

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HURLEY EDUCATION ASSOCIATION (HEA)

and

HURLEY SCHOOL DISTRICT

Case 39
No. 54875
MA-9816

Appearances:

Mr. Gene Degner, Director, Northern Tier UniServ-Central, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54901-1400, on behalf of the Local Union.

Mr. Robert C. Lambert, Junior/Senior High School Principal, Hurley School District, 1S517 Rangeview Drive, Hurley, Wisconsin 54534-9702, on behalf of the District.

ARBITRATION AWARD

According to the terms of the 1995-97 collective bargaining agreement between Hurley School District (District) and Hurley Education Association, affiliated with Northern Tier UniServ-Central (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the discharge of teacher Teresa Faoro Fleischman. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. A hearing was held at Hurley, Wisconsin on May 20, 1997. No stenographic transcript of the proceedings was made. The parties agreed to submit their initial briefs postmarked by July 1, 1997 which the undersigned would exchange thereafter. The parties reserved the right to file reply briefs within ten working days after their receipt of the initial briefs. By agreement of the parties, the record was closed on July 15, 1997, no reply briefs having been received.

ISSUES

The parties were unable to stipulate to an issue or issues to be determined in this case. The Union suggested the following issue for determination at the instant hearing:

Did the School District violate the collective bargaining contract when it non-renewed Teresa Faoro Fleischman for the 1996-97 school year? If so, what is the appropriate remedy?

The District submitted a written statement of the issues at the instant hearing which read as follows:

Do the reasons brought forth by complainants as presented in the October 6, 1995 communication from Bob Lambert to Teresa Fleischman, which resulted in a deterioration of the level of trust and respect for Ms. Fleischman among the students and staff at Hurley Jr./Sr. High School, constitute the "alleged competency based" foundation for the nonrenewal of Ms. Fleischman's teaching contract with reference to Article 7, Paragraph 1 of the Hurley School District Teachers' Master Agreement? Further, is "competency" of a teacher limited to only teaching the content and demonstrating good pedagogical skills within the confines of the classroom, or is it extended to encompass the whole teacher as a professional modeling behaviors appropriate and acceptable to students with young impressionable minds?

In its brief, the Union suggested the following issue for determination:

Did the Board of Education violate the rights of Teresa Faoro Fleischman under the collective bargaining agreement, in particular, Article 7, paragraph 1, by non-renewing her for the 1996-97 school year alleging it was for competency reasons and not providing Teresa with guidance, assistance, and recommendations for improvement as provided for (sic) under Article 7?

In accord with off-the-record discussions the undersigned has fully considered all of the relevant evidence and argument in this case as well as the parties' suggested issues herein and finds that the issue stated by the Union in its brief shall be determined in this case.

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 --- TEACHERS' CONTRACTS

. . .

2. The Association recognizes the legal obligation of the Employer to give to each teacher employed by it a written notice of renewal or non-renewal of his or her contract for the ensuing school year on or before March 15 of the school year during which said teacher holds a contract, pursuant to Section 118.22 of the Wisconsin Statutes and amendments thereto.

. . .

ARTICLE 7 -- CONDITIONS OF CONTRACT

1. Initial employment will be on a two (2) year probationary period. During this period the teacher will be provided with guidance, assistance and recommendations for improvement. At the end of each year during the probationary period, the teacher will either be offered a contract or will be informed that the contract will not be renewed. A nonrenewal at the end of the probationary year for alleged competence based reasons shall not be subject to the

grievance procedure.

2. An established teacher (a teacher beyond the initial two (2) year probationary period) in the system may be placed on probation for a period not to exceed one year if a problem arises as to quality of instruction, professional ethics, or adherence to accepted school board policy. Under these circumstances, the Employer may withhold the increment increase during the period of probation. During the period of probation the teacher will be offered recommendations for improvement, guidance and assistance in making the necessary adjustment. At the end of the probationary period the teacher will either be rehired or the contract will not be renewed. After the initial probationary period no teacher shall be non-renewed except for just cause.

3. An established teacher who has not reached retirement age shall not be disciplined or dismissed, suspended or discharged except for cause. The following might be considered as cause: (1) neglect of duty; (2) repeated violation of rules made by the Employer; (3) conviction of a felony or immorality; (4) evidence of physical or mental incapacity.

...

ARTICLE 8 -- GRIEVANCE PROCEDURE

1. Definition: A "Grievance" shall mean a complaint by a teacher in the bargaining unit, or the bargaining unit, that there has been a violation, misinterpretation or inequitable application of any of the provisions of this Agreement.

2. Procedure: Grievances shall be handles (sic) as follows:

...

D. The District Administrator, the Building Principal, and the Grievance Representative shall meet within three (3) school days of the second filing and attempt to solve the problem. The teacher may be heard personally or be represented by the Grievance Representative. If the grievance cannot be resolved at this level within five (5) school days, the Administrator and Grievance Representative shall submit the grievance in writing within ten (10) school days to the Employer for a hearing.

E. The Employer within five (5) school days of the receipt of the written grievance from the District Administrator and the Grievance Representative shall meet, in executive session, and attempt to solve the problem. The teacher may be heard personally or be represented by the Grievance Representative and up to five (5) other representatives of his choice. The Employer will be represented by the Board of Education, the Administrator, and the School Attorney. The Employer, within

ten (10) school days of said session, shall render its decision in writing to the teacher and the Grievance Representative.

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F. If a mutually satisfactory agreement is not arrived at this level, the Hurley Education Association or the Employer may request the Wisconsin Employment Relations Board to function as an arbitrator in the dispute, within thirty (30) days of the written decision in Part E above. The decision of the arbitrator, if made in accordance with his jurisdiction and authority under this agreement, will be accepted as final by the parties to the dispute and both will abide by it. Nothing in the foregoing shall be construed to empower the arbitrator to make any decisions amending, changing, subtracting from or adding to the provisions of the agreement. Procedures at this step are provided for in Section 2, 111.70(4) of the Wisconsin Statutes. Cost of this procedure will be divided equally between the Association and the Employer.

BACKGROUND

Teresa Faoro Fleischman (Grievant) had been employed as a teacher at a high school in Eau Claire, Wisconsin prior to her hire by the District in late August, 1994. The Grievant applied pursuant to a posting for a grade 7 - 12 Spanish teacher opening at the District advertised at the University of Wisconsin-Stevens Point. One week after submitting her resume and application (in late August, 1994), District Principal Robert Lambert interviewed the Grievant at his office. 1/

There is some dispute regarding what was said during this interview. According to the Grievant, Mr. Lambert asked the Grievant to describe various teaching scenarios; asked her about books she had used in her prior teaching; and asked whether she was familiar with the Spanish text book that the District was then using. The Grievant answered Lambert's questions and stated that she was familiar with the textbook that was being used by the District. Lambert then indicated that he was unsure whether the District teacher who was then the incumbent of the position for which the Grievant was interviewing would be returning in the 1994-95 school year. The Grievant stated that after the close of the interview when she and Lambert were standing in front of the gymnasium, Lambert asked her whether she had any skeletons in her closet. The Grievant, surprised by the question, asked Lambert whether he meant had she ever been arrested. The Grievant stated that Lambert responded in the affirmative. The Grievant then told Lambert that she had never been arrested. Lambert then asked the Grievant why she had left her Eau Claire High School teaching position in February, 1994. The Grievant stated that she told Lambert that she had had a personality conflict with a prior supervisor and she gave Lambert the man's name and telephone number. Lambert wrote the name and number down on a sticky note and put it in the file that he was carrying. The Grievant stated this was the end of her interview.

According to Principal Lambert, Lambert stated that before he interviewed Grievant, he was aware that her prior employer had been about to non-renew her in February, 1994, when she

resigned. During his interview with the Grievant, Lambert asked her about problems or concerns that her prior employer had had with her before she resigned from that position. Lambert stated that he specifically asked the Grievant why there had been a move to non-renew her in Eau Claire prior to her resignation. Lambert stated that the Grievant passed it off as a personal conflict between herself and her supervisor. Lambert stated that as all of the other

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references the Grievant had given him had stated that she was an exemplary teacher, he recommended that the District hire her for the Spanish teacher opening. 2/

When the Grievant began work for the District, she was given a corner of the teacher lounge in which to work instead of being given a separate office. The Grievant testified that she moved a soda machine and a candy machine in the lounge and that she bought a desk and put it behind these machines to make a make-shift office. It is undisputed that the teachers in the District regularly eat lunch in the teacher lounge and take their breaks there and that they generally conduct personal conversations during the time when they are in the lounge to which the Grievant would have been privy.

At the same time that the Grievant was hired another teacher, Miss Hoffman was also hired. She too was given no office but was directed to use a table in the teacher lounge. Miss Hoffman used a District-owned table in the teacher lounge for her work area. Miss Hoffman also took an apartment upstairs in the house where the Grievant lived during her employment with the District. Miss Hoffman and the Grievant were never roommates during the Grievant's tenure at the District.

On October 17, 1994, Principal Lambert observed the Grievant's performance in her classroom for a 50-minute period and wrote a positive evaluation of her performance. Principal Lambert stated that he visited the Grievant's classroom four or five times during an unspecified period of time but that he only once did a formal evaluation of her teaching ability. It is undisputed that neither Lambert nor anyone else from the District did any formal evaluations of the Grievant during the 1995-96 school year. The evaluation form which Principal Lambert used on October 17, 1994, listed the length of the visit; the subject taught; the teacher observed; the person observing; and the school in which the teacher was employed. Principal Lambert also wrote on the form that the instructional objective of the class was to "(I)dentify numerals verbalized in Spanish, translate phrases concerning time, and write given Arabic numbers in Spanish."

The standard evaluation form used by Lambert contained five general questions, listed below, and gave a date for the conference held regarding the observation, as well as leaving spaces for the teacher and the supervisor to sign and date the form. The five questions listed on the form read as follows:

...

1. Did the teacher teach to the objective:

Yes No uncertain

List specific / supportive evidence: _____

2. Was the objective at the correct level of difficulty for the learner?

Yes No Uncertain

List specific / supportive evidence: _____

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3. Was there monitoring of the learner's progress and adjustments in the teaching?

Yes No Uncertain

List specific / supportive evidence: _____

4. Were the principles of learning being used effectively? If so, which ones?

Yes No Uncertain

List specific / supportive evidence: _____

5. From the diagnosis, list separately instructional skills that provided student progress toward the objective and those that obstructed progress of the students:

Promoted Progress: _____

Obstructed Progress: _____

...

It is significant that Principal Lambert made no negative comments regarding the Grievant's teaching ability on the form he completed on October 17, 1994. Indeed, Lambert crossed out the portion of question 5 which called for the description of "obstructed progress" and placed the following comments in the space available:

Lesson delivery at the appropriate pace for this age group using understandable language. Lesson planned well and time efficiently used for time on task. Ms. Fleischman manages classroom behavior well and addresses disruptions quickly and directly with respect for students. Changes student focus timely to maintain student interest.

The position description for a Junior/Senior High School teacher at the District reads in relevant part as follows:

...

Qualifications:

1. Shall possess at least a BS or BA degree
2. Shall be certified by the Wisconsin DPI
3. Proficiency in subject area being taught

Reports to: Building Principal or designee

Job Goal: To help students learn subject matter and skills that will contribute to their development as mature, able, and responsible men and women.

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Performance Responsibilities:

1. Meet and instruct assigned classes in the locations and at the designated (sic).
2. Plans a program of study consistent with the appropriate K-12 curriculum guide of the district.
3. Establishes and maintains a classroom environment that is conducive to learning and appropriate to the maturity and interests of the students.
4. Prepares for assigned classes and shows written evidence of preparation upon the request of immediate supervisor.
5. Communicates regularly with parents to discuss pupil progress and/or behavior.
6. Guides the learning process toward the achievement of district curriculum goals and, in harmony with the goals, establishes clear objectives for all lessons, units, and projects in order to communicate those objectives to students.
7. Employs a variety of instructional techniques and instructional media, consistent with the physical limitations of the location provided and the needs, interest, and capabilities of the individuals or student groups involved.
8. Strives to implement by instruction and action the district philosophy of education and instructional goals and objectives.
9. Assesses the accomplishments of students on a regular basis and provides progress reports as required.
10. Recognizes student exceptional educational needs, and cooperates with district consultants and specialists in assessing and helping pupils solve health, attitude, and learning problems.
11. Takes all necessary and reasonable precautions to protect students, equipment, materials, and facilities.
12. Maintains accurate, complete and correct records as required by law, district policy, and school administrative requirements.
13. Assists the administration in implementing policies and rules governing student life and conduct.
14. Develops rules of classroom behavior and procedure and maintains order in a fair and just manner consistent with district policy. Makes provisions for being available to students and parents for education related purposes outside the instructional day such as for parent/teacher conferences, staffing, and M-teams.
15. Strives to maintain and improve professional competence through staff

development activities provided by the district and self-selected professional growth activities.

16. Attends staff meetings as required.

17. Serves on committees and participates in the sponsorship of student activities to the extent possible.

18. Performs other professional duties as assigned by the Principal or designee.

Evaluation: Performance of the job will be evaluated annually.

. . .

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Attached to the above-quoted position description is the following separate document which reads in its entirety as follows:

EVALUATION OF STAFF

Building principals will evaluate a first year teacher to the system at least three times during the first school year. They will evaluate a second year teacher in the system at least two times in that school year. Every effort will be made to evaluate all other teachers during a school year. As a minimum, each teacher with two completed school years of experience in the district will be evaluated at least one time in a three year time period. Support staff will be evaluated on an as needed basis.

A pre-conference is recommended before the evaluation takes place and a post-conference is mandatory. The post-conference should take place as soon after the evaluation visit as possible with the evaluation being reviewed by both teacher and principal. The teacher's signature on the evaluation will attest to the fact that the teacher has reviewed the evaluation with the principal. Each teacher is invited to comment in writing on the evaluation in agreement or in rebuttal, but this act is not necessary.

The primary purpose of evaluation is to improve instruction. The for (sic) used in the evaluation process will be primarily narrative.

At times, the district administrator may supervise or evaluate.

FACTS

The facts surrounding the Grievant's nonrenewal are as follows. Sometime in March, 1995 Bonnie Leino, an 8th and 9th grade English teacher at the District for the last six years went

to Principal Lambert with concerns regarding the Grievant's actions. Leino told Principal Lambert that she had heard students say things in class about the personal lives of other teachers that they had heard from the Grievant. In one case, Leino stated that a student came into her classroom and stated in front of approximately 20 to 25 students that the Grievant had said that two District teachers had spent the night together. Leino stated that the student volunteered this information in her classroom. Leino stated that she felt that it is not acceptable for a professional educator to make such statements to students. In another incident, Leino stated that a former teacher, Deborah Reed, told her at lunch one day that the Grievant had announced to students that she (Reed) would be leaving the District at the end of the school year. Leino stated that Reed had told her that she (Reed) had told the Grievant this information in confidence. Later, Leino's students volunteered that the Grievant had told them that Ms. Reed would be leaving school at the end of the school year. Leino stated that these incidents made her feel guarded in her speech to the Grievant, as she would not want information about herself to be made the subject of gossip in the school.

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Leino stated that she went to Principal Lambert with her concerns regarding the Grievant's statements described above. Leino stated that she did not talk to the Grievant before she spoke to Mr. Lambert because these were just concerns that she had and she felt that Lambert could talk to the Grievant better than she could and that she did not know the Grievant well enough to speak to her on these points. Leino stated that she did not go to Mr. Lambert immediately upon hearing her students recount the Grievant's statements regarding the two teachers spending the night together, but that after she had heard the comments the Grievant had made about Ms. Reed, she spoke to Lambert.

According to Business Education teacher Ann Gulan (a District teacher for 28 years) on or about September 27, 1995, she was a witness to two conversations. Gulan testified that at lunch the Grievant told her that Mr. Kelly (a District teacher) had made a statement to Mr. Myran (the District Administrator) using the "f" word. Mr. Lambert called Gulan into his office to question her regarding what she had heard, as Gulan had been present in the District office when Mr. Kelly and Mr. Myran had had their conversation about which the Grievant had spoken. Ms. Gulan confirmed that she did not hear Mr. Kelly use the "f" word in the conversation and she confirmed to Mr. Lambert that the Grievant had told her and others at lunch that Mr. Kelly had in fact used the "f" word with Mr. Myran in the office.

It is unclear from the record who complained regarding the comment made by the Grievant, however it is clear that Ms. Gulan did not volunteer the information to Mr. Lambert. Rather, Gulan was questioned by Lambert after the fact. Ms. Gulan testified that after this incident, her level of trust of the Grievant decreased and she was careful from this point forward regarding what she told the Grievant. 3/

On or about October 5, 1995, two students came to Mr. Lambert to register complaints regarding the Grievant. One of these students was Farah Swartz and the other was Heide Salzmann. 4/ Farah Swartz, a full-time college student at the time of the instant hearing, had been

a student as a junior in the Grievant's Spanish I class. Swartz stated that she complained to Mr. Lambert regarding a statement that was made by the Grievant to a group of students just prior to the Spring prom in 1994. Swartz stated that one of her friends told her that the Grievant had told a group of students that she (Swartz) said that she (Swartz) expected to be elected prom queen. Swartz stated this was false. After the prom, Swartz stated that her mother called the District and that a meeting was held with the Grievant in which the Grievant apologized and said that she (the Grievant) had talked about Swartz to the wrong people who had gossiped about it. 5/

Also, around Christmas, 1994, Swartz stated that the Grievant embarrassed her in front of the class. Swartz stated that on the day in question, she had worn a skirt and nylons and the boy in front of her was touching her nylons. She told this boy to stop because the nylons were expensive. Later, during the class, the Grievant's students went carolling at the Elementary School and when Swartz sat down on a plastic chair the Grievant advised her to be careful that she did not run her nylons. Swartz stated that this was very embarrassing to her and that she felt that the Grievant had acted inappropriately.

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Swartz stated that she did not understand why the Grievant had treated her this way. Swartz stated that while she was in the Grievant's Spanish I class, the students would laugh off the Grievant's comments and stories because they were unbelievable; and that the Grievant's actions were a joke among the students. Swartz stated that her level of trust and respect for the Grievant decreased due to the way the Grievant treated her as well as due to the Grievant's unbelievable stories. As a result of the Grievant's treatment of her, Swartz refused to take Spanish II from the Grievant.

Swartz admitted, however, that during her high school years she did complain about another teacher at school, that she lost respect for that teacher as well and that she did not understand why that teacher had treated her poorly, as she felt she had not deserved such treatment. Swartz stated that with regard to all her other teachers, they had kept their distance and had operated at a professional level and that she had not had trouble with them. Swartz stated that when the Grievant made statements about her to other students, those students tended to believe the Grievant because she was a teacher and in a position of authority. 6/

On October 6, 1995, without having first interviewed the Grievant but after having received complaints from Ms. Leino, students Swartz and Salzman and after having interviewed Ms. Gulan, Principal Lambert issued the following memo dated October 6, 1995 to the Grievant:

. . .

Re: Unprofessional Conduct

Recently, a number of incidences (sic) have been brought to my attention by members of the teaching staff and students concerning what I would term a serious

deficiency in professionalism on your part. Specifically, reports include:

- a. Making false statements about other staff members.
- b. Making unacceptable comments about other staff and students in the classroom.
- c. Making embarrassing comments about students in front of their peers.
- d. Sharing professional staff teacher lounge 'gossip' with students in the classroom.
- e. Fabricating stories about yourself to impress your peers.
- f. Defamation of character - students and staff.
- g. Compulsive lying.

No doubt, this is a very serious matter that is causing disruption among the professional staff and concern among the student body. This type of modelling is totally unacceptable as a professional educator employed by a public school system.

I find these reports to be quite disappointing to receive. These are issues of (sic) which your former employer had concerns and of (sic) which we discussed when you interviewed for your position at Hurley. I recall you denying the accusations Page 11
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during the interview leading me to believe that no such problems existed. It is very distasteful for me to discover the truth of the matter in this manner.

Undoubtedly, your unprofessional behavior will result in a recommendation for non-renewal of your contract.

To overcome this deficiency so that you might continue in the education profession, your seeking professional help would be not only advantageous but essential.

The Grievant testified that she received the above-quoted memo on October 11, 1995; that it came as a shock to her. The Grievant stated that she then asked Mr. Lambert what she needed to do and he stated that she should sign the bottom of the memo and date it. The Grievant stated that Mr. Lambert also suggested that she seek professional help. The Grievant stated that she later asked Mr. Lambert what else she should do and that he suggested that she resign by Christmas.

From November to March, 1995 the Grievant stated that she saw a psychologist in Wausau as Mr. Lambert had suggested. The Grievant stated that she knew that the statements that had been made about her were unfounded. The Grievant stated that when people say disturbing things about you, you wonder about yourself. And that this is why she sought professional help from a psychologist. The Grievant stated that in March, the psychologist stated that he saw no reason for her to continue seeing him and that he did not know why she was coming to see him. The Grievant admitted that after March, 1995, her insurance would no longer pay for her sessions with the psychologist. The Union offered no documentary evidence from the Grievant's (unnamed) psychologist regarding her visits to him.

The Grievant stated that Lambert's October 17, 1994 evaluation of her was the only such evaluation she had ever received as a teacher that had no recommendations for improvement. The Grievant stated that she never received any criticism from Mr. Lambert regarding her teaching

abilities. The Grievant stated that no one from the District ever asked her whether she had sought professional help after October 11, 1995.

At the instant hearing, the Grievant never denied the incident regarding Mr. Kelly nor the incidents reported by Ms. Leino. In her testimony, she disputed the facts as they had been stated by Ms. Swartz as follows: The Grievant stated that she had been prom advisor in the Spring of 1994; that on the second night after prom, she returned home and found that there was a message on her answering machine from Farah Swartz' mother but that the telephone number to return the call had been cut off. The Grievant stated that she then called the School District (to get Ms. Swartz' number). At the time, the Grievant stated that she told Lambert there was a problem with the prom and he told her that she should handle it. The Grievant asked if she could use the office on Monday to set up a meeting with Farah and her mother. Mr. Lambert agreed. The Grievant stated that Mr. Lambert told her that he did not feel he needed to attend the meeting, as something like this happened every year with the prom. Mr. Lambert did not dispute the Grievant's testimony summarized above.

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The Grievant stated that when Farah and her mother left the meeting with her, she believed that Farah's mother was satisfied; and that Mrs. Swartz had realized that the Grievant had become caught in the middle of a situation. The Grievant stated that Mrs. Swartz was concerned that her daughter had not been made prom queen because the ballots had been rigged; and that the ballots had been thrown away in a bathroom in the ski lodge where the prom had been held due to the Grievant's actions. The Grievant stated that she told Mrs. Swartz that she would go and get the ballots from the ski lodge but that Mrs. Swartz stated that would not be necessary. When asked whether the Grievant had apologized to Farah Swartz (as Farah Swartz had stated herein), the Grievant responded that she did not know what she would have apologized for. The Grievant also stated that what Farah Swartz testified to as having occurred at the meeting had not actually occurred.

Sometime in early February, 1996, Mr. Lambert interviewed long-time teacher Beverly Pertile regarding statements that the Grievant had made. During her interview with Mr. Lambert, Ms. Pertile stated that she told Lambert that the Grievant had made comments about staff to students and that students would come into her class from the Grievant's class complaining about things that the Grievant had said in the classroom. Pertile characterized these things as fantastic stories that she (the Grievant) had told to students in the classroom and that they could not believe. Pertile stated that there were many such stories that were reported to her by her students, although she could not remember the specifics of any of them. In addition, Pertile indicated that the Grievant herself had told her stories, almost on a daily basis, that she believed were quite incredible or were fabrications. Pertile could not recall the specifics of any of these stories.

On February 27, 1996 the Grievant received the following letter from District Administrator Roger A. Myran which read in relevant part as follows:

. . .

In accordance with Wisconsin State Statute 118.22(3), "Renewal of Teacher Contracts", and in compliance with the HEA Master Agreement, Article 6(2), "Teacher's Contracts", and Article 7 (1), "Conditions Contract", the Hurley School District Board of Education on February 20, 1996, authorized the administration to inform you that they issue to you a preliminary written notice of nonrenewal of your current teaching contract.

The Hurley School District Board of Education will make a final decision on contract nonrenewal on or before March 15, 1996.

Please be aware that you have the right to a private hearing with the Hurley Board of Education prior to being given written notice of refusal to renew your contract. If you choose to file a request for a private hearing with the Board of Education, please do so in writing, with the Board of Education Chairman or with me within five (5) days after receiving this preliminary notice of nonrenewal, so that a hearing may be arranged.

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At the hearing, you have the right to be represented by Counsel of your choice, to call witnesses and submit evidence relevant to the subject of your nonrenewal, to cross examine and rebut any unfavorable testimony, and to receive a non-arbitrary decision with regard to your nonrenewal.

...

On March 12, 1996 the Board of Education scheduled a private hearing for the Grievant regarding her preliminary notice of nonrenewal. The Grievant did not attend this meeting nor did anyone from the Union attend in her behalf. On March 25, 1996 the Northern Tier UniServ filed a grievance on behalf of the Grievant which read in relevant part as follows:

...

STATEMENT OF GRIEVANCE:

The district violated the rights of Teresa Faoro Fleischman under the collective bargaining agreement by voting to nonrenew her on March 12, 1996, without providing a private conference, which is a violation (sic) Article 6, Teacher's Contracts, paragraph 2. Further, the district did not afford assistance or recommendation for improvement prior to nonrenewal. Article 7, Conditions of Contract, paragraph 1, makes this grievance subject to the grievance procedure since the grievant was nonrenewed for reasons other than competency. The seven items listed in the October 6, 1995, memo to Ms. Fleischman from Bob Lambert do not talk about competency but rather to issues which address her liberty interest and contains nothing for recommendations for improvement for renewal.

ACTION REQUESTED:

That Teresa Faoro Fleischman be given a contract for the 1996-97 school year and be made whole for all losses suffered as a result of this alleged contract violation and that Ms. Fleischman's file be expunged of all materials relating to this nonrenewal for the 1996-97 school year.

. . .

Principal Lambert stated that he recommended the Grievant's non-renewal because he believed the complaints that his teachers and students had made regarding the Grievant's unprofessional conduct and comments. Mr. Lambert stated that his decision to recommend the Grievant's non-renewal was based upon her lack of competency. Mr. Lambert defined "competence" as a general fitness for a teaching position but he admitted that the Board of Education has no definition of competence or fitness except as is reflected in the job goal section of the junior/senior high school teacher position description.

Mr. Lambert admitted that in March, 1995, he did not confront the Grievant regarding Bonnie Leino's complaints as Ms. Leino had requested confidentiality and had told Lambert that she would talk to the Grievant about the incidents. Mr. Lambert admitted that he used the

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complaints made by Ms. Leino as a basis for the issuance of the October 6, 1995 memo. Mr. Lambert stated that he never warned the Grievant that as her "office" was in the teachers' lounge she should be careful what she said to others as well as what she repeated that she heard there. Mr. Lambert stated that he felt to make such a cautionary statement to any teacher would be demeaning, as teachers are professionals who should not need to be cautioned in this way. Mr. Lambert stated that he failed to evaluate the Grievant as provided in the contract because he felt he had visited her classroom several times and there was no need to criticize her teaching ability. Finally, Mr. Lambert stated that he felt that when his staff and his students came to him and made complaints regarding the Grievant which were the same kind of complaints that he had heard from at least one of the Grievant's pre-hire references, this was sufficient reason to question the Grievant's veracity in general.

District Administrator Myran issued a letter dated April 22, 1996 to Union Representative Degner which read in relevant part as follows:

. . .

The alleged grievance of March 27, 1996, submitted by you on behalf of Teresa Fleischman, could not be acted upon by me since non-renewal action had already been taken by the Board of Education. The second paragraph of your cover letter expresses the point.

The private conference for Ms. Fleischman on March 12, 1996, was unattended. Representation at an April 15, 1996, meeting by Mr. Dan Stella and you took place.

Anticipated Board of Education meetings are May 7, 1996, a special meeting, and May 21, 1996, the regular meeting. Executive sessions will be scheduled for both meeting dates in the event that you and/or HEA representation and/or Ms. Fleischman wishes (sic) to address the Board of Education.

Board denied 5/7/96

. . .

POSITIONS OF THE PARTIES

District

The District noted that complaints were received from students and teachers regarding the Grievant's conduct in and out of the classroom; that the evidence showed that the behaviors caused the deterioration of trust and respect for the Grievant as a public school teacher; and this demonstrated the Grievant's incompetence. The District also observed that the Grievant had engaged in the same type of behavior during her former employment but that she had denied engaging in such behavior to Mr. Lambert in her pre-hire interview, stating that her problem had been simply a personality conflict with the a former supervisor. Based upon these factors, the District suggested that the Grievant seek professional help on October 6th. However, the

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District observed that to provide such professional help to the Grievant was beyond its ability and outside its normal goals and functions. The District further noted that the preliminary notice of nonrenewal was sent to the Grievant on February 26, 1996, and that a private conference with the Board was set up for the Grievant and the Union on March 12, 1996, although neither the Grievant nor any Union representative attended that meeting.

The District argued that the Grievant's actions demonstrated her incompetency to perform as a public school teacher, as the Grievant had failed to exhibit appropriate role-modeling for students, parents and other teachers. The District pointed to the sworn testimony of other teachers as well as students which demonstrated that the Grievant's behavior had been inappropriate, unacceptable and had resulted in reduced levels of trust and respect for the Grievant among students and staff. The District urged that it had followed the contract as well as the Wisconsin Statutes in nonrenewing the Grievant and that its nonrenewal procedures were fair and just. The District noted that the Board had followed Article 7, Paragraph 1 by refusing to arbitrate the grievance on the ground that the Grievant's nonrenewal was during her probationary period and was based upon her incompetency. Therefore, the District sought denial of the grievance in its entirety.

Association

The Union asserted that the Grievant was denied her rights under Article 7, paragraph 1 of the collective bargaining agreement because she was not offered "guidance, assistance and recommendations for improvement" during her two year probationary period, and as such, the Grievant has a right to expect to be fully employed at the District for the 1996-97 school year. On the other hand, the Union asserted that if the District nonrenewed the Grievant for competence, then it violated Article 8, Paragraph 2a, by inequitably applying Article 7 to the Grievant.

The Union questioned how the District could stipulate that the Grievant was an excellent classroom teacher, yet nonrenew her for competency reasons. The Union found it ironic that the District had evaluated the Grievant only once during her two-year probationary period and that in his evaluation, District Representative Lambert had found no areas in which the Grievant needed improvement. Yet, approximately one year after receiving a glowing evaluation from Lambert, on October 6, 1995, Lambert handed the Grievant a memo which essentially offered her no constructive criticism, told her to seek psychiatric help and indicated that she would likely be nonrenewed.

The Union asserted that the District's actions showed that the District acted arbitrarily and had failed to follow its own policies as well as its contract in nonrenewing the Grievant for the reasons stated in the October 6, 1995 memo. The Union observed that Article 7 only has meaning if the employe is being nonrenewed for competency-based reasons. The Union implied, therefore, that Article 7, Paragraph 1 is not applicable to probationary teacher activities which involve a gross violation of law "or other acts or behavior known to be wrong by reasonable people." In any event, the Union urged that the District must nonetheless establish that probationary teachers have engaged in willful violations of law or behavioral standards of reasonable people before they may nonrenew a probationary teacher.

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The Union argued that it was the District's burden to prove that the allegations against the Grievant had merit and that the District had failed to do so. In this regard, the Union noted that the District failed to prove that the Grievant had fabricated any stories, that the Grievant had gossiped, that the Grievant had been a compulsive liar or had engaged in defamation. Rather, the Union noted, the District had relied upon mere hearsay which remained unsubstantiated by other witnesses' testimony. In the Union's view, as the District had admitted that the Grievant was an excellent teacher, this admission requires a conclusion that the District had nonrenewed the Grievant without "substantive reason" in violation of the contract.

The District's inequitable application of Article 7 to the Grievant (in violation of Article 8) and its failure to properly evaluate the Grievant under Article 19 as well as its failure to bargain with the Union pursuant to Articles 1 and 5 regarding any change in its policies as applied to the Grievant, all supported the Union's arguments in this case. In all of these circumstances, the Union argued that the Grievant should be returned to her teaching position at the District with full backpay and benefits. 7/

DISCUSSION

The District hired the Grievant in August, 1994, before the start of the 1994-95 school year, and it non-renewed the Grievant in March, 1996, during the contractually-required two year probationary period. The labor agreement at Article 7, Section 1 clearly states that all District teachers must serve a two year probationary period and that during this time period, probationary teachers ". . . will be provided with guidance, assistance and recommendations for improvement."

Article 7, Section 1 also provides that the nonrenewal of a probationary teacher ". . . at the end of the probationary year for alleged competence based reasons shall not be subject to the grievance procedure." 8/

Therefore, if the reasons given by the District for its nonrenewal of the Grievant were competence based, the Grievant's nonrenewal is not subject to the grievance procedure and I need not reach the other issue 9/ raised in the grievance regarding whether the Grievant received the guidance, assistance and recommendations for improvement required by Article 7, Section 1. In determining what constitutes teacher competency, I note that both the labor agreement and the District's policies are silent on this point. The only document of record that addresses the subject of competency, albeit implicitly, is the position description for a Junior/Senior High School teacher which provides that teachers must possess "proficiency in subject area being taught"; that a teacher's job goal must be "(t)o help students learn subject matter and skills that will contribute to their development as mature, able, and responsible men and women"; and that a teacher is responsible to establish and maintain a classroom environment that is "conducive to learning" and "(t)akes all necessary and reasonable precautions to protect students. . . ." 10/ This document is only helpful in part in that the position description admitted herein must demonstrate, to some degree, the District's concept of competency. The American Heritage Dictionary (1976) defines "competent" as follows:

- 1) Properly or well qualified; capable.
- 2) Adequate for the purpose; suitable; sufficient.

In my view, competence has a broader meaning than that which the Union would apply herein -- true competence in teaching must include proper role modeling as well as excellent teaching.

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The Grievant was non-renewed because she made inappropriate comments to and about teachers and students. The Grievant never denied making the statements she was alleged to have made about fellow teachers Reed and Kelly. In regard to the testimony of teachers Leino, Gulan and Pertile, the Union failed to attack the credibility of these witnesses. I have therefore credited their testimony in its entirety. Furthermore, the Grievant never denied telling former teacher Pertile fantastic stories and she never specifically denied apologizing to Farah and Mrs. Swartz (as Farah Swartz testified) regarding the homecoming queen situation. Regarding Farah Swartz's testimony, I note that the Union failed to offer any reason why Miss Swartz's testimony should not be credited in full. 11/

This case is not about the Grievant's ability to instruct students in Spanish. Rather, it concerns the Grievant's inability to appropriately interact with students and other teachers; and that she could not be depended upon (as should be the case) to properly perform all the duties of a teacher, including appropriate role-modeling when teaching impressionable, young students. The

Grievant's comments and actions, complained of by faculty and students (and not denied by her) demonstrated her incompetence as a teacher.

When the Grievant's inappropriate comments and actions were reported to the District, it is understandable that District Principal Lambert failed to understand how a professional teacher could act so, and conclude that the Grievant had psychological problems. Indeed, Lambert's recommendation that the Grievant seek professional counseling constituted a reasonable effort to give the Grievant guidance and assistance (which the District was not equipped to give her) in the circumstances. In this regard, I note that the Grievant failed to submit any documentary evidence to show that she actually sought and received professional counseling from a psychologist, as she claimed.

For all of the above reasons as well as the Grievant's demeanor on the witness stand, I find that the Grievant failed to demonstrate full competency as a teacher, that she failed to meet the definition of competence, as set out above, by her actions toward and comments to students and faculty and therefore, that her nonrenewal was not grievable under Article 7, Section 1. 12/

On this basis, I issue the following

AWARD

The Hurley School District did not violate the collective bargaining contract when it nonrenewed Teresa Faoro Fleischman for the 1996-97 school year for competency-based reasons. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 14th day of November, 1997.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

ENDNOTES

1/ Lambert has been a principal of the District Junior/Senior High School since 1992. Lambert made both the recommendation to hire the Grievant as well as the recommendation to nonrenew her that is in dispute herein.

2/ The District stipulated that the Grievant was an excellent classroom teacher and that there were no problems with her pedagogical approach.

3/ Mr. Kelly did not testify in the instant hearing.

4/ Ms. Swartz testified at the instant hearing. Ms. Salzmann did not. Mr. Lambert testified regarding Ms. Salzmann's complaints.

5/ I noted that during her testimony, Swartz wept.

6/ Mr. Lambert corroborated Ms. Swartz' testimony herein. Mr. Lambert also stated Ms. Salzmann told him that the Grievant had told her that Farah had told the Grievant that Farah expected to be prom queen and that Salzmann had stated that she was surprised because she did not believe her friend Farah would say such a thing. Lambert stated that when he met with them in October, 1995, both Salzmann and Swartz were upset about the prom queen incident and that they also brought up the Grievant's comment regarding Farah's nylons, which Lambert stated embarrassed Farah.

7/ The Union cited generally a 1979 grievance arbitration award by Arbitrator Joseph B. Kerkman regarding the Washburn School District (without citation). The Union argued that in this arbitration award, Mr. Kerkman put a probationary teacher back to work because the District had failed to give that teacher proper guidance and assistance prior to the district's nonrenewal of that teacher.

8/ Initially the District refused to arbitrate the instant grievance. The Union then filed a complaint case to force the District to arbitrate and the Commission ordered arbitration hereof in Dec. No. 28804-B (WERC, 2/97). The undersigned was designated arbitrator by the Commission on April 10, 1997.

9/ In its grievance, the Union also asserted that the District failed to give the Grievant a private conference pursuant to Article 6. The Union failed to pursue this claim at hearing and did not argue regarding it in its brief. Therefore, I need not deal with this allegation in this award.

10/ The Union cited an attachment to the position description which states that probationary employees should be evaluated at least three times in their first year of employment and at least twice in their second year of employment. This attachment also states that the "primary purpose of evaluation is to improve instruction."

11/ The fact that Miss Swartz disliked another teacher and that her parents complained about that teacher does not require a conclusion that Miss Swartz should not be believed in this case.

12/ As the grievance is not arbitrable, I need not reach the issue whether the District violated Article 7, Section 1, by not providing the Grievant with guidance, assistance and recommendations for improvement during her probationary period.

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