

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
GIBRALTAR AREA EDUCATION ASSOCIATION : Case 33
and : No. 47947
GIBRALTAR BOARD OF EDUCATION : MA-7445

Appearances:

Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, 1136 North Military Avenue, Green Bay, Wisconsin 54303, appearing on behalf of the Union.
Pinkert, Smith, Weir, Jinkins & Nesbitt, Attorneys at Law, 454 Kentucky Street, Sturgeon Bay, Wisconsin 54235, by Mr. Jeffrey M. Weir, appearing on behalf of the District.

ARBITRATION AWARD

The Gibraltar Area Education Association, hereafter Union, and the Gibraltar Area School District, hereafter Employer or District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On September 11, 1992, the Commission designated Coleen A. Burns, a member of its staff, as impartial arbitrator. Hearing was held on January 26, 1993, in Fish Creek, Wisconsin. The hearing was not transcribed and the record was closed on March 16, 1993, upon receipt of written argument.

ISSUE:

The parties have stipulated to the following statement of the issue:

Did the Employer have just cause to discipline the Grievant by issuing the letter of June 26, 1992?

RELEVANT CONTRACT PROVISION:

ARTICLE XI
Individual Rights

. . .

- H. No teacher shall be disciplined, reduced in rank or in compensation, dismissed or have his individual contract non-renewed in violation of the provisions of this agreement except for just cause. No teacher shall be discharged, suspended or non-renewed (except for reduction in staff) without just cause.

If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population or because of a decrease of programs offered within the school district, the governing body of the school system or school may lay off the necessary number of teachers based on relative performance evaluations or by inverse order of the assignment of such teachers. Teachers laid off shall be reinstated in inverse order of their being laid off if qualified to fill the vacancies that become available in the year following the year for which he/she was laid off.

. . .

On June 26, 1992, Tom Seagard, hereafter the Grievant, received the following letter from Robert F. Dahlstrom, District Administrator:

This is a follow-up to our meeting on June 4, 1992, in reference to your suspension with pay.

As you are well aware accusations were made by several students concerning inappropriate behavior on your part. These concerns were brought to your attention by Mr. Phelan, which in turn resulted in your being suspended with pay until an investigation could be made regarding the accusations.

Mr. Phelan worked closely with social services, the police, district attorney and our school lawyer. The conclusion of all concerned was that inappropriate behavior did occur, but not to the extent of any criminal

involvement.

You should know that students are concerned about being touched in any manner by you and do not appreciate your teasing or joking with them. Placing tape on a student's body is an example of inappropriate behavior.

You must refrain from this type activity to avoid any further accusations on the part of students. I can assure you that you will be under close scrutiny by the students and parents throughout the school year.

During your absence it was also noted that your lesson plans were very sketchy. This cannot occur. You need them for your planning as well as planning for any substitute that may be necessary.

Hopefully no additional inappropriate behavior will occur. If inappropriate behavior does occur, necessary action will be taken.

You should also be aware that several parents are most unhappy with your behavior and attitude. The positive image you have had in our system no longer seems to exist. As district Administrator I am greatly concerned about this image the community and students have of you. Students are scared and apprehensive. It's up to you to change, Tom.

Upon receipt of this letter, the Grievant appended the following:

I do not agree with this statement. I dont (sic) feel it is an accurate assessment.

Thereafter, a grievance was filed, denied at all steps, and submitted to arbitration.

DISCUSSION:

The Union, contrary to the District, argues that the District did not have just cause to issue the letter of June 26, 1992. The Union primarily argues that the District did not have just cause to conclude (1) that the Grievant engaged in inappropriate behavior and (2) that the Grievant's lesson plans were very sketchy. As the Union argues, since the letter is disciplinary in nature, the burden of proof falls upon the District. While the Union argues that the District is required to prove its charges beyond question, the undersigned is persuaded that the appropriate standard of proof is the greater preponderance of the credible evidence.

Allegations of Inappropriate Behavior

As the testimony of Principal Phelan demonstrates, on May 12, 1992, a parent of a student contacted Phelan, the Grievant's immediate supervisor, to report that Student A, a friend of this parent's child, had claimed that the Grievant had "snapped" her bra. During the time period in which Principal Phelan, the

Department of Social Services, and the Sheriff's Department investigated this complaint, Phelan received and investigated complaints against the Grievant which involved Students C, E and F.

During the investigation of the complaints against the Grievant, Student A admitted that she had lied when she had accused the Grievant of snapping her bra. The District did not rely upon the accusation of Student A when it determined that the Grievant had engaged in inappropriate behavior. Rather, the District's conclusion that the Grievant had engaged in inappropriate behavior was based upon the District's determination that the Grievant had placed tape on the body of Student C, in the breast and buttock area; that the Grievant had entered a Girls' bathroom when it was occupied by Student E; and that the Grievant had squeezed the butt of Student F as she was walking up a stairway. The Grievant denies that he engaged in any of the aforementioned conduct.

At hearing, Principal Phelan testified to the following: On May 15, 1992, Student B and Student C, met with Principal Phelan to voice concerns regarding the Grievant; Student B told Phelan that she had gone to the Grievant's office for supplies and that while she was in the Grievant's office, the Grievant wiggled his butt and touched her; Student C told Phelan that, earlier in the school year, while the student was in the art room, the Grievant placed tape on her body, in the breast and buttock area; Phelan responded to these reports by talking to a large number of students in the Grievant's art class; one student, Student D, told Phelan that he had seen the Grievant place tape around the area of Student C's breast; sometime after May 15, 1992, Student E told Phelan that, sometime in late May of 1992, Student E was in the Girls' Bathroom during the noon hour and saw the Grievant enter the bathroom and yell that the girls should go outside; on May 19, 1992 a parent of Student F told Phelan that Student F had alleged that the Grievant had reached out and squeezed Student F's butt while the two were ascending a stairway above the middle school stairway; Phelan contacted the local Sheriff's Department and Social Services Department regarding the accusations of the students; a member of each of these Departments conducted an investigation; although Phelan did not receive any letter confirming the results of this investigation, he did meet with a member of the Sheriff's Department and was told that there was no criminal action, but that there had been inappropriate behavior; on May 18, 1992, the Grievant was informed that he would be suspended with pay, effective May 19, 1992; during this suspension, Phelan continued his investigation of the accusations and interviewed the accusing students on several occasions; Phelan found the students to be consistent in their statements; Phelan considered the students to be truthful; when Phelan asked why the

students had decided to speak with him about the Grievant, the students responded that they had heard that the Grievant was being investigated and that they wanted to share their concerns with Phelan; Student C told Phelan that the "tape" incident had occurred in November of 1991; Student C did not say why she had not reported the incident previously; Phelan did not ask, and Student F did not tell Phelan, the date on which the alleged incident occurred; Student E told Phelan that there was at least one other girl in the bathroom at the time of the alleged incident; Phelan spoke with this girl and was told that she had been in one of the stalls and had not seen the Grievant, but had heard his voice; Phelan considered Students C, E, and F to be good students academically, had not had any disciplinary problems with any of these three students, and had not had any staff member advise him that the students were a disciplinary problem; Phelan did not consider the allegations of Student B to be significant; and that the allegations of Student B were not considered when issuing the letter of June 26, 1992.

Allegation of Student C

At the time of hearing, Student C, a female student, was in eighth grade. At the time of the alleged incident with the Grievant, Student C was in 7th grade. At hearing, on direct examination, Student C stated the following: she was in the Grievant's 8th hour art class; she generally received A's in art and believed that she received an A from the Grievant; while in the Grievant's art class in November of 1991, she and the other students in the class removed posters which had been displayed in a hallway and returned to the art room to remove tape from the posters; the Grievant "came over, took the tape off the poster and placed tape on my breast and butt, there were four pieces of tape and he took all four pieces off, placed one piece on the left breast, right breast, and left side of butt"; she did not know if the Grievant had placed any tape on the right side of her butt; she was upset and shocked by the incident; she did not say anything at the time of the incident because she was shocked; Student D observed the incident and stated either "I can't believe that he did that to you" or "Did you see that?"; she later discussed the incident with a friend; she did think that the incident with the Grievant was "kind of a big deal", but that she had not wanted to get involved.

On cross examination, Student C stated the following: in the Spring of 1992, she learned that her friends were telling Principal Phelan "about things being done"; she told some friends about the November, 1991 incident with the Grievant and there was "kind of a group decision to talk to Principal Phelan"; she could not recall for sure if the Grievant had placed tape on her "right butt"; she was by a table when the Grievant reached around her body to place the tape on her butt; other students were milling around "doing their own thing"; the Grievant may have said "Good job kiddo", but that she did not really remember what was said by the Grievant; the tape was masking tape; the tape had stuck to her body; and that she removed the tape and threw it in the garbage.

At hearing, on direct examination, the Grievant stated the following: Student C was an average student; he had not had any "major hassles" with Student C; Student C was "a little spacey", but he had not any complaints about Student C, other than normal complaints"; Student C had been a member of a 7th grade clique that included Student B; he never put tape on Student C's body; Student C's allegation was "fantasy land"; the class was removing drawings, not posters; he had taken the students in groups of four or five to the hallway to remove the drawings so that he could monitor their activity and keep them quiet; and that he had not been close enough to Student C to put tape on her body, even accidentally.

On cross examination, the Grievant stated the following: by "average" he meant that Student C was a "typical" student; Student C was above average gradewise; he was positive that he did not have the contact alleged by Student C; at the Board hearing on the grievance, he had stated that he did not recall putting tape on a student; at the Board hearing, he had not been confronted with the specific allegation of Student C, but rather, had been asked a general question about putting tape on students; and when making his statement to the Board, he had given consideration to the fact that it was possible that he had accidentally put tape on a student.

Allegation of Student E

At the time of hearing, Student E, a female student, was a freshman. At the time of the alleged incident with the Grievant, Student E was in 8th grade. At hearing, on direct examination, Student E recalled the following: in the Spring of 1992, maybe May, during the afternoon, she and two of her friends went to the ladies bathroom which was located near the High School office; the Grievant, who had hall duty, told Student E and two of her friends that they had two or three minutes to go to the bathroom and brush their teeth or get detention if they did not come out; a High School girl was also in the bathroom at that time; as Student E was brushing her teeth, she heard the Grievant's voice, looked up, and observed that the Grievant was standing, partially in the doorway of the bathroom; the Grievant said "get out now or be in Mrs. Krists' detention". Upon further questioning, Student E stated that the Grievant "was by the door, maybe two feet into the bathroom"; the Grievant said "get out of the bathroom now or its detention, or something"; she was surprised to see the Grievant, because she did not expect him to come into the bathroom; no other male teacher had ever come into a bathroom like that; when the Grievant came into the bathroom, her two friends were in the stalls; her friends had told her that they had heard the Grievant's voice; the day after the incident, she and a friend went to see Phelan and told him of the incident; she had also told her parents of the incident; the incident had upset her; the Grievant was her art teacher in 5, 6, 7 and 8th grades; she had received A's from the Grievant; she and the Grievant got along well; and that she had never had detention or any run-ins with the Grievant.

On cross examination, Student E stated that it was scary to hear a man's voice in the bathroom; she could not recall if the Grievant had been holding the door open; she was at the second sink and could be seen by the Grievant; she had not said anything to the Grievant; she did not know the identity of the High School girl; she did not recall the Grievant pounding or knocking upon the door prior to opening the door; on prior occasions, Teacher

Priscilla Krist had come into the bathroom and told students to go out to recess, but that Krist always let them finish whatever the students were doing; the Grievant left when Student E saw him; and that the Grievant did not appear to be startled.

On direct examination, the Grievant stated that Phelan had wanted the students to be outside in supervised areas; Student E and her friends were a "constant hassle" in that they would fritter time away; when he had previously pounded on the door, they had replied that they did not hear him; this time Student E and her friends had been in the bathroom for fifteen minutes or so; and that he pushed the door open a crack and shouted come out or have detention with Mrs. Krist.

On cross examination, the Grievant stated that Krist had detention duty that day; to get a female teacher, he would have had to leave the area unsupervised; he thought that it was necessary to have the girls leave the bathroom; he opened the door "a crack", maybe 1/4 of an inch, because he wanted them to hear his voice; and that he opened the door and yelled because he had knocked on the door and nothing had happened.

Teacher Priscilla Krist has been employed by the District for thirty-three years. During the Spring of 1992, Mrs. Krist shared noon hour hall supervision duty with the Grievant. At hearing, Mrs. Krist stated that she had the experience of asking Student E to leave the bathroom; while many students are asked to leave the bathrooms, it was an ongoing problem with Student E; she did not believe the Grievant went into the bathroom; many times the Grievant had asked her to get girls out of the bathroom; she was not aware of any male teacher going into a girls' bathroom; it would not be appropriate for a male teacher to go into a girls' bathroom; when you enter the bathroom by the High School Office, you make a left turn, then turn right to see toilets or wash basins; you would have to be in the bathroom to see the toilets and wash basins; from the bathroom door, you would only see the wall; she had Student E in science and Student E was a good average student; she never put Student E in detention; and that she did not know why Student E would lie.

Allegation of Student F

At the time of hearing, Student F, a female student, was in seventh grade. At the time of the incident involving the Grievant, Student F was in sixth grade. The Grievant taught art to Student F in both the fifth and sixth grades. At hearing, on direct examination, Student F recalled the following: she thought that the incident involving the Grievant occurred around Tuesday, May 19, 1992, and that she and her mom arrived at this date by looking at the calendar; on that date, after school, she was in

the choir room with Teacher Karen Stangel receiving a piano lesson; following the piano lesson, she left the room with Stangel; as she was on the stairway with Stangel, the Grievant came up behind Student C and "grabbed my butt and rubbed up against me"; at the time of this incident, Stangel was walking in front of Student F; the Grievant then walked ahead of Student F; and that Stangel did not observe the incident. Upon further questioning, Student F stated the following: at the time of the incident, she was on the right side of the stairwell, by the bannister; the Grievant came from behind and around her left side and "kind of rubbed against me"; "my left arm and his right arm rubbed"; she told her mom of the incident on the night that it happened; the next day her mom came in to report the incident; she did not say anything to either Stangel or the Grievant at the time of the incident because she was "shocked, frightened and did not know what to say"; although she did not really remember, she thought that she had received a B+ from the Grievant; the Grievant had never disciplined her; she thought she and the Grievant had gotten along; as a result of this incident, she and her parents had requested that she not take art in seventh grade; and that she was telling the truth about the incident.

On cross-examination, Student F stated the following: on May 19, 1992, she walked out of the choir room and up the stairs with Stangel; the Grievant came up behind her; the Grievant grabbed her; the Grievant did not hurt her, but that she definitely felt a touch on her buttocks; it could not have been an accidental touch because the staircase is too big; the Grievant could have walked around her without touching her arm; she did not recall the Grievant carrying anything and she did not remember if Stangel was carrying anything; she did not turn back and look at the Grievant; she continued to walk as if nothing happened; she did not know what to do; she had taken piano from Stangel for several years; she did not say anything to Stangel because she did not want her to get involved; and that she told her mother about the incident on the night that it occurred.

At the time of hearing, Karen Stangel was employed by the Svestapol School District. Prior to the 1992-93 school year, Stangel had been employed by the Gibraltar Area School District as a Choir and General Music teacher. At hearing, Stangel recalled that, while at Gibraltar, she overheard a conversation involving a group of three or four students in which one student stated that the students were going to complain about the Grievant to get him fired or in trouble; she did not know these students; prior to overhearing this conversation, she had a conversation with fellow teacher, Jacqueline Green, in which Green had mentioned that students were going to complain about another teacher, Zvara; while at Gibraltar, Green taught Student C; Student C was a good student; she had never heard Student C complain about the

Grievant; Student F received private lessons from Stangel for five years; on a couple of occasions, she had given the Grievant a ride; while at Gibraltar, she had given piano lessons to Student F after school; after these lessons, she and Student F had walked out together; she had seen the Grievant with a Peanuts' character lunch box; shortly before the hearing, Student F had told Stangel about the incident involving the Grievant; Student F is a truthful girl and she believed Student F; shortly before the hearing, Student F told her that after leaving Stangel's room, as Stangel and Student F were going up the stairs, the Grievant came up the stairwell and touched Student F inappropriately by grabbing Student F's buttocks and pressing up against her; Student F was upset when she told Stangel about the incident with the Grievant; and that when Stangel asked why Student F had not said anything when it happened, Student F replied that she had not known how to react and froze.

On direct examination, the Grievant stated that he recalled that Student F was one of his students, but that he could not put a face to her name and that nothing stood out about her; he carries a lunch bucket and an over the shoulder carry-on bag which contains camera equipment; he never touched Student F, but that he could have bumped her; and that he recalls that Stangel took him home because his car did not work, but that he did not remember that Student F was present.

On cross-examination, the Grievant stated that Student F was a typical student with above average ability; he did not remember being in a hallway with Stangel and Student F; everyday when he leaves the building, he carries a lunch box and the carry on bag with camera equipment; he denies squeezing Student F's "rear end"; while he may have bumped Student F, he did not recall having bumped Student F; and that he did not know why Student F would have made-up the accusation.

Testimony of Jacqueline Green and Suzanne Nordin

At the time of hearing, Teacher Jacqueline Green was in her third year of employment with the District. Green recalled that, during the Spring of 1992, she overheard a seventh grade student say that she was upset with one of the physical education teachers, Chris Zvara, and wanted to get the teacher fired, but that the Grievant's name was not mentioned; Green reported this conversation to Principal Phelan, who told her that he would listen to the student if the student came in, but that he would not act upon the student's complaint unless it was dramatic; although Student C was in a "clique" with the students that she overheard, Student C was not a participant in the conversation

which she had overheard. 1/

At the time of hearing, Teacher Suzanne Nordin was in her third year with the District. Nordin recalled that, during the Spring of 1992, a group of students came to her room to pull students out of the room so that they could talk to Phelan about Zvara; no student complained to her about the Grievant; she and Green went to talk to Phelan about the student's attitude in complaining about Zvara; and that she could identify one of the complaining students. 2/

Credibility of Witnesses

As the Union argues, Green, Nordin and Stangel each heard a conversation in which students complained about teachers. Chris Zvara was the teacher who was the subject of the complaints overheard by Green and Nordin and the Grievant was the subject of the conversation overheard by Stangel. It is not evident that Students' C, E and F were participants in any of the conversations overheard by Stangel, Green and Nordin.

Green and Nordin, concerned about the students' attitude, reported the students' complaints about Zvara to Phelan. Phelan responded to the report that one student would like to have Zvara fired by saying that he would listen to the student's complaint if the student came in to speak with him, but that he would take no action unless the complaint were "dramatic". Phelan's response to Green and Nordin does not indicate that Phelan considered the students' conduct to be either unusual, or particularly threatening to his staff.

The testimony of Green, Nordin and Stangel does not establish the nature of the students' complaints against Zvara and the Grievant and, thus, there is no basis to conclude that the students overheard by Green, Nordin and Stangel were not justified in their criticisms of Zvara and the Grievant. Green, Nordin and Stangel did not claim to overhear any conversation in which students discussed fabricating stories for the purpose of causing trouble for teachers.

Notwithstanding the Union's arguments to the contrary, the fact that, on three occasions, students were overheard to complain about two teachers does not warrant the conclusion that the District's middle school students were on a "witch hunt" against

1/ One of the students involved in the conversation was Student B. Students C and F were not a party to the conversation.

2/ That student was not Student C, E or F.

the District's teachers in general, or the Grievant in particular. Nor does this fact demonstrate that middle school students in general, or Student's C, E and F in particular, conspired to fabricate accusations against any teacher, including the Grievant.

As the Union recognizes, it is generally presumed that children of the age of Students C, E and F do not fabricate the type of allegations made in this case. Not only is the nature of the conduct embarrassing to such children, but also, there is a reluctance to speak out against authority figures such as the Grievant. Moreover, children of the ages of Student C, E and F are old enough to know that, by making such accusations, they are subjecting themselves to intense scrutiny by parents, administration, and other teachers.

To be sure, the investigation of the Grievant was precipitated by the accusation of Student A, who subsequently recanted the accusation. At hearing, the Grievant acknowledged that he had serious disciplinary problems with Student A. While the record does not reveal the reason why Student A chose to lie about the Grievant, the existence of the prior disciplinary problems certainly supports the inference that Student A was biased against the Grievant.

Neither Green, nor Nordin, identified Student C, E or F, as being involved in the complaints about the gym teacher. Nor did any other witness claim to have overheard Student C, E or F make any disparaging remarks against the Grievant, or any other teacher of the District. Students C, E, and F had been art students of the Grievant and the Grievant had given each of these students a grade of B+, or better. All of the students maintain that, prior to the incidents which gave rise to the disciplinary letter, they had a good relationship with the Grievant. The Grievant did not claim otherwise. 3/

The evidence of the Grievant's relationship to Student's C, E and F, unlike the evidence of the Grievant's relationship to Student A, does not provide a reasonable basis to conclude that Student's C, E and F were biased against the Grievant. Nor does the record provide a reasonable basis to conclude that the Students C, E and F had any other motive to fabricate accusations

3/ To be sure, Student E's reluctance to leave the bathroom over the noon hour was a continuing problem for the Grievant and Krist. However, it is not evident that either Krist, or the Grievant, considered such reluctance to constitute a serious disciplinary problem. Nor is it evident that the Grievant's prior attempts to dislodge Student E from the bathroom were acrimonious.

against the Grievant.

The Union argues that the failure of Student C to make a contemporaneous report of the incident, as well as the fact that Student C did not report the incident until she learned that her friends were reporting on the Grievant, proves that the testimony of Student C is not credible. It is plausible, however, that, as she stated at hearing, Student C would choose not to report the incident because she did not want to get involved. It is also plausible that, upon learning that she would not be the lone accuser, Student C would decide to become involved and to report the incident to Phelan.

The Union characterizes Student C's demeanor at hearing as "listless, uninterested, and bored". While the undersigned does not accept this characterization of Student C's demeanor, the undersigned does agree that Student C evidenced little, if any emotion, when she recounted the incident involving the Grievant. While this lack of emotion could be due to the fact that the incident never happened, it could also be the result of the fact that Student C had been more shocked, than distressed by the Grievant's conduct. A lack of true distress could also explain why the Grievant had not reported the incident at the time the incident happened. The undersigned considers Student C's lack of nervous behavior to militate against the finding that Student C was lying when she testified at hearing.

As the Union argues, Student C, in direct examination, stated that the Grievant removed four pieces of tape. Student C, however, did not, as the Union also argues, state that the Grievant placed all four pieces of tapes on her body. Rather, Student C stated that the Grievant placed one piece on her left breast, one piece on her right breast, and one piece on the left side of her "butt". The Grievant then stated that she did not know if the Grievant had placed any tape on the right side of her "butt". On cross-examination, Student C reiterated that she could not recall if the Grievant had placed tape on the right side of her "butt". Phelan recalled that Student C told him that the Grievant had placed tape on her breast and buttock area.

As the Union argues, the District knew that there was a student witness to the events described by Student C and the District did not call this student as a witness. Not all students, however, can weather the stress of a hearing of this type and not all parents are willing to have their children involved in hearings of this nature. While the failure of the District to call the corroborating student witness certainly weakens the District's case, it does not, as the Union argues, provide a sufficient basis to conclude that the student witness would not have corroborated the testimony of Student C.

As the Union argues, the Grievant was on suspension on May 19, 1992 and, thus, the incident alleged by Student F could not have occurred on May 19, 1992, as Student F stated at hearing. Upon review of Student F's testimony, the undersigned is persuaded that Student F was guessing when she stated that the incident occurred on May 19, 1992. The undersigned considers Student F to have been mistaken, rather than lying, when she stated that the incident involving the Grievant occurred on May 19, 1992.

Relying upon the Grievant's testimony that he always carries a lunch box and a carry-on bag, the Union argues that the Grievant could not have touched Student F. Evidently, the Union's argument is premised upon the belief that the Grievant could not have grabbed Student F because his hands were full.

While Stangel agreed that she had seen the Grievant carry a "Peanuts" character lunch box, Stangel did not claim that the Grievant carried this lunch box each time that she had given him a ride home. Nor did Stangel make any reference to a carry-on bag.

When questioned at hearing, Student F could not recall that the Grievant was carrying anything, but did not deny that the Grievant was carrying anything. While the testimony of Stangel and Student F does not contradict the Grievant's testimony regarding his lunch box and carry-on bag, neither does it confirm that the Grievant's hands were not free to grab Student F. As the Grievant stated at hearing, the carry-on bag was an over the shoulder bag. Even if the Grievant always carried the lunch box and the carry-on bag as he left school, the undersigned is not persuaded that he could not have had a hand available to grab Student F.

The Union argues that, given the relationship between Student F and Stangel, it is incredible that Student F did not mention the incident to Stangel until shortly before hearing. It is plausible, however, as Student F stated at hearing, that she did not say anything at the time of the incident because she had froze and did not want to get Stangel involved. Moreover, inasmuch as Student F did not believe that Stangel had been in a position to see the incident and, thus, could neither confirm nor deny that the incident happened, it is not unlikely that, after the initial shock wore off, Student F would continue to remain silent and not involve Stangel.

The Grievant acknowledges that, at a time in which Student E was in one of the Girls' bathrooms, he opened the door of the Girls' bathroom and shouted that Student E and her friends were to come out of the bathroom or be placed on detention. The Grievant, however, denies that he entered the bathroom and claims that the door was only open a crack.

As the Union argues, Krist's testimony establishes that the Grievant could not have seen either the toilets or the wash basins unless he were in the bathroom. It follows, therefore, that Student E, who claimed to have been brushing her teeth at the time, would not have seen the Grievant, or known that he had opened the door, unless the Grievant had actually entered the bathroom.

While the Union claims that no male teacher would put himself at risk by entering a Girl's bathroom, the Grievant's lack of judgment is evidenced by that portion of his testimony in which he acknowledges that he opened the Girls' bathroom door. 4/

Students C, E and F did not claim to have said anything to the Grievant at the time that the Grievant engaged in the conduct which was the subject of the disciplinary letter. While the Union argues that such silence is incredible, the undersigned disagrees.

Each of the three students claimed to have been shocked, surprised, or frightened by the Grievant's conduct. Given the age of the students, the status of the Grievant, and the nature of the Grievant's conduct, it is entirely plausible that Students C, E and F would have been too astounded or fearful to make any response directly to the Grievant.

At hearing, Principal Phelan stated that he had discussed the allegations with Student's C, E and F on more than one occasion and that he found their statements to be consistent. Moreover, Student F's testimony was consistent with her prior statements, as reported by Stangel.

To be sure, the students did not recount exactly the same facts each time that they described the Grievants' conduct. The undersigned, however, is not persuaded that Students C, E and F made any statements which were inconsistent with respect to any of the material facts underlying their accusations against the Grievant.

The Union argues that the District's case must fail because the District did not call witnesses to the incidents involving Student's E or F. The undersigned disagrees. According to Student E, her friends were in the stalls and, thus, not in a position to confirm that the Grievant had entered the bathroom. While Student E did recall that a high school girl was in the bathroom, she could not identify the high school girl. Since the District was not privy to the identity of the high school girl,

4/ The difference between a male teacher opening a Girl's lavatory door and entering a Girls' lavatory is one of degree, not kind. By opening the Girls' lavatory door, the Grievant engaged in inappropriate behavior.

the District can not be faulted for not calling this girl as a witness. Moreover, Student E did not claim that any high school girl had observed the Grievant enter the bathroom. With respect to Student F, there is no evidence to suggest that anyone was present at the time of the incident other than Student F, Stangel, and the Grievant, all of whom testified at hearing.

As the Union argues, the Grievant does deny that he engaged in the conduct reported by Students C and F, and denies that he entered the Girls' bathroom as reported by Student E. Since admission of such conduct is adverse to the Grievant's interest, the record does provide a motive for the Grievant to lie.

Given the testimony that Stangel was walking in front of both the Grievant and Student F, the evidence indicates that the Grievant was in a position to realize that any contact with Student F would not be observed by Stangel. Thus, despite the Union's argument to the contrary, the incident involving Student F was not incredibly chancy.

It is rather astonishing that the Grievant would have engaged in the behavior reported by Student C at a time in which the Grievant was in a class full of students. However, given the testimony concerning the nature of the activity, it is not implausible that, as Student C suggested at hearing, with the exception of Student D, the other students were too busy to notice what the Grievant was doing.

Summary

Upon consideration of the record as a whole, the undersigned is persuaded that the greater preponderance of the record evidence warrants the conclusion that Student's C, E, and F are credible witnesses. Crediting the testimony of Student's C, E and F, the undersigned concludes that the Grievant placed masking tape on the breast and buttocks area of Student C; that the Grievant grabbed the buttocks of Student F; and that the Grievant opened the door of a Girls bathroom and entered the Girls bathroom at a time in which the bathroom was occupied by Student E and other female students.

Notwithstanding the Union's arguments to the contrary, the undersigned is not persuaded that the Grievant's conduct in this matter was accidental or unintentional. By placing masking tape on the breast and buttocks area of Student C; by grabbing the buttocks of Student F; and by opening the door of the Girls' bathroom and entering the Girls bathroom at a time in which the bathroom was occupied by Student E and other female students, the Grievant engaged in inappropriate behavior.

As the Union argues, the Grievant has served the District for eleven years. As the Union further argues, the Grievant has had very good evaluations from the District during this time period. However, contrary to the argument of the Union, neither the length of the Grievant's service with the District, nor the high quality of the Grievant's service with the District, makes it appropriate to issue an oral, rather a written warning.

While the Grievant was not disciplined in 1990-91, the Grievant was certainly put on notice that the District had a concern about the manner in which the Grievant was making physical contact with students. Even if the Grievant had not received such notice, the Grievant should have known that it was inappropriate to (1) grab the buttocks of a female student; (2) place tape on the breast and buttock areas of a female student; or (3) open the door of and enter a Girls' bathroom at a time in which he knew that the bathroom was occupied by female students. Given the nature of the Grievant's misconduct, the issuance of a disciplinary letter is not too harsh a penalty.

Sketchy Lesson Plans and Other Allegations

At hearing, Phelan stated that, while the Grievant was on suspension, Phelan met with the teacher who was substituting for the Grievant and discovered that the Grievant's lesson plans were sketchy and almost impossible to follow. The Grievant does not deny that the lesson plans were sketchy. The Grievant, however, maintains that there were mitigating circumstances.

At hearing, the Grievant recalled that, in the first part of April, 1992, he received a call to put on an art show at Bailey's Harbor, a local community. The Grievant also recalled that he discussed this show with Phelan; told Phelan that he would have to go off curriculum to do the show; and that Phelan said that would be okay. The Grievant further recalled that he and his students worked on the show for a month; the Grievant hung the art work on the weekend before his suspension; the Grievant intended to have his students assess the work of the art show when he arrived at school on Monday, May 18, 1992; when he arrived at school, Phelan had a note that the Grievant was to see him; and that upon learning of the suspension, the Grievant became too upset to work. The Grievant's testimony on these matters was not contradicted at hearing and is entitled to be credited.

As the Union argues, the prior evaluations of the Grievant do not indicate that the Grievant had an on-going problem with his lesson plans. As the Union further argues, the Grievant's involvement with the art show in Bailey's Harbor is a mitigating circumstance in the Grievant's failure to have a more complete lesson plan at the time of his suspension. Given these factors,

the undersigned concludes that the District did not have just cause to issue a written reprimand to the Grievant regarding sketchy lesson plans.

The Union makes the general argument that other criticisms contained in the letter of June 26, 1992, regarding the Grievant's relationship with his students, parents, and the community, are inconsistent with his classroom evaluations. The undersigned notes, however, that the allegations which are the subject of the June 26, 1992 letter became known to the District after February 5, 1992, the date of his last evaluation. The record presented at hearing does establish that, on June 26, 1992, the District did have just cause to conclude that students were concerned about being touched in inappropriate manners; that students were scared and apprehensive; that several parents were most unhappy with the Grievant's behavior and attitude; and that the positive image that the Grievant had within the system no longer seemed to exist.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer does have just cause to discipline the Grievant by issuing the letter of June 26, 1992, except that the Employer does not have just cause to issue the Sixth Paragraph of the letter which states:

During your absence it was also noted that your lesson plans were very sketchy. This cannot occur. You need them for your planning as well as planning for any substitute that may be necessary.

2. The Employer is to immediately remove the Sixth Paragraph from the letter of June 26, 1992.

Dated at Madison, Wisconsin this 15th day of June, 1993.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator