

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WAYNE POTTER and the NEW LISBON  
EDUCATION ASSOCIATION

and

NEW LISBON SCHOOL DISTRICT

Case 33  
No. 52870  
MA-9134

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of Wayne Potter and the New Lisbon Education Association.

Lathrop & Clark, Attorneys at Law, by Mr. Michael J. Julka and Ms. Malina R. P. Fischer, appearing on behalf of the New Lisbon School District.

ARBITRATION AWARD

New Lisbon Education Association, hereinafter referred to as the Association, and the New Lisbon School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association filed a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the nonrenewal of Wayne Potter. The undersigned was so designated. Hearing was held in New Lisbon, Wisconsin, on February 7 and 8, July 8 and 10, and September 4 and 5, 1996. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which was received on February 10, 1997.

BACKGROUND:

The grievant, Wayne Potter, was hired by the District in 1975 as a guidance counselor and was the K-12 guidance counselor for the first 15 years of employment and thereafter was the 7-12 guidance counselor. On April 24, 1995, the District nonrenewed his employment contract. The reasons were as follows:

1. Commencing with the 1991-92 school year and continuing to date, Mr. Potter's formal written evaluations and supplemental file documentation indicate poor performance,

and specific performance areas that were rated as needing improvement or not meeting expectations have not improved sufficiently to recommend renewal.

2. Mr. Potter's conduct has evidenced a blatant, insubordinate (or, at a minimum, negligent) disregard for deadlines and directives as evidenced by:
  - a. Failure to comply with state requirements and meet deadlines as well as his responsibilities as the District's Education for Employment Coordinator as documented by letters from Robert Gomoll (12/1/92) and Herbert Grover (1/5/93) from the DPI and Mr. Derrickson's letter to you on January 7, 1993.
  - b. Administrative directives issued on October 7, 1991 as a plan for improvement were not adhered to -- most specifically, development and follow up of four-year plans for each high school student beginning in the eighth grade.
  - c. Failure to comply with directive of August 29, 1994 to meet with each senior sometime during September or October for a follow up of four-year plans.
  - d. Failure to comply with directive of August 29, 1994 to keep a daily log which represents an hourly account of all activities and which is to be updated daily.

When the twenty standards were established by the Department of Public Instruction, hereinafter DPI, the District's two guidance counselors drafted a K-12 Guidance Counseling Program which was adopted by the District on June 5, 1991. It established a Developmental Guidance Program. Mr. Roger Derrickson became the District Administrator at the start of the 1991-92 school year. On October 4, 1991, a meeting was held with the grievant, Derrickson, High School Principal, Ken Adams, and Elementary Principal, Carl Paradise. A memo of that meeting states the following:

October 7, 1991

This memo is to document the meeting held at 9:45 A.M. on Friday, October 4, 1991 with Roger Derrickson, Wayne Potter, Ken Adams and Carl Paradise. The purpose of the meeting was to give some directives to Wayne Potter regarding components of the 7-12 guidance program which were discussed with the Board of Education at the September 19 meeting. The directives given to Mr. Potter were:

- I. Develop a four-year plan for every student entering high school before they register for classes for their freshman year. The plan is to be implemented this year for our current eighth grade students. The four-year plan will be designed to assure an annual follow-up contact by the guidance counselor to review and update the plan for each student individually. Follow-up interviews should be conducted as soon as possible following the start of the school year.
- II. A financial aid seminar will be conducted for parents and students each year at a time determined to be most appropriate relative to filing financial aid applications and scholarship applications. The seminar is to be conducted at our school with the assistance of available outside resources. Notice of the seminar shall be given to students and parents at least two weeks in advance and a notice shall also be published in the Star Times and announced on WRJC.

This memo shall be kept on file in the district office with copies to Wayne Potter, Ken Adams, Carl Paradise and School board members.

Roger Derrickson /s/  
Roger Derrickson - Dist. Admin.

Prior to the 1991-92 school year, the grievant was never formally evaluated. On March 6, 1992, the grievant was given his first formal evaluation by Principal Adams. In nine of the

performance areas, the grievant was rated "Needs improvement to meet expectations" and

in the other eight performance areas, the grievant was rated "Meets expectations." The grievant objected to three areas but never filed a rebuttal to the evaluation. On May 26, 1992, the grievant was given the following written reprimand:

To: Wayne Potter  
From: Ken Adams  
Date: May 22, 1992

This letter is written as a formal reprimand for failure to comply with an administrative directive. In November of 1991 you were instructed to install a bulletin board in the high school which would be readily visible to students and the public (hallway). The bulletin board was to provide information regarding scholarships and including eligibility guidelines, application deadlines and amounts. To date, you have not followed this directive. Failure to comply with such directives is a serious matter and will not continue to be tolerated. Therefore, a copy of this reprimand will be placed in your employment file. Please be aware that future non-compliance with administrative directives could result in disciplinary action which may include suspension with pay, suspension without pay, or termination of employment.

Your signature indicates you have received a copy of this letter and does not necessarily indicate agreement with its contents. You have the right to respond to this letter and have such response placed in our employment file.

Wayne K. Potter /s/  
Employee

5-26-92  
Date

Kenneth J. Adams /s/  
Administrator

5/26/92  
Date

The grievant never responded to the reprimand and did not grieve it. The Superintendent also gave the grievant a letter of reprimand on May 28, 1992, with respect to the failure to submit monthly reimbursement of expenses. The grievant did not grieve or otherwise respond to that reprimand.

On January 8, 1993, the grievant was given a written reprimand which stated the following:

To: Wayne Potter

From: Roger Derrickson

Date: January 7, 1993

Enclosed is a copy of the letter I received from Bob Gomoll on December 7, 1992. I have also attached a copy of the minutes of the May 13, 1991 Board of Education meeting where you were designated as Education for Employment coordinator.

As stated in Mr. Gomoll's letter, the New Lisbon School district (sic) was found to be out of compliance with standard (m), education for employment, at the time of the state audit in February, 1992. In June, 1992 the district was granted an extension of the timeline for compliance until October 1, 1992. Also in June, auditor Larry Rush met with you and Peter Kososki to provide information regarding the requirements for compliance. In mid November, 1992 we received a letter from Mr. Gomoll stating we had not submitted the required information and we were well beyond the extended deadline of October 1. I forwarded that letter to you for action. Mr. Gomoll's letter of December 1, 1992 indicates he still had received no response, but was allowing additional time until December 16, 1992 for us to comply. He further stated that failure to do so would result in his recommendation to the state superintendent to begin withholding payment of state aid.

I met with you and Mr. Adams regarding this situation. You stated you were not aware of what information the state wanted, but you would find out, and assured me you would meet the December 16 deadline. As the deadline approached you told me you had talked with Mr. Gomoll and told him the information would be sent by the 17th or 18th. You told me he did not have a problem with that delay. On December 23, 1992 you gave me a copy of what you were sending to the DPI and stated that it was going out in the mail that day. (copy attached).

This letter is written as a reprimand for a pattern of failure to meet

state established deadlines and to meet your responsibilities as the district's (sic) Education for Employment coordinator. Any continuation of poor performance, or the delay or loss of state aid as a result of your poor performance may result in more serious disciplinary action including suspension with pay, suspension without pay, or termination.

This letter is being placed in your personnel file and will serve as part of your performance evaluation. Your signature indicates you have received a copy of this letter and not that you necessarily agree with its content. You have the right to submit a written response and have it place (sic) in your file.

Roger Derrickson /s/  
Administrator

1/8/93  
Date

Wayne Potter /s/  
Employee

1-8-93  
Date

The grievant never filed a grievance over the letter or otherwise made any written response to it.

On March 8, 1993, the grievant was given his formal annual evaluation. In six performance areas, he was rated, "Does not meet expectations." In three areas, he was rated, "Needs improvement to meet expectations." In six areas, he was rated "Meets standard." One area was not observed and one area was rated "Exceeds standard." It was stated in the evaluation that "lack of improvement in the areas previously mentioned could lead to a consideration of non-renewal." The grievant did not file any rebuttal to this evaluation and did not file a grievance over it.

The grievant was given his annual evaluation for 1993-94 on March 14, 1994. The grievant's performance generally met the standard, with one "Exceeds standard" and three "Needs improvement to meet standard." The grievant did not respond in writing to the evaluation or grieve it.

On September 7, 1994, the grievant met with Principal Adams and Superintendent Derrickson and was given the following memo and directives:

To: Wayne Potter

From: Ken Adams and Roger Derrickson

Date: Sept. 7, 1994

As you indicated in May, 1994, you did not comply with the directive of October, 1991 relative to follow-up for each student regarding their 4 - year plans. Therefore, attached is a copy of the 1991 directive along with a new memo which is very specific in nature and must be strictly adhered to. Failure to comply with all aspects of both directives shall result in nonrenewal of your contract for 1995-96.

Roger Derrickson /s/

Kenneth J. Adams /s/

August 29, 1994

Mr. Wayne Potter:

This memo is to document the meeting which will be held today, Monday, August 29, in the District Administrators (sic) Office. The purpose of the meeting will be to give some directives to Wayne Potter regarding the 1994-95 school year. The following directives will be given:

- I. A daily log will be kept:
  - A. It will represent an **hourly** account of all activities.
  - B. It will identify students seen and the general reason for the meeting (ie. personal, four-year plans, general discussion, scholarships, careers, scheduling, etc.).
  - C. The log is to be updated **daily**.
  
- II. For Out-of-Building Activity:
  - A. It must be entered in the daily log.
  - B. A written request for each building absence (not including lunch).



- C. Emergencies may be excepted from written request, but the office must be notified before leaving. Emergencies must also be entered into the daily log.
- III. The October 7, 1991 Directive (attached) is to be strictly adhered to; however, that Directive is to be

amended to include the following time frame for Four-Year Plans and Four-Year Plan follow-up (they may be done sooner):

- A. Seniors - September & October
- B. Freshmen - November & December
- C. 8th Graders - January
- D. Juniors - February & March
- E. Sophomores - April & May

This memo shall be kept on File in the district office with copies to Wayne Potter, Ken Adams, Carl Paradise and School Board Members.

Roger Derrickson /s/  
Roger Derrickson, District Administrator  
School District of New Lisbon

On November 3, 1994, Superintendent Derrickson and Principal Adams met with Potter with respect to his adherence to the August 29, 1994 memo. The following memo was prepared prior to said meeting:

To: Wayne Potter  
From: Roger Derrickson and Ken Adams  
Date: November 3, 1994  
Re: Follow-up of directives for performance improvement issued October 7, 1991 and September 7, 1994

Attached Documents:

- A. Memo of directives dated October 7, 1991
- B. Memo of directives dated August 29, 1994
- C. Memo dated September 7, 1994
- D. Photo copies of required daily log of activities for the one month period of October 3, 1994 thru November 1, 1994

This letter is issued to communicate and document our dissatisfaction with your performance thus far in the 1994-95 school year. It is clear in the attached documents that specific directives

were given once again on September 7, 1994 regarding our expectations for your performance as New Lisbon High School/7 and 8 grade guidance counselor. You indicated in a conference with us on September 7, 1994 that you did not have a problem complying with all directives and assured us they would be met.

Upon review of your performance on November 2, 1994, we found that several key directives were not being performed. From the day you began the daily log, you did not record an hourly account of all activities. The activities were merely listed without notation of time of day or length of activity. When we met with you in September, we gave you specific examples of how the log was to be kept (i.e. 9:00-9:25 met with John Doe to discuss four-year plans).

In addition, the directive stated the log was to be updated daily. When reviewed on November 2, the most recent entry was October 24. Eight calendar days and four working days had elapsed without an entry of any kind being made.

Another directive included a time frame for meeting with each individual student to discuss four-year plans. For seniors, this task was to be completed by the end of October (or sooner). A poll of 33 seniors on Tuesday, November 1, 1994 showed eight students had met with you; four students indicated they had no need or interest to meet with; (sic) and twenty-one said they have not met with you at all. The activities noted in your log seem to substantiate that poll.

In addition to the deficiencies in meeting our directives, you have been frequently observed arriving at work after the established starting time of 7:45 a.m. This is an issue which has been brought to your attention on more than one occasion in the past. Most recently observed on Wednesday, November 2, 1994 you arrived at 7:55 a.m. On that day there was a mandatory faculty meeting at 7:30 a.m. which you did not attend. You did not notify anyone that you would not be there. This issue is further highlighted by the fact you were on the agenda to make a presentation to the faculty.

Mr. Potter, it is quite evident that you continue to demonstrate your unwillingness to perform your duties at a satisfactory level. As stated in the September 7, 1994 memo "Failure to comply with all aspects of both directives shall result in nonrenewal of your contract

for 1995-96." Please understand it is our intention to follow through with nonrenewal.

Your signature indicates you have received a copy of this letter and understand its' (sic) content. You further understand this letter is being placed in your personnel file.

Roger Derrickson /s/  
District Administrator

Date 11/3/94

Kenneth J. Adams /s/  
High School Principal

Date 11/3/94

The grievant refused to sign this memo. On November 7, 1994, the Superintendent sent the grievant the following letter:

This letter is to serve you with notice of a disciplinary warning for acts of insubordination during the conference held with Mr. Adams and myself on November 3, 1994. During that conference you stated to me, "Where does it say that when you say something it's fucking law." Also, at the conclusion of the conference, you refused to sign the letter of November 3, 1994 regarding the follow-up of directives for performance improvement. It was clearly written at the end of the letter that "your signature indicates you have received a copy of this letter and understand its content. You further understand this letter is being placed in your personnel file."

Both of these actions are clear acts of insubordination and will not be tolerated. Future acts of insubordination shall result in disciplinary action up to, and/or dismissal.

A copy of this letter is being placed in your personnel file.

Roger Derrickson /s/

Roger Derrickson  
District Administrator

The grievant did not respond to this letter or grieve it.

On January 16, 1995, the grievant met with Superintendent Derrickson and Principal Adams which meeting was summarized in the following memo:

Date: January 16, 1995

Re: Meeting to review and discuss job performance of high school guidance counselor, Wayne Potter, relative to written directives of Oct. 7, 1991 and Aug. 29, 1994.

Present: Wayne Potter, Ken Adams, Roger Derrickson

Place: District Administrator's Office

Time: 10:08 A.M.

Mr. Potter was asked to summarize his own perceptions of his job performance since our last meeting. Mr. Potter indicated he had met with all ninth graders during November and December as required. He stated he had never been busier than in the last few months and that he was somewhat frustrated with a number of seniors that were not coming in to see him and were not getting college applications sent in. Mr. Potter also noted that some seniors had finalized future plans before this school year began, and really had no need to meet with him. Mr. Potter also indicated he has been to work on time every day since we last met.

Mr. Derrickson noted his observations which included the following areas of improvement since the last meeting:

1. Mr. Potter is consistently coming to work on time.
2. Mr. Potter has met with each ninth grader as requested.
3. Mr. Potter has shown improvement in keeping his daily log.

Mr. Derrickson also stated areas of continued concern relative to not fully complying with administrative directives:

1. There are ten days during Nov. & Dec. when the daily log was not completed.

2. A January 3, 1995 survey by Mr. Adams shows approximately 40% of the seniors indicated they have not discussed future plans with Mr. Potter (18 of 47). Copy is hereto attached.

Comments: Mr. Potter has shown evidence of increased effort to comply with aforementioned directives. Improvement in several areas is apparent. Mr. Potter still has not met with every senior individually regarding future plans (this was to have been completed by the end of October, 1994). Mr. Potter's log does not provide complete accountability for time on task as required. Mr. Potter stated he feels he has given his best effort in trying to comply with administrative directives. It is evident Mr. Potter has shown some improvements, but is still not in strict compliance with all requirements of the directives. On the basis of repeated noncompliance, it is likely that administration will recommend nonrenewal of Mr. Potter's contract for 1995-96.

CC: Wayne Potter, Ken Adams, Roger Derrickson, Mr. Potter's personnel file

R. Derrickson /s/  
1/24/95

The grievant did not respond to or grieve this memo.

On February 10, 1995, Potter was given an evaluation by Principals Adams and Paradise. In seven performance areas, he was rated as "Does not meet standard," in four others, he was rated "Needs improvement to meet standard" and in six areas, he was rated "Meets standard." Potter's overall performance was deemed not satisfactory by Adams and Paradise. The grievant never filed a rebuttal to this evaluation nor did he grieve it.

On February 14, 1995, the District gave Potter a written preliminary notice of nonrenewal. Potter requested a private conference with the District's Board and a waiver was signed by the parties as to the statutory deadlines. Neither the grievant nor his representatives attended the private conference and on April 24, 1995, the District nonrenewed the grievant. The nonrenewal was grieved and appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Whether the School district of New Lisbon violated the 1993-95 Collective Bargaining Agreement, specifically Article XI, regarding the method of supervising and evaluating the Grievant, and Article X, standard of just cause for nonrenewal, when it did not renew the contract of Wayne Potter.

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE X

TEACHER DISCIPLINE

- A. The Board may discharge a teacher for just cause. The Board or its designate may suspend, discipline, transfer, reprimand, or deprive a teacher of any professional advantage or (sic) just cause. If a teacher is to be disciplined or reprimanded by any member of the administration, he/she will be entitled to have an Association representative present. Any pay lost through unjustified suspension will be fully reimbursed by the District.
- B. All teachers new to the District will be placed on probation for the first three (3) years of employment. During the probationary period, a teacher may be nonrenewed for any reason; however, the reason may not be arbitrary or capricious. Upon completion of the probationary period, no teacher will be nonrenewed except for just cause.

ARTICLE XI

TEACHER EVALUATION

Observation of the work of teachers shall be conducted openly and shall include not only performance in a classroom situation but also performance in all school activities in which the teacher has responsibility assignment or involvement. The purpose of such observation is not only to evaluate but also to guide and encourage and help a teacher in a positive way.

It is understood that many observations will be done in an informal manner. When a report of a formal or informal observation is made in writing to be submitted to the Superintendent, the teacher will be given a copy of such written report, will discuss same with the person making the report, and acknowledge his/her having read the report by signing his/her name to the report with the contents within ten (10) days. It is further understood that it is the responsibility of the Board and the Administration to establish the basis for teacher evaluations. The format of the evaluation procedures, the frequency of the evaluations shall be determined by the Board. The Board of Education shall not refuse to renew the teaching contract of any teacher unless at least two (2) formal evaluations have been made prior to such refusal. Said formal evaluations shall be made at least six (6) weeks apart. Individuals conducting the evaluations shall be certified by the Wisconsin Department of Public Instruction to supervise instruction. The Board shall maintain only one (1) file for every teacher.

A teacher shall have the right upon request to review the contents of his personal (sic) file. At least once each four (4) years, he/she shall have the right to indicate materials in his/her file which he/she believes to be obsolete or inappropriate to retain. That material shall be reviewed by the Superintendent, and if he/she agrees, shall be removed.

#### DISTRICT'S POSITION:

The District contends that it had just cause to nonrenew the grievant. It asserts that the burden of proof is a preponderance of the evidence and the just cause standard is met where it is shown that the grievant committed the acts on which the nonrenewal is based and nonrenewal is appropriate given the acts committed. It points out that Article II provides that poor or unacceptable work or other legitimate reasons constitute just cause for the District to nonrenew a teacher. It submits that the preponderance of the evidence establishes the grievant's poor performance as well as his disregard for administrative deadlines and directives.

With respect to poor performance, the District argues that the grievant's evaluations show that his work performance was pathetically substandard. It notes that in October, 1991, the grievant was given specific performance directives and his 1991-92 evaluation reflects that he did not meet the District's expectations. In his 1992-93 evaluation, the grievant still did not meet the District's requirements and he was warned that a lack of improvement could lead to nonrenewal. It refers to the 1993-94 evaluation as reflecting that the grievant failed to meet expectations in 8



out of 17 performance areas and in September, 1994, the grievant was given specific directives on how to improve his performance. It observes that the grievant did not comply and his 1994-95 evaluation reflected continued substandard performance. The District refers to the grievant's reprimands in May, 1992, and January 7, 1993, as well as other written memos which document the grievant's continued failure to improve his work performance.

It claims that the grievant was insubordinate or negligent in his disregard for deadlines with respect to the DPI standards for Standard (m) which the grievant failed to meet and also failed to meet his own extension of the deadline. It contends that the grievant failed to develop and follow up four-year plans as required. The District points out that the grievant was told what was expected and in the 1992-93 evaluation was informed his results were nothing more than class sign-up sheets. It claims that despite its best efforts, the grievant did not change but continued to consider class scheduling documents as four-year plans. It argues that the grievant refused to bring his practices into conformance with the District's expectations; rather, he simply ignored them. It asserts that at worst the grievant was insubordinate and at best, he chose not to change his way of performing the job despite given specific directives to do so. The District states that the grievant failed to comply with the August, 1994 memo to meet with all seniors during September and October and the grievant admitted he did not meet all seniors until the end of January, 1995. The District observes that the grievant failed to keep a daily log despite a clear directive to do so. It argues that the grievant was time and again given the chance to meet administrative directives but he entirely failed to do so.

The District maintains that it was justified in nonrenewing the grievant based on his four-year history of failure to improve his job performance and his failure to follow administrative deadlines and directives. It submits that despite the District's repeatedly counseling with the grievant, he did not change his unsatisfactory performance. It maintains that its only alternative was nonrenewal.

The District contends that it has complied with Article XI. It observes that a formal guidance counselor evaluation form was developed in 1991, and was used for the grievant's evaluations which were given to him annually. With respect to the requirement of Article XI that there be two evaluations at least six (6) weeks apart prior to nonrenewal, the District claims that the grievant was given four (4) annual evaluations prior to his nonrenewal which complies with Article XI. It rejects the Union's assertion that there must be two evaluations in the year of nonrenewal because this argument is contrary to the clear and unambiguous language of Article XI. It concludes that it acted in accordance with Article XI. It further asserts that the grievant was evaluated on November 3, 1995, and given a written report and evaluated again on February 10, 1995, thereby complying with Article XI even if the Union's argument as to the number of evaluations in the year of nonrenewal is accepted.

The District contends that there was just cause to nonrenew the grievant but if it is found that the penalty is excessive, the grievant should be reinstated but without back pay because his

conduct warrants discipline sufficient to get the message through to the grievant that he must improve his performance. It further argues that if a violation of Article XI is found, the remedy should not be reinstatement.

In conclusion, the District insists that it had just cause to nonrenew the grievant and it complied with all provisions of the contract and the evidence supports nonrenewal and it asks that the grievance be dismissed.

#### ASSOCIATION'S POSITION:

The Association contends that the grievant's nonrenewal is both procedurally and substantively flawed. It asserts that the District has the burden of proof and the quantum of proof is substantial because of the grievant's professional reputation and the potential loss of future employment opportunities and substantial retirement benefits. The Association claims that the District did not act in good faith but created artificial barriers designed to make the grievant quit or justify his nonrenewal. It submits that in May, 1994, Superintendent Derrickson asked the grievant about early retirement in lieu of nonrenewal to maneuver the grievant out of his job but when the grievant declined, strict deadlines for meeting students and a log book were imposed on the grievant to hound him out of his job or to trip him up as a reason for nonrenewal. It claims that the reasons for the burdensome directives given by the Superintendent are not credible and the motive was to get rid of the grievant. The Association argues that the District's concerns about the four-year plans and the information on them was a fabricated reason for the nonrenewal. It submits that the Superintendent's testimony separating a four-year plan from a class schedule was never discussed with the grievant and his testimony is not reliable.

The Association contends that the reasons relied upon by the District do not warrant nonrenewal of the grievant. It submits that a fair analysis of the evidence pertaining to the reasons for the nonrenewal demonstrates that the District lacked just cause. The Association observes that the grievant's performance since the 1991-92 school year was not poor as evidenced by the acceptable 1993-94 evaluation. It asks how Principal Adams could find the grievant's performance satisfactory for 16 years and then in need of improvement in the March, 1992 evaluation without any prior mention of concerns? It submits that the grievant followed the October, 1991 directives and there were so many inconsistencies in Adams' testimony that his evaluations do not reflect reality in order to support nonrenewal. It insists that the areas of concern, developmental guidance and four-year plans, do not support the grievant's nonrenewal. It argues that the District never gave the grievant any meaningful direction on the Developmental Guidance Program and did not guide, encourage or help him in a positive way as required by Article XI. It maintains that the grievant was never given any specific instructions on what the District wanted in the four-year plans and essentially left the grievant to read the job description and figure out for himself what to do. The Association alleges that Principal Adams did not understand the Development Guidance Program and failed to demonstrate leadership in a program

he considered important. It observes that the District told the grievant to be "more productive" yet was inconsistent in what "being productive" required the grievant to do.

The Association asserts that Principal Paradise was also unconvincing in his testimony. It maintains that the record demonstrates that the grievant's evaluations were not objective, fair or accurate.

The Association argues that the bulletin board and DPI audit issues are stale and should not be considered as independent bases for nonrenewal. It submits the May, 1992 and January, 1993 reprimands were seriously disputed by the grievant.

The Association believes that the District failed to prove the October 7, 1991 administrative directives were not adhered to. It claims that this vague charge lacks any credible evidence. It notes that the main criticism is that the four-year plans did not specifically list career goals or extra-curricular activities, yet, the District never told the grievant that this was required and at the hearing changed the main problem to the plans not being completed. It insists that the evidence also fails to prove this assertion. The Association further maintains that the District did not prove that the grievant's failure to comply with the August 29, 1994 directives was just cause for his nonrenewal. It agrees that the main issue here was to meet with the seniors during September and October, but the WSAS test was rescheduled for the fall and the grievant could not meet these deadlines as previously agreed and he completed this task by the end of January. It argues that the deadline was artificial and not supported by any educational purpose and there was no harm to students; thus, the Association claims that the directive was not reasonable under the circumstances. With respect to the daily log pursuant to the same directive, the Association states that the grievant substantially complied with the directive and it served a minor policy objective and was a pretext to create artificial and time consuming requirements for the grievant. It admits that the grievant initially did not keep the log as the District wanted but this was because the District did not explain exactly what it wanted, and when it did, the grievant made a good faith effort to comply. It terms the log keeping a "Mickey Mouse" excuse and the grievant did a surprisingly good job in doing the log. The Association denies that the grievant uttered any profanity about the directives/evaluations but merely about his being erroneously accused of being late and the District's refusal to listen to his explanation. The Association claims that the District's case is unworthy of any respect. It requests that the grievance be sustained and the grievant made whole.

#### DISTRICT'S REPLY:

The District contends that it has no obligation under Article XI to guide, encourage or help the grievant in a positive way. It points out that Article XI distinguishes between "observing" and "evaluating." It insists that the reference to guide, encourage and help applies only to observation. It further denies that it failed to guide or help the grievant as evidenced by the directives,

evaluations and memoranda. It submits the grievant was given the opportunity to discuss his evaluations yet he never did and this issue was raised for the first time in the Association's brief.

The District scoffs at the Association's allegation there was a conspiracy orchestrated by some person to get rid of the grievant. It claims that the Association attempted to link 1991-92 School Board President Willer to the nonrenewal, yet pinned it on Superintendent Derrickson. It observes that the record simply does not support the Association's unfounded assertions and the reasons for the grievant's nonrenewal were well documented and the grievant was responsible for his own nonrenewal.

Contrary to the Association's arguments, the District insists that its directives to the grievant had a rational basis with the October, 1991 memo being the change in guidance program to meet state educational standards and the September 7, 1994 memo to provide the grievant with deadlines because he had not completed his assignments in the past and the log book was a means of testing the reasonableness of the timelines. It notes that had the grievant kept the log and it had shown that he did not have enough time to meet the directives perhaps they might be deemed unreasonable. The District notes that he did not keep the log and thus could not demonstrate that he had other duties preventing him from meeting the deadlines and thus both directives were reasonable.

The District argues that credibility is not an issue in this case and failed memory is not a violation of the contract. It asserts that the documentary evidence is more credible than the testimony of any witness. It also notes that the evaluations, reprimands and written memos were never challenged by the grievant who did not even appear at the private conference. It claims that the challenge to witness credibility must be disregarded. The District contends that the Association misrepresents the grievant's knowledge that he was to meet individually with students and distorts the record in this regard. It notes that in October, 1991, the grievant was told to meet individually with each student, his evaluations states "guides and counsels students individually," "needs to see every student during the year," and this was made clear in September, 1994. It observes that the record demonstrates that the grievant clearly failed to do this. It asks that the grievance be denied.

#### ASSOCIATION'S REPLY:

The Association contends that the District's assertion that credibility is not a significant factor is erroneous and the District is engaged in wishful thinking as every significant fact has been disputed. It claims that the District's case places form over substance in that it is structured around a format of providing direction and assistance to the grievant and the grievant's failure to follow legitimate directives. It objects to the District's extensive reference to the grievant's decision not to attend the April 24, 1995 school board meeting where the final vote to nonrenew the grievant was taken because there was no legal duty to attend and it would be a waste of time. It suggests that the District's exhaustion of remedies argument, which was raised for the first time in its brief,

has no legal authority to support it and is a shameless attempt to rescue it from the mess it created for itself. The Association distinguishes the instant case from the cases cited in the District's brief on the grounds that the facts are different.

As to the District's characterization of the grievant's performance, the Association asserts that the District had very little understanding of what the grievant did and Principal Adams lacked knowledge to support his criticisms of the grievant. It argues that the District distorted the grievant's 1993-94 evaluation.

The Association points out that the District promotes a highly fictitious argument that the four-year plan was a cornerstone of the Developmental Guidance Program as that Program hardly mentions it and the administrators' testimony was not convincing that the Developmental Guidance Program was even mentioned in October, 1991. The Association maintains that the evaluations were not clear as to what was expected.

The Association submits that the February 10, 1995 evaluation was the ultimate charade and the areas marked below "meets standards" could not be substantiated. With respect to the Education for Employment issue, the Association insists that the grievant had done what he was required to do and timely submitted the proper document.

#### DISCUSSION:

A number of issues were raised by the parties. One is the burden of proof. The grievant was nonrenewed for reasons other than ones that could result in criminal prosecution. Therefore, there is no need to consider any standard other than the generally accepted preponderance of the evidence standard and that will be applied to the grievant's nonrenewal. The standard of just cause requires that the District's requirements on the grievant be reasonable, the grievant knew the requirements and failed to meet them.

Certain of the reasons set forth by the District involve situations that occurred some years prior to the nonrenewal. Although the Association asserted that these were stale, the District, in imposing discipline or nonrenewing a contract, may consider the past record of the grievant in making its decision. The District considered the grievant's past evaluations and reprimands. There was much testimony with respect to these and witnesses could not remember or recall certain rationale or reasons for many items. The undersigned finds that the grievant had the right to file a rebuttal to his evaluations and to file a grievance over the reprimands and other memos he now claims were inaccurate. The grievant did not file any rebuttal or grievances at the time he received the documents. The general rule in arbitration is that documents unchallenged at the time are accepted on their face without relitigating the merits at a later time. The undersigned has followed this rule and the facts set out above reflect the documents in the file and not the later testimony as to the merits of these documents.

The Association has alleged that someone (Willer or Derrickson) was pulling the strings behind the scenes so the District could unload the grievant by having him quit or be nonrenewed. That there was a conspiracy by the administration to get rid of the grievant by imposing onerous and unreasonable demands on him and a failure to follow unreasonable directives was a pretext to support the grievant's nonrenewal. The evidence simply does not support this argument and it is rejected.

The Association has asserted that the grievant had an excellent record for 16 years and then was found to be unsatisfactory after that. It submits that the grievant's performance was not proven to be unsatisfactory, his positive contributions were overlooked, and his evaluations do not justify nonrenewal as they are unreliable.

The record establishes that for the first 15 years of his employment with the District, the grievant was the only guidance counselor employed by the District and he was responsible for

K-12. The grievant was essentially involved in crisis counseling and handled problems on a case-by-case basis. In other words, if a problem arose that needed the assistance of the guidance counselor, the grievant would react to the problem and resolve it. The District needed further guidance counseling and hired a guidance counselor for K-6 in the 1990-91 school year and the grievant then was guidance counselor for grades 8-12. There was no formal written evaluation of guidance counselors until 1991-92 and prior to that school year, the grievant's performance was satisfactory. In June, 1991, the District's board adopted a Developmental Guidance Program. The program was developed by the K-6 guidance counselor and the grievant in preparation for a subsequent audit by the Department of Public Instruction. The purpose of the new program was to provide guidance and counseling services to all students and not just to those who deviated from acceptable patterns. As a co-author of the program, the grievant was well aware of its contents and its change of direction from crisis intervention to what might be termed preventive intervention to assist all students and to head off problems.

In a meeting with the two principals and the Superintendent on October 4, 1991, the grievant was given two specific directives. Both of these directives were entirely reasonable. The first had to do with four-year plans; the second with a financial aid seminar. The grievant performed the second without any problems. As to the first, the record establishes that the grievant failed to perform it. The grievant has attempted to equate a four-year plan with a class sign-up sheet or class schedule covering the four years. The grievant had been doing class schedules for the following year, i.e. a one-year class schedule, in Miss Thede's, Mrs. Sabey's or Mr. Gibson's classes for years and all he did was extend the class schedule out four years and called it a four-year plan. According to the grievant, all he needed from the student was whether he/she planned on going to college. In his 1992-93 evaluation, the very first comment read:

. . . last year's evaluation specifically stated that four year plans were to be developed with the eighth graders; however, the final results were nothing more than class sign-up sheets. There was no indication as to the direction the student was interested in pursuing, nor were more than a third actually filled out. This would seem to indicate little or no individual dialogue with those students.

Again, the guidance counselor needs to see every student during the year - they must be called in; not just "happen stance." The board directive of October 7, 1991 on individual counseling has not been met.

The evaluation also mentioned that lack of improvement could result in consideration of nonrenewal.

The grievant is a professional educator with bachelor's and master's degrees yet he claims

that he didn't understand what the District wanted. If he didn't understand what was required before March 8, 1993, it is clear from his evaluation that a four-year plan is not a four-year class sign-up sheet or a four-year schedule. The grievant simply did not change his view of what was sought. In 1994, the grievant was given very specific directives and he again failed to meet those. The record establishes that the grievant never asked what the District wanted him to do concerning a four-year plan and throughout the period of 1991 to his nonrenewal, he simply extended the class sign up to schedule classes from one year to four. If the grievant didn't understand what was required, it would have been so simple to ask. Rather, he chose to provide guidance to students as he had always done in the past. The District repeatedly informed him that he must change and was given ample opportunity to do so. His crisis intervention was always satisfactory but his implementation of a developmental guidance program simply never occurred. He just never got with the program and after four years still hadn't. This failure alone provides just cause for the grievant's nonrenewal. The grievant's record of reprimands and poor evaluations simply supports his nonrenewal. The District had just cause to nonrenew the grievant.

The Association contends that the District violated Article XI by not conducting two formal evaluations at least six weeks apart during the academic year in which the nonrenewal occurs. Article XI provides that the District "shall not refuse to renew the teaching contract of any teacher unless at least two (2) formal evaluations have been made prior to such refusal." Said formal evaluations shall be made at least six weeks apart. Nothing in Article XI requires the evaluations be made in the same academic year. The Association's argument that the employe is entitled to adequate notice and an opportunity to demonstrate improvement is well taken. However, it seems that regular annual evaluations would satisfy this requirement, whereas two formal evaluations, say seven weeks apart, might not allow sufficient time to demonstrate improvement. The Association is correct that perhaps formal evaluations separated by very long periods, like ten years, would not be compatible with the purpose of Article XI. Here, however, the evaluations were done yearly for the last four years and this duration between formal evaluations cannot be found to be unreasonable. These yearly evaluations met the purpose of Article XI as set out above and was a fair time frame to demonstrate improved performance from one evaluation to another. It must be concluded that the District did not violate Article XI.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

#### AWARD

The School District of New Lisbon did not violate the 1993-95 collective bargaining agreement, specifically Article XI, regarding the method of supervising and evaluating the grievant and Article X, standard of just cause for nonrenewal, when it did not renew the grievant's contract, and therefore, the grievance is dismissed in all respects.

Dated at Madison, Wisconsin, this 9th day of May, 1997.



By Lionel L. Crowley /s/  
Lionel L. Crowley, Arbitrator