directly on February 8, but that the other boy's father called to express concern later in the day.

The District has a set of school policies, which include the following related to discipline of teachers:

> Performance Expectations In order for our staff to function effectively and in the best interest of the students of Southern Door, the School Board has set overall policy for professional and support staff personnel. This policy sets, among other things, conditions of employment for all personnel. (Policies 4000,4112,4118). Clearly, it is the interest of the Board, through the administration, to establish procedures consistent with maintaining a professional condition of employment for all employees. Part of that condition involves performance expectations for staff in our district. Those expectations for staff in our district. Those expectations traditionally have fallen in the areas of:
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> A) Instructional Responsibilities - Included in this would be all aspects of classroom instruction in terms of creating a successful atmosphere for learning for students.
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> B) Professional Growth and Development - Included here would be any activities which add to the employee's expertise in his/her job, such as taking courses, conferences, professional readings, curriculum writing, and in general, professional behavior related to the job described.
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> C) Relationships with Staff/Students/Community - This is the "affective" area, including working relationships, parent interactions, employee demeanor, and problem solving.
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> D) Additional Operational Responsibilities - This includes proper report writing; observing the workday times including reporting on time for school and classes and remaining for the appropriate workday period; being prompt for meetings; appropriately using work time during the workday; being present in supervisory and classroom situations when students are present for the duration of time that has been assigned; communication problems, circumstances or unusual conditions involving students. Being on time for the start of classes and remaining until the completion of class.
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> In regards to sections C & D above, the following steps will be implemented if the listed responsibilities are not be appropriately met:
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> | 2nd violation: | A second verbal warning with date noted. |
> | 3rd violation: | A letter of reprimand to the employee detailing the problem (filed, dated). A meeting with immediate supervisor to follow the letter - an attempt to work out a viable solution. Written plan of assistance implemented. |
> | 4th violation: | Upon continued inappropriate behavior, the employee will be |

suspended from his/her job for one day without pay. Conference with supervisors ins a prerequisite to return along with continuation of the plan of assistance regarding the "problem: areas.

5th violation: Suspensions without pay for up to 3 days.

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 grievant had previously received a written warning concerning corporal punishment of a student, concerning a February 17, 1989 incident in which the grievant pushed a student into a door when angry with him. Among the comments in the letter of discipline introduced into evidence was the following:

> Please be advised that you are directed to have no physical contact with students at school except to restrain them if they are endangering the safety of others around them. You are further directed to consult with resource personnel at Southern Door regarding discipline problem students in your classes, particularly if they do not improve in response to your disciplinary interventions. Also, be further informed that physical contact with students in disciplinary situations can be interpreted as corporal punishment which is against Wisconsin state law. Continued problem situations in your classes will not be tolerated in the future, and may result in discipline action up to and including discharge.

In addition to the two day disciplinary layoff, the District also required Kinziger to lay out a "plan of assistance" intended to define discipline to be used within the gym for misbehaving students. The plan, signed by Kinziger and subsequently by Langenberg, specifies in pertinent part as follows:

. . .

1. Student will sit in bleachers as a short time out discipline.
2. Student will discuss the problem with Mr. Kinziger.
3. Mr. Kinziger will write up a discipline referral to the office.
4. Mr. Kinziger will contact student's parents.
5. Behavior in class is part of the physical education grade.

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Kinziger testified without contradiction that prior to the introduction of this plan, he had for 21 years required students to perform exercise as a disciplinary measure, and no complaint had ever been made about this practice prior to the present incident.

THE DISTRICT'S POSITION

The District contends initially that the grievant's actions violated several of the District's policies, in that they failed to promote a positive self-image in students, failed to promote students' self-control, failed to facilitate interactions between the teachers and students, and the like. The District contends that in particular, it is required by law to ensure that all teachers adhere to the corporal punishment statute, and that the grievant's action had a detrimental effect on the students' safety, welfare and health. The District argues that "the running of wind sprints and laps when used as a form of punishment would be interpreted as corporal punishment". The District argues that all of the seven elements of just cause articulated by Arbitrator Carroll Daugherty have been met in this case, arguing that the grievant had notice of the possible disciplinary consequences of his conduct because all employes were given a copy of the corporal punishment statute and because the grievant was previously disciplined for corporal punishment in 1989, with an express warning that "continued problem situations" could result in further discipline. The District argues that the grievant engaged in conduct which is legally and morally wrong, and that no express warning as to the particular form of corporal punishment was therefore required under prior arbitration decisions. The District contends that its policies are reasonably related to orderly and safe operation, that its investigation was fair, that the evidence was substantial that the grievant violated policies and rules, and that there

has been no discrimination between employes. Finally, the District contends that the degree of discipline was reasonably related to the seriousness of the proven offense, particularly in light of the grievant's previous disciplinary record for corporal punishment. The District argues that the grievant's long service with the District in this instance does not weigh in the grievant's favor, because he should be more careful of his actions with that degree of experience. The District argues that the discipline given was minor considering the consequence of the grievant's conduct, and should not be modified by the Arbitrator. In its reply brief, the District contends that the Association ignores the prior related discipline of the grievant, that the corporal punishment argument of the District is clearly related to the grievant's conduct, and that the fact that the grievant did not intend to harm the student is irrelevant.

THE ASSOCIATION'S POSITION

The Association contends initially that the District has attempted to turn this into a question of statutory interpretation, and that this should be rejected by the Arbitrator as an afterthought of the District. The Association contends that the grievant's testimony as to the February 8 incident is entirely consistent with the other evidence and that the grievant should therefore be credited that the boy C refused to follow instructions that were clearly understood by the rest of the class. The Association contends that there is no evidence in the record that C had complained about feeling ill, or had prior health problems, or had been sick in physical education class before. C was told to run because he acted for a second time in clear defiance of the teacher's instructions, and running laps and sprints were common activities within the physical education class. The Association notes that the grievant testified that C had completed exercises such as this in the past with no ill effects. The Association argues that there is no evidence that the grievant intended to harm C, and that there had never been any complaints or problems with this type of disciplinary procedure in the past even though the grievant had used similar methods for 21 years. The Association also argues that there is insufficient evidence that there is a relationship between C's illness and the grievant's actions, because the testimony by teacher Brent Claflin was simply that C looked "a little ill". The Association contends that in view of the time which had elapsed between the discipline and the illness, there is no evidence that ties one to the other. As to the "Daugherty" tests for discipline, the Association contends that the District introduced no evidence that running in a physical education class was an inappropriate form of student discipline, and points to a memo from the school superintendent at the beginning of the following school year joking that the job of a physical education teacher was to exhaust the children.

In its reply brief the Association contends that the District exaggerated the extent of the student discipline in its brief, and that there is no evidence that the District has a student discipline policy which would be contravened by the use of physical exercise in a physical education class. The Association also argues that the statute governing corporal punishment refers to the intentional infliction of physical pain when used as a means of discipline, and notes that there is no evidence that the grievant intentionally harmed C. The Association requests that the grievant be awarded two days' back pay and that his record be cleared.

DISCUSSION

I reject the District's argument that the corporal punishment statute required its discipline of the grievant here. First, there is no evidence in the record that the grievant had ever expressly been advised that the use of exercise as a form of student discipline was prohibited by that regulation, until after the discipline took place in this incident. Only at that time did the District require the grievant to prepare a plan of assistance which avoided the use of such exercise. The grievant testified without contradiction and credibly that he had used such exercise for 21 years without comment by the District, and the prior incident of discipline for corporal punishment was a clear instance of pushing a child. This would not necessarily have caused a discussion between the grievant and any supervisor as to the extent to which the child could be required to engage in extra exercise as discipline. Furthermore, there is no evidence in the record that such a discussion was had.

In addition, I note that the Union correctly cites the corporal punishment statute as including an exception which states that corporal punishment "does not include . . . reasonable physical activities associated with athletic training." This, and the fact that the District presents no precedent in support of its interpretation of the corporal punishment statute, suggests that at the least, the District's interpretation of the statute was never communicated to the grievant prior to the incident involved here.

The matter does not, however, end there. The fact remains that the grievant engaged in a form of discipline and an extent of discipline which shortly thereafter reduced the child involved to a state of incapacitation. In this context I specifically reject the Association's argument that there is no evidence tying the one to the other; it does not require advanced medical

knowledge to find that when a person has been subjected to considerable stress and exercise and shows no other reasons for a collapse shortly thereafter, the two events are related.

The Association does not suggest, and the record does not indicate, that the student simulated his condition after the grievant's class. I must therefore find that the grievant conducted the exercise discipline in such a way and to such a degree that it posed a notable risk of harm to the child involved. The question which remains is whether the grievant might reasonably have expected this.

On the one hand, the evidence is unrebutted that C had not been ill before, had engaged in strenuous exercise before, and did not give evidence of being ill on this occasion prior to the discipline. These factors would intend to exonerate the grievant from any expectation that his actions would cause such a result. But against this must be set the constant work, over a 21 year period, of a physical education teacher who among all teachers in a school district should know what is a reasonable degree of stress and exercise and what is not. In this instance, it is clear that C was required to exercise beyond what the other students did, and also that it produced a deleterious result. In declining to overturn the District's discipline resulting from this incident, I have weighed the grievant's lack of specific knowledge of C's abilities against the degree of care expected to be exercised by a physical education teacher. While I find that there was no specific information in the grievant's possession which would tend to indicate that C was likely to experience such effects, I also find that as a physical education teacher a high degree of care for the physical welfare of students can reasonably be expected of the grievant. While the District, in choosing to give a two-day suspension, administered a degree of discipline which was somewhat more severe than some employers might have imposed in similar circumstances, it was not so beyond the bounds of the District's discretion as to shock the conscience. I therefore decline to disturb the penalty and substitute my judgment for that of the District.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District did have just cause to discipline the grievant.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 20th day of February, 1991.

By _____
Christopher Honeyman, Arbitrator