BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
ALGOMA EDUCATION ASSOCIATION	Case 19 No. 47811 MA-7394
and	
ALGOMA SCHOOL DISTRICT	

Appearances:
Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, for the Association.
Godfrey & Kahn, S.C., by Mr. Robert W. Burns and Ms. Angela M. Samsa, Algoma, for the District.

ARBITRATION AWARD

Pursuant to a request by Algoma Education Association, herein the Association, and the subsequent concurrence by the Algoma School District, herein the District, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on September 24, 1992 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on December 3 and 4, 1992 at Algoma, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on April 19, 1993.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following issues:

1. Did the Board of Education violate the collective bargaining agreement by its nonrenewal of Chris Holm?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

Christine Holm, hereinafter referred to as the grievant, was employed by the District as a special education teacher for six years between 1986 and 1992. She is a 1986 graduate of the University of Wisconsin - Oshkosh with a bachelor of science degree in special education specializing in the areas of mentally retarded, now referred to as "cognitively disabled," and learning disabled students. She holds certification in mentally retarded K-12 and learning disabled K-8. Her students had chronological ages varying from seven to eleven years and cognitive and mental ages varying from three to four years. Her students' limitations involved significant developmental delays in areas such as intellectual functioning, motor skills, adaptive behaviors and social/emotional behavioral skills.

On or about February 25, 1992, Mr. and Mrs. Kuss reported to Dale Larson, Algoma Elementary School Principal, that their son, Jason, had been tied to his desk most of the school day, and that he had been sprayed with chemical cleaner. They alleged that the grievant was responsible for these actions.

The District then conducted a preliminary investigation into the Kuss's allegations. The Kusses told the District that Jason was very upset about being tied to his desk when he returned from school on February 25th and the he also complained about being sprayed with a cleaner. They showed the District the sweatshirt and eye glasses Jason had worn that day which appeared to be sprayed with something that smelled like a cleaner. The mist and stains on Jason's glasses were substantial and made drip marks on the lenses.

During student interviews regarding the physical restraint of Jason, students reported incidents of being struck, being shaken, being pulled and grabbed, being yelled at loudly and generally being afraid of the grievant.

With this information in hand, the District determined that, in order to guarantee the safety and well-being of the grievant's students, she would have to be suspended with pay pending the outcome of the investigation.

Thereafter, the District conducted a more comprehensive investigation into allegations of abuse against the grievant. The District determined that based on the physical restraint and cleaner spray incident of February 25th, and the District's unsuccessful efforts in the past to assist the grievant in meeting its standards and directives for the special education teacher position it would recommend nonrenewal of the grievant's teacher contract. On February 27, 1992, the District issued the grievant a "Preliminary Notice" of the nonrenewal of her teaching contract. On February 28, 1992, the grievant requested a private hearing on the District's nonrenewal recommendation pursuant to her statutory rights. Said hearing was held on April 28, 1992, and continued on May 11, 1992. Both the grievant and the District were given the opportunity to present evidence, testimony and argument at this hearing and were represented by counsel. The hearing was transcribed. After consideration of the record evidence, the District Board of Education, by unanimous vote of the full Board, decided not to renew the grievant's teacher contract for the 1992-93 school year. The Board stated in a letter dated May 18, 1992 that its decision not to offer the grievant a new contract to teach "was based on the substantiation of allegations that you physically and emotionally abused the handicapped students under your care."

In response to a request from the Association's attorney, Stephen Pieroni, for a statement of the reasons which formed the basis for the Board's nonrenewal decision, the District wrote on May 29, 1992 as follows:

> The deliberations resulted in the Board's conclusion that the administration had carried its burden in establishing, based upon the proof presented on the various allegations made with regard to Ms. Holm, that there was just cause for the non-renewal of Ms. Holm's contract. Although the following list of specific items is not meant to be all-inclusive, the Board determined that the administration had met its burden of proof in showing that Ms. Holm had been given adequate notice of areas in which her superiors determined she needed improvement, that she understood the various directives to address and correct these problem areas, that her superiors provided options for her in addressing these problems and continuously offered their assistance in this regard, and that Ms. Holm exhibited, on at least one occasion, a severe lack of sound professional judgment in her dealings with the students.

In follow-up to the above letter, the District again explained its decision to nonrenew the grievant's teacher contract in a letter dated June 18, 1992 to Attorney Pieroni as follows:

> Mr. Maxwell has again forwarded to me your request for additional information. In answer to your questions, the Board believes that the administration adequately established that Ms. Holm's conduct in tying Jason Kuss's shoelace to the desk in front of him exhibited a severe lack of sound professional judgment.
>
> This is not to say that there was not other evidence of additional lapses in judgment, as indicated by the evidence presented by the administration. Rather, the "one occasion" to which I referred in my last correspondence to you was this shoelace tying incident.

Upon her employment, the grievant received copies of Standards for Teachers and School Board Policies, documents which set forth District standards for special education teachers. Further, District representatives counseled the grievant, both formally and informally, in the implementation of these standards at various points throughout her career.

On November 3, 1987, Nola Smith, Director of Special Education, completed a formal evaluation of the grievant. In said evaluation, Smith noted "a disciplined, structured, productive classroom," and that the grievant taught "with assurance and expertise". Smith also noted the "children appear to be comfortable and confident within the classroom structure and routine." Smith concluded "It is difficult to find something to suggest for development in this observation. Ms. Holm is well on her way to becoming a master teacher."

On April 6, 1987, Smith again formally evaluated the grievant noting "Impressive ability to motivate, hold children's attention, involve children in the lesson, teach independence." Smith stated "very enjoyable and gratifying observation."

On February 10, 1988, Dale Larson, Elementary School Principal, made a formal evaluation of the grievant. In his written report Larson wrote "As was discussed, the feeling tone during the lesson appeared to be appropriate and positive throughout much of the lesson. Feeling tone is an important part of

the lesson, as it helps determine how much effort the student will place on learning. In general, a good solid lesson was observed with the above listed improvements needed." Because of feedback from staff and Smith, however, Larson attached a sheet of paper entitled "Creating a Climate" which included a discussion of the necessity for use of positives with special education students and the need for the teachers "to be sincerely compassionate, warm, empathetic, and accepting" with students and "to make students feel good about themselves and who they are."

On February 27, 1989, Smith did a formal evaluation of the grievant wherein she indicated "Perfect order exists in the room. Chn (sic) at the table are attentive and contribute. . . . She is able to maintain the children's enthusiasm throughout the lesson. She understands how to teach a little beyond the children's ability to be challenging, but not so far as to discourage." Smith concluded:

> . . . The Children _____ so quietly and _____, I can only conclude that this teacher has made learning rewarding to them by understanding their abilities and teaching to that level for successful outcomes, thereby, creating in them a desire for more success.
>
> Even viewing this teaching episode with a critical eye, it is hard to find a flaw or to be able to make a constructive criticism.
>
> It is a pleasure to observe such talent for teaching in action.

On January 3, 1990, Larson wrote a memo to the grievant on "classroom atmosphere" wherein he indicated that he had received a documented parental complaint regarding comments the grievant allegedly made to students and the feeling tone associated with them. Specifically, Larson stated "It was reported that you made strong negative comments to students that have a negative effect on their self-image."

In said memo Larson counseled the grievant:

> Chris, while it is recognized that there are times when students need to be reprimanded it is also recognized that reprimands should be done constructively and in such a way as to correct, not to have potential as to damage your students' self image. Chris, with the small number of students that you have you should be able to know each one very well. You should also be able to set up a behavior management plan that emphasizes the positive behaviors. I am hereby directing you to initiate such a program. I offer my assistance. I also offer several sources for your reference on Assertive Discipline by Lee Canter. I also suggest that you meet and confer with Ms. Nola Smith, Director of Special Education, for her assistance.

Larson closed his memo stressing "the importance of all students to feel positive about their school experience," and stating "I trust that I have made my position clear on this matter and that you will take immediate steps to resolve this concern."

Smith again formally evaluated the grievant in March, 1990, "based on

observations of December 19, 1989; February 28, 1990; March 2, 1990 and more." Smith began the evaluation by noting "I have spent extra time in your room Chris, for a reason. In my past observations . . . I saw a teacher well established in direct instruction, whose careful planning and unstinting giving of herself results in the maximum academic growth for her students." However, Smith noted "complaints from several parents over the years, including this one, tell us of children who do not want to come to school, really don't want to - resisting it, to the point where parents are concerned enough to call." (Emphasis supplied) Smith went on to state the grievant could turn things around if she adopted a different philosophy of instruction, one that provided for breaks in instruction and for fun group activities between periods of seatwork/ instruction. Smith told the grievant to implement changes in her teaching methods immediately, and offered to help with such changes.

On March 26, 1990, Smith wrote the grievant a directive as follows:

> Research indicates that punishment may get the job done in the short term but no lasting behavior changes result. Therefore, I am directing you to cease all forms of negative reinforcement and substitute a positive form. Specifically, do not deny recess to any child for any reason. Your children work hard for you. They need their recesses.
>
> As for Jason Kuss' problems with dressing, I am talking to the Occupational Therapist about this and we will learn from her what Jason can and can't do as far as dressing is concerned. It is hard to believe that your methods of getting him to dress independently are working, if so late in the school year, he still can't do it.

Again, on April 2, 1990, Smith directed the grievant to incorporate into her teaching "more activities that are attractive and enjoyable to children." In particular, Smith advised the grievant to have "a lot more play, smiles, laughter and children's noises in" her room; to smile "often and everyday at the children"; to spend some time "playing . . . just fun games" with the children; and to encourage the children to loosen up, relax, and recapture their spontaneity. (Emphasis supplied) Smith also expected "to see the last fifteen to twenty-five minutes of each day as a free period for the children AND YOU to go back there and PLAY."

The grievant was concerned because for three years she "had been doing just this really great job of teaching and then all of a sudden in the 1990 school year . . . I was no longer doing that." Consequently, in her self evaluation at the end of the 1990 school year, the grievant expressed some concern over the matter. As a result of her self evaluation comments, Smith wrote her a note in June suggesting a meeting with the two of them and Larson. A meeting was subsequently held in August at which time Smith told the grievant "80 to 85 percent of what I had been doing that there was no problem with." "It was just some of these other things that she had asked me to make some changes."

Smith observed some improvement in the grievant's performance following the issuance of these directives toward the end of 89-90 school year and into the beginning of the 90-91 school year. However, both she and Larson continued to receive parental complaints and feedback from the social worker that youngsters still did not want to come to school. She talked the matter over with Larson and then decided it would be a good idea to get a fresh look at the situation. Consequently, Smith asked Special Education Director Pat Johansen,

then a Program Supervisor certified in learning disabilities and "mentally retarded", to formally observe the grievant's classroom in the fall of 1990. Smith did not tell Johansen anything about the grievant's teaching so that she would do the evaluation without any preconceived ideas.

Johansen did not conduct an introductory conference with the grievant until February 4, 1991. At said introductory conference, the grievant indicated "she was looking for ideas for improvement as well as general impressions about her program." Johansen then conducted a formal observation on February 11, 1991. As part of the evaluation, Johansen found some positive things to say about the grievant's class beginning ("Asking about the students' weekend activities was also a good way to involve them in group discussions."), reading lesson (the grievant's "lead-in to the oral reading story was especially good . . .") and interaction with the speech therapist. However, Johansen also found some of the same problems with the general classroom atmosphere as did Smith and Larson. Johansen noted the following in her written report:

> The children were quiet and seemed very reserved and reluctant to interact, both with Ms. Holm and with each other. The classroom did not seem to have the usual level of classroom interchange. Subsequent observations on this observer's part may help to shed some light on this situation.

Regarding a problem one student was having at recess with his boots, Johansen suggested to the grievant "a simple word" to the student that he was trying to put one of them on the wrong foot would have been more helpful then letting him struggle needlessly.

Following a post-conference with the grievant on March 8, 1991, Johansen wrote:

> During this meeting, all of the above items were discussed. Ms. Holm appeared to be receptive to the discussion and asked questions of clarification on several items. A suggestion of a return visit was made by this observer and Ms. Holm appeared to be agreeable.

However, due to her heavy workload, except for popping "into the classroom a couple times but not for an extended period," Johansen did not make a return visit in the form of a formal observation to the grievant's classroom. This despite the fact that Johansen continued to receive complaints from parents concerned about the grievant's teaching, and that she, Smith and Larson continued to discuss their concerns about the grievant's teaching. Larson did talk to the grievant on occasion, but usually received enough of a response from the grievant that he did not pursue the matter any further. Smith made no further observations of the grievant.

In addition to the events that transpired on February 25, 1992, the District considered other incidents in which the grievant allegedly abused her students, both physically and verbally, during her tenure with the District, on its non-renewal decision.

The District contends that Jason Kuss was subject to continuous verbal and physical abuse by the grievant while in her care. For example, Jason reported to his mother that the grievant called him "dumb" and stated that his art work was not like "normal people". However, Mrs. Kuss did not complain to school officials at the time about these remarks but did speak to the grievant who replied with words to the effect that "why would I say something like that when I would want to promote self-esteem, not take it away?"

There was also an alleged incident of physical abuse perpetuated by the grievant against Jason occurring at Bay Beach in May 1991. While at Bay Beach on a field trip, Jason sustained a laceration on his arm. After returning from Bay Beach, Jason reported to his mother that the grievant grabbed him by the arm and hurt him.

During her testimony, the grievant stated that she, Ann Schoenborn, a teacher aide, and the students participated in an outdoor trip to Bay Beach sometime in the spring of 1991. Later in the day, when it became time to leave, the grievant informed the children of that fact and asked them to gather in a group near herself and Schoenborn. All of the children except Jason complied with this request. Jason ignored the grievant's request and continued to use the slide. The grievant went over to the slide that Jason was using, took him by the arm, and led him towards the other students. The grievant stated that she did not "grab him or do anything to hurt him." The grievant further testified that when she took Jason by the arm, he did not resist. Later, Mrs. Kuss complained to Larson that Jason had a scratch on his arm. Larson subsequently asked the grievant about the incident. The grievant never received any reprimand or criticism from District officials in connection with the Bay Beach incident. In addition, Schoenborn corroborated the grievant's testimony.

On another occasion, Mrs. Kuss reported to the District that Jason had come home with a significant laceration on his cheek. The grievant had caused the injury with her fingernails while attempting to assist Jason with his shoes. Mrs. Kuss described the cut as "substantial" and requiring "a bandage over it while it healed." Again, however, the grievant did not receive any disciplinary warning from the District for this incident.

Matt Kuehl testified before the Board that the grievant yelled at him loudly, that she grabbed him by the cheeks and squeezed his cheeks and that she rapped him on the head when he was naughty and that it hurt. On several other occasions, Matt came home from school with bruises on his wrists. However, Matt's parents "could never figure out where they (the bruises) had come from" and "are just guessing and probably assuming that when he was grabbed or pulled by Chris." They never inquired about the source of these injuries. The District also never asked the grievant for an explanation of the cause of these injuries or disciplined the grievant regarding same.

Mrs. Kuehl testified Matt wet his pants during his first year in the grievant's classroom "and he was in it all day." However, Mrs. Kuehl admitted "We didn't have dry clothes there the first year." Mrs. Kuehl stated that Matt wet his pants on more than one occasion and implied that he was forced to go through his entire school day in wet pants more than once.

The grievant testified that on the first occasion Matt wet his pants, she made an unsuccessful attempt to get in touch with Mrs. Kuehl. The grievant stated that because of Matt's size the school did not have a change of clothes for him but, instead, wrapped him in a blanket in a semi-private place (another classroom) while his clothes were put in a dryer. The grievant also testified that on at least one other occasion when Matt wet his pants, she called Mrs. Kuehl to request that she send a change of clothes to school. Mrs. Kuehl responded that she did not "have extra clothes at home that she could be sending a change of clothes to school." The grievant never received any criticism or discipline from District officials for her method of handling the "pants-wetting" incidents.

The grievant directed Matt to socialize more with students and less with adults. After being directed in this fashion, Matt injured his ankle on the playground at morning recess. Instead of reporting the injury, Matt kept silent about his ankle. His injury became apparent, however, as he began to limp in the classroom. The grievant was not aware of a problem concerning Matt's ankle until the afternoon. She and others tried to find out about the injury from Matt but without success. The grievant then attempted to ask other students for information regarding Matt's condition. At this point, the grievant discovered that Matt had injured himself at recess and was told to walk it off. The grievant was not responsible for the students at recess. Later the grievant filled out an accident report and called Mrs. Kuehl and reported what she knew about Matt's ankle. The grievant never received any criticism or discipline from the District regarding her response to this incident.

Mrs. Kuehl testified that Matt was kept in during recess for a period of six to eight weeks. However, the grievant testified that Matt only missed a portion of his recess on five occasions in order to complete unfinished work. (This was, however, done at least part of the time after the grievant had been told not to use negative behavior management techniques.) The grievant added that Matt's parents were always advised of this and signed off on a home work sheet sent home with him explaining that Matt spent part of his recess completing his school work. Mrs. Kuehl admitted signing off on this report on several occasions, but denied any knowledge that Matt was being kept in from recess.

Mary Kickbush, mother of Jackie LeBotte, testified that the grievant hit her daughter hard on the forehead causing her head to fly backwards. She testified as follows:

"I did see Jackie get hit on the head. In fact, it's

> around a table like this. Ms. Holm was sitting on that side and Jackie was sitting in approximately the middle of the table. I was in between two classrooms. I had seen Chris Holm hit her in the forehead approximately right here. (indicating on her forehead) Jackie had her head down and when she hit her, her head popped back up. I seen it. . . There was force (used) because when Jackie's head is down and you hit it and you're going to hit it hard enough for her head to bounce back, that I call force because I am not allowed to hit her. Nobody else should be able to hit her like that either."

Kickbush stated that Jackie was so upset over this violent incident that she was sobbing and her tears saturated the assignment paper the grievant was insisting she complete before going out for recess. This incident which occurred in January 1992 was, according to Kickbush, "a punishment for her because she wasn't able to go outside and play."

Kickbush, after witnessing her daughter being struck on the head, did not say anything to the grievant or to the District about this incident. She first told Larson about it the night after her daughter testified before the Board - the first night of the Board's nonrenewal hearing.

Mrs. Kuss, Mrs. Kuehl and Mrs. Kickbush all testified as to their children's fear and reactions to the grievant and her teaching methods. Jason Kuss was afraid of the grievant, often refused to leave the house and had to be physically escorted to school. Matt Kuehl also was afraid of the grievant and did not want to go to school. Matt became physically sick - vomiting and having diarrhea - before going to school on several occasions. Mrs. Kuehl had to "drag" him to school. Jackie LeBotte also was "scared" of the grievant, and refused to go to school the first day of her 1992-93 school year at a new school because "she was afraid Holm was going to be there waiting for her."

Jason Kuss had recurring panic episodes in which he was petrified that the grievant was in his closet waiting to pop out and harm him in his sleep. Matt also had nightmares in which he would awake screaming the grievant's name. All of the above parents testified that their children experienced low self-esteem, decreased interest in learning, increased negative behavior and a less positive

outlook socially and emotionally under the grievant. Said children are doing better in new environments, either with new teachers or in new schools.

The grievant's classroom atmosphere was sometimes described as "rigid," lacking in normal classroom exchange, "tight" and "cold and sterile". The grievant sometimes yelled loudly at students in a frightening and/or demeaning tone which scared them. The grievant's personality and moods caused the children not to know what to expect from her, and had a "negative" and "debilitating" effect on them. Her "lack of positives" also contributed to a "negative" classroom atmosphere.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE II

MANAGEMENT RIGHTS AND RESPONSIBILITIES

A. The Board of Education, on its own behalf, and on the behalf of the electors of the district, hereby reserve unto itself all powers, right, authority, duties, and responsibilities conferred upon and vested in it by the Wisconsin Statutes and the Constitution of the State of Wisconsin and of the United States.

B. The foregoing enumeration of functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth nor is it to be construed as obligating the Board to continue any functions or practices in their judgment deemed no longer necessary.

C. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Section 111.70 of the Wisconsin Statutes.

ARTICLE V

GRIEVANCE PROCEDURE

H. Unresolved grievances shall be submitted to binding arbitration within twenty (20) days after Step 3. The parties agree that they shall mutually submit in writing to the Wisconsin Employment Relations Commission a request for a named arbitrator. The Arbitrator shall meet with the Board and the Association and hear evidence and give an opinion within a reasonable period of time. Each party shall bear the cost of preparing their own arbitration case. Any costs of the Arbitrator shall be borne equally by both parties. It is further understood that the function of the Arbitrator shall be to provide an opinion as to the interpretation and application of the specific terms of this Agreement only and that the Arbitrator shall have no power to advise on salary

adjustment, except the improper application thereof, nor to issue any opinions advising the parties to add to, subtract from, modify or amend any terms of this Agreement.

ARTICLE VII

EMPLOYMENT AND PLACEMENT

C. Dismissal. Nothing in this Agreement shall interfere with the rights of the Board in accordance with state and federal law, whichever is applicable. The Board reserves the right to suspend, demote, nonrenew, discharge, or take other appropriate action against the employee for just cause.

ARTICLE X

TEACHER EVALUATION

A. The evaluation process is based on the philosophy that Algoma School District employs and retains well-qualified, able teachers and supervisors who will work together to improve the quality of instruction for students.

B. All staff members in the Algoma School District have the responsibility for creating a favorable atmosphere for instruction and learning and for providing a setting within which each staff member can work to increase his/her effectiveness.

C. The growth of each teacher is more important than the evaluation process. Evaluation should be a continuous, constructive, and cooperative experience involving the teacher and his/her supervisor.

D. The major emphasis of the evaluation process will be to provide assistance to and reinforcement of each teacher's efforts in teaching and working with students. The ultimate goal of the activities of the school is the learning by the students. Evidence of their learning is an appropriate, but not total, part of the evidence of teaching effectiveness.

F. It is recognized that evaluation is an open and continuing process and that during the course of the year, the administration may make use of and consider many different forms and means of evaluation.

H. New and experienced teachers will be evaluated as necessary as determined by the district administrator or his agent.

L. If there are any complaints made regarding a teacher, which have an effect on continued employment of a teacher or the evaluation of that teacher, that are made to the administration by any parent, student, or other person, the teacher shall be notified within ten (10) school days.

N. The Board and the Administration shall retain the right to require as a condition of employment, the cooperation of staff members in the evaluation program and to carry out the directions of their immediate supervisor with regard to optional forms of self-evaluation, peer evaluation, and student evaluation programs, should the Board and the Administration implement such programs. The teacher will be required to use no more than one of the three specified types with only the type and date of evaluation being placed in the teacher's file. Failure to cooperate shall result in the following:

(1)	First Violation:	Loss of 1/190th of the individual's ensuing year salary.
(2)	Second Violation:	Loss of yearly increment for ensuing year.
(3)	Third Violation:	Consideration of non-renewal.

O. When a teacher's performance is judged deficient in any manner by the evaluator, the teacher will be notified within ten (10) school days of the evaluation and an attempt at definite, positive assistance will be immediately provided to teachers who are found to have "professional difficulties" or deficiencies.

PERTINENT SCHOOL BOARD POLICY:

L. Discipline

1. It is recognized that good discipline is an essential element in the establishment of a desirable learning situation and that the school faculty must have sufficient authority to maintain good discipline.

2. "Corporal punishment" means the intentional infliction of physical pain which is used as a means of discipline. "Corporal punishment" includes, but is not limited to, paddling, slapping or prolonged maintenance of physically painful positions, when used as a means of discipline. "Corporal punishment" does not include actions consistent with an individual educational program developed under s.115.30 (3)(e) or reasonable physical activities associated with athletic training.

No official, employe or agent of the school board may subject a pupil enrolled in the school district to corporal punishment; except, an official, employe or agent of the school board is not prohibited by this law from:

(a) Using reasonable and necessary force to quell a disturbance or prevent an act that threatens physical injury to any person.

. . .

(f) Using reasonable and necessary force to prevent a pupil from inflicting harm on himself or herself.
(g) Using reasonable and necessary force to protect the safety of others.
(h) Using incidental, minor or reasonable physical contact designed to maintain order and control

PARTIES' CONTENTIONS:

The Association initially argues that the Arbitrator's authority to review the grievant's discharge is a de novo proceeding under Wisconsin law and that the District's effort in seeking an abuse of discretion standard of review is an attempt, sub silentio, to convert the just cause standard in the contract to something substantially less than a completely independent determination of the issue as a matter of contract law by the Arbitrator.

The Association also argues that the District's hearsay evidence (testimony of witnesses before the District Board of Education nonrenewal hearing) should be disregarded by the Arbitrator because it denies the Arbitrator the opportunity to observe the demeanor of the witnesses and prevents the grievant from pointing out inconsistencies in the witnesses' testimony. In particular, the Association maintains it is inconsistent with the grievant's due process rights to allow any weight to be given to hearsay testimony of the students from the Board non-renewal hearing, especially in light of the sensitivity to employe rights demonstrated repeatedly by Wisconsin courts.

With respect to the merits of the dispute, the Association argues that the District did not have just cause to nonrenew the grievant's teaching contract. In support thereof the Association cites the widely known standard for determining if just cause exists articulated by Arbitrator Carroll Daugherty as the "seven tests" in Enterprise Wire Co., 46 LA 359 (1966). In effect, the Association argues that this just cause standard requires the District to notify an employe what he or she is doing incorrectly and give that employe an opportunity to correct the behavior issue. The Association also argues that the employe must be forewarned of the consequences of her actions. In addition, the Association argues that just cause requires that the process leading up to the discipline be fair which would include an objective investigation to discover if the behavior in dispute actually happened. Finally, the Association maintains that just cause requires the discipline imposed not be unduly harsh or applied unevenly.

In failing to meet the above tests, the Association argues that the District should be required to prove "beyond a reasonable doubt" or, in the alternative, by "clear and convincing evidence" that the evidence supports a finding of just cause to terminate the grievant's employment. In arguing for a higher quantum of proof, the Association contends that the evidence must be truly substantial since the District's allegations carry the stigma of general social disapproval as well as disapproval under canons of teaching practices which could lead to her having "her teaching license revoked by the Department of Public Instruction" or "prevent her from finding gainful employment in her profession". The Association concludes that the District did not meet its burden of proof that it had cause to nonrenew the grievant's teaching contract because one, in the absence of the events that transpired on February 25, 1992,

the grievant would have had her contract renewed by the District, and two, the District's argument that the grievant regularly abused her students, both physically and verbally, during her tenure with the District is not supported by the record.

Based on all of the above, the Association requests that the Arbitrator sustain the grievance, and reinstate the grievant with full back pay and benefits, less any interim earnings that she would not otherwise have earned.

Alternatively, the District argues it had just cause to nonrenew the grievant within the meaning of the relevant Daugherty tests.

In support thereof, the District first maintains that the Arbitrator has the discretion to apply an abuse of discretion standard of review herein due to the unique circumstances of the case. In this regard, the District claims the "cognitively disabled" children who were abused by the grievant would be "traumatized" if they had to testify again on the subject and their testimony at the Board proceeding "is more than sufficient for the arbitrator to rely on in reviewing the basis for the" District's nonrenewal decision.

Regardless of the standard of review employed herein, the District argues the testimony of witnesses before the Board should be relied upon by the Arbitrator because the transcript has been admitted into evidence and is part of the record and because the Association's objection to parts of the Board transcript as hearsay is invalid under Wisconsin law.

In regard to the merits of the dispute, the District argues that the record supports a finding that it had just cause to nonrenew the grievant's teaching contract for the following reasons. One, the grievant was repeatedly informed of and counselled regarding the professional standards to which she was required to conform her conduct. Two, contrary to the District's standards and directives, the grievant improperly used negative reinforcement and punishment as a behavior management technique, and maintained a negative, cold, sterile, and demeaning classroom atmosphere which caused emotional and physical harm to the students under her care. Three, the grievant was informed of her violation of District standards and warned of the need to change her conduct and assisted in an attempt to correct her deficiencies. Four, despite the foregoing the grievant failed to change her conduct to meet District standards. In particular, the District points to specific incidents of physical abuse including the grievant's use of physical restraint in tying Jason to his desk as a form of behavior management, her inappropriate handling of disinfectant cleaner as well as the smacking of Jackie in January, 1992. Five, the grievant's personality as well as her belief that the District standards were invalid stopped her from conforming her conduct to same, rendered her unable to meet the needs of her students and forced the District to take action to ensure the welfare of the special needs children under her care.

The District argues the quantum of proof by which the Arbitrator is bound in this case is the "preponderance of the evidence" standard not the higher standard found in cases involving criminal conduct, such as theft or fraud, found in cases cited by the Association to support its position. The District believes arbitrators should not impose such a "heavy" burden of proof in a noncriminal nonrenewal case like the instant dispute.

Based on all of the foregoing, the District requests that the grievance be denied and the matter dismissed.

DISCUSSION:

Standard of Review

The District points out that where a collective bargaining agreement is silent on the issue, arbitrators have the discretion to review discharge and discipline cases of employers by applying either a de novo or an abuse of discretion standard of review. In the Matter of Nicolet High School District v. Nicolet Education Association, 118 Wis. 2d 707, 715 (1984). The District correctly notes that the parties' collective bargaining agreement is silent on the standard of review issue and argues that the unique circumstances of this case warrant the application of the more restrictive abuse of discretion standard. Wisconsin courts, however, consistently have rejected school district attempts to limit an arbitrator's authority in binding arbitration proceedings. Arbitration Between West Salem and Fortney, 108 Wis. 2d 167, 180 (1982) and Nicolet, supra.

Apparently, the District's argument for a more restrictive standard of review by the Arbitrator herein centers around the idea that the students would be further traumatized if they were required to testify to specific incidents of abuse by the grievant a second time, having previously "courageously testified" regarding same "in front of the entire Board of Education". However, the Arbitrator already has received the student's testimony into the record as part of the transcript of the Board non-renewal hearing in Employer Exhibit Nos. 11 and 12. Consequently, there was no need for the students to be present at the arbitration hearing as suggested by the District in its brief. The Arbitrator instead left it up to the parties to decide whether or not to call the students as witnesses. The parties chose not to have the students testify before the Arbitrator. The District offered no other persuasive evidence that the circumstances of this case call for application of an abuse of discretion standard of review.

In the absence of a contractual restriction or some other substantial showing by the District, and based on all of the above, the Arbitrator will review the District's non-renewal of the grievant by applying the more commonly utilized de novo standard of review. The Arbitrator will make an independent determination of whether there was just cause for the non-renewal as is his authority under Article II, Section C, Article V, Section H, and Article VII, Section C of the Agreement.

Proof

The Association argues that all of the evidence must be evaluated by a higher standard of proof such as "beyond a reasonable doubt" or, in the alternative, by "clear and convincing" evidence because the allegations "carry the stigma of general social disapproval as well as disapproval under canons of teaching practices" which could lead to the revocation of the grievant's teaching license by the Department of Public Instruction or "prevent her from finding gainful employment in her profession." The Arbitrator is aware that arbitrators differ as to the appropriate standard to be applied. Some have concluded that a "preponderance of evidence" is sufficient, while others have adopted the more stringent "clear and convincing" or "beyond a reasonable doubt" standard. Where, as here, there is no allegation or persuasive evidence that the grievant's misconduct or performance deficiencies are criminal in nature; that she was involved in immoral conduct; that she was engaged in conduct that would cause the Department of Public Instruction to revoke her teaching license; and where the grievant's situation is no different than any other employe who is discharged or non-renewed who could argue that their reputation was harmed and future employment chances dimmed, the Arbitrator finds that the District must prove that the grievant committed the charged offense by a "preponderance of the evidence".

The Association also argues that the Arbitrator should disregard the

hearsay testimony of the students contained in the District Board of Education transcript of the non-renewal hearing because it denies the Arbitrator the opportunity to observe the demeanor of the witnesses and prevents the grievant from pointing out inconsistencies in the witnesses' testimony. However, there is nothing in the Agreement which would prevent the Arbitrator from considering the Board transcript in reaching a decision in the instant case. In addition, the Association stipulated to have the transcript admitted into evidence at the arbitration hearing. Arb. Tr. December 3, 1992, at pp. 5-7. The Arbitrator, accordingly, admitted the Board transcript into evidence, and made it part of the record in this arbitration proceeding. Id. The Board transcript is now as much a part of the record herein as is the testimony of all the witnesses and

all the exhibits which were received into evidence during the hearing by the Arbitrator. The Arbitrator agrees with the District's contention that on this basis alone "the parties may rely on the Board transcript in establishing their cases herein." Furthermore, the Arbitrator points out that his decision to consider said transcript in reaching a decision herein is consistent with the arbitrator's consideration of a Board transcript in a non-renewal proceeding in Nicolet, supra, which was upheld on appeal.

The Arbitrator also notes that a review of the Board transcript indicates that said hearing was conducted in a fair manner, and the Association's attorney had every opportunity to question the students, and other witnesses who appeared before the Board. And, as the Association's brief indicates, the Association has not been hesitant to point out inconsistencies in the students' testimony or compare said testimony with the evidence and testimony presented to the Arbitrator. Finally, the Arbitrator points out either party could have called the students as witnesses, but chose not to. The Arbitrator considers the students' testimony before the Board relevant to the non-renewal just cause determination.

Just Cause

At issue is whether there is just cause to non-renew the grievant.

The District argues that the grievant was non-renewed for cause, in accordance with the terms of the collective bargaining agreement, for "physically and emotionally 'abusing' the handicapped students under your care." In particular, the District found "Ms. Holm's conduct in tying Jason Kuss's shoelace to the desk in front of him exhibited a severe lack of sound professional judgment." The District also noted: "This is not to say that there was not other evidence of additional lapses in judgment, as indicated by the evidence presented by the administration."

The Association argues that cause did not exist for non-renewal of the grievant's teaching contract because the District did not afford the grievant certain due process considerations, and because the grievant's conduct did not warrant non-renewal.

Although both the Association and the District cite the seven Daugherty questions 1/ as standards for defining "just cause", they cannot agree on the relative importance of the questions or their exact framing for deciding the just cause of the grievant's non-renewal herein. Since it is clear that the parties do not share an understanding on the use of those standards, the Arbitrator will apply his own test.

1/ This is an analytical framework devised by the late Carroll R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. It was his attempt at defining "just cause". His approach has its critics and its shortcomings.

This Arbitrator believes there are two basic and fundamental questions in any case involving just cause. One is whether the employe is guilty of the actions complained of, which, as noted above, the Employer has the duty of so proving by a satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second basic question is whether the punishment is appropriate, given the offense.

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the grievant physically and emotionally abused the handicapped students under her care as claimed by the District.

The record is mixed on this point. Both the District and the Association presented witnesses whose testimony raised not only serious and important issues but also substantial and material credibility questions. Based upon a careful review of the record and evidence, with special attention placed upon the demeanor and credibility of the witnesses in this matter, the Arbitrator finds that the testimony offered raises a credibility problem that defies third party resolution. In sum, this is because all the witnesses who testified at the arbitration hearing were credible in the opinion of the Arbitrator, but told conflicting stories. Consequently, the Arbitrator can rely on only those facts on which the parties agree, or that are unrefuted.

The record is clear in regard to the following: one, the grievant tied Jason's foot to his desk for at least two minutes on February 25, 1992, contrary to prohibitions on using "aversive" behavior management techniques and in violation of District standards; two, the grievant used prohibited behavior management techniques such as the denial of recess after having been directed to cease all forms of negative reinforcement; three, some students appeared to suffer greatly as a consequence of being in the grievant's classroom and under her care; and four, these same students improved significantly when put in new environments. 2/

Therefore, based on the above, the Arbitrator finds that there is a factual basis on which to non-renew the grievant, although not as much as claimed by the District. The remaining question is whether the punishment is

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2/ The grievant admits the first incident. Bd. Tr. May 11, 1992 at pp. 112-116. Nor did the Association show that physically restraining Jason fell within one of the permissive forms of discipline set out in Section "L" of the School Board policy. The grievant also admits to the second offense. Arb. Tr. December 4, 1992, at pp. 398-401. With respect to the final two findings, the Arbitrator relies on the persuasive testimony of the parents and students before the Board and at the arbitration hearing. While the District was unable, in the opinion of the Arbitrator, to carry its burden of proof with respect to most allegations of physical and emotional abuse against the grievant, the Arbitrator is persuaded that some students under the grievant's care suffered greatly as a result of her sometimes contradictory teaching approach. So, while the Arbitrator agrees with the Association's contention that in the absence of the events that transpired on February 25, 1992, the grievant would have had her teaching contract renewed, the Arbitrator also agrees that the District properly considered the grievant's entire record when making its decision to non-renew the grievant and based on same the Arbitrator concludes that there was sufficient factual basis for non-renewing the grievant.

appropriate for the offense.

A review of this question may be undertaken within the context of the issues raised by the Association in arguing against non-renewal.

The Association initially argues that the grievant did not receive proper notice. The Association fashions two arguments from this contention. One, the District did not notify the grievant of what she was doing incorrectly and give her an opportunity to correct the behavior at issue. Two, the grievant did not receive any advance warning that she faced possible non-renewal for further misconduct.

Based on the record, the Association's first claim must fail. The District formally notified the grievant on several occasions to improve "the feeling tone" during her lessons; to cease using negative reinforcement and punishment as a behavior management technique; and to create a more positive classroom atmosphere. The District also informally counseled the grievant over the past two years to improve her performance. Yet, despite some short-term improvement, the grievant failed to improve her conduct on an ongoing basis to meet District standards and directives. Arb. Tr. December 3, 1992, at pp. 31, 167-169, 182, 220, 261, 278, 306 and 345.

The record, however, supports the Association's second claim that the grievant did not receive notice at any time material herein that she faced possible non-renewal for her deficiencies. In this regard, the Arbitrator notes that the District started getting complaints from parents that their children did not want to go to school as early as 1988 or 1989 Arb. Tr. December 3, 1992, at p. 155, but did not directly confront the grievant with the problem until January, 1990. In fact, from 1987 until early 1990 the grievant received generally positive work evaluations and had no idea that she had a major problem with her teaching methods. While it is true that from January, 1990, to March, 1991 the grievant was formally evaluated on several occasions and directed to conform her conduct to District standards and requirements, the District never specifically informed the grievant that she was in danger of losing her job. What is even more noteworthy is that following Pat Johansen's formal evaluation of the grievant in February 1991 wherein she found some of the same problems with the general classroom atmosphere as did Nola Smith and Dale Larson (although like most of the grievant's evaluations, much of her evaluation of the grievant was fairly positive), neither Johansen nor anyone else formally observed the grievant again prior to the grievant's suspension in February, 1992. This despite the fact that at the introductory conference for said evaluation the grievant made it clear she was looking for ways to improve her teaching and that at the post conference "A suggestion of a return visit was made by this observer and Ms. Holm appeared to be agreeable." Such a return visit might have kept the grievant on track, assuming arguendo the District could have addressed the grievant's objections to some of its directives, since she was showing some signs of improvement. Arb. Tr. December 3, 1992, at p. 235. Both Johansen Arb. Tr. December 3, 1992 at p. 336 and Smith Arb. Tr.

December 3, 1992 at p. 167 testified that they were too busy or otherwise did not find time to formally evaluate or observe the grievant in her classroom during this period despite the fact that the District was still receiving parental complaints about the grievant and the District had a continuing concern about her teaching. The Arbitrator sympathizes with the time pressures put on District administrative personnel, but finds it unconscionable that the District did not meet with the grievant during this period of time both to put her on notice that she was in danger of losing her job and to protect the interests of her students. Such a failure violates both Article VII, Section C, the "just cause" provision, and Article X, particularly Section L,

of the Agreement.

The Association argues for additional mitigation. However, for the reasons listed below, these arguments must fail. In this regard, the Association first argues that the District did not conduct an objective investigation into the allegations against the grievant to discover if the incidents in question actually happened. While it is true that there were some flaws in the Employer's investigation, i.e., the District did not interview the grievant prior to suspending her, the Arbitrator is not persuaded that any such omissions influenced the outcome or prejudiced the grievant's situation. The record indicates the grievant had a fair and objective hearing before the entire Board of Education regarding her possible non-renewal. She was represented by counsel at this hearing and had full opportunity to present evidence and testimony in support of her position. She also had the opportunity to question District witnesses at this hearing. Based on the foregoing, the Arbitrator rejects this claim of the Association.

The Arbitrator likewise rejects any suggestion that the District applied discipline here in an uneven manner. The Association offered no persuasive evidence that the District treated the grievant differently than other teachers similarly situated. The Arbitrator will address the allegation that non-renewal was unduly harsh within the context of the Remedy portion of this Award.

The Association suggests that there are other due process violations by the District. The Association does this by listing the seven Daugherty questions and by arguing the District failed to sustain its burden of proof that it met them. However, the Association makes no specific allegations and gives no specific examples regarding same, and the record contains no persuasive evidence in support of this claim. Therefore, the Arbitrator rejects these due process arguments put forward by the Association.

Based on the above, the Arbitrator finds that while the District has some factual basis upon which to non-renew the grievant, the District committed a serious procedural error in failing to give the grievant proper notice that she faced possible loss of her job if she did not improve her teaching methods and conform her conduct to District standards and requirements. Therefore, the Arbitrator finds it reasonable to conclude that the answer to the stipulated issue is YES, the Board of Education violated the collective bargaining agreement by its non-renewal of the grievant. A question remains as to the appropriate remedy.

Remedy

This is a difficult question. The District has adequate evidence to support its decision to non-renew the grievant. However, the District failed to meet even minimum requirements of due process when it failed to properly warn the grievant of the consequences of her conduct. This is especially important here not only because just cause requires notice as an element of fair procedure, but because the grievant received decidedly mixed signals from the District regarding her performance and showed some ability to respond positively to criticism and improve her performance. 3/ In this regard, the

3/ In fact, if the grievant had not indicated on several occasions that she did not agree with some directives given by her supervisors Bd. Tr. May 11, 1992 at pp. 140-141; Arb. Tr. December 3, 1992 at p. 191 and failed to carry out these directives thus raising an issue, not sufficiently rebutted by the Association, that she might not be able to conform her conduct to District standards in the event of reinstatement

Arbitrator points out that the grievant received generally positive evaluations from her date of hire until January, 1990. From that point on, her evaluations contained both positive and negative comments but nothing which indicated her continued employment was in danger. Even Pat Johansen's Spring, 1991 evaluation was not entirely negative, but at that same point where both the grievant and Johansen agreed that a "return" observation was needed, no one from the District followed through. This was particularly crucial because, as noted above, in the Fall of 1991 the grievant showed signs of improvement Arb. Tr. December 3, 1992, at p. 235 and she was actively looking for feedback. District representatives Smith Arb. Tr. December 3, 1992 at p. 167 and Johansen Id. at pp. 330-336 and Employer Exhibit No. 10 knew they should have been back in the grievant's classroom evaluating her and counseling her, but failed to make a return visit. In fact, Smith felt that she was a teacher worth saving almost until the end, Arb. Tr. December 3, 1992 at pp. 205-206, but may have simply been in the wrong area of teaching. Id. and Bd. Tr. April 28, 1992, at p. 151. Article X, particularly Sections A, B, C, D, F, H and L, requires more of an effort to evaluate and counsel the grievant regarding a possible non-renewal than was put forth by the District.

Based on the record evidence of the grievant's conduct and the effect of the grievant's teaching on some of her students, and the fact that the District had cause to non-renew the grievant but for its failure to give her proper notice, the Arbitrator finds that reinstatement would be an inappropriate remedy. However, the Arbitrator is of the opinion that the District should pay a significant penalty for its failure to notify the grievant of the consequences of her conduct. Therefore, in view of all of the foregoing, it is my

AWARD

1. That the grievance is sustained in part and dismissed in part.

2. That the District's decision not to renew the grievant's teacher contract is upheld but the District must make the grievant whole for all wages and benefits lost because of the non-renewal from the date of the non-renewal to the date of this Award, excluding:

a) All wages the grievant earned in the interim that she would not have received except for her non-renewal.

b) Any benefits she may have received from unemployment compensation.

3. The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin this 30th day of June, 1993.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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the Association would have made a strong case for reinstatement.