

On February 26, 1993, a high school senior, Cherie DuPlayee, went to visit Herbison during the eighth period to talk about an AIDS quilt. 2/ DuPlayee's brother had died of AIDS about a year and a half before this. 3/ DuPlayee was a student in a class entitled Advanced Social Problems taught by Wolfgang

2/ Tr. 10, 93.

3/ Tr. 10.

Cahn during the seventh period. 4/ This class began in the fall and continued throughout the year. 5/ In the meeting on February 26, 1993, DuPlayee told Herbison that she was uncomfortable with Cahn's conduct of his class. 6/ DuPlayee could not recall the details of the conversation with Herbison. 7/ According to Herbison, DuPlayee objected to Cahn's statements on gay relationships and to Cahn's allowing students to put a drawing on the chalk board, as well as permitting students to make inappropriate comments. 8/

That same weekend DuPlayee went to Madison and visited her brother and sister where she discussed Cahn's class. 9/ Her brother advised her to talk to the principal, the superintendent or the Department of Public Instruction (DPI). On Monday, DuPlayee called DPI and reported five complaints about Cahn which were:

1. He drew sexual positions of himself and his wife on the board.
2. He described the color of his wife's "crotch."
3. He discussed exercises to increase the size of boys' penises.
4. He discussed exercises to increase the size of girls' chests.
5. He referred to blacks as "niggers." 10/

On Tuesday, March 2, 1993, the DPI telephoned John Stahmer, the High School Principal, and relayed the complaints and also

4/ Tr. 8-9.

5/ Tr. 16.

6/ Tr. 12, 24-25, 93.

7/ Tr. 11, 24.

8/ Tr. 93-94.

9/ Tr. 14.

10/ Tr. 49-52.

indicated that this information was reported to Herbison. 11/
After this call, Stahmer asked to meet with Herbison the following
day. 12/

Cahn has been a teacher in the District for at least 18 years
and has had some difficulty and had been out of the classroom for
a year, apparently due to a nervous breakdown and has been
currently receiving counseling in Marshfield. 13/ Stahmer
testified he kept a close eye on Cahn as it appeared he was
depressed, and according to the Superintendent, Cahn was
suicidal. 14/

On March 3, 1993, Stahmer and Herbison met and Herbison told
him that DuPlayee talked about gay bashing and rude comments by
students and that Cahn had allowed boys to draw pictures on the
board. 15/

On March 5, 1993, Stahmer sent the following letter to
Herbison:

I was disappointed to learn you received and
maintained information from me regarding a
teacher's alleged inappropriate classroom
behavior from a student. It was unfortunate
that I had to learn about the situation from
the Department of Public Instruction where it
appeared the student felt they (sic) needed to
go to get appropriate action.

When concerns are raised about staff members'
inappropriate actions, it is necessary I
become informed immediately. Because this was
not done we now have what I consider to be a
local issue at the State level of the
Department of Public Instruction. I feel had
I been informed of this information earlier,
this problem could have remained at the local
level.

11/ Tr. 43.

12/ Tr. 45.

13/ Tr. 44, 54.

14/ Tr. 56, 74.

15/ Tr. 47, 61-63, Ex. 10.

I have always stressed the importance of keeping me informed of school concerns. It is necessary you do this in the future. If this type of conduct were to occur in the future further disciplinary (sic) action will have to be taken. 16/

A grievance was filed over this letter and on April 26, 1993, the Superintendent denied the grievance and stated the following:

Further, I am correcting the typographical error in the letter you received from John Stahmer March 5, 1993 to read:

"I was disappointed to learn you received and subsequently withheld information from me....." to replace "maintained"

All other sections of the letter are to remain the same. 17/

Thereafter, the grievance was processed to the instant arbitration.

Issue:

The parties stipulated to the following:

Do the letters dated March 6 and April 26, 1993, which were placed in Nancy Herbison's file violate the collective bargaining agreement, Article 14? If so, what is the appropriate remedy?

Pertinent Contractual Provisions:

ARTICLE 14

DISCIPLINE, NONRENEWAL, AND DISMISSAL PROCEDURES

16/ Ex. 4.

17/ Ex. 6.

A. All teachers hired after July 1, 1981, shall serve a probationary period of two (2) years. Paragraph two of this section A will not apply during this two (2) year probationary period.

After completing a two (2) year probationary period, no teacher shall be discharged, nonrenewed, reduced in compensation, or disciplined without just cause.

District's Position:

The District contends that Herbison should have notified Principal Stahmer on the weekend or first thing Monday morning about DuPlayee's complaint of the problems in Cahn's classroom and by not doing so she neglected her duties, violated Board policy and violated the guidelines of the American School Counselors Association, (ASCA). It submits that the comments made to her by DuPlayee were of such a serious nature and of such magnitude that the information should have been given to the Principal as soon as possible. The District alleges that DuPlayee went to Herbison seeking advice as to how to deal with the situation in Cahn's classroom and was disappointed that advice was not provided. It claims that Herbison's testimony that she intended to talk to other students before meeting with the Principal does not comply with the faculty handbook or the guidelines for guidance counselors as these direct her to contact the Principal or Superintendent. The failure of Herbison to report the situation, according to the District, is unacceptable. The District argues that it merely expected Herbison to relay the concerns of a student to the Principal and this did not occur. It points out that Herbison spoke with DuPlayee's mother after DuPlayee complained about Cahn, and it was clear that mother and daughter were groping for a solution and Herbison merely had to direct them to the Principal. The District asserts that the Association is attempting to apply the reasonable person standard, but this is not a proper case to make such an argument. The District argues that the discipline given to Cahn should not be considered in this case and any question of potential embarrassment to the District is not relevant. It maintains that Herbison as a guidance counselor should have provided direction to DuPlayee and she didn't. Additionally, it asserts that Cahn's classroom conduct should have been brought to her supervisor's attention at the earliest opportunity. The District takes the position that it acted properly in sending the letters to Herbison as the policies of the District speak for themselves and the ASCA ethical standards require that the conduct should have been reported to

the appropriate individuals. It submits that Herbison chose to ignore a very serious problem and to conduct her own investigation and report it in the future. It concludes that this is unacceptable and the letters were appropriate and the grievance should be denied.

Association's Position:

The Association contends that Herbison did not withhold any information from her superiors. It points out that DuPlayee did not stop in to complain to Herbison about Cahn, but stopped in to talk about an AIDS quilt and during this casual conversation she talked about gay bashing and that Cahn allowed lewd comments to be made in his class. The Association notes that DuPlayee's complaints to the DPI were different from those made to Herbison. If the complaints were the same, then according to the Association, the matter may have taken on a different interpretation.

The Association points out that Herbison is not a supervisor and out of respect for a fellow teacher needed to check with other students and faculty to see if there was a problem that needed to be reported. The Association notes that the comments by DuPlayee were in the context of a casual conversation and were made late on Friday afternoon on a day when the Principal was out of town. It further notes that DuPlayee reported her complaints to the DPI on Monday and that she was out of town on Monday and Tuesday. It asserts that even after the complaint to DPI the Principal was unsuccessful in having the conduct stopped and did not investigate two new complaints by DuPlayee after the report to DPI. It submits that the Principal did not discipline Cahn but the guidance counselor, an innocent bystander, was disciplined. The Association claims that Herbison is being made the scapegoat because the Principal was embarrassed by the DPI phone call. The Association notes that Cahn was found only to have used inappropriate language in the classroom and Herbison was given basically the same discipline. The District, according to the Association, is seeking to uphold its discipline for her failure to immediately report allegations from a social conversation without any verification of the allegation. It notes that DuPlayee's recollection of her conversation with Herbison is vague, and she could have reported Cahn's conduct to the Principal and/or Superintendent but did not want to do so. It also notes that the District was aware of Cahn's difficulties and should have observed him more closely. It points out that after receiving the call from DPI, the Principal did not immediately question DuPlayee, her parents, or Herbison, so there was no urgency to find out the facts. It submits that the Principal is attempting to shift the blame to Herbison for his responsibility to supervise

teachers. It concludes that the facts reported to DPI were not reported to Herbison and the discipline is clearly scapegoating by the Principal for which the just cause standard for discipline protects the employe.

Discussion:

Article 14, Section A, provides that no teacher will be disciplined without just cause. The District had the burden of proving by a preponderance of the evidence that it had just cause for the letter of reprimand.

A review of the evidence establishes that on February 26, 1993, during the eighth period, Cherie Duplayee, a high school senior, stopped in to see the guidance counselor, Nancy Herbison, to talk about an AIDS quilt. DuPlayee's brother had died of AIDS. Sometime during this conversation, DuPlayee expressed uncomfortableness with her seventh hour class taught by Wolfgang Cahn because of "gay bashing" and Cahn's failure to stop boys from making comments which were lewd. Because DuPlayee's brother had died of AIDS, it is possible that she might be overly sensitive to discussions on gays and deem it "gay bashing." Additionally, DuPlayee may have just been uncomfortable with the subject in general, and it was certainly possible that DuPlayee's complaints were well founded. Herbison asked if Cahn was playing devil's advocate to stimulate discussion and also asked DuPlayee if DuPlayee could talk to Cahn or leave the classroom when she became uncomfortable. 18/ DuPlayee felt her grade might be affected if she left the classroom. According to Herbison, she told DuPlayee that she did not supervise Cahn and complaints had to go to Principal Stahmer. No other students had complained about Cahn's class, and Herbison felt that DuPlayee's complaints were not urgent 19/ and decided to talk with other students to determine if DuPlayee's concerns were legitimate. 20/ In any event, Herbison had determined to report DuPlayee's concerns to Principal Stahmer no later than Thursday, March 4, 1993. 21/ DuPlayee made a complaint to DPI on Monday, March 1, 1993, and on Tuesday, March 2, 1993, DPI called Principal Stahmer and reported five separate items complained of by DuPlayee. 22/ DPI told Stahmer

18/ Tr. 94.

19/ Tr. 97.

20/ Tr. 98.

21/ Tr. 99.

22/ Tr. 43.

that DuPlayee had reported this information to Herbison. 23/
Stahmer met with Herbison on March 3, 1993, and Herbison reported
to him what DuPlayee had told her. 24/

It must be noted that what DuPlayee reported to DPI was not
what DuPlayee discussed with Herbison, so the statement that the
five items DPI outlined were reported to Herbison was not correct.

Additionally, the District administration and Herbison were
obviously aware of Cahn's past problems. Herbison was also aware
that DuPlayee was sensitive to comments about gays, and Herbison
wanted to know if this was a single student concern or multiple-
student concern. 25/ Herbison testified that seeking additional
information before going further was a use of her professional
judgment. 26/ Reasonable minds can differ on whether Herbison
should have reported DuPlayee's complaint immediately. A delay to
check out the facts does not appear to be unreasonable. The
evidence presented failed to establish any intentional withholding
of information or undue delay in reporting this matter to
Principal Stahmer. Had Herbison never reported this information
or failed to report it in a reasonable time frame, the result
might be different. The information presented to Herbison on
Friday in the context in which it was made arguably was not so
serious so as to require an immediate report to Stahmer. The
undersigned cannot conclude that Herbison exercised bad judgment
in checking DuPlayee's complaints during the next two school days.

This was a judgment call and the facts do not establish that
Herbison exercised bad judgment in delaying her report two or
three days. Had the five specific complaints that were made to
DPI have also been made to Herbison, perhaps a conclusion of bad
judgment might be made, but the evidence did not establish that
the reports were the same. The reports to Herbison could
reasonably call for further investigation as DuPlayee had been
uncomfortable in this class since the Fall semester without any
complaint being made by her.

The District's reliance on Board policy is misplaced. The
policy is directed to a student's failure to be admitted or
participate fully in school based on sex, race, etc. The policy
also prohibits harassment. It is essentially a non-discrimination
policy. 27/ The District determined that the classroom activity

23/ Tr. 43.

24/ Ex. 10.

25/ Tr. 99.

26/ Tr. 100.

27/ Ex. 3.

by Cahn did not fit within this policy so it is not clear that Herbison had any duty to report DuPlayee's comments immediately. Also, the Ethical Standards relied on by the District requires the reporting of conditions potentially disruptive of damaging to the school's mission, but the Standards do not require an immediate report. 28/ Checking the facts as to DuPlayee's concerns is not at odds with the Standards, so the District's reliance on them does not support the letter of reprimand.

The District has argued that what happened to Cahn is immaterial but just cause requires that transgressors receive the same punishment for the same offense. The evidence established that nothing was done to Cahn and his transgression was use of inappropriate language in the classroom. Under the circumstances it appears that the letter of reprimand is an overreaction and is without just cause.

Herbison exercised her professional judgment in an appropriate manner, and the letter by Principal Stahmer dated March 5, 1993, seems predicated on Herbison's having the same report as DPI, and that DPI would not have been involved had Herbison reported DuPlayee's complaint to him immediately. The evidence failed to establish that this letter is warranted because Herbison did not know the items reported to DPI and they would have been reported by DuPlayee whether Herbison told Stahmer about what DuPlayee had told her earlier. The evidence failed to establish that there was an obligation on Herbison to make an immediate report to Stahmer or that she deliberately withheld information from him for an unreasonable period of time. Thus, the letter of March 5, 1993, as amended by the April 26, 1993 letter, was without just cause.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The District did not have just cause for the March 5 and April 26, 1993 letters, and the District is hereby directed to immediately remove them from Nancy Herbison's file.

Dated at Madison, Wisconsin, this 11th day of November, 1993.

By Lionel L. Crowley /s/

28/ Ex. 7.

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