BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION

and

MILWAUKEE BOARD OF SCHOOL DIRECTORS

Case 237
No. 47011
MA-7135
Thomas Clark Suspension Case

Appearances:

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

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

ARBITRATION AWARD

On February 12, 1992, the Milwaukee Board of School Directors (hereinafter referred to as either the MBSD or the District) and the Milwaukee Teachers' Education Association (hereinafter referred to as either the MTEA or the Association) requested that the Wisconsin Employment Relations Commission designate the undersigned as an arbitrator to hear and decide a grievance involving the suspension of Thomas Clark, a teacher with the Milwaukee Public Schools. Hearings were held on March 9th and 10th, 1992 at the District offices in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the case. A stenographic record was made of the hearings, and a transcript was prepared and forwarded to the parties and the undersigned. The parties submitted post hearing briefs, and the Association submitted a reply brief. On June 17th, the District notified the undersigned that it would not be submitting a reply brief, and the record was closed.

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

ISSUE

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

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

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

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

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

A. Substantive Issue

Did the Board violate Part IV, Section N of the MBSD/MTEA Teacher contract when it suspended Thomas Clark without just cause for the period from August 29, 1991 to November 22, 1991?

B. Procedural Issues

Grievance 91/132:

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

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

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

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

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

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

Grievance #91/139:

Did the Board violate Part II, Section C and Part IV, Section N of the contract on September 18, 1991, when Associate Superintendent Aquine Jackson (a superintendent level official) conducted the Part IV, Section N(1)(b) conference where the contract section requires that such conference be conducted by the community superintendent or his designee (an administrative specialist - level official) so that the second step action can be progressively reviewed by a higher level official at the third step?

Grievance #91/172:

1. Did the Board violate Part IV, Section N(E)(1) of the contract when, despite the complexity of the three related cases it, on November 4 and 6, 1991, placed unreasonable restrictions on the presentation of the teachers' defenses which prevented the teachers from presenting necessary, but lengthy documentary and testimonial evidence?

2. Did the MPS administration violate the rights of Thomas Clark to a full and fair hearing under Part IV, Section N(E)(1) of the contract, when its counsel whispered messages to administration witnesses as they were being cross examined?

3. Did the MPS administration violate the rights of Thomas Clark to a full and fair hearing under Part IV, Section N(E)(1) of the contract, when its counsel asked false and misleading questions of Eric Ransom in an attempt to prejudice the Board

and thereby penalize Mr. Clark for his representative's efforts to interview relevant and necessary witnesses as to the facts of the case?

4. Did the Board and the Superintendent of Schools violate Part IV, Section N(E)(1) of the contract by having the superintendent join the Board in its private deliberations as it reached its decision after the conclusion of the evidentiary of November 4, 1991?

If so, what should be the remedy?

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

PERTINENT CONTRACT LANGUAGE

Part II:

***

C. MANAGEMENT RESPONSIBILITIES

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

***

Part IV:

***

N. ALLEGATIONS OF MISCONDUCT

1. MISCONDUCT. No teacher shall be suspended, discharged, or otherwise penalized, except for "just cause." No teacher shall be involuntarily transferred, nonrenewed, or placed on a day-to-day

assignment as a disciplinary measure. In the event a teacher is accused of misconduct in connection with his/her employment, the accusation, except in emergency cases as referred to herein, shall be processed as follows:

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

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

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

d. The superintendent shall, within five (5) working days, review the decision of the assistant superintendent of the Division of Human Resources and issue his/her decision thereon. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure in cases not involving a recommendation for dismissal or suspension. A Teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 788, Wisconsin Statutes.

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

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

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

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

2. EMERGENCY SITUATIONS. When an allegation of serious misconduct which is related to his/her employment is made, the administration may conduct an administrative inquiry which would include ordering the teacher to the central office or authorizing him/her to go home for a period not to exceed three (3) days. Authority to order an employee to absent himself/herself from work shall be vested in the superintendent or his/her designee. The administration shall notify the MTEA as to the identification of its designees. In no case can the designee be a member of the bargaining unit. The MTEA shall be notified previous to the decision.

No teacher shall be temporarily suspended prior to the administrative inquiry, not without the opportunity to respond to the charges and have representation of his/her choice as set forth above. No teacher may be suspended unless a delay beyond the period of the administrative inquiry is necessary for one (1) of the following reasons:

a. The delay is requested by the teacher.

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

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

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

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

FACTUAL BACKGROUND

The District is a municipal employer providing general educational services to the people of Milwaukee, Wisconsin. The Association is the exclusive bargaining representative for certain of the District's employees, including a bargaining unit of 6,000 teachers. The grievant, Thomas Clark, had been a math teacher at North Division High School for five years at the time of his suspension in September of 1991.

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

Ransom was disturbed by conditions at North Division, a 99% African-American school in a poorer area of the City. He believed that the school did not provide an adequate educational experience, and that part of the blame lay with the attitude of some members of the teaching staff.

In the Spring of 1991, Ransom agreed to work with NBC television's Expose program to produce a tape of conditions at North Division. He was provided with a television camera concealed in a bookbag, and instructed to surreptitiously film events during the day at the school. NBC instructed Ransom to film only the negative features of the school. In May of 1991, Ransom shot eight hours of film over about a one week period. Included in this footage was a conversation he had had with the grievant one day in the third floor corridor while the grievant was on hall monitor duty.

Ransom and the grievant were acquainted with one another, and were on friendly terms, although Ransom had never been in one of the grievant's classes. When he saw him, the grievant asked Ransom if he hadn't graduated and gone on to college. Ransom said he was done with classes but still had responsibilities as Class President. The two engaged in some small talk, and the conversation turned to the school system in Milwaukee and the problems of North Division. Ransom held forth on his view that a boarding school system was needed, with military discipline and authority vested in the schools to discipline and direct the lives of students. In particular, Ransom was critical of parents' inability to get their children to attend school. The grievant indicated that he was skeptical of the public's willingness to embrace Ransom's plan in the 1990's. The conversation then turned to attendance, as several students walked past and the grievant told them to get to class. The grievant said to Ransom: "It's so retarded, you know, they give you this little pink slip and say if anybody is tardy to class or in the hall, you put their name on it. They get detention. Don't serve detention, you get suspended. What it amounts to, if you come late to class, you get suspended. Now, tell me it makes sense. You're trying to get kids to class, and you suspend them, you know. What they need to do is find these knuckleheads that are truant all the time and smack them a few times…" Ransom interjected: "Give them the boot…" The grievant continued: "…slap their mothers."

The conversation continued after that point, with the grievant saying: "If they're sticking all that money right here, and the kids aren't even coming here. Christ, we got 1,400 kids and 500 are benefiting from all the money they are sticking into the school." Ransom replied: "Yeah, correct." The grievant continued: "And the rest of the kids are off in the streets."

The tape shot by Ransom on that day was delivered to NBC, and the quoted portions were included in an edited version along with other edited footage. None of the conversation between Ransom and the grievant preceding the quoted portions was included in the edited tape. In August of 1991, NBC contacted the District and advised the superintendent's office that North Division would be the subject of a story to be broadcast on September 1st, immediately prior to the opening of school. The edited version was made available for an August 22nd screening by Dr. Howard Fuller, the new Superintendent of Schools, Dr. Austin, Deputy Superintendent Robert Jasna, Communications Director Denise Calloway and Donald Ernest, the Executive Director of the Association. The section involving the grievant was a small part of the overall tape, which showed, among other things, students playing dice in a classroom and students misbehaving during a reading period, both apparently while teachers were present. Three teachers, including the

grievant, were featured on the tape. NBC film crews were present at the screening, and taped Dr. Fuller's response for inclusion in the telecast.

Dr. Fuller was incensed by what he saw on the tape. He had a very strong concern about the effect that the broadcast of this tape might have on the opening of school at North Division. He discussed the available options with his staff, expressing his desire to take immediate action, including insuring that none of the three teachers would be in school when it opened. He was advised that an emergency misconduct proceeding was available under the contract, and on that same day had letters sent to all three teachers telling them to absent themselves from their duties effective August 30th (the first day for teachers to report for the Fall semester) and report to the District offices on September 4th for a meeting with District officials. The grievant was advised that he could be represented at the meeting by the Association, or whomever else he wished to have present. The purpose of having the meeting scheduled for September 4th was to be sure that none of the teachers would be in North Division High School when students reported on September 3rd for the first day of classes.

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

NBC ran the tape on its Expose program on Sunday, September 1st. The tape as shown on television did not include any of the footage featuring the grievant.

On September 4th, the District found probable cause that the grievant had engaged in serious misconduct in the form of "unprofessional verbal comments" and suspended him without pay effective September 5th. A meeting was scheduled with the Associate Superintendent, Dr. Aquine Jackson, for September 12th. The meeting was later rescheduled for September 18th.

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

> Based upon the video tape and the testimony presented at this hearing, it is my opinion that the comments you made to a former student, although in private, were unprofessional and unacceptable. As you are aware, the use of corporal punishment is in conflict with School Board policy. Your defense that the tape is

> taken totally out of context is not valid. Any comment relative to corporal punishment or a comment that refers to a student's mother in a negative manner is totally inappropriate regardless of the context of that specific comment. Your comments show a lack of commitment, good judgment, and concern for the students of North Division High School. These comments can only create an impression that the teacher making them has little concern for the welfare of his/her students. Although you have the right to your own opinion, your position as teacher does not allow you to promote your feelings to others within the school environment. The types of remarks you made to Eric can only have a negative impact upon students, parents, and the school environment. These statements are not only unprofessional but are unacceptable and will not be tolerated by this administration.
>
> As a result of the documentation and testimony presented at the hearing, I will recommend to the Superintendent that you be suspended without pay from your teaching position from September 5, 1991, through January 27, 1991, which is the end of the first semester, and that this letter become part of your personnel file.

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

The Board scheduled a hearing for the evening of November 4th, along with the hearing for another of the teachers featured in the videotape. The Association's attorney requested a rescheduling of one of the hearings so that he could more comprehensively address the cases. The second hearing was rescheduled, but another matter was placed on the Board's agenda for the 4th. As a result of this, the Board limited each side of the case to approximately one hour for its presentation, and a break in proceedings was taken at 8:30 p.m. to deal with the other matter. During the course of the hearing, Ransom was called by the District and was later recalled adversely by the Association. As the Association's counsel was beginning his questioning, counsel for the District whispered something to the witness. Counsel for the Association objected, and the Committee Chair directed the City Attorney to direct comments to the Chair rather than to the witness, and to allow Counsel for the Association to continue his examination. Counsel for the Association proceeded with his examination, including questions about a statement Ransom had previously given to representatives of the Association. On cross-examination, Counsel for the District asked Ransom whether he had been advised of any right to counsel he might have before giving the statement.

Following the conclusion of the evidence and the arguments by counsel, the Board Committee withdrew to deliberate in a private caucus room behind the Board room. While the Board was absent, Association representative Barry Gilbert noticed that the Superintendent was missing. After the Board emerged from their deliberations, Gilbert asked the Committee Chair,

Donald O'Connell, if the Superintendent had been present in the caucus room and participating in the discussion. O'Connell said that he had been. The Committee then voted to impose an unpaid suspension on the grievant, extending from September 5th through November 22nd.

A series of grievances were filed concerning the procedural aspects of the case against the grievant, including the alleged misuse of emergency misconduct proceeding, the use of upper level District personnel at the lower levels of the appeal process, pre-judgment of the case by the Superintendent, a lack of adequate hearing time, improper coaching of witnesses by Board Counsel, the asking of misleading questions by Board Counsel and the participation of the Superintendent in the Board Committee's deliberations. They have been joined in this proceeding with the substantive grievance over the merits of the discipline. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the District

The District takers the position that the grievant engaged in misconduct and was suspended for just cause under the Agreement. There is no question that the grievant said the things reflected on the videotape viewed by Dr. Fuller, and said them on school premises during his normal workday. The only question, the District submits, is whether the statements rise to the level of misconduct.

Superintendent Fuller testified that he expects teachers to care about children and to be sensitive to the issues in those children's lives, including racial issues. A major portion of the Superintendent's program for change in the Milwaukee Public Schools involves accountability for both faculty and students, and both the expectation of sensitivity and the philosophy of accountability are widely known within the community. The grievant's comments about slapping students' mothers, even if made without malicious intent, were insensitive to the racial issues at North Division. As Fuller testified:

> First of all, I mean, I thought it was inappropriate for any teacher to be talking about slapping anyone, whether it was said in jest or not. I thought it was doubly a problem that there is a white man standing up talking about I want to slap your mothers in a school that is 99% black. And I felt that it was not only insensitive, but it could have been very inflammatory if it in fact appeared on television.

The inappropriateness of the grievant's comments was also recognized by two of the three Board members who reviewed this case and decided upon the three month suspension. Director Lucey commented that the grievant's remarks were "entirely inappropriate" and did not meet the "level of sensitivity that we demand of our teachers." Director Mitchell concurred, noting that even joking comments can be very offensive and destructive where racial issues are involved.

The grievant should have understood that his comments, whether actually offensive to Eric Ransom, would have been offensive to most members of the minority community served by North Division. As noted by Dr. Fuller, most racist comments are later defended as having been meant a different way, or having been unintentional. They nontheless do serious damage. The grievant failed to recognize that, and continues to maintain that he did nothing inappropriate. Only by having a neutral third party -- in the person of the arbitrator -- acknowledge that his statements rise to the level of misconduct will be grievant realize the need for care in selecting his words, and sensitivity to the volatile state of race relations in some sectors of the School District.

The District argues that, given the clearly inappropriate nature of the grievant's statement to Ransom, the only substantive disciplinary issue is the severity of the penalty imposed. Although the District has employed a wide range of penalties for verbal misconduct, the arbitrator must be mindful of the fact that each case is determined on its own merits and there should be no generalization on the subject of penalties. The District notes, however, that there are several instances of teachers being terminated or resigning for engaging in verbal misconduct. Absent specific information on each of the prior cases, the arbitrator can rely only upon the range of penalties in judging whether a three month suspension is appropriate. Clearly it is less severe than a dismissal, and thus lies within the area of managerial discretion.

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

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

Clearly, this was an emergency, since Dr. Fuller identified the enormous potential for unrest and disruption at North Division High School had the grievant and the other two teachers been present on the first day of classes. The presence of a white man who had suggested that black students' mothers should be slapped would have been provocative to say the least. The Superintendent acted responsibly in taking the only course open to him to defuse the situation.

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

Superintendent had discretion as to which route he chose to use in this emergency situation.

As for the various due process complaints raised by the Association, the Board dismisses them as a case of throwing in the kitchen sink, in hopes that the arbitrator will be persuaded by the sheer number of allegations that something must have been done incorrectly. Ignoring the most minor of the allegations, the Board addresses the Association's claims that the emergency misconduct procedure was improperly invoked, and that Superintendent Fuller improperly participated in the Board's decision making process.

The interposition of Associate Superintendent Dr. Aquine Jackson in the second step of the grievance procedure is not violative of the grievant's due process rights. While the second step had previously been handled by a community superintendent, Dr. Fuller's reorganization of the District eliminated this position. The Associate Superintendent has no greater powers in personnel matters than the Director of the Department of Human Resource Services, who heard the case at the third step. The Association has failed to identify any due process violation, and at most a minor technical contract violation, in the sequence of hearings.

The claim that Dr. Fuller participated in Board deliberations on this discipline is supported only by the brief testimony of Barry Gilbert, who said a Board member told him this. The Board member was not called as a witness, nor was Dr. Fuller asked about this alleged participation. Thus there is scant evidence that Dr. Fuller did participate, and no evidence whatsoever about the extent of any participation. Even if he did participate, however, the District asserts that this would not taint the Board's actions. The U.S. Supreme Court's seminal decision in Goldberg v. Kelly, relied upon by the Association for the bulk of its due process arguments, promises an impartial decision maker. Here the Superintendent acted in the role of reviewer of the record, rather than as an investigator and his presence in the Board room, if he actually was present, should not be presumed to have influenced the Board's decision in any way. The District concedes that there is precedent for the proposition that it is inappropriate for the Superintendent to participate in Board decisions where he has played a role in the discipline. However, to the extent that Arbitrator Imes' Clifton Award suggests that the appearance of unfairness created by the Superintendent's presence may be equated with actual unfairness in the process, the award is simply wrong and should be overruled. The one does not logically follow from the other. The sounder principle, and the one that should apply in this case, is that compliance with the spirit of the grievance procedure should suffice where technical failings have not prejudiced the grievant. Here the grievant was afforded a full and fair hearing before the Board, and the Board reduced his discipline from one semester to three months.

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

The Position of the Association

The Association takes the position that there was no misconduct in this case. The grievant

engaged in a quiet, lighthearted and respectful conversation with a student he believed had graduated, and his comments were largely in response to Ransom's remarks about the problems of truancy and discipline in the schools. The grievant had no idea whatsoever that he was being filmed, or that his statements would be severely edited in a deliberate attempt to create a sensationalized picture of conditions within the public schools. While the grievant's choice of words would obviously have been inappropriate for a public forum or a classroom, they were perfectly all right in the context of his private discussion with Ransom.

Ransom has initiated the discussion of discipline and attendance, and had expressed extreme views about students being signed over to the school system, which the grievant attempted to moderate. It was Ransom who first suggested that the students' mothers were at fault for their non-attendance at school. The grievant was, in the context of the private discussion, advocating that the system place responsibility on the parents for encouraging attendance at school.

Ransom testified that he did not perceive anything offensive or racist in the grievant's remark. He understood that the grievant was simply saying that parents had to get the kids up in the morning, get them to school and check up on them. While the participants in this conversation understood its true, inoffensive meaning, the Superintendent saw only a severely edited version which, conjoined with other edited scenes, made the situation at North Division High School appear to border on anarchy. His outrage at the overall impression created by the videotape and his concern over possible public reaction led him to respond publicly with suspensions and prejudicial comments to the newspapers, before conducting any investigation.

The Association asserts that, if the grievant's comments warranted any response, they called for corrective action under the contract's evaluation procedure and perhaps an in-service program on racial sensitivity. The use of emergency procedures was, the Association argues, inappropriate in that the Superintendent had no particular concern about investigating the teachers' conduct but had a great concern with being seen to take decisive action and in defusing a controversy at North Division before school began. It is obvious, the Association claims, that District incorrectly applied emergency misconduct proceedings to what was at most an evaluation problem simply because that was the only means of removing the teachers from the school before classes began.

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

same end by using the correct section of the contract. \The District failed to realize that it had the right to temporarily transfer the grievant by using a 281-T evaluation card under the evaluation section of the contract, as interpreted by Arbitrator Seitz in the Adamski Award.

Even if the grievant had engaged in some form of verbal misconduct in this case, the Association points to the dispositions made in previous verbal misconduct cases, and suggests that a three month suspension is grossly disproportionate to the alleged offense and inconsistent with past discipline. Neither the Superintendent nor the Board could rationally have concluded that a three month suspension was fair, given that other cases have yielded reprimands and/or brief suspensions. Thus, the Association concludes, the discipline in this case was wholly unwarranted and grossly out of step with the norms of discipline, even if the allegations had been proven.

On the procedural issues raised by the case, aside from the misuse of the emergency procedure, the Association asserts that the District has ignored and subverted the contract and the basic notion of due process. At the outset, the Association argues that the District's judgment of the grievant's performance in this case is an act of evaluation, and that reliance on a hidden camera to provide a basis for evaluating employees is fundamentally unfair. The evaluation procedure is designed to be corrective, and surreptitious evaluation, by whatever means, is inconsistent with the intent of the contract.

The processing of the grievance in this case was inconsistent with the letter and the intent of the contract. Dr. Fuller dismantled the administrative structure created by his predecessor, leaving no clear order of progression for the consideration of appeals. Associate Superintendent Aquine Jackson heard this appeal at the second step, and his recommendation was then reviewed by his subordinate, Ray Nemoir, at the third step. This effectively denied the grievant due process, in that the third step appeal became meaningless.

The Association asserts that the conduct of the hearing in this case violated the fundamental notions of due process. The Board set time limits on the presentation of the grievant's case which rendered it virtually impossible to present an adequate defense. Given the complexity of this matter, the one hour allotted to the Association at the November 4th hearing was plainly insufficient, and this denied the grievant his contractual guarantee of a full and fair hearing. The fairness of the hearing was further undermined by the District's Counsel, who whispered to Ransom while he was on cross-examination and then suggested, through questions to Ransom, that the Association had somehow denied the student some non-existent right to counsel. These actions directly undercut the grievant's right to counsel before the Board and the right of cross-examination.

Finally, the Association asserts that the Board Committee's deliberations were faulty, since Superintendent Fuller attended the Committee's private deliberations after the hearing. Arbitrator Imes' Raymond Clifton Award addressed this issue, and clearly held that the Superintendent should not be present during these deliberations.

For all of these reasons, the Association asks that the discipline be expunged from the grievant's record, and that he be made whole for his losses. Further the Association asks for a series of orders directing the District to comply with the principles of due process embodied in the Agreement and in Goldberg v. Kelly, as well as a prohibition on clandestine surveillance, direction to the Superintendent not to prejudge cases, and direction to the Board to restrain its counsel during hearings, to allow adequate time for misconduct hearings, and to refrain from ex parte contacts with the Superintendent.

DISCUSSION

Just Cause for Discipline

The central issue in this case is whether the District had just cause to suspend the grievant for three months in the Fall of 1991. I find that they did not, and therefore direct that he be made whole for compensation lost during the period of his suspension.

The grievant was disciplined for making unprofessional verbal comments. More specifically, the grievant is alleged to have exhibited insensitivity to the racial implications of a statement he made during what he assumed to be a private conversation with Eric Ransom about discipline and attendance problems at North Division High School. The portions of the conversation with Ransom that prompted this discipline were:

> Clark: ""It's so retarded, you know, they give you this little pink slip and say if anybody is tardy to class or in the hall, you put their name on it. They get detention. Don't serve detention, you get suspended. What it amounts to, if you come late to class, you get suspended. Now, tell me it makes sense. You're trying to get kids to class, and you suspend them, you know. What they need to do is find these knuckleheads that are truant all the time and smack them a few times…"
>
> Ransom: "Give them the boot."
>
> Clark: "Slap their mothers."

Unbeknownst to the grievant, NBC television's Expose program had equipped Ransom with a minicam in search of footage for their television show. Ransom had been instructed by the producer to film negative things about life at North Division. From the conversation with the grievant and eight hours of other film taken during a one week period, the network edited together a short segment for their program portraying North Division as a school out of control. Students were shown supposedly playing dice in a classroom while a teacher stood by doing nothing. Other students were portrayed wandering in and out of classrooms, and misbehaving while a

teacher sat by reading quietly. Some of this was accomplished by juxtaposing shots taken at different times and in different locations. In the case of the conversation between Ransom and the grievant, the preceding portions of the conversation, during which Ransom raised the issues of discipline and the role of mothers in permitting truancy, and proposed placing the schools in the shoes of parents for discipline, were edited out entirely, to create the impression that the grievant, a white man, was initiating a casual conversation in which he seriously suggested a desire to slap black women.

I have previously discussed the preconditions for discipline under this contract: "Just cause for discipline exists where (1) the employee actually engaged in the conduct alleged and (2) the conduct violates the contract, established work rules or recognized norms of the industry." (Glenn Kukla Discharge, 8/90, at page 53) In this case, there is no question that the grievant made the comments attributed to him. The question is whether the comments violate the recognized norms of appropriate discussion in the school district. In order to determine that, the comments must be considered in context.

The norms which the District alleges have been violated dictate that faculty be sensitive to the racial implications of statements they make in the schools, and particularly at a school such as North Division, with an overwhelmingly African-American enrollment and some history of controversy. I agree that this is an enforceable norm of conduct. The Association points out that Superintendent Fuller's emphasis on racial sensitivity cannot be said to have given the grievant notice of this expectation, since Dr. Fuller became Superintendent in July of 1991, after the conversation with Ransom. As noted in the Kukla Award, however, there are some things that are matters of common sense, and employees can be expected to conform their behavior to the dictates of common sense whether there is a specific rule in place or not. (Kukla, at pages 61-62). The making of racially inflammatory comments in any public school violates broadly recognized social norms, and has resulted in discipline in the District in the past. 1/

Having determined that sensitivity to cultural differences is a legitimate expectation for faculty members, the question remains whether the grievant's comments violate this expectation. Taken in the context of a private conversation, I conclude that they do not. Reading the grievant's version of the conversation together with Ransom's, it is clear that the grievant engaged in a fairly loose discussion of attendance problems in the schools, and the role of parents in combating truancy. The comment "slap their mothers" is a direct response to Ransom's suggestion that students be "given the boot", and a fair reading of the remark conveys the impression that the parent bears responsibility -- and should be accountable -- for having the children in school. Ransom made it clear that he understood the remark as such, and never believed that the grievant conveyed, or intended to convey, anything connected with race.

1/ See MTEA Exhibits 449-455.

The District argues that the grievant's comments are so insensitive, coming from a white man in an African-American school, that it does not matter what Ransom understood them to mean. Certainly some comments may be so inherently inflammatory that they may not be excused in the context of a public school, no matter what the audience's level of sensitivity or speaker's intended meaning. They are analogous to shouting "fire" in a crowded theater or joking about hijacking in an airport. More often, however, the appropriateness of a comment or turn of a phrase must be judged by its context. 2/ Here, a private conversation took place in an empty hallway between two people -- a teacher and a former student -- who understood perfectly what was said and what was meant. The words used by the grievant made sense in the context of that conversation and carried no racial connotation. The only danger of misunderstanding or inflammation in the community came from the threat by NBC to telecast the remarks in an entirely different and provocative context. Neither the grievant nor any other ordinary individual in the course of the work day could anticipate that a private conversation such as this would be technologically reconstituted and sensationalized by a national network.

Made in a different conversation, or to a different audience, the grievant's comments might have risen to level of misconduct under the collective bargaining agreement. The comments were, however, made in this conversation and to this audience. They conveyed an inoffensive opinion about a non-racial issue to a listener who took them in precisely the manner intended. The fault for the degree of upset and anxiety they might potentially have caused in the Milwaukee community lies not with the grievant, nor with Eric Ransom, nor with Superintendent Fuller, but with NBC television.

The record evidence does not support the allegations of unprofessional verbal comments against the grievant. Instead the record evidence indicates that the student, the grievant and the District were victimized by an unprincipled use of technology and power by the National Broadcasting Corporation. Ransom was used to sensationalize and polarize the school he hoped to assist. The grievant was placed in a false light. The District was placed in an untenable position by a broadcast which might fairly be said to have been deliberately designed to inflame the African-American community against the schools on the eve of the school year.

The District did not have just cause to suspend the grievant. The appropriate remedy is to

---

2/ As noted by Mr. Justice Holmes, in an opinion often cited in connection with the interpretation of labor agreements: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." See, Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985) at page 343. (Hereinafter cited as "Elkouri")

make him whole for all compensation lost by reason of his suspension between September 5, 1991 and November 22, 1991, less any unemployment compensation or other income which he would not have received had he been employed in his teaching position during that time, and the expungement of any reference to the discipline from the District's files.

Misuse of the Misconduct Procedure

The network contacted Howard Fuller, the new Superintendent of the Milwaukee Schools, in late August and informed him that they were going to show a segment on North Division on their September 1st telecast, right before the opening of school. He was shown the segment and asked for comment. Fuller reacted very strongly to the videotape, feeling that the conduct and attitudes displayed were totally inappropriate. He also immediately perceived the likely impact of the broadcast on the standing of North Division High School, and the school system in general, within the African-American community. He decided that the three teachers shown, including the grievant, could not be allowed to be in school on September 3rd, and consulted with his staff on how the three might be forced to absent themselves from North Division. He was advised that nothing in the evaluation provisions of the contract would allow removal of the teachers, but that this could be accomplished under the emergency misconduct section. He directed his staff to proceed with emergency misconducts against all three faculty members. The notices were sent to the teachers on August 22nd, with a meeting date set for September 4th, 13 days later.

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

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

the teacher may have engaged in serious misconduct.

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

The Association takes exception to the use of the emergency misconduct proceedings in this case on several grounds. It argues first that this was more properly an evaluation case, calling for training in issues of cultural diversity, than a misconduct case, calling for discipline. They further argue that any perceived need to remove the grievant from North Division should

have been handled with a 281-T evaluation card. 3/ The question of whether a case involves misconduct or a non-disciplinary evaluation issue is part and parcel of the just cause analysis and any remedy that might be ordered. If there is no just cause for discipline, the District should not have proceeded under the misconduct provisions. The fact that they erred in judging their case by imposing discipline is not a separate contract violation. It may of course be that a given case would present both disciplinary issues and evaluation issues, and in such a case the Board would have the option of deciding to proceed under evaluation.

The Association also asserts that the Superintendent misused the emergency misconduct procedure as a device to punish the teachers by removing them from the schools for three days without a hearing, rather than an opportunity to conduct a quick inquiry into the facts and determine whether serious misconduct had occurred, as the parties intended when they negotiated the procedure. The District responds to this argument by noting that the contract allows for removal with pay for up to three school days in an emergency situation, and asks if this was not an emergency, given the explosive situation created at North Division High School and the pending commencement of the school year, what might constitute an emergency?

Other than the title of the section, the emergency misconduct provision does not actually make reference to emergency situations as the trigger for ordering a teacher to temporarily absent himself from school. The right to conduct an administrative inquiry is triggered by "an allegation of serious misconduct which is related to his/her employment" and ordering an inquiry carries

---

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

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

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

with it the right to order the teacher out of the school with pay for up to three days pending the outcome of the inquiry. However, in deciding the seriousness of the allegation, the District is entitled to give weight to the overall context, and in this sense, the existence of an "emergency" situation might justify use of this procedure for conduct that, in another school or climate, would not justify invocation of the section. 4/

In this case, Dr. Fuller reasonably believed that the presence of the three teachers in North Division at the opening of schools would create an emergency if NBC went ahead with its plans to broadcast the excerpt he had seen. The Association argues that there is no evidence of this, but given the press coverage 5/ and the sensational nature of the edited film, I believe that the record

---

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

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

adequately supports the Superintendent's judgment about the likely reaction in the community. He was entitled to remove the grievant from the school in order to further investigate his conduct.

In reaching this conclusion, I do not mean to suggest that political expediency can justify the suspension of the normal discipline procedures. Dr. Fuller sincerely, but erroneously, believed that the grievant had engaged in verbal misconduct, in a school where particular care needed to be paid to racial sensitivity. It is the conjunction of the type of comments Fuller thought had been made, the looming dissemination of those remarks over network television and the impact on the teacher's working environment that constituted the emergency situation and, in Fuller's mind, exacerbated the seriousness of the misconduct.

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

While I am skeptical of the District's belief that a period of administrative inquiry may be measured backwards from the third work day of the school year, irrespective of break time available for investigation prior to that period, I find that it is not necessary to resolve this issue. The practical effect of the District's action in this instance was to pay the grievant for three days on which he would have been on unpaid suspension, had the administrative inquiry proceeded in exactly the same way but before the beginning of the teacher's work year. I find no indication that the extension of the inquiry period affected the District's decision making. Given the decision at each step of the appeal to find probable cause, the grievant was not prejudiced by the District's odd use of the three day removal provision.

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

process to impose discipline, the propriety of the District's approach need not be resolved herein.

Due Process Issues

Finally, the Association raises a host of due process issues relating to the fairness of the proceedings against this grievant. 6/ Several of these allegations, specifically the amount of time available for a hearing before the Board, the City Attorney's communication with a witness on the stand and the City Attorney's suggestion that the Association violated Ransom's right to counsel, do not, on this record, rise to the level of a due process denial. Of greater consequence are the Association's complaints that the grievance procedure was subverted at the second step, and that the Superintendent engaged in improper ex parte contacts with the Board.

The District is alleged to have ignored the upward progression of authority in the appeal procedure by having an Associate Superintendent handle the second step, while the third step review was conducted by the Acting Director of the Department of Human Resource Services. This change in procedures appears to flow from the elimination of the position of Community Superintendent and some confusion over the distribution of that position's responsibilities including second step appeals in misconduct cases. This is currently a topic of negotiations between the parties.

Certainly the contract follows the usual structure of grievance and appeal procedures by having decisions made at lower levels reviewed by officials having progressively broader authority. The Association's concern about having decisions reviewed by subordinate officials is completely legitimate, since it is inconsistent with the structure set by the contract and common sense suggests that an effective review cannot be had where someone is called upon to disagree with his superior. In this case, however, it is not completely clear that the review was conducted by a subordinate official. The Superintendent testified that the position of Associate Superintendent was not superior to the position of Director of the Department of Human Resource Services. He also testified that Aquine Jackson was at a higher level of authority than Raymond Nemoir. The confusion appears to spring from the fact that Nemoir was functioning in an acting capacity when this grievance was processed. Given this confusion and the practical impossibility of having the second step hearing conducted by the official named in the contract, I cannot conclude that the District violated the contract by having the Associate Superintendent conduct the second step hearing. Even if a violation had occurred, it would be purely technical in this case,

---

6/ The Association also raises the question of whether the use of a hidden camera to record teacher performance constitutes a violation of the negotiated evaluation procedure. The District did not initiate the use of the camera in this case and I find that the issue raised by the Association is not presented on this record. I therefore decline to express any view on the propriety of surveillance techniques under the evaluation provisions of the contract.

since contrary to the Association's fears, Nemoir overruled Jackson's recommendation of termination and instead proposed a one semester suspension.

Finally, the Association asserts that the Superintendent and the Board violated the grievant's due process right to a full and fair hearing. The violation springs from the Superintendent's participation in the Personnel and Negotiations Committee's deliberations on the grievant's appeal. The District counters by admitting that the Superintendent cannot participate in these hearings, but asserting that there is no evidence that his mere presence in the room had any effect of the outcome.

The evidence of Superintendent Fuller's participation in the Committee discussions is purely hearsay, based upon Barry Gilbert's recounting of a discussion had with Committee Chair O'Connell. However, the evidence is uncontradicted in the record despite the presence of Fuller for lengthy direct and cross examination during this hearing. In allowing hearsay testimony, I have advised the parties that the objection of hearsay in arbitration goes to weight rather than admissibility. Given the lack of any challenge to Gilbert's version of events, I find that the record is sufficient to establish that Fuller was present during the Committee's deliberations, and did participate in those deliberations.

In the Raymond Clifton Award, Arbitrator Imes discussed the propriety of the Superintendent's participation in Board deliberations over disciplinary matters, and found that the presence of the Superintendent was, in and of itself, a violation of due process:

> Thus, while it cannot be determined that the presence of the Superintendent in the Personnel and Negotiations committee deliberations actually influenced the decision of the Committee, it is sufficient in itself to conclude that the risk of unfairness did appear and that thus the grievant was denied the rights of due process as is provided under the full and fair hearing clause of the disciplinary procedure. (Clifton Award, 11/81, at page 16).

The District challenges the rationale of the Clifton Award, and urges that it be set aside. The contract provides for a highly structured series of hearings and reviews, patterned after the due process protections set forth in Goldberg v. Kelly with the decision maker at each step insulated from the preceding decision maker. In cases such as this, where the Superintendent appears to be the moving party behind the discipline as well as the reviewing officer at the third step of the appeal procedure, this process is somewhat unrealistic. However, the requirements of the contract are fairly clear and the Clifton Award is a rational interpretation of those requirements. The quoted portion of the Award is not simply an aside by the arbitrator. It represents the direct holding of the arbitrator on a contested point.

The parties have agreed that arbitrator's awards are to be final and binding (Part VII, §D), and the Clifton Award has stood for a decade, through several sets of negotiations, as the binding

interpretation of the Superintendent's role in Board deliberations. The District has not put forward any basis on which I may revisit the holding in Clifton, and I am not free to ignore the contract as negotiated by the parties and interpreted in past cases. Given this, and based upon my finding that the Superintendent participated in the Committee's deliberations in this matter, I find that the District violated the grievant's right to a full and fair hearing under the contract. In light of the decision that there was not just cause for discipline in this case, there is no need to determine what impact, if any, this has on the propriety of the discipline. The appropriate remedy is to order the Superintendent to refrain from attending and participating in Committee deliberations in misconduct cases which fall within the scope of the Clifton Award. 7/

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

AWARD

1. The grievant, Thomas Clark, was not disciplined for just cause. The appropriate remedy is to immediately make him whole for all losses suffered by reason of his suspension from September 5, 1991 through November 22, 1991, less any interim earnings which he would not have received had he been working at his teaching position, and to remove all references to this discipline from District files.

2. The District denied the grievant, Thomas Clark, due process as afforded under Part IV, Section N(E)(1) of the Agreement, by allowing Superintendent to attend and participate in the Personnel and Negotiations Committee's deliberations on the grievant's appeal, even though the Superintendent had functioned in an investigative capacity at the earlier stages of the procedure. The appropriate remedy is an order to the Superintendent not to attend and/or participate in such deliberations in the future.

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

Signed at Racine, Wisconsin this 22nd day of September, 1992:

7/ The arbitrator in Clifton based the due process violation on the fact that the Superintendent had played a role in the earlier disposition of the case, and wrote of the duty of an investigator to disqualify himself "where there is no need for the investigator to also be a part of the decision-making process…" I decline to speculate on the limits of the Superintendent's duty to disqualify himself, since Dr. Fuller clearly played an investigating role in this case as well, and the direct holding of Clifton therefore suffices to dispose of this case.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator