

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
GENERAL TEAMSTERS UNION, LOCAL 662,	: Case 35
affiliated with the INTERNATIONAL	: No. 50773
BROTHERHOOD OF TEAMSTERS, AFL-CIO	: MA-8376
	:
and	:
	:
SCHOOL DISTRICT OF NEW RICHMOND,	:
New Richmond, Wisconsin	:
	:

Appearances:

- Ms. Naomi E. Eisman, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.
- Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the School District of New Richmond, New Richmond, Wisconsin, referred to below as the Employer or as the District.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Brad Boardman, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 8, 1994, in New Richmond, Wisconsin. The hearing was not transcribed. The parties entered oral argument at the hearing, and each waived the filing of a post-hearing brief.

ISSUES

The parties stipulated the following issues for decision:

Did the District have just cause to suspend the Grievant for five days without pay from February 2, 1994, through February 8, 1994?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 9

DISCIPLINE AND DISCHARGE

Section 1. The Employer will not discipline, suspend, or discharge an employee without just cause.

Section 2. The normal disciplinary procedure is:

1. Verbal warning
2. Written warning
3. Suspension
4. Discharge

The above procedure need not be followed in cases of serious misconduct.

The number of warnings or length of suspension shall be determined by the Employer in accordance with the gravity of the violation, misconduct, or dereliction involved; taking into consideration that such steps are intended to be corrective measures.

BACKGROUND

Vaughn Hoffman is the District's Superintendent, and issued the Grievant's letter of suspension on February 1, 1994. 1/ The letter reads thus:

On January 27, 1994, you were notified that I had received a report of an alleged incident which occurred on January 20, 1994 during a girls' basketball game and which involved allegations of misconduct on your part.

You were also directed to attend an investigatory conference in my office at 11:00 a.m., Friday, January 28, 1994.

During the January 28, 1994 conference, you were represented by Union Steward Dennis Hurtis. In addition to myself, the Administration was represented by Fiscal Manager, Brian Johnston. During the conference, I reviewed the allegations with you. Specifically, I advised you that the District had received written statements from 17 members of the Baldwin-Woodville Seventh Grade Girls' Basketball Team.

In their statements, the students allege that during the time when they were using the music room as a locker room for the January 20th girls' basketball game, you deliberately situated yourself near the doorway to the music room for the purpose of viewing the students while they were changing their clothes for the game. The students state that there appeared to be no other purpose for your presence at the music room door. Other statements also allege that you were looking through the windows of the door while they were changing. Further, the statements allege that you appeared at the door at more than one time, i.e. both before and after the A-Team game. The statements also allege that some of the students told you to go away because they were changing clothes but that you did not comply with their request. Finally, the statements allege that your presence caused both commotion and

1/ References to dates are to 1994, unless otherwise indicated.

embarrassment for the students.

Following my review of these allegations with you, you were given an opportunity to respond and to tell your side of the story. Your response was to deny each of the allegations. You then asked what the next step would be, and I indicated that I would review what I had heard at the conference and would get back to you within the next few days.

Based on my review of the circumstances surrounding this matter, the written statements from the 17 students, and your response to those statements during our conference, I have concluded that it is more likely than not that some, if not all, of the allegations are true. Therefore, this letter will serve as notice to you that you will be placed on a five-day suspension .

I would encourage you to carefully review your actions in this matter and to take steps to ensure that you are never again in a situation which could present even the appearance of impropriety or the potential for being perceived as such. As school district employees, we are all held to certain standards and are accountable for measuring up to those standards . . .

This letter will also place you on notice that any further incidents will result in additional disciplinary action up to and including dismissal.

On January 20 the seventh grade girls' basketball teams from the District and the Baldwin-Woodville School District played two basketball games. The first started at roughly 4:30 p.m. and involved each school's "A" team. The "B" teams then played a game starting at roughly 5:40 p.m. Baldwin-Woodville players arrived at East Elementary School, where the game was played, at roughly 4:00 p.m. East Elementary School has six entrances, and no locker rooms. Prior to a theft at another athletic event, players used restrooms as changing rooms. Because those rooms cannot be locked, the District decided to have the Baldwin-Woodville team members use the Music Room as a changing room. Double doors grant entrance to that room. A teacher's office is located in the Northwest corner of the room. The room has one window on its South wall, and two narrow windows in the double doors. The double doors are roughly in the center of the room, on its West wall. The window on the south wall had blinds. The windows on the double doors did not. The Grievant was on duty from 3:00 p.m. until 11:30 p.m. on January 20. He was the only Custodian on duty, and worked that evening, as he typically does, without direct supervision. After the arrival of the bus carrying the Baldwin-Woodville basketball teams, the Grievant showed them into the Music Room, then locked the door from the outside.

This background is not disputed, but much of the balance of the background to the discipline is. That will be summarized as an overview of the testimony.

Vaughn Hoffman

Hoffman noted that he learned of the January 20 incident on January 24

from Brian Johnston, the District's Director of Buildings and Grounds. Johnston informed him that a parent of a student on the New Richmond Girls' basketball team had heard a disturbing rumor from his daughter. The parent stated that his daughter had told him that she had overheard players from the Baldwin-Woodville team talking about a Custodian who had watched them change. The parent was a Custodian employed by the District.

Hoffman directed Johnston to discuss the matter with the Coach of the New Richmond Girls' basketball team, and then personally informed Duane Lones, the Superintendent of the Baldwin-Woodville School District, about the rumor. Lones returned Hoffman's call on January 24, and informed him that Dan Keefer, the Coach of Baldwin-Woodville's girls' basketball team, knew of nothing to substantiate the rumor. Lones had, however, asked his Middle School Principal, George Streeck, to discuss the matter with team members. Later in the day on January 24, Lones informed Hoffman that Streeck had discovered that there appeared to be considerable knowledge about the incident among team members. By January 25, Hoffman had learned that no District employe or student contacted by Hoffman, Johnston, or the Middle School Principal had direct knowledge of the incident. He asked Lones to have the students who had some knowledge of the incident put that knowledge into a written statement. Hoffman did not give Lones any direction on how to obtain the statements. Later that week Hoffman received from Lones written statements from seventeen members of the Baldwin-Woodville seventh grade girls' basketball team.

On January 28, Hoffman and Johnston met with the Grievant and a Union Steward. Hoffman initiated the meeting by informing the Grievant of the general nature of the allegations made in the statements. He then read from one of the statements he viewed as typical. He then asked the Grievant for his account and whether the Grievant could corroborate that account. The Grievant generally denied looking in on the girls, stated he was working in the hallway area, and did have to get chairs for parents and others who came to watch the games. At

the end of the meeting, Hoffman informed the Grievant that if he could bring forward any evidence corroborating his account, Hoffman would consider it before determining how the District would respond to the allegations. The Grievant did not further respond, and on February 1, Hoffman issued the suspension letter set forth above.

Hoffman testified that the consistency of the seventeen statements and the absence of any evidence to corroborate the Grievant's denial grounded his decision to suspend the Grievant for five days. He acknowledged that the Grievant has received no discipline prior to that at issue here, and that he did not independently verify the statements he received, or speak to the people contacted by Johnston or by Lones.

Dan Keefer

Keefer estimated that twenty-three girls made the trip to New Richmond on January 20. He could not recall if the music room was locked, but noted that it was typical for both teams to change into their uniforms as soon as possible. Those "A" team players who were not going to play in the "B" game would typically change back into street clothes after the "A" game. Keefer noted he did not learn of the allegations until the Friday or Monday following the game. He learned of allegations of impropriety from Streeck. Streeck informed him that there had been some vandalism to the music room. Keefer had noticed his players and the New Richmond players had taunted each other following the game, and he decided to meet with his players to discuss both problems.

That meeting occurred sometime before the next scheduled game on January 25. He noted that after discussing his concerns, one of the players indicated a Custodian had watched them dress. Other team members agreed. He could not, however, recall who first brought the incident up. He noted he was surprised none of the team members had mentioned the incident prior to this meeting. He did not think any of his team members would lie, and noted the five team members who testified are not members of the same social circle. He could recall identifying himself and his team members to the Grievant and noting that they would be using the music room to change. He testified he never told the Grievant to leave the area. No parent of any team member complained to Keefer about the events of January 20.

Sarah Noll

Noll noted that the Grievant showed them to the Music Room, and unlocked it for them. While she was changing, a team member noted a Custodian walking by the door. She stated she saw the Custodian looking in. She estimated he was two to two and one-half feet from the door. She testified that one of the team members stated she would talk to Keefer, who eventually came and told the Grievant to stay away from the Music Room. He continued, however, to walk by the doors, and at one point jiggled the handle to the doors. Many of the team members responded by moving to the sides of the room to avoid being seen from the double door windows. Some of the team members told the Grievant to go away, but he continued to return. She estimated he returned on three occasions, roughly every three to four minutes while the team changed. Noll could not identify the Grievant as the Custodian she saw on January 20. She noted the team discussed his presence, with some team members thinking it was coincidental that he was in the hallway, and that he was not watching them. She did not agree with this, however. She testified that one of the times she saw him was after she had left the Music room. She saw him walk toward the Music Room doors, then turn into an intersecting hallway, turning his head to

look toward the Music Room. The final time she saw him, he was walking in the hallway which abuts the Music Room. He again tilted his head to look into the Music Room as he passed its doors.

Noll's written statement, dated January 25, reads thus:

. . . While we were changing the Janitor would walk by and look in the windows, then he'd go get a drink, and walk by again, then he'd sweep the floor, and he would always look when he went by. On time he even started fooling around with the door handle like he was trying to get in. We yelled at him to get out but he wouldn't, then our coach told him we were changing and he left.

Shonda Johnson

Johnson changed for the "B" game immediately after arriving at East Elementary School. She was in the center of the Music Room. While she was changing into her uniform, she heard a team member say words to the effect of "What are you doing, get out of here." She then dressed and watched for the Grievant. He got a drink at a water fountain in the hallway leading into the Music room, and walked back toward the doors. He repeated this process several times. She noted on at least one occasion, he came up to the doors and fiddled with the door handles. On another occasion, he opened the door slightly, and leaned into the room. He never said anything to the team members. Her written statement reads thus:

The basketball girls were changing in the music room. There was a janitor walking by. First he was walking past the door looking in. Then he got a drink, and went to the door and started fooling around with the handle. He was looking in the whole time. I don't know if many people saw him, but I did. Some other girls told him to get away. Also there were a couple of boys walking by and looking in.

Shae Marie Blakely

Blakely testified that the Grievant, whom she identified, walked up to the music room doors on perhaps five occasions, and looked into the room. On two to three of those occasions, he jiggled the door handle. She stated she saw him leave the doors to get a drink, and then return. He appeared at the Music Room doors throughout the "A" and "B" games, including half-time of the "A" game. After the "A" game, and while at least two team members were changing, he appeared at the Music Room doors, again jiggling the handles. He once stopped and opened the music room doors. No one, at that time, was changing. She stated she never saw him moving chairs. She noted she told Keefer, sometime before the "B" game about the Grievant's conduct. She did not recall telling any other team member she would mention the incident to Keefer. She thought Keefer said something to the Grievant about the girls using the room to change. Her written statement reads thus:

. . .

We began to change as soon as we got there. As we were

changing, I noticed that a male janitor kept on walking by, looking in as we were changing. After 5-10 min, we all went into the gym to get ready for the game.

. . .

When the 'A team' started changing back into our normal clothes, the janitor started walking by and sweeping, mopping, getting drinks, and doing practically anything else to walk by. At first I thought that maybe he was just watching us to make sure that we didn't break anything, but a lot of other girls started getting worried about what he was doing, so they either went somewhere else to change, or they put their other clothes on over their other clothes. I changed behind the bleachers, so nobody really saw me change.

When we were changing right after our (A team) game, he came to the door, and started fiddling around with it.

I don't know what he was doing, but he wasn't really looking at the door, he was mostly looking at us! Some people really didn't care if he was looking or not, but I did not feel very comfortable about changing where he could see me, so that is when I went behind the bleachers, but we didn't have that much time to change, so not everybody had time to go behind the bleachers, and he did look like he was looking at them, because I could see through the bleachers.

P.S. One time he came by and just kind-of touched the door handle, and everybody was undressed. I was standing only in my shorts and sports bra, and he was looking around the room!

Summer Peterson

Peterson noted that she had her back to the door when she heard the rest of the team screaming. Although there was considerable screaming, she noted none of the team members directly said anything to the Grievant. Peterson identified the Grievant as the Custodian she saw at the doors of the Music Room on perhaps five occasions. She first saw him after the appearance which prompted the screaming. On three to four of those occasions, she heard him fiddling with the door handles. She noted the Grievant did not appear at the door at anytime after the end of the "A" game. Team members only briefly discussed the incident. She also recalled that the Grievant approached her in the hallway leading to the gym during the "A" game. She had bounced a basketball hard enough to hit the ceiling. He told her if she wished to embarrass herself, she should do so in the gym. She noted that she had seen Blakely tell Keefer about the Grievant's conduct before the start of the "A" game, and that Keefer told the Grievant to stay away from the music room. Her written statement reads thus:

When we got to New Richmond we had to get changed in the music room or one of their class rooms. Most of us had our pants and shirts off when everyone started screaming. I asked someone why they were screaming? As I turned around I saw the Janitor walking away. One of my friends said the janitor was looking in at us. I also saw him fidgeting w/the door for awhile like he was staling time. He didn't leave until our coach came and said, "There are girls changing in this room . . .

Peterson affirmed the accuracy of this statement except for the representation that "I saw the Janitor walking away." She stated that this is not true, and that she did not know what prompted her to include it in her statement. She did not discuss the incident with her parents, feeling it was not "that much of a big deal."

Denise Van Soneren

Van Soneren noted that within a couple of minutes after the Grievant had shown them the music room, he returned into the hallway across from the windows of the double doors, looking up as he cleaned. She moved further away from the window, after a friend told her he was watching her change. She stated she saw him for a few minutes, glancing up as he cleaned. She and a couple of teammates informed Keefer of the Grievant's conduct, and Keefer informed them he would advise Streeck. Keefer told the Grievant to stay away from the Music Room while the team changed. The only other time Van Soneren saw the Grievant was during the "B" game, when the Grievant opened the doors to look into the Music Room. She acknowledged she and fellow team members were playing with a keyboard in the room. She also noted that Streeck approached team members in a Conference Room at Viking Middle School regarding the incident. That occurred, she thought, in the afternoon of January 21. Her written statement reads thus:

. . . The janitor said that we could dress in the music room and showed us where it was. I saw him sweeping the halls by the room a lot of times. Then all of a sudden the janitor was doing something with the door. There were windows on each door that anybody could see in if they wanted to. After a minute or so Mr. Keefer came up and told him that we were dressing in there and

for him to leave.

The Grievant

The Grievant has worked as a Custodian for the District for roughly seven years. Prior to February 1, he had received no formal discipline. For the January 20 game, the Grievant had been instructed to show the Baldwin-Woodville team members into the music room, and then to lock the doors. He stated he told Keefer how to operate the lock on the music room double doors to insure the room would stay locked after the players left the room. One of the handles on the inside of the Music Room double doors has a push lock which, if engaged, will keep both doors locked if the outside lock is also engaged. The outside lock is a keyed lock. The Grievant had the only key to that lock available on January 20. If not engaged, the inside lock permits the Music Room doors to be opened even if the outside lock is engaged.

After instructing Keefer on the operation of the lock, the Grievant prepared the gym for the game. He had to get chairs for the gym, due to the size of the crowd. To do so, he went into the fourth grade wing of East Elementary School. To reach that wing, he walked in the north/south hallway which runs in front of the Music Room, and in the east/west hallway which runs directly from the doorway of the Music Room and leads to the north/south hallway onto which the fourth grade classrooms open. He also got chairs from the teachers' lounge which is located at the end of the east/west hallway which runs directly from the doorway of the Music Room. The Grievant described the crowd which attended the game as the largest he had ever seen, and he stated parents and students walked freely in the hallways, some going as far as the teachers' lounge to get refreshments. He noted that he locked the Music Room door every time he was required to be there. He estimated that he was summoned to the room on three or four occasions to unlock the doors for team members. He also noted that midway through the "B" game, he heard the piano being used, and went to the Music Room where he discovered Baldwin-Woodville team members climbing on shelves and playing with a keyboard. He told them to leave the room and go back into the gym. He did not, however, wait until the room cleared of students.

Prior to the game, the Grievant found a girl and two boys in the gym bouncing a basketball. These were the daughter and two sons of the Custodian who eventually reported the Grievant's alleged impropriety to Johnston. The daughter asked him to get more basketballs, and he refused to do so. He instructed the daughter to stop playing, and to wait for her coach to arrive. He then sent all of the children and their mother from the gym. The daughter was, he stated, upset.

He denied he ever intentionally looked into the music room. He also denied ever fiddling with the door handle or feigning duties in the area. The weather was wet and snowy, and the arriving crowd continually tracked in snow. He had difficulty keeping the hallways dry, and was continually mopping either melted snow or spills. He noted he was never alone in the hallways from which the Music Room is visible. Coach Keefer never spoke to him, and never told him to stay away from the Music Room. He was required to open the Music Room doors on several occasions, one of which involved certain team members locking other team members out of the Music Room. After the Baldwin-Woodville team left East Elementary School, he cleaned the Music Room. He noted, at that time, that certain paper snowflakes had been pulled from the ceiling and that one slat of the blinds covering the window on the south wall of the Music Room had been pulled from its track.

The Grievant noted that he did discuss the allegations with Hoffman on January 28. He did not recall mentioning the incident with the other Custodian's daughter.

Roger Breault

Breault works as a Custodian/Leadman for the District. He assigns and oversees the Grievant's work. He noted that the Athletic Director determined that the Music Room was the only lockable changing area for away teams. Breault noted that on January 21 he received a call from the Music Teacher at East Elementary School. She told him she was upset by the damages to her room, and by the fact that her desk had been rummaged through. Breault and maintenance staff meet on a monthly basis to discuss work related problems and any complaints regarding maintenance. He has specifically discussed with maintenance staff, at these meetings, the need to avoid situations in which any impropriety involving students could be perceived.

Further facts will be set forth in the DISCUSSION section below.

THE DISTRICT'S POSITION

After a review of the factual background, the District argued that Hoffman learned of the incident within two days of the basketball game, and acted promptly to investigate. He received seventeen statements from members of the seventh grade basketball team from Baldwin-Woodville. A review of those statements establishes, according to the District, that the Grievant repeatedly positioned himself to look through the narrow, uncovered windows of the music room doors. This conduct spanned five to perhaps fifteen minutes, and went on even after he had been told to leave. Hoffman confronted the Grievant with these allegations, and received, the District argued, an inadequate response. None of the seventeen students who wrote a statement, and none of the five students who testified, had any motive to lie. It necessarily follows, the District concluded, that the grievance must be denied.

THE UNION'S POSITION

That the District may have erred in placing the Baldwin-Woodville team in an area open to view from the hall does not, the Union contended, establish cause for discipline. January 20 was a snowy night, and the crowd was a large one, entering from each of the doors to East Elementary School. The Baldwin-Woodville team members were, the Union contended, boisterous and required supervision. This background establishes, according to the Union, that the Grievant had work related reasons to be in the hallways around the music room.

That the crowd was large and spilled into the hallway establishes, the Union contended, that the Grievant could not have done what he is accused of, since a parent or a student would have observed him. The Union argued that the written statements are inconsistent; were not offered without prompting; and were unaccompanied by any parental complaints. The initial complaint, according to the Union, arose because the Grievant had to tell the daughter of another custodian she could not play in the gym before the game. That girl suggested to the Baldwin-Woodville players that the Grievant was watching them dress, and her father brought the complaint of the Baldwin-Woodville players to the District's attention. The Union concluded that the incident had been blown far out of proportion, and that the evidence cannot support a finding of just cause for the suspension.

DISCUSSION

The issue is stipulated, requiring a just cause analysis of the Grievant's suspension. What constitutes a just cause analysis has been stated in various ways. Examining differing statements of the analysis highlights the difficulty posed by the grievance.

One of the most cited definitions of just cause is that of Arbitrator Carroll Daugherty. In Enterprise Wire Co., 46 LA 359 (1966), Daugherty posited seven questions and twenty-one notes defining a just cause analysis. 2/ The seven questions pose a standard of review regarded by some as the basis of just cause. An application of those standards to the facts posed here affords little reason to question the propriety of the discipline, and highlights the difficulty posed in the litigation of the grievance.

The first two of the seven standards are not in doubt. That peeping at middle school girls risks discipline is not an offense requiring forewarning.

2/ 46 LA at 363-365. The seven questions are: (1) Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?; (2) Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?; (3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?; (4) Was the company's investigation conducted fairly and objectively?; (5) At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?; (6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?; and (7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee with the company?

3/ If it was, Breault's discussion, during a monthly staff meeting, on the need to avoid situations in which even the appearance of impropriety could be implied fulfills this standard. That the District could discipline to protect the privacy rights of adolescent girls is, without question, a "managerial order reasonably related to the operation" of the District and rooted in "performance that the (District) might properly expect" of the Grievant.

The Union has noted that Hoffman did not independently verify the statements he received from Lones, and did not independently confirm the information he received from others. This does not, however, offer a basis to doubt he made "an effort to discover whether (the Grievant) did in fact violate . . . a rule or order of management." Hoffman directed an investigation of District and non-District sources of information. He collected the resulting evidence, weighed it, discussed it with the Grievant and then afforded the Grievant an opportunity to supplement it. That effort meets the third standard.

That Hoffman played a reviewing role in assessing the efforts of others effectively addresses the fourth standard. 4/ He read the student statements, discussed them with the Grievant, and offered the Grievant an opportunity to further respond after their discussion. The Grievant did not respond, and Hoffman acted on the evidence available to him. There is no persuasive evidence he failed to act on the evidence in an fair and objective manner.

The seventeen statements submitted to Hoffman manifest an internal consistency. That seventeen girls would submit such statements is "substantial evidence" that, as Hoffman described it, "some, if not all, of the allegations are true." There was no apparent reason for the seventeen girls to lie about the incident, and no apparent reason to conclude the consistency of the statements reflects something other than fact. Against these statements, Hoffman had only the Grievant's general denial. In sum, Hoffman had obtained the "substantial evidence" of guilt required by the fifth standard.

The sixth standard plays no role here since this is the sole incident of its type. There is no basis to doubt the District applied "its rules, orders, and penalties evenhandedly."

The seventh standard is the sole standard subject to meaningful doubt. The Grievant had no prior record of discipline. That a five day suspension appropriately reflects the seriousness of the "proven offense" cannot be doubted

3/ See Note 3, 46 LA at 363.

4/ See Note 2 to Question 4, 46 LA at 364.

if the "proven offense" is repeated and deliberate peeping into the music room. That the Grievant has no prior discipline cannot obscure that this type of offense undermines parental and student trust in the school system.

The final standard, however, highlights the difficulty in a strict application of the Daugherty standards. The "proven offense" highlighted by this standard focuses primarily on the proof obtained by Hoffman, not on the proof adduced at hearing. 5/ The tension between the evidence adduced at hearing and by Hoffman prior to the February 1 suspension is the fundamental difficulty posed by the grievance.

The Daugherty standards are not universally accepted, and I am reluctant to imply those standards into the parties' agreement. In the absence of a stipulation, I believe a just cause analysis turns on two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects its disciplinary interest. This does not attempt to state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements which must be addressed and relies on the parties' arguments to flesh out that outline. The more procedural review of Enterprise Wire highlights that the differences between the "record" produced in February and the "record" produced in June pose the fundamental problem for resolution. The problem must be resolved by addressing the elements noted above.

That the District has demonstrated the existence of conduct by the Grievant in which it has a disciplinary interest cannot be seriously questioned. The credibility conflict pointed to by the parties is not posed by this conclusion. The Grievant acknowledges that he was in the area of the music room while the Baldwin-Woodville team members changed. He asserts that his duties required him to be there. This ignores that the primary source of the complaints is the five to fifteen minute period after the arrival of the Baldwin-Woodville bus. That fans entered from several entrances on a snowy evening and may have wandered into the hallways in front of the music room does not explain why the Grievant had to be there for the five to fifteen minutes necessary for the Baldwin-Woodville team to change. The entrance closest to the music room was not the primary entrance, and it is not apparent why the Grievant chose to continue his duties in the music room area while the Baldwin-Woodville team changed. That the Grievant had to get chairs for the game may account for his presence in the area. There was, however, no evidence that he could not have obtained chairs without walking by the music room. More significantly, this offers no explanation for why the Grievant was compelled to sweep or mop the area for the five to fifteen minutes crucial to the discipline.

The record affords no persuasive basis to doubt that the Grievant performed duties in the music room area while the Baldwin-Woodville players changed. The District has a disciplinary interest in this lapse of judgment. Admittedly, the lapse in judgement to have the girls change in a room with uncovered windows was not the Grievant's. That lapse in judgement cannot, however, be taken as an excuse for the Grievant's lapse in judgement. That the Grievant cannot be expected to understand the sensitivity of this point is questionable as a general conclusion. It is, in any event, untenable in light of Breault's discussion with Custodians that even the appearance of impropriety involving students must be avoided.

5/ See Note 3 to Question 5, 46 LA at 364.

This disciplinary interest is, however, only background to the fundamental issue of whether the Grievant deliberately put himself in the area and acted to look in on the Baldwin-Woodville team members while they changed.

The conflict between the evidence adduced at hearing and the evidence available to Hoffman on February 1 turns on witness testimony. More specifically, the conflict turns on reconciling the various accounts. The Grievant's testimony was not internally inconsistent. Keefer's and the students' testimony form something less than a seamless fit. Keefer testified he first learned of peeping allegations at a team meeting held perhaps several days after the incident. Only Van Soneren's testimony even intimates such a meeting occurred. Beyond this, each of the testifying students stated Keefer was aware of the incident on January 20, and told the Grievant to stay out of the area. Conflicts between the testimony of the student witnesses are also apparent. The conflicts range from the inconsequential, such as whether the Grievant carried a mop or a broom at the time the team was changing, to the significant. Examples of the latter include whether the Grievant repeatedly walked back and forth from a drinking fountain to look into the music room and when he came close enough to the door to jiggle the handle.

These conflicts make it impossible to isolate, with scientific precision, what the Grievant did on January 20. It is not possible, from the testimony, to determine if, when, or how many times the Grievant jiggled the door handle to the music room. The record is, however, sufficient to establish that the Grievant conducted himself in a fashion which invaded the privacy of the Baldwin Woodville team members and intimidated them.

Even the conflicts in the testimony do not obscure the underlying consistency which struck Hoffman on his review of the written statements. The accounts of the five testifying students vary on the details, but each account describes a repeated series of casual visits to the music room which afforded the Grievant the opportunity to look in. The subtlety of some of the looks must be acknowledged, but the number of the written statements and depth of feeling of the testifying witnesses establish that the looks were not so subtle to be ignored or to be inoffensive.

This consistency cannot be accounted for without concluding it derives from a core of fact. The students testified voluntarily, based on the discomfort each had felt on January 20. Keefer's testimony establishes the five who testified are acquaintances, not members of the same clique or "best friends." While the allegations of the written statements of the team members who did not testify cannot persuasively be used to corroborate the detail of the testimony of the five who did, the existence of those statements underscores that the events of January 20 were offensive to the bulk of the team.

Nor does it appear that administrative personnel suggested the responses elicited on January 25. Streeck apparently met twice with team members. The first meeting, noted only in Van Soneren's testimony, would have occurred after Lones asked Streeck to determine if any team members had information to corroborate the rumor heard by Hoffman. That meeting arguably suggested an impropriety had occurred. However, there would be no way of seeking the information without somehow suggesting an impropriety. More significantly, neither this nor the January 25 meeting manifest an attempt to suggest a particular response from the players. At most, Streeck sought a statement on anything unusual or obscene perceived by the players. Each student testified Streeck did not allow any talking while the team members who acknowledged seeing something offensive prepared their statement. Beyond this, the team members understood Streeck's instruction to be that they should not compare notes or write anything other than their personal recall. Any players who did not see anything on January 20, or were unwilling to acknowledge it, were permitted to leave without making a written statement. The existence of the seventeen statements does, then, lend support to the conclusion that something generally perceived by team members as offensive occurred on January 20.

Significantly, there is no persuasive basis to impeach the five students' testimony. Keefer's testimony does not, in part, mesh well with the students'. If his testimony is taken as the bedrock upon which credibility is to be founded, however, the Grievant's testimony appears no more solid. Keefer testified the New Richmond Coach directed him and his teams to the music room. Each student and the Grievant noted that the Grievant showed them the room. The Grievant, unlike Keefer, testified that he instructed Keefer on locking and unlocking the music room doors. More significantly, Keefer and each student agreed Keefer said something to the Grievant to the effect that the team was using the room as a changing area, and he should not be cleaning there. The students testified Keefer did this after some team member or members complained. Keefer recalled no such complaint. The Grievant denied Keefer said anything to him, and his testimony would indicate Keefer had no reason to tell him it was a changing area, since he had shown them to the room and instructed them on how to keep it locked. I am convinced Keefer said something to the Grievant to keep him from the music room area. That the statement was made is meaningful without regard to what prompted it. If made before the team members started to change, it establishes the Grievant kept himself in the area in spite of an express instruction. This makes the lapse of judgement discussed above aggravated. If made after the team members started to change, it confirms the existence and significance of team members' complaints.

That the testimony of Keefer and his team members form less than a seamless fit does not, in the absence of other evidence, undercut that testimony. That the students' testimony conflicts on whether anyone shouted at the Grievant indicates nothing more than the bedlam in the music room. Apart from any individual emotional impact, the general chaos would have been perceived differently based on each student's location in the room.

More significantly, the Grievant's testimony does not make the inconsistencies noted above appear to be anything more than the inevitable vagaries of individual recall. His testimony offers no explanation for the general panic related by the testifying students or the general perception of being watched inherent in the written statements. It is difficult to conclude that either the panic or the general perception was fanciful. Whatever the difficulties that Keefer's or the students' testimony pose regarding when the Grievant appeared in the doorway throughout the evening on January 20, the Grievant's account leaves unanswered why his duties required his presence in the music room area for the five to fifteen minute period following the arrival of the bus. The bulk of fan traffic and its consequences would, presumably, come closer to the start of the game than to the time the teams arrived.

Nor are other ambiguities traceable to the students' testimony clarified by crediting the Grievant's. If it is difficult to understand why the students did not complain more adamantly to Keefer on January 20, it is no less perplexing why the Grievant did not tell Hoffman in February about the behavioral problems he testified to in June. If the students damaged the music room, it is not clear why Keefer did not see the damages in his final inspection of the music room or why the Grievant did not either attend to them as he cleaned the room after the game, or report them. Most disturbing of all is the lack of any indication, in the Grievant's testimony, that the presence of girls changing behind uncovered windows required any adjustment in his duties for the period of time necessary for them to change.

Concluding there is a factual core to the students' testimony does not mean the Grievant's account must be rejected because he works alone and cannot offer corroborating evidence. Rather, his own testimony puts him in the area of the music room at a crucial time, and affords no basis to question the internal consistency of the students' testimony. In sum, the evidence will not yield a precise picture of what the Grievant did on January 20, but establishes that he put himself in the area of the music room while the Baldwin-Woodville team changed, and took the opportunity to look into the music room.

The final element of the cause analysis is whether the five day suspension reasonably reflects the District's disciplinary interest in the Grievant's conduct. This poses a troublesome point. The intimidating nature of the Grievant's conduct should not be overstated. No parent of a Baldwin-Woodville team member complained about the incident. Peterson characterized it as "not that much of a big deal." However, the incident cannot be trivialized.

Public school students can, and should, expect their privacy to be honored. Violations of that trust cannot be ignored. Hoffman's February 1 suspension balances these considerations by noting further incidents could result in discipline or discharge. The refusal to impose immediate discharge avoids overstating the intimidating nature of the conduct. The statement that further incidents could result in additional discipline or discharge is, in a sense, rooted in the admonition of Article 9, Section 2, that disciplinary steps "are intended to be corrective measures."

The troublesome nature of the suspension is that, under Article 9, any suspension from one through five days would indicate that discharge is potentially the next step. Since a one day suspension indicates this as well as a five day suspension, four of the five days arguably constitute not "corrective measures," but punishment. Under any standard of review, however, the issue is not whether I would impose the sanction the District did, but whether that sanction reasonably reflects the District's disciplinary interest in the Grievant's conduct. Hoffman's decision to impose a five day suspension to underscore the significance of the breach of trust involved cannot be dismissed as unreasonable.

In sum, the suspension stands under either my own or Daugherty's formulation of the just cause standard. Discussion of the Daugherty standard underscores that, from a procedural point of view, Hoffman had a reasonable basis on February 1 to act as he did. This conclusion is complicated by the difference in the evidence available to Hoffman in February and to me in June.

Conflicts within witness testimony pose the most troublesome difference. Those conflicts, however, are insufficient to question the reasonableness of the District's action.

AWARD

The District did have just cause to suspend the Grievant for five days

without pay from February 2, 1994, through February 8, 1994.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 6th day of July, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator