

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
NORTHEAST WISCONSIN VOCATIONAL, :
TECHNICAL AND ADULT EDUCATION DISTRICT :
and : Case 74
: No. 43941
NORTHEAST WISCONSIN TECHNICAL : MA-6117
COLLEGE FACULTY ASSOCIATION :
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Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association
Council, on behalf of the Association.
Mr. Robert W. Burns, Godfrey & Kahn, S.C., on behalf of the District.

ARBITRATION AWARD

According to the terms of the 1987-89 collective bargaining agreement between the parties, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an impartial arbitrator to hear and resolve a dispute between them involving the District's maintaining "second personnel files" on District employees. The undersigned was designated arbitrator and made full written disclosures to which there were no objections raised. Hearing was originally scheduled for September 5, 1990; it was then held in abeyance pending settlement and rescheduled for October 24, 1990; the hearing was thereafter again postponed and held in abeyance pending a possible settlement of the case. Hearing was held on February 12, 1991 at Green Bay, Wisconsin. A stenographic transcript of the proceedings was made and received on March 1, 1991. The parties submitted their post-hearing briefs by July 18, 1991 and those were thereafter exchanged by the undersigned.

ISSUE

The parties were unable to stipulate to the issues in this case. The Association proposed the following issues:

Is the District permitted by the collective bargaining agreement to keep a second personnel file on Mr. Gaie or any other bargaining unit employe, the contents of which could be used for disciplinary purposes? If so, what is the appropriate remedy?

The District proposed the following issues:

Under the collective bargaining agreement including the letter of agreement and applicable law, is the District required to destroy investigatory materials regarding Mr. Gaie which are held by the District? If so, what is the appropriate remedy?

The parties agreed to allow the undersigned to frame the issues herein, and based upon the relevant evidence and argument, I conclude that the issues herein shall be as stated below:

1. Did the District violate the collective bargaining agreement by collecting, developing and maintaining investigatory information on Mr. Gaie or any other bargaining unit employe which was not placed in the official personnel file and which information could be used for disciplinary purposes?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV - CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

SECTION K. TEACHER FILES

1. Official teacher files shall be maintained for each teacher. Teachers shall continue to have access to their files.
2. No other personnel file or any material, record, or the like may be kept on any teacher for any purpose, except that material received in confidence from previous schools or employers shall remain in confidence.
3. Commendatory or non-commendatory material may be placed in the teacher's file. The teacher shall receive a copy of any non-commendatory material at the time it is placed in the file. The teacher shall then have the right to answer or qualify any material filed and said answer shall be attached to the material in the file. The teacher shall also have the right to dispute the accuracy of the material contained; and if his dispute is sustained, the materials shall be removed. In no case shall any material of non-commendatory nature remain in the file for over three years. However, non-removal does not necessarily imply a basis for action if such material does not demonstrate a continuing or consecutive breach of rules governing the work force.
4. The above shall not hinder development or use of payroll records, sick leave, and such other related records necessary for

operational purposes.

ARTICLE IX. CONFORMITY TO LAW, SAVING CLAUSE

SECTION A.

If any provisions of this agreement is or shall at any time be contrary to law, then such provision shall not be applicable to be performed or enforced except to the extent permitted by law. Any substitute action shall be subject to appropriate consultation and negotiation with the Association.

SECTION B.

In the event that any provision of this agreement is or shall at any time be contrary to law, all other provisions of this agreement shall continue in effect.

CONFORMITY TO LAW: NON-DISCRIMINATION

It is agreed that both parties to this contract shall support non-discriminatory employment practices and that nothing in this agreement shall violate the rights of any individual based on sex, race, creed, religion, or handicap.

BACKGROUND

The parties have had language in their collective bargaining agreements pertaining to teacher files since the late 1960's. The following language appeared in the 1967-68 collective bargaining agreement:

IV. CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

Section F. Teacher Files

1. Official teacher files in the school shall be maintained for each teacher.
2. No secret file or any material, record, or the like, may be kept on any teacher for any purpose, except that material received in confidence from previous schools or employers shall remain in confidence.
3. No material derogatory to a teacher's current conduct, service, character, or personality shall be placed in the file unless the teacher has had an opportunity to read the material and has affixed his signature to the copy to be filed, with the understanding that such signature merely signifies that he has read the material, and does not necessarily indicate agreement with its content.
4. The teacher shall have the right to answer any material filed, and his answer shall be attached

to the file copy.

5. Upon request by the teacher, he shall be permitted to examine the file.

The language of Article IV, Section F was changed in the 1968-69 agreement to eliminate numbers 3-5 of Section F of the old Article and replace them with the following:

3. Commendatory or non-commendatory material may be placed in the teacher's file. Non-commendatory material relating to the teacher's service shall be known to the teacher, and he shall have the right to dispute the accuracy of the material contained, and if his dispute is sustained, the material shall be removed. In no case shall any material of a non-commendatory nature remain in effect for over one year.

In the 1971-72 agreement, the parties added one sentence to the end of Section F (3), as follows:

... This does not apply to probationary teachers.

In the 1973-74 agreement the language was changed to read as follows:

Official teacher files shall be maintained for each teacher. Teachers shall continue to have access to their files.

No other personnel file or any material, record, or the like may be kept on any teacher for any purpose, except that material received in confidence from previous schools or employers shall remain in confidence. Commendatory or non-commendatory material may be placed in the teacher's file. The teacher shall receive a copy of any non-commendatory material at the time it is placed in the file. The teacher shall then have the right to answer or qualify any material filed and said answer shall be attached to the material in the file. The teacher shall also have the right to dispute the accuracy of the material contained; and if his dispute is sustained, the materials shall be removed. In no case shall any material of a non-commendatory nature remain in the file for over one year for a non-probationary teacher.

The above shall not hinder development or use of payroll records, sick leave, and such other related records necessary for operational purposes.

In October 1989, the District, the Association and Mr. John Gaie (a chemistry teacher at NWTC) entered into a "Letter of Agreement" regarding complaints and concerns of "sexual harassment" made against or involving Gaie. That letter stated in pertinent part:

. . . The purpose of this agreement is to assist Mr. Gaie in the elimination of practices which are injurious to students, their learning environment and NWTC itself.

1. It is acknowledged that Mr. Gaie has a problem both in classroom presentations and in his general relationship with female students which exhibits itself in a number of aspects which causes some of his female students to be either uncomfortable with him or offended by him, and which have been viewed by NWTC as inappropriate.

2. Mr. Gale shall immediately seek professional counseling with regard to the areas of concern identified herein and a letter from a qualified professional verifying that said counseling has commenced shall be provided by NWTC (to the attention of Mr. Evans) no later than October 15, 1989. Should any question arise as to the definition of "qualified professional," it shall be determined by NWTC. Mr. Gaie shall continue in regular counseling until such time as it is determined that whatever problems now exist have been eliminated or are otherwise sufficiently controlled so that further counseling is not deemed necessary by the qualified professional counselor. The District shall have the right to independently verify the status of such counseling and any professional determination that the problems are or are not so resolved or controlled; however, no other information shall be required. In that regard, the counselor shall specifically be requested to advise the District if any portion of contractual or extra contractual assignments are deemed appropriate, too demanding or inconsistent with treatment. With regard to the District's ability to so monitor, Mr. Gaie agrees to and will execute a medical information release.

3. Mr. Gaie shall present classroom instruction and conduct himself in the classroom and at NWTC in a manner free from inappropriate behavior or instruction as it relates to female students. "Inappropriate behavior" is understood to include, but not be limited to, sexual innuendo, sex stereotyping, discussion of personal relationships, and inappropriate physical contact with students.

4. Mr. Gaie agrees that he shall not fraternize with students enrolled at NWTC either in his courses or in other courses where there is a substantial likelihood that the student will be in his class. This agreement shall extend to periods between semesters. It is specifically noted that dealing with students in bars are times and places of great risk. In the unique situation where Mr. Gaie has previously established a relationship with an individual who subsequently becomes a student, Mr. Gaie will provide that student(s) name to the District at the time they become a student prior to continuing the relationship. It is specifically understood that Mr. Gaie shall neither sponsor, announce in class, nor participate in student parties and socials after school, after semester, celebrating holidays or between terms.

5. Mr. Gaie shall serve a thirty calendar day disciplinary suspension, commencing September 16, 1989, and ending October 15, 1989. Fifteen days of this suspension shall be deemed served by virtue of his paid suspension; however, for disciplinary purposes the suspension shall be treated as a 30-day suspension.

6. It is understood that the District shall from time to time survey students either individually or by group with regard to class, professional conduct and adherence to this agreement. The District may monitor and investigate Mr. Gaie's compliance with this agreement to the extent it deems appropriate and Mr. Gaie specifically acknowledges his responsibility to fully cooperate with and be responsive to any District request with respect to such monitoring or investigation. In addition, it is agreed that Gaie, the District, or students may tape any and all presentations. All extensive monitoring must be conducted in such a way so as not to create a prejudicial atmosphere to Gaie. Nothing herein shall be construed to limit the District's general supervisory and management rights at any time.

7. All students shall be provided a course syllabus. The syllabus shall include a specific statement with regard to grading policies and practices and an attendance policy. The relationship, if any, of the attendance policy to grades shall be disclosed.

8. This settlement shall be harmonized with the collective bargaining agreement, whenever possible. If no harmonization is possible, this agreement shall prevail.

9. Any significant breach of this agreement by Mr. Gaie shall result in immediate reopening of the initial District investigation and imposition of discipline under the terms of the master agreement. It is understood that such adjusted discipline will be in lieu of that previously stated.

FACTS

In 1989, Teacher John Gaie filed a grievance regarding disciplinary action taken against him for alleged sexual harassment. The District had investigated the allegations against Mr. Gaie in depth by, among other things, surveying large numbers of students and then interviewing some of those who responded to the surveys. The appropriateness of the method and means of the original investigation of Mr. Gaie's activities are not in dispute here. District Personnel Vice President William Evans' investigatory approach was developed after he had contacted Ms. Joanie Reimer, Coordinator of the Sexual Assault Center. 1/ As part of a settlement of Mr. Gaie's grievance, the Union

1/ Ms. Reimer testified on behalf of the District in this case. Her testimony is relevant only to the extent that it supports Mr. Evans' credibility (not in dispute here) regarding the method and means he used in investigating the original allegations against Mr. Gaie.

and the District agreed that the District could "survey students," "monitor and investigate Mr. Gaie's compliance" with the settlement agreement (with some limitations) and that nothing in the settlement agreement was to "be construed to limit the District's general supervisory and management rights at any time."

This agreement also specifically stated that it "shall be harmonized with the collective bargaining agreement, whenever possible. If no harmonization is possible, this agreement shall prevail." Finally, the settlement agreement stated that "any significant breach of this agreement by Mr. Gaie shall result in immediate reopening of the initial District investigation and imposition of discipline" under the terms of the labor agreement.

It is in this context that the Union filed the instant grievance on behalf of Mr. Gaie alleging that the District was maintaining a second personnel file on Mr. Gaie, in addition to Mr. Gaie's official personnel file.

At hearing, District Vice President of Personnel Evans admitted that he was in fact collecting and maintaining information outside of Mr. Gaie's official personnel file relating to Mr. Gaie's conduct which might have a bearing on the operation of the above-quoted settlement agreement and/or affect Mr. Gaie's employment. The Union's concerns in this case also dealt with Evans' procedure upon his receipt of both commendatory comments and complaints about a teacher's conduct or performance.

Evans summarized his normal business practice while employed at NWTC regarding his treatment of complaints he receives about employes, as follows. Evans admitted that when he receives a complaint about an NWTC employe he determines its importance by looking at the frequency of similar complaints about the individual and the type of complaint: he weighs the credibility of the complaint by checking its source (whether it is anonymous or not) and checking its form and content (whether it is external or internal and whether it can be confirmed by some other reliable source). Evans then determines whether an investigation of the complaint is necessary. This decision is often based largely upon formal or informal complaints Evans may have received previously about the individual employe which Evans previously decided not to investigate, but which Evans retained in the bottom left-hand drawer of his desk in case they might become important later. In large part, it is Evans' practice of placing items in his bottom left-hand desk drawer, unbeknownst to the Association or affected employes, which caused the Association to proceed with the instant grievance.

If Evans decides to investigate a complaint, he then plans who he will interview, what material/information should be gathered and how he will get that information or material. Later on in an investigation Evans normally interviews the employe involved, rarely providing the employe with an accusation. Usually at the point that he interviews the employe, Evans informs the Association of his investigation and Evans will then tell the Association what issue he is looking into.

If, after the involved employe and the Association are contacted during the investigation, Evans feels the employe should be disciplined, he then drafts the disciplinary letter which triggers the employe's right to grieve. It is undisputed that prior to or at the grievance hearing relating to disciplinary actions taken, Evans has shared investigatory information with the Association which he has used to support his decision to discipline employes. This information has not been kept in employe personnel files. It is also undisputed that Evans has brought in and used such investigatory information (not kept in the personnel files) in grievance hearings that have been held in the past.

Evans admitted that it might be helpful to a grievant to have all complaints made about him/her which could lead to discipline placed in the

personnel file. Evans also stated that materials or information he collected that might not support or might hurt the District's case against a grievant, such as commendatory comments have not and would not be given to the Association or to the grievant. Evans explained that he would not use an old complaint (from his bottom left-hand drawer) to support a new complaint but that he would use the old complaint to show why he (Evans) chose to investigate, to show a pattern of employe conduct, to show that something is wrong or to attack a grievant's credibility. Evans stated that in these circumstances, he would not ask the employe to respond to the old complaint but that in his view the District has the burden to support its actions on the new complaint with "convincing evidence". Evans stated, "The subsequent discipline has to stand on its own...."

Over the many years that Mr. Evans has been Vice President of Personnel at NWTC, he has retained complaints about employes in his bottom left-hand desk drawer for up to one year and sometimes longer. At least annually, Evans goes through the items in the drawer and decides what items he should throw away, what items he should retain and how the retained items should be organized. Evans stated that the information he retains in this drawer has "practically never" been placed in employe personnel files. Mr. Evans stated that he makes all of the necessary subjective decisions regarding what to do about the complaints as well as the commendatory material he has received on his own without any input from the Association or from the employes involved.

Evans stated that over the years, although he never informed the Association in so many words, he believed that the Association was aware that he was collecting data on employes that was not placed in their personnel files; that at times over the years, Evans showed or gave copies of documents he had collected to Association officers or affected employes that were never placed in those employes' personnel files. Evans stated that over the years he has carried large files with him and used these when speaking to Association representatives about investigations and that the Association must have known these files were not personnel files. Finally, Evans stated that he has a well-known reputation at NWTC for retaining a lot of documents.

Union witness Neal Olsen stated that in the past 16 to 17 years that he has been an Association officer, he ". . . assumed (Evans) had files that were archival in nature" in addition to employe personnel files. Olsen also stated that he "assume(d) grievances were stored in a grievance file" along with other "operation records." Olsen and Jerome Miller (currently Association Grievance Chair) stated that Evans never told them that he (Evans) was keeping files other than personnel files on NWTC employes. Mr. Miller also stated however, that he was previously aware that Evans "retains anything he comes in contact with" in the way of information or materials relevant to an investigation. Miller and Olsen both stated, however, that they were not actually aware that second files existed on employes until the instant grievance arose. When Mr. Gaie became aware that Evans was collecting information on him and keeping it in files other than Gaie's personnel file, Mr. Gaie informed Mr. Miller and the Association then filed and pursued the instant grievance.

The record contains an index and testimonial description (both given by Mr. Miller) of the information Evans has collected and retained on Mr. Gaie. This collection is apparently quite large and it includes, for example, the following kinds of materials: cassette tapes, transcripts of witness' statements, student survey documents, notes of Evans, drafts of agreements, correspondence to and from counsel, computer data, photographs, cards, research documents, letters to students, mailing labels, course rosters, invoices, student transcripts and grade books, internal college memoranda, research articles and documents, as well as items from former employers of Gaie.

At the hearing the parties stipulated that the District must be allowed "some reasonable time" in which to investigate a complaint about a teacher before the District must notify the employe that an investigation is being conducted. The parties did not stipulate as to what amount of time would be "reasonable." However, Association Grievance Chair Miller stated that in the Association's view a complaint regarding an employe which could lead to discipline should be "immediately" placed in the employe's personnel file so that the employe will receive a copy of it (para. 3, Section K) and so that the employe then has the right to rebut the charge. Thereafter, according to Miller, the District could complete its investigation into the allegation.

Mr. Evans stated that placing all investigatory material in the employe's personnel files would have the following impact upon his operations:

1. It would make personnel files very large and cumbersome;
2. It would result in the District having to destroy all documents that supported District decisions to discipline employes (per Section K3 of Article IV);
3. All documents and physical evidence would have to be placed in personnel files whether worthy of credibility or not and whether relevant or not;
4. Privileged documents, draft documents, and personal notes would have to be placed in personnel files;
5. The destruction of all personnel documents every three years pursuant to the contract might violate Wisconsin law.

POSITIONS OF THE PARTIES:

Union:

The Union asserted that the collective bargaining agreement clearly states that the Employer may only develop and maintain one personnel file on each of its employes; that the materials kept on Mr. Gaie outside of his official personnel file constitute a second personnel file, contrary to Article IV K (2) the agreement; and that Mr. Gaie has had no opportunity to rebut any non-commendatory material placed in his "second" file, some of which has remained there for longer than the three year period specified by Article IV K. The Union contended that the Employer's argument that its investigatory files are operational is without merit. The Union pointed out that the primary purpose of the operational items listed in Article IV, payroll and sick leave records, is not for use in a disciplinary proceeding but rather for use in the day-to-day administration of the Employer's business. Thus, the "second" file materials being collected by the Employer should not be exempted from the ordinary function of Article IV, or the exception would appear to swallow the general rule.

In addition, the Union argued that the Employer is not prohibited from keeping investigatory materials, but only from keeping them, indefinitely, outside the employe's official personnel file. At a "reasonable time" after the Employer has begun its investigation, the Union asserted, the Employer should reveal all non-commendatory and commendatory material to the employe

involved. The Union stated that a "reasonable time" would vary depending upon the type of investigation and the Employer's decision therein whether or not to discipline. (The Union stated that it could file a grievance if the Employer exceeded a "reasonable time" in a particular case).

But all material must be revealed, according to the Union, so that the employe can officially respond to any non-commendatory material. The Union also asserted that investigatory material not necessarily germane to the Employer's investigation as well as commendatory material must be placed in the official file. The Union stated that if the employe is not charged with misconduct, the investigatory material should be discarded or sealed and not used in any subsequent disciplinary proceeding. The Union stated, in addition, that the Employer's concerns regarding the release of items in the official file as public records and the Employer's claimed need to maintain the confidentiality of its investigatory sources carry no weight since the Employer, if it so elects, may seal investigatory materials "and store the same in a warehouse, that is (the Employer's) business."

The Union contended that the Settlement Agreement regarding Mr. Gaie requires that the grievance herein be sustained. The Union pointed out that nothing in the contract or the settlement agreement would prohibit the Employer from monitoring or investigating Mr. Gaie as described within the Settlement agreement so "long as the results of those investigations are placed in his personnel file" and "harmonizing the settlement with the contract requires a finding that a second file may not be maintained on Mr. Gaie."

Thus, the Union sought that the grievance be sustained, the Employer be ordered to cease maintaining materials outside Mr. Gaie's and other employe's official personnel files, that the Employer be ordered to place materials in employes' official files from now on and that it remove all material more than three years old from these consolidated files. Finally, the Union claimed that were the grievance herein denied, this would send a message to NWTC employes that "protest is futile," that the contract is "meaningless" and that the spirit of that agreement is "beneath consideration."

The Union chose not to file a reply brief herein.

Employer:

The Employer asserted that the clear language of Article IV K and the Employer's practice of collecting materials over the years, demonstrate that no violation of the contract has occurred here. The Employer contended that its investigatory function must be considered operational and that the Union's restriction of this function would essentially hamstring the Employer's personnel activities. In addition, the Employer asserted, the various limitations that the Union has argued should be placed upon the Employer relating to the disclosure of investigatory materials are unsupported by the contract. However, the Employer urged, if such limitations are to be placed upon the Employer's activities, the parties should negotiate regarding these limits, not have a third party impose them by implication or otherwise.

The Employer noted that the contract contains a just cause standard for discipline or discharge. The Employer stated that were the Union's view adopted here, it would be forced to place raw investigatory materials into the employe's official file or destroy them. The Employer opined that it might hurt the employe or interfere with the Employer's investigation were the raw investigatory materials placed in the employe's files. The Employer argued that given the just cause standard and the due process requirements of the grievance procedure, the aggrieved employe's rights would be preserved without putting the further restrictions upon the Employer which are sought in this

case.

However, if the contract language were found ambiguous, the Employer urged, its practice of collecting and maintaining investigatory documents outside of the employee's official file supports the Employer's view of this case. In addition, the Employer asserted that the Arbitrator here cannot grant the remedy sought by the Union because Article VII, Step 3 prohibits such additions to the agreement. The Employer contended further that the Public Records laws, legislated after Article IV was placed in the contract, prohibit the Employer from destroying the documents sought by the Union to be placed in the official file and/or destroyed after three years. Prudence and arbitral principles require that the contract language be harmonized with the law. Thus, the Employer asserted that the law implicitly requires maintenance of investigatory files rather than destroying documents either not placed in the official file or documents more than three years old that had been placed in the official files.

The Employer contended that the settlement agreement covering Mr. Gaie's prior case specifically recognizes that the Employer must maintain, not destroy documents because it may have to reopen its investigation of Mr. Gaie's conduct. In addition, the sensitive nature of its potential renewed investigation of Gaie as well as the general need for victim confidentiality in cases that might involve sexual harassment further demonstrate the Employer's need to maintain separate investigatory files in this case as well as others that may arise.

The Employer chose to file a reply brief on July 18, 1991. In its reply brief, the District urged that the Association's characterization of investigatory files as "second personnel files" is inaccurate and misleading. In this regard, the District noted that if any personnel action were taken, the District would show documentation regarding or supporting any formal personnel action to the Association. The District pointed out that the Association has failed to prove that any employee has been prejudiced by any action of the District taken here. On the other hand, the District noted that if it has to discard evidence that later becomes relevant, pursuant to the Association's approach, this would definitely harm the District. The District further emphasized that a ruling in favor of the Association would result in an unworkable, imprudent and detrimental system of investigation and discipline. The Union's proposed restrictions on the District's investigatory powers, the District reiterated, are also completely beyond the terms of the collective bargaining agreement. Finally, the District contended that the Gaie Settlement Agreement requires that there be some investigation to be reopened should the necessity arise. The District could not truly open the Gaie investigation (or properly investigate any other case) if it had to destroy potentially relevant evidence before an investigation could be concluded. For these and the reasons stated in its initial brief, the District again urged the denial and dismissal of the grievance.

DISCUSSION

The current language of Article IV in issue here, demonstrates the parties' concerns that the District be prohibited from maintaining any "other" personnel files, "or any material, record or the like . . . for any purpose" (Article IV K (2)). The major exceptions to this prohibition are:

- 1) Materials received in confidence from previous employers may be maintained in confidence between those employers and the District (Article IV K (2));

- 2) "Commendatory or non-commendatory material" may be placed in the teacher's official file, triggering the District's responsibility to give the teacher a copy of such material and the teacher's right to respond to and/or dispute the accuracy of the material, and triggering the District's responsibility to remove disputed material if it sustains the teacher's dispute and to remove such materials, in any event, after three years (Article IV K (3)).
- 3) The District has an unhindered right to develop or use payroll records, sick leave and such other related records necessary for operational purposes (Article (IV K (4))).

I note that over the many years since 1968-69 that the parties have had language in their collective² bargaining agreements regarding inclusion of commendatory or non-commendatory material in a teacher's official file, the parties have consistently and specifically made such inclusions permissive: the District, at its option may or may not place such material in a teacher's

file. 2/ Thus, it is clear in this case that there is no contractual requirement, and no language directing that the District place either commendatory or non-commendatory material in a teacher's file. Although once the District places non-commendatory material in a teacher's official file, this triggers the Article IV K (3) procedure for protection of the teacher which must be followed by the District.

It is also significant that in the 1973-74 agreement, the parties placed an exception to the general rule of not maintaining "other" personnel files in the agreement: thenceforth nothing in Article IV K was to hinder the District's "development of use" of "payroll records, sick leave and such other related records necessary for operational purposes." This language appears in the effective labor agreement. In my view, the use of the words "development or use" tend to support the District's argument that its collection and maintenance of investigatory materials outside the employe's official personnel file is allowed under the contract. It is axiomatic that an employer must use and develop materials gathered and received during any investigation of employe conduct. On a practical level, it is difficult to envision how the District could conduct a proper investigation of an allegation or allegations made against an NWTC employe unless the District were allowed to do so without having to send all of its raw investigatory materials directly to the personnel file for disclosure to the employe, as the Union urges it should do, before the conclusion of the investigation and before the District has decided whether or not to discipline the employe. Indeed, the District might conclude after its investigation that no discipline is warranted so that the previous revelation of non-commendatory material to the employe would have caused undue upset to the employe and it might have caused the employe to bring a grievance or to dispute the material which would then require the District to decide whether the employe's dispute and/or grievance has merit, and so on. Thus, a great deal of time and effort might be expended by the parties in cases where no actual discipline was meted out and/or where the materials placed in the formal file were removed pursuant to the District's sustaining the employe's dispute thereof.

Further, the Association's interpretation of the term "for operational purposes" is too narrow a construction of the relevant language. Pursuant to the Association's construction of the language, any record or material that does not directly relate to payroll or sick leave records would be non-operational material which could not be maintained, used or developed by the District outside of the employe's official personnel file. Such a construction of Article IV K directly conflicts with and renders inoperative the non-directory language of Article IV K (3) discussed above. Indeed, such a construction would effectively render that language mandatory. Such an outcome is unacceptable.

It is a generally accepted notion in labor relations that a major important function or operation of any employer is to conduct investigations into employe conduct which may or may not result in disciplinary actions being taken. Thus, just as the maintenance, use and development of payroll and sick leave records (which might result in disciplinary action being taken) is considered an operational necessity, so should the District's investigatory function be considered an operational necessity, as described in Article IV K (4).

The above analysis of Article IV is further supported by the other

2/ As the District maintains and has control over teacher files, the District has the final word on whether or not materials will be placed in the file.

historical changes made by the parties in the language of Article IV. In looking at Article IV K (2), I note that in 1973 the parties chose to delete the phrase "no secret file . . ." and to replace it with the phrase "no other personnel file." The reference to a "secret" file has been deleted, so that whether or not Union agents actually knew Mr. Evans was collecting and maintaining information outside of employe personnel is not determinative here.

However, in this regard, I note that both Messieurs Miller and Olsen essentially admitted that they were aware that Evans had been collecting materials over the years that were never placed in employe personnel files. In addition, it is difficult to believe that the Association or any other union would expect the District to automatically place all non-commendatory material in an employe's official personnel file. As the District properly points out, such a requirement would make these files unreasonably cumbersome and it would require the disclosure, in some instances, of otherwise privileged material that neither the Association nor the involved employe would be entitled to. Furthermore, the proper interpretation of Article IV K (3) requires that it be analyzed as a procedure separate from and/or alternative to the contractual disciplinary procedure.

The Association's major complaints in this case appear to be that the employe/grievant will not necessarily receive all commendatory material and that the District may use stale complaints about employes which are never revealed to the employe as a basis for proceeding to investigate a fresh complaint. With respect to commendatory materials, as stated above, it is extremely significant that the contract states that such materials "may" be placed in the teacher's file. Thus, it is the District that has the power to decide whether to place these materials in the teacher's file. Whether, in fairness, the District should place such materials in a teacher's file is not addressed by the contract. Such decisions are simply left up to the District, without elaboration or qualification in the contract.

As to stale complaints, The District correctly pointed out that even if it used a stale complaint or complaints as a basis for initiating an investigation of a new complaint, the District would have to support any action taken on the new complaint by sufficient other evidence to support its actions thereon. In addition, it is a well-accepted principle of arbitration, that stale complaints against an employe which did not result in discipline and/or were not revealed to the employe or to the union should be given less weight or, depending upon the facts of the case, completely disregarded by an arbitrator analyzing a grievance regarding a recent allegedly similar complaint. However, the District could still use prior stale complaints it has not acted upon to attack a grievant's credibility at the grievance hearing if the arbitrator allowed it. This is true in any contested case, however. Also, the District's use of stale complaints to explain or support its motivation for an investigation of a fresh complaint would also be allowed as background information.

The Association urged that the undersigned decide the basic issue presented by this case, whether maintenance of any investigatory materials outside of an employe's official personnel file is permitted by the labor agreement. Under the above analysis of the language of Article IV the answer is clear, the District is permitted by this contract to collect, maintain, use and develop investigatory materials without placing these in the employe's personnel file, and these activities fall within the "operational purposes" exception of Article IV K (4). Were it otherwise, the District could not properly perform the necessary management function of investigating employe conduct.

Under all of the circumstances presented here and based upon the relevant

evidence and arguments presented, 3/ I conclude that no violation of the labor agreement has occurred here and I therefore issue the following

AWARD

The District did not violate the collective bargaining agreement by collecting, developing and maintaining investigatory information on Mr. Gaie or any other bargaining unit employe which was not placed in the official personnel file and which information could be used for disciplinary purposes.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 10th day of September, 1991.

By _____
Sharon Gallagher Dobish, Arbitrator

3/ The District argued that Wisconsin law restricts its ability to release information to the Association and/or the public. Based upon the facts of this case and the rulings made herein, I need not address this issue herein.