BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MILWAUKEE TEACHERS' EDUCATION ASSOCIATION and MILWAUKEE BOARD OF SCHOOL DIRECTORS	Case 260 No. 47891 MA-7420 Michael Valadez Suspension Case Original Case No.: A/P-M-92-258

Appearances:

Perry, Lerner & Quindel, Attorneys at Law, 823 North Cass Street, Milwaukee WI 53202-3908 by Mr. Richard Perry, appearing on behalf of the Milwaukee Teachers' Education Association.

Grant Langley, City Attorney, 200 East Wells Street, Milwaukee WI 53202 by Ms. Mary Kuhnmuench, Assistant City Attorney, appearing on behalf of the Milwaukee Board of School Directors.

ARBITRATION AWARD

The Milwaukee Board of School Directors (hereinafter referred to as either the MBSD or the District) and the Milwaukee Teachers' Education Association (hereinafter referred to as either the MTEA or the Association) selected Arbitrator Reynolds Seitz to hear and decide a grievance involving the suspension of Michael Valadez, a probationary teacher with the Milwaukee Public Schools. Hearings were held on May 11th and 14th, 1992 at the District offices in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the case. A stenographic record was made of the hearings, and a transcript was prepared and forwarded to the parties. Prior to the submission of briefs, Arbitrator Seitz died. The parties requested that the Wisconsin Employment Relations Commission designate the undersigned to serve as the arbitrator, and to decide the case on the basis of the record generated before Arbitrator Seitz. The undersigned was so designated, and the full record was forwarded to him by the parties. The parties submitted post hearing briefs, and neither party elected to submit a reply brief.

Now, having considered the evidence, the arguments of the parties and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

ISSUE

The parties were unable to agree on a formulation of the issues presented in this case, and stipulated that the Arbitrator should frame the issues in his Award. The Board's statement of the issue was:

1. Was the grievant, Michael Valadez, disciplined for just cause? If not, what is the appropriate remedy?

2. Did the Milwaukee Board of School Directors, ("Board"), violate the Agreement between the parties by proceeding under the Emergency Misconduct section of the contract? If so, what is the appropriate remedy?

3. Did the Board deny the grievant, Michael Valadez, due process as afforded under Part IV, Section N(E)(1) of the Agreement? If so, what is the appropriate remedy?

The Association frames the issues in more specific terms, particularly with respect to the procedures used by the Board to administer the discipline:

A. Substantive Issue

Did the Board violate Part IV, Section N of the MBSD/MTEA Teacher Contract when it suspended Michael Valadez without just cause for the period from August 29, 1991 to the end of the 1991-92 school year?

B. Procedural Issues

Grievance 91/132:

1. Did the MPS administration violate Part IV, Section M (Evaluation) of the contract when it used video tapes from a hidden camera as a basis for bringing action against teacher Michael Valadez?

2. Did the MPS administration violate Part IV, Section N (Misconduct) of the contract by bringing misconduct charges against Michael Valadez where the conduct asserted as the basis of those charges can under no rational construction be considered misconduct?

3. Did the MPS administration violate Part IV, Section N(2) and Part II, Section C of the contract when it initiated the emergency procedures when there was clearly no rational basis to content the emergency procedures were necessary?

4. Did the MPS administration violate Part IV, Section N(2) of the contract when it suspended Michael Valadez at a time when it was clear that the three (3) day contractual administrative inquiry could be completed before the first day of duty for the coming school year?

5. Did the MPS administration violate Part IV, Section N(2) of the contract when it suspended Michael Valadez on August 22, 1991 as punishment rather than as the contractual period to conduct a careful and fair administrative inquiry?

6. Did Superintendent Howard Fuller violate Part IV, Section N of the contract on August 22, 1991, and thereafter, by prejudging the guilt of Michael Valadez without making a careful study of the evidence, including an attempt to hear Mr. Valadez's response before doing so, since he is the hearing officer at the third step of the grievance procedure?

If so, what should be the remedy?

On reviewing the statements of the issues, the undersigned is persuaded that the District's somewhat less detailed enumeration embraces essentially all of the points raised by the Association, and adopts it as the statement of the issue in this case.

PERTINENT CONTRACT LANGUAGE

Part II:

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C. MANAGEMENT RESPONSIBILITIES

The MTEA recognizes the prerogative of the Board and superintendent to operate and manage its affairs in all respects in accordance with its responsibilities. The Board and superintendent on their own behalf hereby retain and reserve unto themselves all powers, rights, authority, duties and responsibilities conferred upon and vested in them by the laws and the Constitution of the State of Wisconsin and of the United States. In exercise of the powers, rights, authority, duties and responsibilities by the Board or superintendent, the use of judgment and discretion in connection therewith shall not be exercised in an arbitrary or capricious manner, nor in violation of the terms of this contract, Section 111.70 of the Wisconsin Statutes, nor in violation of the laws or the Constitution of the State of Wisconsin and of the United States.

. . .

Part IV:

. . .

N. ALLEGATIONS OF MISCONDUCT

1. MISCONDUCT. No teacher shall be suspended, discharged, or otherwise penalized, except for "just cause." No teacher shall be involuntarily transferred, nonrenewed, or placed on a day-to-day assignment as a disciplinary measure. In the event a teacher is accused of misconduct in connection with his/her employment, the accusation, except in emergency cases as referred to herein, shall be processed as follows:

a. The principal or supervisor shall promptly notify the teacher on a form memo that an accusation has been made against the teacher, which if true, could result in proceedings under Part IV, Section N, of the contract. The memo will also indicate that it will be necessary to confer on the matter and that at such conference the teacher will be allowed to be represented by the MTEA, legal counsel, or any other person of his/her choice. This notice shall be followed by a scheduled personal conference during which the teacher will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.

b. If the principal or supervisor decides on further action, he/she shall specify the charges in writing and then furnish them to the teacher and the MTEA and attempt to resolve the matter. The teacher and the MTEA shall have a reasonable opportunity to investigate and to prepare a response.

c. If the matter is not resolved in this manner, a hearing shall be held within ten (10) working days to hear the charges and the response before the assistant superintendent of the Division of Human Resources or his/her designee, at which time the teacher may be represented by the MTEA, legal counsel, or any other person of his/her choosing. Within five (5) working days of the hearing, the teacher and the MTEA shall be notified of the decision relative to the charges in writing and the reasons substantiating such decision.

d. The superintendent shall, within five (5) working days,

review the decision of the assistant superintendent of the Division of Human Resources and issue his/her decision thereon. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure in cases not involving a recommendation for dismissal or suspension. A Teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 788, Wisconsin Statutes.

e. 1) NONTENURE. Where the superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a nontenure teacher or suspension of a teacher, the teacher may, within ten (10) working days of receipt of the decision of the superintendent, request a hearing before the Personnel and Negotiations Committee which shall be held within forty-five (45) working days of the request. The Committee, after a full and fair hearing which shall be public or private, at the teacher's request, shall make a written decision specifying its reasons and the action and recommendations, prior to the next full meeting of the Board.

2) TENURE TEACHER. In any case where the superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a tenure teacher, the matter shall be processed in accordance with the provisions of this section, except that the full Board, rather than the Personnel and Negotiations Committee, shall conduct the hearing.

f. The MTEA may, within ten (10) work days, invoke arbitration, as set forth in the final step of the grievance procedure. A teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 788, Wisconsin Statutes.

g. To accommodate scheduling conflicts, the time limits of the misconduct procedure may be modified, on a case-by-case basis, by the mutual consent of the parties responsible for scheduling at the particular step of the procedure where the scheduling conflict arises.

2. EMERGENCY SITUATIONS. When an allegation of serious misconduct which is related to his/her employment is made, the administration may conduct an administrative inquiry which

would include ordering the teacher to the central office or authorizing him/her to go home for a period not to exceed three (3) days. Authority to order an employee to absent himself/herself from work shall be vested in the superintendent or his/her designee. The administration shall notify the MTEA as to the identification of its designees. In no case can the designee be a member of the bargaining unit. The MTEA shall be notified previous to the decision. No teacher shall be temporarily suspended prior to the administrative inquiry, not without the opportunity to respond to the charges and have representation of his/her choice as set forth above. No teacher may be suspended unless a delay beyond the period of the administrative inquiry is necessary for one (1) of the following reasons:

a. The delay is requested by the teacher.

b. The delay is necessitated by criminal proceedings involving the teacher.

c. Where, after the administrative inquiry, probable cause is found to believe the teacher may have engaged in serious misconduct.

In the event that the teacher suspended is cleared of the charges, he/she shall be compensated in full for all salary lost during the period of suspension, minus any interim earnings. At the conclusion of the administration's inquiry, hearings of the resultant charges, if any, shall be conducted in accordance with Part IV, Section N(1)(b).

Additionally, the contract provides for evaluation of teacher performance (Part IV, §M) and final and binding arbitration of disputes (Part IV, §N; Part VII, §D). The parties in this case waived the contract's three week time limit for issuance of awards.

FACTUAL BACKGROUND

The District is a municipal employer providing general educational services to the people of Milwaukee, Wisconsin. The Association is the exclusive bargaining representative for certain of the District's employees, including a bargaining unit of 6,000 teachers. The grievant, Michael Valadez, was entering his second year as probationary teacher in the medical specialty program at North Division High School at the time of his suspension in September of 1991.

Eric Ransom was a student at North Division. Ransom had been an outstanding student

during his career at North Division, until encountering some personal difficulties in second semester of the 1990-91 year. In consideration of his past excellence, and since he had completed the credits necessary for graduation by the end of the first semester, the principal of the school, Dr. Cecil Austin, arranged to list him as a January graduate. Ransom continued to appear at the school in the second semester, attending to his responsibilities as senior class president and head of the school talent show. He did not, however, attend classes.

Ransom was disturbed by conditions at North Division, a 99% African-American school in a poorer area of the City. He believed that the school did not provide an adequate educational experience, and that part of the blame lay with the attitude of some members of the teaching staff. In the Spring of 1991, Ransom agreed to work with NBC television's Expose program to produce a tape of conditions at North Division. He was provided with a television camera concealed in a bookbag, and instructed to surreptitiously film events during the day at the school. The producer initially assigned to the project told him to film a balanced view of events at the school. NBC subsequently assigned a different producer to the project, who instructed Ransom to film only the negative features of the school. In late May of 1991, Ransom shot eight hours of film over about a one week period. Included in this footage was a six and a half minute segment of a class being supervised by the grievant.

The grievant, as noted, was a teacher in the medical specialty program. On the day in question, the school was observing Black Heritage Day. In order to accommodate the morning events associated with the observance, the school day was reorganized with the second hour classes moved to the final hour of the school day. As a result of this change, Ms. Loiusenne Roth, a travelling learning disabilities teacher, was unable to teach her second hour class. The grievant was assigned to substitute for Ms. Roth. This assignment was made a few minutes before the class was to begin, and the grievant was not informed that the class contained learning disabled and cognitively disabled students. Because Ms. Roth was a travelling teacher, there was neither a lesson plan nor a class roster available to the grievant.

When the grievant entered the classroom, the students were milling about, and throwing a cardboard box and other objects around the room. He got the students to take their seats and stop throwing things. He also told them to stop using profanity in his classroom, although this was ignored. He asked if they knew where Ms. Roth kept her lesson plans and instructional materials, but the students did not know. He distributed a set of books that were in the classroom and gave them a health-related reading assignment. About half of the students began reading, and continued to do so throughout the remainder of the class. The other students refused to do the reading assignment, instead chatting among themselves. The grievant decided to allow them to talk, so long as they remained in their seats and refrained from throwing things. One student, Leroy Ward, a very large young man with whom the grievant had had a previous confrontation in the cafeteria, put his feet up on a desk. The grievant told him to put his feet down and he did.

After about half of the class period was over, Ransom knocked on the door and asked

where Ms. Roth was. When told that she had gone home, Ransom asked if he could stay in the class. The grievant told him that he could, but that he would first have to put his coat and bookbag in his locker. He returned a short time later, still carrying the bookbag with the concealed camera, and took a seat at the teacher's table in the front of the class next to the grievant. Several other students came in after Ransom, including one known as Kojack and another known as Xerox. Ransom stayed in the room for the remainder of the class and filmed a total of twenty-six minutes of videotape. During that period of time, half of the students continued to read the assignment, while others, most notably Leroy Ward and Kojack, continued to talk and use profanity. During most of this time, the grievant did not attempt to stop them from talking or using profanity. At one point, Ward put his feet back on the desk, and the grievant told him to put his feet down. Ward initially refused, and the grievant threatened to send him to the office and pulled out a hall pass. Ward then put his feet down.

The tape shot by Ransom on that day was delivered to NBC, and the portions featuring the grievant were included in an edited version along with other edited footage. In August of 1991, NBC contacted the District and advised the superintendent's office that North Division would be the subject of a story to be broadcast on September 1st, immediately prior to the opening of school. The edited version was made available for an August 22nd screening by Dr. Howard Fuller, the new Superintendent of Schools, Dr. Austin, Deputy Superintendent Robert Jasna, Communications Director Denise Calloway and Donald Ernest, the Executive Director of the Association. The video included six and a half minutes of the class supervised by the grievant. The tape also showed, among other things, students playing dice in a classroom, a student sleeping at a desk, and a conversation between Ransom and another teacher regarding truancy. The three teachers most prominently featured on the tape were Thomas Clark, William Kemen and the grievant. NBC film crews were present at the screening, and taped Dr. Fuller's response for inclusion in the telecast.

The tape seen by Fuller and the others began with the shots of the sleeping student and the students playing dice under a desk. It included scenes of a teacher saying that she was only interested in teaching students who were going to graduate, a teacher reading a book in front of a class where students were talking, students leaving a class without permission, hallway scenes of students planning a fight, a teacher discussing truancy with Ransom, two teachers discussing the fact that students skip class or do no work in class, and students telling a teacher that they are going to walk the halls because their class isn't going to do anything. Instances of profanity and misbehavior by students were sprinkled throughout these scenes. The last portion of the tape showed a six and a half minute excerpt from the grievant's experience in Ms. Roth's LD class:

[SCENE CHANGE TO MS. ROTH'S CLASS]

Leroy Ward: I'd graduate. I went to high school and flunked every class.

Mr. Valadez: I thought you were an A student. You passed this class, didn't you?

Leroy Ward: I'd pass your classes buddy. What do you teach?

Mr. Valadez: Medical specialty.

[STUDENTS TALKING]

Mr. Valadez: Consider your situation, what if it was you?

[SCENE CHANGES]

Student: Now, you gonna help me.

Student: Hey, [unintelligible]

{LAUGHING]

Student: [unintelligible] right here [unintelligible] man.

[NEW SCENE]

Mr. Valadez: Close the door please.

[DOOR CLOSES]

Student: You don't want the door closed. [Opens the door]

Student: What's up man?

Student: Oh, shut you big mouth.

Student: That's why you look at the ceiling.

Student: I remember when you were talking to me then. [unintelligible]

Student: You know that's crazy. You know that's crazy. He look like he could kick some ass. I had … with him too. Nobody [unintelligible] home.

[SHIFT SCENE]

Kojack: Why this second hour? This should be seventh hour. One time … you on dope, man.

Mr. Valadez: Will you get your feet off of there please?

Student: Say man.

Mr. Valadez: I'm asking you to please get your feet off there.

Leroy Ward: [unintelligible] take me down?

Mr. Valadez: I'm asking you to please take them down. I don't have to take you down. I'll just get an escort to take you down to the office. Is that fair enough? Okay. [takes out 86 card] You know what it is.

Leroy Ward: [takes foot down]

Kojack: [to Leroy Ward] You remind me of this dude in this movie. Did you ever see Cooley High? You remind me of … not the guy with the bald head. You remind me of the other dude … the skinny one. I think that's his name. The one who got caught in bed with that girl, and she was like, "Ooooh, I'm telling mama. You had naked girls in your room". Did you ever see Cooley High?

Student: I'm going to rent that story. Last night I watched Scarface I and II.

Eric Ransom: Ah no, you're always watching Scarface. I watched "Albert Kill"

Kojack: I sure did. I love that movie.

Student: Fuck [unintelligible]

Kojack: Al Pacino [unintelligible], say hello to my little friend … boom. Oh damn.

Student: It's a pig, he gonna bite ya.

Student: [unintelligible]

Eric Ransom: I only saw the one with Al Pacino … movie …

Leroy Ward: Hey Kojack … he's a kayo …

During most of this segment, the grievant sat quietly at his desk reading.

Dr. Fuller was incensed by what he saw on the tape. North Division had a troubled history and was the focus of much concern in the African-American community, including charges that the District had been lax in providing discipline and quality educational opportunities for students. Fuller had a very strong concern about the effect that the broadcast of this tape might have on the opening of school at North Division. He discussed the available options with his staff, expressing his desire to take immediate action, including insuring that Clark, Kemen and the grievant would not be in school when it opened. He was advised that an emergency misconduct proceeding was available under the contract, and on that same day had letters sent to all three teachers telling them to absent themselves from their duties effective August 30th (the first day for teachers to report for the Fall semester) and report to the District offices on September 4th for a meeting with District officials. The grievant was advised that he could be represented at the meeting by the Association, or whomever else he wished to have present. The purpose of having the meeting scheduled for September 4th was to be sure that none of the teachers would be in North Division High School when students reported on September 3rd for the first day of classes.

Dr. Fuller contacted the local media and advised them of the upcoming broadcast, including a description of some of the more controversial portions, and his response to it. The next day's newspapers gave extensive coverage to the story, including quotes from the Superintendent indicating that he was "horrified" by the tape, and that "[under] no circumstances can there be any excuse for this. None." He told the papers that "Under no circumstances will they be in any Milwaukee public school on September 3."

NBC ran a shorter version of the tape on its Expose program on Sunday, September 1st. Included in the broadcast was a portion of the footage featuring the class supervised by the grievant.

On September 4th, the District found probable cause that the grievant had engaged in serious misconduct, and suspended him without pay effective September 5th. A meeting was scheduled with the Associate Superintendent, Dr. Aquine Jackson, for September 12th. The charges specified in the letter setting the meeting with Dr. Jackson were:

"Omission of duties-failure to perform duties of a professional teacher as follows:

1. Failure to discipline students.
2. Failure to provide an atmosphere conducive to learning.
3. Failure to provide educational instruction to students.
4. Failure to maintain adequate student supervision.

The meeting with Dr. Jackson was later rescheduled for September 18th.

On the 18th, Dr. Austin made a recommendation that the grievant be reinstated upon completion of six credits of classroom management courses. Dr. Jackson disagreed with this recommendation, and instead recommended that the grievant be terminated. After meeting with the grievant and MTEA representatives, Jackson notified them that the matter remained unresolved and that a further hearing would be conducted by the Department of Human Resource Services on September 26th. That hearing was held with Raymond Nemoir, Acting Director of the Department. On October 2nd, Nemoir summarized the hearing and his conclusions in a letter to the grievant:

> Dear Mr. Valadez:
>
> A hearing was held on September 26, 1991, under Part IV, Section N, 1 (c), of the contract between the Milwaukee Board of School Directors and the Milwaukee Teachers' Education Association to review the following misconduct charges:
>
> - Failure to discipline students
> - Failure to provide atmosphere conducive to learning
> - Failure to provide education instruction to students
>
> Present at this hearing, in addition to you and me, were Dr. Cecil Austin, Principal of North Division High School, Dr. Aquine Jackson, Associate Superintendent, and Mr. Barry Gilbert, representative of the Milwaukee Teachers' Education Association.
>
> Dr. Jackson indicated that the video tape that was taken by Eric, a former student at North Division, was a tape of a learning disability class you were asked to teach during your preparation period. You were not given this assignment until approximately two to five minutes prior to the start of the class which was the last period of the day.
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> The video tape begins with you walking into class a few minutes late. You are sitting at a desk while the students are acting in a disruptive manner. You do little to control the students from laughing, talking, clowning around, and using profanity. You give minimal directions to the students who continue to act in an uncontrolled manner. You are heard asking a student, "Would you close the door,please?" This was two minutes into the tape. The students are heard using profanity and one student was heard telling another student to "shut up." You ask a student to "Get your feet off there," and the student's response could not be understood. Students continue to talk at will, making inappropriate comments such as "One got caught in bed with another girl," which is heard in the background. The tape continues to show you sitting at the desk making no attempt to get the students on task by providing meaningful instructional activity. The students

appear to be out of control and you appear to be oblivious as to what is going on in the room.

Dr. Jackson indicated that you made no attempt to provide any type of instructional program for the students. Instead, you let students behave in an uncontrolled manner throughout the six and a half minute tape. Dr. Jackson stated that a teacher has a professional responsibility towards his students even though that teacher may not be certified in a subject area for which the teacher is asked to teach. The administration pays any teachers who covers a class during his/her preparation period and in return expects the teacher to provide a meaningful instructional program in a controlled classroom environment.

You testified that, when you arrived at the class a few minutes late, the students were throwing a box around the room and you asked them to stop. You said that there were no lesson plans, seating chart, or attendance lists left by the teacher. You passed out a book and asked the students to read a passage which was related to a health topic. You indicated that the reason you picked this passage was because you are a teacher in the medical specialty and thought you could discuss this passage with the students since you have insights into the subject of health. Although the students were acting in an uncontrolled manner, you indicated that you did not discipline them for fear of student retaliation. However, you did say at the beginning of the class that you told the students that they should not use profanity.

Your union representative, Mr. Barry Gilbert, indicated that the matter should not be under the misconduct provision of the contract. He said that if the administration had a problem with the way the teacher handled the class, the evaluation process within the contract would have been the appropriate procedure to follow. Dr. Austin indicated that he held a conference with you at the end of the 1990-91 school year to discuss your teaching performance. At this conference, he pointed out a number of problems you were having in your regular classes which were consistent with those viewed on the video tape.

Caring about and teaching students is the most fundamental aspect of your role as an educator. Willful inattention to this aspect is inexcusable. If ever there a case where the phrase "actions speak louder than words," is applicable, it is this one. Your inaction sent the following message loud and clear - "I don't care," or worse, "I give up."

As passionate as your explanation and defense are, there can be no excuse for not caring about students, or worse yet, giving up on them. It is your job to care. If you don't care, you don't want the job. It is as simple as that.

Moreover, if you have given up only one year into your probationary period with the Milwaukee Public Schools, then you should acknowledge this deficiency and move on to a job that does, in fact, interest you.

Your explanation that you took over a class with relatively short notice and little or no preparation, only suggests that your assignment to that particular class was a bit more difficult than normal. Nonetheless, this does not excuse your sitting on your hands and doing little or nothing to make a meaningful learning experience for the students in that class.

Based upon the testimony presented at the hearing as well as viewing the video tape, I have concluded that you acted in an unprofessional and unacceptable manner while assuming the teaching responsibilities for a learning disabilities class. The administration not only expects but demands that each teacher is to maintain a classroom atmosphere conducive to learning as well as to provide a meaningful instructional program.

It was obvious from the tape that you displayed no skill in these areas and, as a result, cheated the students in your classroom. Each teacher is paid a fair salary. In return, the Milwaukee Board of School Directors, the administration, and the parents expect a teacher to be committed to their students and to provide students an instructional program that keeps them on task and allows them to reach their potential. This is a teacher's job each and every time he reports for work. The video tape clearly showed that you took advantage of the trust placed in you. You showed no respect for the students in the learning disabilities class. Your actions cannot help but negatively impact upon the students in the class and your lack of commitment cannot help but lower their self-esteem.

As a result of the documentation and testimony presented at the hearing, I am recommending to the Superintendent that you be terminated from your teaching assignment with the Milwaukee Public Schools.

Sincerely,

/s/ Raymond N. Nemoir
Acting Director
Department of Human Resource Services

Two days later, Dr. Fuller sent a letter to the grievant, indicating that he had reviewed the proceedings to that date and concurred in Nemoir's judgment. The grievant then appealed for a hearing before the Board's Personnel and Negotiation Committee.

The Board Committee scheduled a hearing for the evening of November 4th, along with the hearing for another of the teachers featured in the videotape. The Association's attorney requested a rescheduling of one of the hearings so that he could more comprehensively address the cases. The hearing in this case was rescheduled for December 2nd. At the hearing the Committee took testimony from Eric Ransom, Cecil Austin, Aquine Jackson, Louisenne Roth, teacher Carlton Lord, teacher Michael Powell, and the grievant. After the testimony, the Committee recessed for deliberations. At the conclusion of their deliberations, they reconvened and announced that their finding that the grievant had been guilty of misconduct as charged, but that the penalty should be reduced from termination to a suspension for the school year. They conditioned his reinstatement on his successful completion of six credits in classroom management. This recommendation was adopted by the full School Board later in the month. The Board imposed an identical one year suspension on Kemen, and a one semester suspension on Clark.

A series of grievances were filed concerning the discipline imposed on the three teachers and the procedural aspects of the cases. Each teacher's case was arbitrated separately. Several of the procedural issues were addressed in the arbitration involving teacher Thomas Clark 1/ and are not in presented in this case. The procedural questions before this arbitrator include the alleged misuse of emergency misconduct proceeding, the use of misconduct procedures instead of evaluation procedures, the use of a concealed camera for purposes of evaluation and pre-judgment of the case by the Superintendent. They have been joined in this proceeding with the substantive grievance over the merits of the discipline. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the District

The District takes the position that the grievant engaged in misconduct and was suspended for just cause under the Agreement. There is no question but that the grievant failed to control his classroom, or even make any attempt to control his classroom. This failure to take responsibility for insuring a safe and stable learning environment violates the grievant's fundamental duty as a teacher. In abdicating this responsibility, the grievant committed serious misconduct.

In response to the Association's argument that this case should have been handled as an evaluation matter, the District argues that this case does not raise an evaluation issue. The evaluation procedures in the contract are used in cases where a teacher is trying but not

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1/ Milwaukee Board of School Directors, Case #237, No. 47011, MA-7135 (Nielsen, 9/22/92)

performing adequately. The misconduct here consists of not trying at all to control the class or educate the students. Failure to try shows a complete disrespect for the students and disregard for the District's educational mission. Moreover, the District points out that the grievant received additional compensation for covering this class and had an ethical obligation to put forward some effort for the additional money.

The District addresses and dismisses the three primary arguments made by the Association in attempting to mitigate the grievant's conduct: First, that he was only substituting and had not been given either a class list or assignments; second, that the class was comprised of learning disabled, emotionally disturbed and mentally retarded students; and third, that the grievant did make some attempts to control the class. The first of these is irrelevant. The grievant is a fulltime teacher at North Division, and should understand that he has an obligation to control the classroom and offer some educational experience to the students. The discipline here is not for the lack of content in the grievant's teaching -- it is for the lack of effort in controlling the classroom. Whether as a substitute or a regularly assigned teacher, he had a basic obligation to control the classroom.

The fact that the students were learning disabled, retarded and/or emotionally disturbed has no bearing on the grievant's obligation to assert control over the class. The District notes that there is testimony supporting the proposition that classroom control techniques are not materially different in a class such as this than in a mainstream class. This fact was fully developed at the Board and arbitration levels and was weighed by the administrators who judged the grievant's performance.

The third point raised by the Association is essentially that the six and one-half minutes shown on the tape are not representative of the grievant's conduct on that day. In response to this, the District notes that Ransom was present for twenty five minutes in this classroom and testified that the behavior on the tape continued unabated during that entire time. Furthermore, the conduct on the tape is unacceptable for any period of time in a classroom. That the grievant allowed it to continue for six and one-half minutes is no less serious a violation of his professional duties than if he allowed it for the full period.

The administrators who reviewed the grievant's case fully considered the mitigating circumstances raised by the Association. They concluded that these circumstances did not excuse his behavior. Dr. Austin recommended remedial discipline in the form of additional classroom management training. Mr. Nemoir and Superintendent Fuller believed that a discharge was the appropriate response. The Board reduced the penalty from a discharge to a one year suspension, with a requirement for additional classroom management training. All of them agreed, however, that misconduct had occurred and that some penalty was appropriate. In reviewing the appropriateness of the penalty employed by the Board, the District urges that arbitrator recognize the employer's right to determine penalties in the first instance, and to weigh heavily -- as the Board did -- the fact that this grievant is a probationary teacher. He has

no track record of exemplary service to offset his misconduct, and is therefore subject to a heavier penalty than would be a teacher of long tenure.

Turning to the procedural complaints of the Association, the District asserts that the grievant's case was properly addressed as an emergency misconduct, and that he was afforded full due process rights. The contract allows the administration to remove a teacher from the classroom for up to three days in an emergency:

> When an allegation of serious misconduct which is related to his/her employment is made, the administration may conduct an administrative inquiry which would include ordering the teacher to the central office or authorizing him/her to go home for a period not to exceed three (3) days.

Clearly, this was an emergency, since Dr. Fuller identified the enormous potential for unrest and disruption at North Division High School had the grievant and the other two teachers been present on the first day of classes. The volatile situation at North Division could only have been further inflamed by allowing these teachers to report for work immediately after the NBC broadcast. The Superintendent acted responsibly in taking the only course open to him to defuse the situation.

The District notes the Association's citation of Arbitrator Seitz's Award in Adamski for the proposition that a less drastic step, involuntary transfer, was available. Even if the Adamski decision would have allowed for an involuntary transfer on these facts -- an action that the District doubts the Association would have acquiesced in had it been taken -- neither the contract nor the Adamski Award suggests that the administration is bound to employ that procedure rather than an emergency misconduct proceeding. The language of the emergency misconduct section is permissive ("…the administration may conduct an administrative inquiry…") and the Superintendent had discretion as to which route he chose to use in this emergency situation.

Addressing the other procedural complaint of the Association, the District denies that Superintendent Fuller pre-judged the case against the grievant. Dr. Fuller certainly made an initial decision that the behavior shown on the videotape warranted a disciplinary inquiry, and directed that the misconduct proceedings be commenced. That initial judgment is commonplace and even inevitable in discipline cases, and does not amount to a violation of due process. The grievant was afforded an opportunity to be heard, and to confront his accusers before an impartial decision maker. He had a full and fair hearing before the Board, and the Board reduced his discipline from a discharge to a suspension. Certainly this satisfies the District's obligation to provide due process under both the contract and the Constitution.

For all of the foregoing reasons, the District urges that the discipline be sustained.

The Position of the Association

The Association takes the position that the grievant is innocent of misconduct. If his conduct was in any way inappropriate, it was a performance problem calling for further instruction in professional techniques. The grievant entered a very difficult classroom, wholly unprepared because of the lack of a class list, lesson plan or knowledge of the students. Despite this, he was able to calm the classroom, stopping the chaos he found when he entered, creating a physically safe environment and giving the students an educationally meaningful reading assignment.

The Association notes that other substitutes had experienced severe difficulties with this class. The regular teacher, Ms. Roth, testified that there had been instances in the past of substitutes being hit with books, enduring eraser fights and having the classroom plunged into darkness. Moreover, Roth identified Leroy Ward, the student who did much of the disrupting in the class, as a particularly difficult student who used boisterous conduct to cover up his learning and emotional disabilities. The District ignored these factors in deciding to blame the grievant for the conditions shown on the videotape, even failing to interview Ms. Roth about normal classroom problems.

The District also ignored the bias of both Eric Ransom and NBC in judging the grievant's case. Although Ransom approached the filming project with a predisposition against the faculty, whom he blamed for poor conditions at the school, and NBC obviously sought to sensationalize the schools problems, the District simply accepted the videotape as a complete and honest version of events in the grievant's classroom that day. It gave no weight to the disruption of the school day from the Black Heritage Day celebration and the effect of this on the disabled and retarded students in the class. It discounted his earlier efforts to control the class and his success at establishing a safe environment and providing a reading assignment. It ignored the impact of its own policy at North Division of discouraging teachers from referring problems to the office. Finally, it did not consider the grievant's reasonable concern for his safety in any confrontation with Ward, who was considerably larger than him and with whom he had a previous confrontation in the cafeteria.

The Association points to a 21 year history of misconduct cases, some 700 in all, which is devoid of any record of punishment for failing to adequately control a classroom. This demonstrates the mutual understanding of the parties that this is not a disciplinary offense. It also shows that, even if some measure of discipline was warranted, the principles of progressive discipline would completely rule out the one year suspension imposed on this grievant.

The Association argues that the grievant did his best in an impossible situation and that any lack of success should have been addressed under the contract's evaluation procedure and perhaps additional training on classroom control techniques. This raises two questions. The first is the legitimacy of using hidden cameras for evaluative purposes, which the Association

argues is completely at odds with the corrective purposes of evaluation. The second is the application of the emergency misconduct procedure for a performance related deficiency. The use of emergency procedures was, the Association argues, inappropriate in that the Superintendent had no particular concern about investigating the teachers' conduct but had a great concern with being seen to take decisive action and in defusing a controversy at North Division before school began. It is obvious, the Association claims, that District incorrectly applied emergency misconduct proceedings to what was at most an evaluation problem simply because that was the only means of removing the teachers from the school before classes began.

The Superintendent further violated the contract by prejudging the guilt of the three teachers, even though he was the fourth step hearing officer in misconduct cases. His public statements that their conduct was outrageous and inexcusable, and that none of the three would be in any public school when school opened, demonstrates that he was not capable of acting as an impartial decision maker. He also tainted the entire hearing process by meeting with first step hearing officer Cecil Austin and second step hearing officer Aquine Jackson prior to initiating the misconduct proceedings. The clear desires of the Superintendent could not have been lost on these subordinate officials.

In addition to improperly relying on misconduct proceedings in the first instance, and tainting the hearing procedure with public statements, the District compounded its error by waiting for eight to twelve days between the invocation of the procedure and the commencement of any investigation. The administrative inquiry under the emergency procedure was intended to be a three day period during which charges could be investigated to determine whether there was probable cause for discipline. Here the District had all of the facts, except for the grievant's version of event, in its possession as soon as Dr. Fuller viewed the videotape. Yet they delayed the interview with the grievant to insure that he would not be able to be present at North Division. It is ironic, the Association argues, that the District misused the misconduct procedure to punish this teacher, when it could have accomplished the same end by using the correct section of the contract. The District failed to realize that it had the right to temporarily transfer the grievant by using a 281-T evaluation card under the evaluation section of the contract, as interpreted by Arbitrator Seitz in the Adamski Award.

Even if the grievant had engaged in some form of misconduct in this case, the Association points to the fact that the only other case of discipline for failure to control a class in the past 21 years resulted in a dropping of charges. A one year suspension is grossly disproportionate to the alleged offense and inconsistent with past disciplinary practices. Neither the Superintendent nor the Board could rationally have concluded that a one year suspension was fair. Thus, the Association concludes, the discipline in this case was wholly unwarranted and grossly out of step with the norms of discipline, even if the allegations had been proven.

For all of these reasons, the Association asks that the discipline be expunged from the grievant's record, and that he be made whole for his losses. Further the Association asks for orders directing the District to comply with the principles of due process embodied in the Agreement and in Goldberg v. Kelly, as well as a prohibition on clandestine surveillance.

DISCUSSION

Just Cause for Discipline

The central issue in this case is whether the District had just cause to suspend the grievant for the 1991-92 school year. I have previously discussed the preconditions for discipline under this contract: "Just cause for discipline exists where (1) the employee actually engaged in the conduct alleged and (2) the conduct violates the contract, established work rules or recognized norms of the industry." (Glenn Kukla Discharge, 8/90, at page 53).

The discipline against the grievant flows from the District's belief that he is guilty of a willful inattention to duty. The District's theory of the discipline is that the grievant failed to make any effort to control Ms. Roth's classroom, as opposed to having been simply ineffective in controlling the class or lacking the skills to control the classroom. While the latter are serious performance issues, they would generally call for a non-disciplinary response. As the Association points out, failure to adequately control a classroom has not traditionally been addressed through the misconduct procedures of the contract. Willful inattention to duty, however, is a commonly accepted basis for discipline. The core responsibility of any employee is to give an honest effort to perform the job for which he or she is being paid.

The grievant's performance on the videotape, and as detailed in his testimony and that of Eric Ransom, was plainly not a model of effective classroom management. He acknowledged that he erred in deciding to allow some students to continue to talk while other students were performing the reading assignment, and in accepting as his goal for the non-reading students no physical misbehavior and staying in their seats. The question here is whether his ineptness falls to the level of misconduct. I conclude that it does not.

The conditions in Ms. Roth's Special Education class were, all parties concede, difficult. Some of the students, including Leroy Ward, were emotionally disturbed and given to boisterous behavior. Some, unbeknownst to him, were not assigned to that class. Previous substitute teachers had experienced even greater problems maintaining control over the class. The day on which the videotape was taken was near the end of the school year and the normal routine had been disrupted both by the Black Heritage Day program and by the use a substitute teacher. The grievant successfully gained control over the classroom when he entered, to the extent of ending the physical chaos and establishing a safe environment. He introduced himself and attempted to take attendance. Despite the lack of a lesson plan and his unfamiliarity with the class, he devised an educationally meaningful reading assignment for the students, although some students refused to

do the reading. He attempted to put an end to the profanity, without success. He enforced the rules against putting feet on furniture against Ward twice, and in the second instance was able to face Ward down when he initially refused. 2/ Most of these efforts are not shown on the videotape, because they took place before Ransom entered the classroom.

Had the grievant's efforts been limited to those shown on the six and one-half minute videotape seen by Fuller and the others in August, a disciplinary response might well have been appropriate. 3/ The totality of the grievant's behavior as a substitute in Ms. Roth's class establishes that he was ineffective in that setting and made several very poor decisions, but does not show the lack of effort alleged by the District. In arriving at this conclusion, I am mindful of the District's concern with maintaining and policing the quality of its workforce. The use of discipline in this case instead of the evaluation procedures under the contract is premised upon the absence of effort rather than the quality of the result. The complete record beyond the videotape shows an effort by the grievant to perform his duties. As noted above, ineptness is not misconduct and I therefore have sustained the grievance challenging the suspension.

Misuse of the Misconduct Procedure

In the companion case involving teacher Thomas Clark, the emergency misconduct procedure was used in essentially the same manner as it was in this case. The discussion of that aspect of the case is reproduced below.

> The network contacted Howard Fuller, the new Superintendent of the Milwaukee Schools, in late August and informed him that they were going to show a segment on North Division on their September 1st telecast, right before the opening of school. He was shown the segment and asked for comment. Fuller reacted very strongly to the videotape, feeling that the conduct and attitudes displayed were totally inappropriate. He also immediately perceived the likely impact of the broadcast on the standing of North Division High School, and the school system in general, within the African-American community. He decided that the three teachers shown, including the grievant, could not be allowed to be in school on

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2/ In this regard, the colloquy between the grievant and Ward during the second instance included Ward asking if the grievant was going to take his foot down from the chair. This lends some credence to the grievant's claim that he was concerned for his safety, yet he did not back down.

3/ Even in that case, the past disciplinary record of the District would raise serious questions about the appropriateness of a one year suspension.

September 3rd, and consulted with his staff on how the three might be forced to absent themselves from North Division. He was advised that nothing in the evaluation provisions of the contract would allow removal of the teachers, but that this could be accomplished under the emergency misconduct section. He directed his staff to proceed with emergency misconducts against all three faculty members. The notices were sent to the teachers on August 22nd, with a meeting date set for September 4th, 13 days later.

The emergency misconduct procedures are set forth in Part IV, §N (2) of the contract:

> 2. EMERGENCY SITUATIONS. When an allegation of serious misconduct which is related to his/her employment is made, the administration may conduct an administrative inquiry which would include ordering the teacher to the central office or authorizing him/her to go home for a period not to exceed three (3) days. Authority to order an employee to absent himself/herself from work shall be vested in the superintendent or his/her designee. The administration shall notify the MTEA as to the identification of its designees. In no case can the designee be a member of the bargaining unit. The MTEA shall be notified previous to the decision. No teacher shall be temporarily suspended prior to the administrative inquiry, not without the opportunity to respond to the charges and have representation of his/her choice as set forth above. No teacher may be suspended unless a delay beyond the period of the administrative inquiry is necessary for one (1) of the following reasons:
>
> a. The delay is requested by the teacher.
>
> b. The delay is necessitated by criminal proceedings involving the teacher.
>
> c. Where, after the administrative inquiry, probable cause is found to believe the teacher may have engaged in serious misconduct.
>
> In the event that the teacher suspended is cleared of the charges, he/she shall be compensated in full for all salary lost during the period of suspension, minus any interim earnings. At the conclusion of the administration's inquiry, hearings of the resultant charges, if any, shall be conducted in accordance with Part IV,

Section N(1)(b).

The Association takes exception to the use of the emergency misconduct proceedings in this case on several grounds. It argues first that this was more properly an evaluation case, calling for training in issues of cultural diversity, than a misconduct case, calling for discipline. They further argue that any perceived need to remove the grievant from North Division should have been handled with a 281-T evaluation card. 4/ The question of whether a case involves misconduct or a non-disciplinary evaluation issue is part and parcel of the just cause analysis and any remedy that might be ordered. If there is no just cause for discipline, the District should not have proceeded under the misconduct provisions. The fact that they erred in judging their case by imposing discipline is not a separate contract violation. It may of course be that a given case would present both disciplinary issues and evaluation issues, and in such a case the Board would have the option of deciding to proceed under evaluation.

The Association also asserts that the Superintendent misused the emergency misconduct procedure as a device to punish the teachers by removing them from the schools for three days without a hearing, rather than an opportunity to conduct a quick inquiry into the facts and determine whether serious misconduct had occurred, as the parties intended when they negotiated the procedure. The District responds to this argument by noting that the contract allows for removal with pay

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4/ A 281-T evaluation card indicates a satisfactory evaluation with a recommendation for transfer. Arbitrator Seitz, in his Adamski Award, indicated that this was a tool available for handling unusual circumstances where a teacher had done nothing wrong, but nontheless needed to be moved from his/her school outside of the normal transfer period:

> "It is conceivable that a most unusual fact would justify transfer on a 281-T evaluation during the course of the year. The arbitrator will not undertake an enumeration. He will only give one example. It could be that a very satisfactory teacher had become unable to control a class because of unjust accusations of racial discrimination. It would seem that in such a situation it would be hard to conclude that there was any intent to prevent the Board from effecting a transfer on a 281-T evaluation." Adamski Award, at page 11.

Although the District and the Association have reversed roles in this argument, with the Association claiming the District has a right to involuntarily transfer and the District expressing skepticism, I concur with the Association's reading of Adamski and find that the situation here falls squarely within the interpretation given by Arbitrator Seitz.

for up to three school days in an emergency situation, and asks if this was not an emergency, given the explosive situation created at North Division High School and the pending commencement of the school year, what might constitute an emergency?

Other than the title of the section, the emergency misconduct provision does not actually make reference to emergency situations as the trigger for ordering a teacher to temporarily absent himself from school. The right to conduct an administrative inquiry is triggered by "an allegation of serious misconduct which is related to his/her employment" and ordering an inquiry carries with it the right to order the teacher out of the school with pay for up to three days pending the outcome of the inquiry. However, in deciding the seriousness of the allegation, the District is entitled to give weight to the overall context, and in this sense, the existence of an "emergency" situation might justify use of this procedure for conduct that, in another school or climate, would not justify invocation of the section. 5/

In this case, Dr. Fuller reasonably believed that the presence of the three teachers in North Division at the opening of schools would create an emergency if NBC went ahead with its plans to broadcast the excerpt he had seen. The Association argues that there is no evidence of this, but given the press coverage 6/ and the

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5/ In distinguishing "regular" misconduct from "emergency" misconduct, MTEA Assistant Executive Director Don Deeder spoke of a regular misconduct as being "where somebody does something *but it's not so onerous or disruptive to the school environment that the teacher cannot continue to work while it's going on*, and then the third situation is where you have an emergency misconduct, a serious allegation, perhaps a teacher is accused of having sexual relations with a student or something like that where you want to actually pull them out of the environment for a short time while you can investigate it and determine if there's probable cause that this may have happened." (Transcript, pages 377-78. Emphasis added.). Later in his testimony, Deeder again referenced the impact of the charge on the overall environment: "If there's no reason to believe that it's serious misconduct, *that the employee's conduct or remaining in school would not, you know, jeopardize the school or the employee or any person involved,* then they send him back to work and they process the allegation through the normal procedure." (Transcript, page 384. Emphasis added.)

6/ The Association notes that Fuller himself generated much of the press coverage, by commenting to the media before the broadcast. This line of response appears to have been designed to get ahead of the situation, and influence the public reaction. In the case of the grievant it was both unnecessary, since NBC did not air his comments on the telecast, and

sensational nature of the edited film, I believe that the record adequately supports the Superintendent's judgment about the likely reaction in the community. He was entitled to remove the grievant from the school in order to further investigate his conduct. In reaching this conclusion, I do not mean to suggest that political expediency can justify the suspension of the normal discipline procedures. Dr. Fuller sincerely, but erroneously, believed that the grievant had engaged in verbal misconduct, in a school where particular care needed to be paid to racial sensitivity. It is the conjunction of the type of comments Fuller thought had been made, the looming dissemination of those remarks over network television and the impact on the teacher's working environment that constituted the emergency situation and, in Fuller's mind, exacerbated the seriousness of the misconduct.

There remains the problem of the duration of the administrative inquiry. Both the testimony of Don Deeder on the bargaining history of this provision, and language of the provision itself plainly indicate that the purpose of the administrative inquiry is to determine whether there is probable cause to believe that misconduct occurred. It is absolutely clear from the record that the Superintendent had no intention of using the three day period for the purpose of conducting an administrative inquiry. There were eight days between his order to the grievant and the first teacher work day on August 30th, and 13 days between the order and the date set for the grievant's meeting with the administration. Dr. Fuller's admitted reason for invoking the three school day removal provision was to insure that the grievant was absent from North Division on the first day of classes.

While I am skeptical of the District's belief that a period of administrative inquiry may be measured backwards from the third work day of the school year, irrespective of break time available for investigation prior to that period, I find that it is not necessary to resolve this issue. The practical effect of the District's action

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premature, since further investigation, such as speaking with Ransom and the grievant, would have put the remarks in their true and innocuous context. At the point at which Fuller acted, however, he could not have known NBC would excise these portions. The Association's criticism of him for "going public" emphasizes the Superintendent's role under the contract to the exclusion of his political role as the head of a public institution. That is an understandable focus for the Association, but I find that Fuller's decision to go to the media, if not the tenor of his comments as they relate to this grievant, was reasonably predictable and from his point of view necessary. He did not go to the media in order to create an emergency and thus enable himself to use emergency misconduct proceedings, and therefore the climate created by the press coverage may legitimately be considered in determining whether an emergency situation existed.

in this instance was to pay the grievant for three days on which he would have been on unpaid suspension, had the administrative inquiry proceeded in exactly the same way but before the beginning of the teacher's work year. I find no indication that the extension of the inquiry period affected the District's decision making. Given the decision at each step of the appeal to find probable cause, the grievant was not prejudiced by the District's odd use of the three day removal provision.

In summary on the question of misuse of the emergency misconduct provision, I find that the District could have interpreted the conjunction of what they believed the grievant's comments to have been, the volatile situation in North Division High School and the threatened airing of the Expose segment as an emergency situation, justifying the use of §N(2). The fact that they were wrong in believing that there was just cause for discipline does not automatically yield a contract violation for failing to address the situation with a 281-T transfer under the Adamski Award or some other provision of the evaluation procedure. The duration of the administrative inquiry was highly questionable, but given the peculiar timing of this case and the decision at each step of the process to impose discipline, the propriety of the District's approach need not be resolved herein.

Even though the grievant here is charged with a sin of omission in failing to perform his job, rather than commission as in the verbal misconduct charge against Clark, the District could rationally have viewed his failure to act as an intentional disregard of duty rather than a failure to understand his duty. Furthermore, the grievant was caught up in the same inflammatory actions by NBC as Thomas Clark was, and the District's judgment that an emergency existed had a rational basis. Thus, I do not believe that there is a meaningful distinction between these two cases on this point, and the prior analysis disposes of the evaluation versus discipline issue here.

Use of Concealed Cameras for Evaluation

The Association argues that the District violated the contract by relying upon a hidden camera to evaluate the grievant's conduct. As noted in the Clark Award, the District did not initiate the videotaping here, and the propriety of using surreptitious surveillance techniques for evaluation purposes is not presented on the record.

Pre-Judgment by the Superintendent

The Association has grieved what it believes was the pre-judgment of this case by the Superintendent as evidenced by his public statements after the screening with NBC in August. The Superintendent's reaction to the videotape certainly conveyed his strong condemnation of the conduct he witnessed. The videotape was highly edited to create the image of a school out of control and a staff that was indifferent to the students. NBC informed him at the screening that they intended to air the program right before the opening of school.

Superintendent Fuller is the fourth step hearing officer under the contract's highly structured misconduct procedure. He is also, however, the head of an embattled public institution. While it is understandable that the Association would focus on his role under the contract, it is unrealistic to expect the Superintendent to remain silent in the face of a potentially explosive situation at a high school with a history of tension and controversy.

In the vast majority of cases, the parties to the contract clearly anticipate that the Superintendent will refrain from commenting on matters that will come before him as the fourth step hearing officer. The due process provisions of the contract may be undercut by the impact of such comments on the decisions by lower level hearing officers, and by the possibility that the Superintendent could tie his own hands as a hearing officer with strong public comments prior to his review of the case. In the narrow set of cases where the Superintendent initiates the misconduct process, and where circumstances beyond the control of either party compel public comment by the Superintendent in his political role, the contract cannot be interpreted to prohibit him from speaking out. This conclusion does not relieve the District of its obligation to provide an opportunity to the grievant to present his side of the case, and to fairly consider the evidence and arguments brought forth in the various steps of the due process procedure. While it is possible to criticize the District's investigation of this matter, I do not believe that the record shows a violation of the grievant's basic due process rights. Accordingly the grievance challenging the Superintendent's conduct in this case is denied.

On the basis of the foregoing, and the record as a whole, it is my

AWARD

1. The grievant, Michael Valadez, was not disciplined for just cause. The appropriate remedy is to immediately make him whole for all losses suffered by reason of his suspension for the 1991-92 school year, less any interim earnings which he would not have received had he been working at his teaching position, and to remove all references to this discipline from District files.

2. The Milwaukee Board of School Directors did not violate the Agreement between the parties by proceeding under the Emergency Misconduct section of the contract.

3. The Milwaukee Board of School Directors did not deny the grievant, Michael Valadez, due process as afforded under Part IV, Section N(E)(1) of the Agreement.

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The arbitrator will retain jurisdiction for a period of thirty days from the date of this Award, for the sole purpose of clarifying the remedy ordered herein.

Signed at Racine, Wisconsin this 6th day of January, 1993:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator