

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ELEVA-STRUM SCHOOL DISTRICT**

and

**ELEVA-STRUM EDUCATION ASSOCIATION and  
MARK RYSER**

Case 18  
No. 55096  
MA-9898

*(Grievance of Mark Ryser)*

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Appearances:

**Mr. Steven Pieroni**, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of Eleva-Strum Education Association and Mark Ryser.

**Ms. Kathryn J. Prenn**, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the Eleva-Strum School District.

**ARBITRATION AWARD**

Pursuant to the provisions of their collective bargaining agreement, Eleva-Strum School District (District) and Eleva-Strum Education Association (Association or Union) jointly requested that the Wisconsin Employment Relations Commission designate Sharon A. Gallagher, a member of its staff, to serve as arbitrator to hear and decide a dispute concerning the non-renewal of Mark Ryser. The hearing was held on August 12 and 13 and September 30, 1997, in Eleva, Wisconsin at which time the parties were afforded full opportunity to present relevant testimony, exhibits, and other evidence and argument. No stenographic transcript of the proceedings was made. The parties submitted their initial post-hearing briefs, which were simultaneously exchanged through the arbitrator, on November 3, 1997. Thereafter, the parties filed reply briefs by December 1, 1997, whereupon the record was closed.

**STIPULATED ISSUES**

The parties stipulated that the following issue should be determined in this case:

Page 2  
MA-9898

Did the District have just cause to non-renew the Grievant? If not, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE V**

**TEACHERS/UNIT MEMBERS RIGHTS**

**A. EVALUATION**

**1. Teacher/Unit Member Evaluation**

- a. All monitoring or observations of the work performance of the teacher/unit member shall be conducted openly and with full knowledge of the teacher/unit member. The use of audio systems or similar surveillance devices shall be strictly prohibited unless previous approval by teacher/unit member being evaluated.
- b. Any teacher/unit member evaluation shall result in a written report. Teachers/unit members shall be given a copy of any evaluation report prepared by their supervisors and shall have the right to discuss such a report with their superiors before it is submitted to the administration or put into their personnel files.
- c. Any complaint regarding a teacher/unit member made to the administration by any parent, student, or other person shall be recorded, dated and called to the teacher/unit members attention. The record shall include the name of the complainant, the date and time of the complaint, and the exact nature of the complaint. No record of any complaint made anonymously shall be recorded or brought to the attention of the teacher/unit member.
- d. All teachers/unit members new to the School District of Eleva-Strum will be placed on probation for three (3) consecutive school years of teaching. However, these teachers/unit members may not be non-renewed for arbitrary or capricious reasons. Upon completion of the probationary period, no teacher/unit member will be non-renewed except for cause.



- e. Recourse to any action by the Board to discipline, suspend, discharge, or non-renew any nonprobationary teacher/unit member shall be through the Grievance procedure.

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### C. SUSPENSION, DISCIPLINARY ACTION, NONRENEWAL, DISCHARGE

#### 1. Suspension

- a. The District Administrator may suspend a teacher/unit member without pay, but the Board must act on the suspension within three (3) working days or the suspended teacher/unit member receives full pay for the suspension period. If the administrator's decision to suspend is overruled by the Board, the teacher/unit member is reinstated with full back pay.

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#### 3. Non-renewal

- a. At least fifteen (15) days prior to giving written notice of refusal to renew a teachers/unit members (sic) contract for the ensuing year, the employing Board shall inform the teacher/unit member by preliminary notice, in writing, that the Board is considering nonrenewal of the teachers/unit members contract. If the teacher/unit member files a request within five (5) days after receiving the preliminary notice, the teacher/unit member has the right to being given written notice of intention to non-renew his/her contract.
- b. On or before March 15 of the school year during which a teacher/unit member holds a contract, the Board by which the teacher/unit member is employed or a teacher/unit member, at the discretion of the Board shall give the teacher/unit member written notice of renewal or refusing to renew his/her contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing year, or a teacher/unit member who does not receive notice of renewal or refusal to renew his/her contract for the ensuing school year on or before March 15, shall accept or reject, in writing, such contract not later than the following April 15. No teacher/unit member may be employed or dismissed except by a majority vote of the full membership of the Board. No such Board may enter

into a contract of employment with a teacher/unit member for any period of time as to which the teacher/unit member is then under contract of employment with another Board.

4. Discharge
  - a. The Board, through its administration may discharge a teacher/unit member for conviction of offenses related to sexual misconduct, production, sale or distribution of illegal substance and similar offenses.
  - b. The district administrator shall notify the teacher/unit member, in writing, of any alleged infractions, as stated in (a), that could result in his/her discharge.
  - c. All information and evidence forming the basis for discharge shall be given to the teacher/unit member, the Association and the Board.
  - d. The teacher/unit member shall be permitted to appear before the Board, during closed session at which the Board is considering his/her discharge.
  - e. The discharged teacher/unit member, at his/her own option, may be accompanied by one other association teacher/unit member or legal counsel during the discharge proceedings.
  - f. Previously scheduled meetings or discussions involving discharge proceedings shall not interfere with duties or classroom instruction.
  - g. The Board shall deliberate in private, but shall reach its decision in open session. The teacher/unit member may request the action to take place in a closed session.
5. Just Cause
  - a. A teacher/unit member shall not be disciplined, suspended, nonrenewed or discharged except for just cause.

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## **RELEVANT DISTRICT POLICY**

On March 22, 1993, the District adopted the following policy regarding sexual harassment:

### **SEXUAL HARASSMENT**

#### **POLICY**

- A. It is the policy of the Eleva-Strum School District to maintain a learning and working environment that is free from sexual harassment.
- B. It is a violation of this policy for any employee or volunteer of the Eleva-Strum School District to harass another employee, volunteer, or student through conduct or communications of a sexual nature as defined under "DEFINITION" below.

It is also a violation of this policy for students to harass other students, employees, or volunteers through conduct or communications of a sexual nature as defined under the following "DEFINITION".

#### **DEFINITION**

- A. Sexual harassment is a form of sex discrimination, and is illegal as defined by Title IX of the Educational Amendments of 1972, Title VII of the Civil Rights Act, the 14th Amendment of the Constitution, and numerous state criminal and civil statutes. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
  - (a) submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment;
  - (b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  - (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- B. Sexual harassment, as set forth under "DEFINITION - A" above, may include, but is not limited to the following:

- verbal harassment or abuse
- pressure for sexual activity
- repeated remarks to a person, use of inappropriate language or jokes with sexual implications
- unwelcomed touching or unsolicited, inappropriate gestures
- suggesting or demanding sexual involvement accompanied by implied or explicit threats concerning one's grades, job, etc.
- repeated display of offensive, sexually graphic materials which is not necessary for business purposes.

#### PROCEDURE

The building principal is the designated sexual harassment officer in the District and is responsible for coordinating federal regulations concerning sexual harassment. The enforcement of this policy shall be processed according to the following procedure:

1. Any complaint will be presented in writing or orally to the building principal, unless the alleged offender is the building principal, in which case the complaint would be presented directly to the superintendent and be handled by him/her.
  - a. Oral complaints will be handled informally.
  - b. If the complaint is submitted in writing, (it should include the specific nature of the harassment and corresponding dates, and also include the name, address, and phone number of the complainant) the following steps will be taken to resolve the complaint:
    - 1) The building principal will promptly notify the superintendent regarding the complaint, file a copy of the complaint with the superintendent, and promptly investigate the complaint, notify the person who has been accused of harassment, arrange meetings to discuss the complaint with all concerned parties, and submit a report of the results of the investigation to all parties within ten (10) working days after receipt of the written complaint. The building principal may exercise discretionary authority to discipline the employee, volunteer, or student involved if he/she feels satisfied that the evidence as presented warrants.

- 2) If the complainant is not satisfied with the result of the investigation and follow up activities by the building principal, he/she may submit a written appeal to the superintendent indicating the nature of disagreement with the report and the reason underlying such disagreement. Such appeal must be filed within ten (10) working days after receipt of the building principal's report. The superintendent will arrange a meeting with the complainant or other affected parties, if requested by the complainant or deemed appropriate by the superintendent, at a mutually agreeable time, to discuss the appeal. The superintendent will give a written response to the complainant's appeal within thirty (30) working days. The superintendent may exercise discretionary authority to discipline the employee, volunteer, or student involved if he/she feels satisfied that the evidence as presented warrants the discipline.
- 3) If the complainant or the superintendent wishes to pursue the matter further, either party may file an appeal requesting a meeting with the superintendent within ten (10) working days after the decision in Step 2 has been rendered. The superintendent shall review the matter with the appropriate parties and provide a response to the appeal within ten (10) working days.
- 4) If the complainant or the superintendent wishes to pursue the matter further, either party may file an appeal requesting a hearing with the Board of Education within ten (10) working days after the decision in Step 3 has been rendered. The Board of Education will hear evidence regarding the matter in closed session and take appropriate action to resolve the matter as soon as practicable.

#### SANCTIONS

- A. A substantiated charge against an employee or volunteer in the school district will subject the employee or volunteer to appropriate disciplinary action, including possible discharge.



- B. A substantiated charge against a student in the school district will subject that student to student disciplinary action, including suspension and/or expulsion, consistent with the student disciplinary code and/or referral to County Social Services.
- C. Employees, volunteers or students are encouraged to file a bona fide complaint of conduct prohibited by this policy to fully advise the School Board of any instances of improper conduct or violations of this policy. Individuals who retaliate against an employee, volunteer or student who files a bona fide complaint under this policy or who assists in an investigation under this policy shall be subject to immediate, appropriate disciplinary action for such conduct.

#### NOTIFICATIONS

Notice of this policy will be distributed to all district employees and incorporated in staff and student handbooks.

#### STATEMENT

Regardless of how its appearances and existence are rationalized, sexual harassment interferes with the right to receive an equal educational opportunity. We therefore wish to let our students and staff know through our written policies, seminars, and actions that:

- (a) We do not tolerate sexual harassment;
- (b) We take all sexual harassment accusations very seriously;
- (c) We work to empower people themselves to handle potential sexual harassment situations; and
- (d) We do our best to protect the rights of everyone involved as we try to resolve all situations.

All complaints will be kept confidential to the maximum extent possible.

#### STIPULATIONS OF THE PARTIES

By letter dated November 18, 1997, the parties agreed as follows regarding the contents of this Award:

. . . In summary, the Award could provide an introduction which sets out Arbitrator Gallagher's appointment as the arbitrator, hearing dates, statement of the issues, statement of the facts, and perhaps, a brief summative statement of the arbitrator's rationale and the award, which either dismisses or sustains the grievance. In the event of the latter, Arbitrator Gallagher possesses the authority to fashion an appropriate remedy. . .

### **BACKGROUND**

The following is a summary of the pertinent actions taken by the District regarding M.R.'s employment in the District between 1984 through the end of the 1994-95 school year:

#### **1983-84**

2/14/84 Possible nonrenewal or probationary contract threatened in written memorandum. Issues involved discipline; lack of helping students; off-color comments, stories, music and posters from personal parties or get-togethers. The Board offered a regular contract to M.R. for 1984-85.

#### **1984-85**

8/27/84 Principal Gary Marine notes an observation of M. placing both hands on shoulders of a female student. No complaint from the student is filed (Dist. Ex. 3.)

#### **1985-86**

4/17/86 Principal Marine reprimands M.R. in writing for following up on a student's suggestion to figure out the time it would take to urinate from the roof of a building until the urine struck the ground.

#### **1986-91**

James Tocko is Principal of Eleva-Strum High School. No problems are reported regarding M.R. by Tocko.

**1991-92**

3/31/92 Superintendent Gary Marine reprimands M.R. (with threat of future suspension or discharge) for allegedly putting his arms around a female student in the hallway and giving her a hug and several kisses on the neck. The female student advised the Administration that she did not solicit, welcome, or appreciate M.R.'s conduct. 1/

**1992-93**

No problems reported by Principal Tocko regarding M.R. Elementary Principal Semingson is trained for and becomes Title IX Coordinator.

**1993-94**

8/23/93 Sexual Harassment In-Service given at ESSD. M.R. attended.

9/93 Dr. Zavada becomes Superintendent when Superintendent Marine leaves for other employment.

10/13/93 After observing M.R.'s class, Principal Tocko issues a memoranda to M.R. to "be careful about the remarks made in regards (sic) to the different sexes", and to be "super conscious of any contact whatsoever with females."

**1994-95**

8/94 M.R. begins using CPM Program in his Math I and II classes.

9/94 Female student JH files a complaint in November 1994 alleging that M.R. made a statement in September to the effect of "What's the matter, J.? Didn't you get enough sex during the summer?"

9/7/94 Principal Tocko issues a memorandum informing M.R. not to talk about short-shorts, car wash and bikinis, or math problems being done from the front or the rear. 2/

- 10/11/94 Memo warning M.R. from Principal Tocko. 3/
- 11/29/94 In M.R.'s Math class, female student MD was holding a new eraser, which M.R. comments on by asking if it is a new birth control device. Student makes a formal complaint which is investigated. M.R. admits he made the statement and subsequently apologizes in writing. 4/
- 11/94 Female students TH and CS file written complaints that M.R. gave them the finger in Math class.
- 12/1/94 Letter of reprimand issued to M.R. for the TH/CS complaints. 5/
- 2/12/95 Complaint from Mrs. Jane Hermundson. M.R. allegedly did not advise her of her daughter's progress, even though she had requested this information.
- 2/27/95 Mrs. Hermundson writes a complaint to Title IX Coordinator mentioning several inappropriate comments and some conduct that M.R. engaged in with her daughter and other students. 6/ This complaint is eventually appealed to the Department of Public Instruction.
- 3/16/95 Semingson Title IX investigation report on Hermundson complaint. 7/
- 3/22/95 Superintendent Zavada issues a three-day suspension to M.R. based on Hermundson's complaint. Grievance filed. 8/
- 5/15/95 Board agrees to one-day suspension of M.R., a reduction from a three-day suspension issued by Zavada, M.R. drops grievance.

### FACTS

M.R. taught high school Mathematics at Eleva-Strum School District for approximately 22 years before his non-renewal on March 12, 1997. M.R. was the only High School Math teacher at the District. Since approximately 1993 or 1994, M.R. has taught an innovative math program in all of his high school math classes known as College Preparatory Math (CPM). CPM requires students to work in groups and teach each other mathematics without assistance

from the teacher unless all of the students in the group have the same question or they cannot reach a consensus regarding how to complete a mathematics problem. It is undisputed that M.R.'s students have performed above average in mathematics on standardized tests and that they have also performed above the national average in mathematics during all times relevant hereto. 9/

There were no problems reported with M.R.'s teaching or conduct during the school year 1995-1996. During the school year 1996-1997 the following incidents occurred. In the Fall of 1996, a parent, Mrs. Sleep, spoke to Dr. Hitchens, District Superintendent, regarding her daughter's performance in M.R.'s Math I class. (Mrs. Sleep's daughter was then a sophomore.) Mrs. Sleep spoke to Dr. Hitchens in September, prior to the end of the nine-week grading period. Mrs. Sleep told Dr. Hitchens that she was concerned that her daughter was not learning math as she should in M.R.'s class; that the manner in which M.R. taught his class made it difficult for her daughter to learn math; and that her daughter was frustrated, upset and on edge because of this. Mrs. Sleep also told Dr. Hitchens about a comment M.R. made to her daughter during class to the effect that if her daughter's sweater weren't so tight, she (the daughter) could learn math more easily. As a result of this discussion with the parent, Dr. Hitchens directed Elementary School Principal Semingson (Title IX Investigation Coordinator) to investigate Mrs. Sleep's statements to him which Hitchens believed constituted "rumors, reports or complaints of sexual misconduct or suspicious conduct".

Semingson proceeded to investigate the allegations made and issued a report dated December 19, 1996, which read, in relevant part as follows:

. . . The investigation included discussions with students who are presently in a course taught by M.R., and a discussion with M.R. while having Mr. Tocko and an association representative also present. I interviewed twelve students in small groups and shared the results with M.R. giving him an opportunity to respond to any of the findings.

#### **Investigation Results**

I began the student discussions by telling them that I was investigating student's attitudes toward the math program. I told them that I had three main questions but that I may ask them to elaborate or give examples of specific things that are brought up. The three questions were:

"Describe a typical day in math class."

"What is the general atmosphere of the class?"

"Describe the classroom discussions."

I told the students that I would be writing a report on my findings but that their names would remain confidential and that if they did not want to be part of the interview they may go back to class. All students chose to remain and be part of the interview.

With all of the groups interviewed, some common comments were made about M.R.'s classes. First, students reported that there is a lot of "arguing" between the class as a whole and M.R. Most of this seems to be about the class not understanding the material, the students having to "teach each other", and the lack of assistance from M.R. There were also concerns raised regarding the use of inappropriate language by M.R. and students. The two words heard most often, "almost daily", from the students were "shit" and "fuck". When asked if M.R. also heard these words all group's responses were affirmative. When asked what Mr. R. does when he hears those words the responses were "ignores them", "warns the students" and "gives students detention". One student said that he was given detention for saying "cocksucker". The student said that M.R. thought "I was saying it to him", when actually the student made this comment to a girl in retaliation for calling him an "asshole". When asked if M.R. uses this type of language with the students, three groups responded no and one group responded "yes, sometimes in his jokes".

A second common topic discussed by all groups was that of M.R.'s jokes. "He tells lots of jokes." I asked what the jokes were like and all groups said "dumb". When I asked if any are inappropriate or suggestive, two groups said yes, sometimes, but only one group could remember any examples. Two examples given were about "Winnie the shit" and witches' husbands having "hollow weanies". Remarks made by the students describing M.R. included "stupid", "a bad teacher", and "pervert".

Of the students interviewed, two females commented about remarks being made by M.R. directly to them which made them feel uncomfortable. According to one new student, M.R. made a statement in September about her shirt being so tight that blood couldn't get to her brain and another statement about her smelling good. The other student said that M.R. often makes comments about her being good looking.

During the December 10th meeting with Mr. Ryser, I shared all of the above information and invited him to respond to any of it, directing him to be "truthful and honest" and that knowingly giving false information may result in disciplinary action up to and including discharge. M.R. informed me that he had been

advised not to enter into any discussion about allegations at this time. He did,

however, comment on some of the items discussed.

I informed M.R. that of the two basic categories of sexual harassment, Quid Pro Quo and creating a hostile environment, I consider this a hostile environment case caused by his failure to take consistent and appropriate action, inability to keep order and control in his class, and specific comments and jokes he has made to the students.

Mr. R. chose to comment on some of the items brought to his attention. First, he felt that he does take action on the inappropriate language in the classroom as evidenced by the large number of students whom he has put on detention this year. Second, he said that his joke about "Winnie the shit" was just a "cute joke" and not offensive. Third, his class is discussion based and there will be disagreements. Fourth, he didn't remember whether or not he had made comments about a tight sweater, how a student smells, or how a student looks, but if he said these things, they were not offensive comments nor did they have any hidden meaning. Finally, when asked about the student who said "cocksucker", Mr. R. said that he wasn't sure who the statement was directed toward, but that he gave the student detention because the statement was inappropriate regardless of the person for whom it was intended.

### **Conclusions and Recommendations**

Under Title IX of the Educational Amendments of 1972, it is the responsibility of each school district to ensure a learning environment which is not hostile, intimidating, or offensive. Administrators and teachers have a legal duty to ensure that each classroom is free of offensive and suggestive jokes, language and comments. Although M.R. seems to have made some attempts to curb offensive language in his classroom through detentions, it is not consistent and the attempts appear unsuccessful. According to the students, this type language would **never** be tolerated in other classrooms and it is only M.R.'s classes which are out of control in this way. Based on my discussions with students, I believe M.R. projects an attitude of sometimes it's okay to use profanity in the classroom and sometimes it isn't. Some of the jokes told by M.R. also project this attitude.

Being an experienced teacher of adolescent students and having had inservice training on Title IX and sexual harassment, M.R. is expected to know that many students of this age are offended by off color jokes and offensive language and are also especially sensitive to comments about their looks, smells, or dress. He should also understand that these create a classroom climate which make many students uncomfortable which actually inhibits learning.

The records reveal that this behavior has been a historic problem with M.R. In March of 1995, M.R. was involved in another sexual harassment case in which a

complaint was filed against him by a parent. M.R. received a disciplinary suspension of one day without pay. I believe the district has a legal obligation under Title IX to take further disciplinary measures in an attempt to ensure a hostile free learning environment for students and employees.

It should be noted that M.R. told the two jokes referenced above to Math III students in class at the end of October, 1996.

On December 12, 1996, the State of Wisconsin Department of Public Instruction (DPI) issued its final decision regarding Mrs. Jane Hermundson's appeal of her 1995 complaint against M.R. and the District, finding that the District violated Sec. 118.13, Stats. After the District received the copy of DPI's decision, Dr. Hitchens and M.R. had a discussion regarding whether Mrs. Hermundson would exert her right to make this report public. Ultimately, Mrs. Hermundson decided not to make the DPI decision a public document and the controversy over her complaint (and M.R.'s conduct which gave rise to it) died down.

On December 19, 1996, Dr. Hitchens held a meeting which M.R. and his union representative attended along with Semingson and Principal Tocko, in which Hitchens confronted M.R. regarding M.R.'s having told his Math III students the "Winnie the Ship" joke. At this meeting, M.R. stated, "I said 'Winnie the Ship', not the other term. I alluded to it." During this interview, M.R. also admitted having told the "Hollow Weanies" joke to his students. M.R. also stated that he would not tell jokes of this nature to his classes again. Dr. Hitchens asked M.R. during this interview whether he understood that the incidents that had been investigated could lead to his (M.R.'s) termination. M.R. responded that he did not understand this, and that there were lots of next steps that the District could take. 10/

On December 19 and 20, 1996 and January 3 and 10, 1997, M.R. spoke with Dr. Hitchens regarding what action the District anticipated taking concerning Semingson's Title IX report. During these discussions, Dr. Hitchens offered to allow M.R. to resign and take a one-day suspension along with a severance package, rather than face a longer suspension of three days and non-renewal at the end of the school year. On January 10, 1997, Dr. Hitchens issued the following Memorandum to M.R. regarding what actions the District would take following Semingson's report of December 19, 1996:

...



I have finished my review of both Mr. Semingson's The Title IX Investigation Report, dated December 19, 1996 and my notes of the meeting held on that same date involving you, Mr. Tocko, Mr. Semingson, Mr. Warren Behm (as ESEA representative) and me.

The conclusions from that review are as follows:

1. That the alleged incident of your inappropriate remark to a female student regarding either her shirt or sweater being too tight did, in fact, occur.
2. That the telling of inappropriate jokes to students in your charge such as "Winnie the Shit" and "hollow weanies" did, in fact, occur.
3. That student use of inappropriate language in the classroom, did, in fact, occur, however there is also reason to believe that you attempted to control it.
4. That your occasional classroom use of inappropriate language such as "shit" did, in fact, occur.

These actions on your part are serious violations of the trust the public places in us when interacting with their children. You have allowed a hostile environment to continue to exist, though you have been warned and directed over the years of your employment to improve in this area.

Your repeated unwillingness to follow directives given to you by your supervisors causes me to have serious concerns about your sincerity of "I wouldn't do it again".

#### DISCIPLINARY ACTION

As a result of these most recent incidents, you will be suspended from work without compensation for one day (January 20, 1997). You are also directed to establish and maintain an appropriate, non-hostile classroom environment in which all verbal and non-verbal behavior on your part is above reproach. You are also hereby directed to take whatever professional steps are necessary to establish and maintain an appropriate, non-hostile classroom environment in which all verbal and non-verbal behavior on the part of the students in your charge is above reproach.

Failure on your part to follow these directives will, in all likelihood, result in my recommendation that your employment in this district be terminated.

On January 13, 1997, Hitchens issued the following Memorandum to M.R. regarding "current disciplinary action, possible non-renewal":

...

I truly regret that the process to secure both your resignation and a reasonable level of financial security failed late Friday afternoon. I had thought we were well on our way to a mutual resolution after our earlier discussions on December 19th and 20th and again when you stopped in to talk on January 3rd.

The letter of reprimand issued on Friday, January 10, 1997, which included only one day's suspension without pay, was a direct reflection of those discussions, as was the honoring of your specific request to have that day be January 20, 1997. The reduction in suspension from multiple days to a single day was, of course, supposed to be coupled with your probable resignation, but I recognize your right to act according to what you believe is in your best interest. I certainly have no intention of altering your suspension.

As we discussed in both December and January, the Board will now begin its process tonight, January 13, 1997, toward the possible non-renewal of your teaching contract. They will also act on the one-day suspension you were issued on Friday, January 10, 1997.

As outlined in the Master Agreement, you have opportunities to request hearings before the Board regarding both the suspension and possible non-renewal. Please review those portions of the agreement and let me know if you wish to partake in any of those opportunities.

...

Dr. Hitchens' offer of a one-day suspension along with a severance package and was always tied to the condition that M.R. resign from employment. Dr. Hitchens stated that he felt that M.R. might accept his proposal up until the Board took its final action on M.R.'s non-renewal and that this was, in part, the reason why Hitchens did not seek a multiple-day suspension along with a non-renewal of M.R. before the Board in March, 1997. 11/

Also on January 13, 1997, a parent called Dr. Hitchens and complained about a lack of control in M.R.'s classroom as well as inconsistent punishment of students by M.R. This complaint was put in writing by the parent and received by the District on February 24, 1997;

it was forwarded to M.R. on February 28; and it was discussed with M.R. and representatives of the District, including Dr. Hitchens on March 3, 1997. As the process of non-renewal had already begun when the parent's complaint was received in writing, Dr. Hitchens did not proceed formally on this complaint. 12/

On February 12, 1997, Dr. Hitchens issued M.R. a preliminary notice of non-renewal pursuant to Sec. 118.22, Stats. Dr. Hitchens' recommendation for non-renewal was based upon the following:

Job deficiencies:

- a. Failure to follow administrative directives to cease inappropriate verbal and non-verbal interaction with students, including inappropriate jokes.
- b. Failure to follow administrative directives to establish an orderly, non-threatening classroom environment.
- c. Repeated failure to follow Board of Education Policy GBAA, Sexual Harassment.

By memo dated March 6, 1997, Dr. Hitchens notified M.R. that he would recommend that the Board of Education non-renew M.R.'s contract for the 1997-98 school year, at the Board's March 10, 1997 regular meeting. By memo dated March 12, 1997, Dr. Hitchens informed M.R. that the Board of Education, by a 7-0 margin, had voted to non-renew his teaching contract for 1997-98. In addition, Hitchens' memo stated that the reasons for the Board's decision were the three deficiencies listed in Hitchens' February 12th memo and also stated:

. . . You are further advised that pursuant to S.S. 115.31, which defines immoral conduct as "behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil", a report of the Board's action will be filed with the state superintendent.

...

Six students were called to testify in the instant case, five female students and one male student. The male student stated that M.R. made no inappropriate comments to students, that M.R. did not swear in class, and that he did not tell jokes in class. This male student stated that he took math during his freshman and sophomore years (1995-97) from M.R. One female student who had graduated at the time of the instant hearing, stated that she had M.R. for Math classes in 1993 through 1996 and that although M.R. told jokes, none of these were harmful or inappropriate in her opinion. This student stated that M.R. treated students with respect and that M.R. told students not to swear in class.

The remaining four female students (including H.S.) stated that M.R. told inappropriate jokes in their classes (both a Math I class and a Math III class). Two of these female students stated that they felt that M.R. inappropriately placed single girls alone in groups with several boys. All of these female students stated that M.R.'s jokes were gross, dirty and disgusting; or that they were distracting, embarrassing or inappropriate. One of these students stated that M.R. would say he was sorry for telling jokes, and assure the class that it would not happen again. However, the student stated, M.R. continued to tell jokes. One student also stated that M.R. swore and used words such as "damn", "shit", and once he used the word "bitch" in class. Another of these female students stated that M.R. used the words "damn" and "shit" probably less than once each week, and that M.R.'s classes were loud, his students were confused, and that M.R. would not help the students. Two of these female students stated they heard M.R. tell the "Winnie the Shit" and "Hollow Weanies" jokes in class. Two other students remembered that M.R. told inappropriate jokes but could not remember the jokes. Two of these students stated that M.R.'s students had the impression that Mr. Tocko would do nothing regarding complaints about M.R. because Mr. Tocko and M.R. were good friends; and because students had complained in the past and nothing had been done. 13/

Female student H.S. (daughter of Mrs. Sleep) stated that there was only one other girl in her Math I class with M.R. in 1996. She stated that some of the things that M.R. said in class were not appropriate; that she did not know how to deal with this and that she dreaded going to M.R.'s class. In regard to the comment M.R. made concerning her sweater, H.S. stated that she had told M.R. that she did not understand math and that M.R. responded "Maybe if your shirt wasn't so tight, you could figure it out." H.S. stated that at least two other students heard this remark and that it made her angry because the comment was out of place. In regard to M.R.'s comment that H.S. "smelled good", H.S. stated that M.R. told her "you smell good" and asked "what is that?" H.S. stated that she felt this comment was inappropriate but she admitted that M.R. allowed students to chew gum in his class and that M.R. could have been referring to gum that she may have been chewing at the time the comment was made, rather than to her body odor. Regarding M.R.'s comment to H.S. that she would make a "good-looking bum", H.S. stated that this comment made her angry and that some members of the class heard it and told M.R. that the comment constituted sexual harassment. H.S. also said the boys in class teased her about M.R.'s various comments to her.

M.R. stated that he did not intend to comment on H.S.'s body by his comments to her in 1996; that he (M.R.) made comments to H.S. to help her to relax about math; and that H.S. never objected to his comments. M.R. stated he also made comments to boys in his classes that if their hats weren't so tight, they could figure out their math more easily. M.R. admitted to having said "shit" in class; to having made the "sweater" and "good-looking bum" comments to H.S. and that he might have made the front/rear math operation comment while a female student was at the chalk board working a math problem.

M.R. admitted that he told the "Winnie the Shit" joke once in October, 1997 in a Math III class (containing mostly high school sophomores and juniors) and that he also told the "Hollow Weanies" joke once in his Math III class at the end of October, 1997. M.R. was asked to and he repeated these jokes under oath herein. I will not recount them here. I find the jokes M.R. told were off-color and inappropriate and that they would be distracting to young people.

### **DISCUSSION**

As this is a non-renewal case, the District has the burden to show that it had just cause for its actions pursuant to Article V, Section C of the labor agreement. The Association has argued that the District should be held to a higher burden of proof in this case as the outcome hereof will affect M.R.'s reputation. I am sensitive to the Association's concerns in this regard. As the allegations in this case involve moral turpitude, and could affect M.R.'s reputation, a persuasive basis exists for applying a more stringent burden of proof herein -- that of clear and convincing evidence. The clear and convincing evidence standard will, therefore, be applied herein. 14/

The Association has argued that M.R.'s conduct did not rise to the level of sexual harassment as defined in the District's policy. In my opinion, there is no doubt that the conduct M.R. engaged in from 1993 forward constituted "use of inappropriate language or jokes with sexual implications" which "created an intimidating, hostile or offensive environment" in M.R.'s classroom, pursuant to the District's Sexual Harassment Policy. In addition, the application of the District's Sexual Harassment Policy does not require the application of statutory standards in my opinion.

The Association has also argued that because M.R. did not intend to offend anyone by his comments, because M.R. did not tell his jokes in the context of sexual implications, because M.R.'s students failed to object to M.R.'s jokes/statements, and because M.R. kidded his male students about their hats being too tight to allow them to do their math properly, that this evidence proved that M.R. did not sexually harass female students. I strongly disagree. Whether M.R. intended to sexually harass or intimidate female students is not relevant to the issue whether sexual harassment occurred in this case. Rather, it is the perception/impression of the victims which determines whether sexual harassment has occurred. Furthermore, the fact that M.R.'s students may not have formally complained about his statements does not prove that M.R.'s female students did not, in fact, feel sexually harassed or intimidated thereby. It may have been the case that the young women in M.R.'s classes were so shocked or offended by M.R.'s verbal sexual harassment that they were rendered speechless thereby or that they did not wish to call further attention to themselves by objecting to M.R.'s comments. It is significant that in 1994 one student was reportedly reluctant to ask questions of M.R. for fear that he would touch her. In addition, two of the students who testified herein stated that they believed that to complain about M.R. would be fruitless, as the District had failed to take action on complaints made in the past and because these students believed Principal Tocko and M.R. were friends.

Finally, in my view, M.R.'s comments regarding the tightness of boys' hats were not as personal and sexually explicit as M.R.'s comment regarding the tightness of H.S.'s shirt. Therefore, one cannot conclude that no students were sexually harassed by M.R.'s statements due to his lack of intent to harass, the lack of complaints about his conduct, or his neutral comments to male students.

M.R.'s conduct over many years (set forth in the "Background" portion of this Award) demonstrates that M.R. had severe problems interacting properly with female students from 1984 until his non-renewal in 1997. The fact that no complaints were lodged with Principal Tocko during the 1986-91 and 1992-93 school years does not require a different conclusion. Indeed, the fact that no complaints were lodged during these years may have been largely due to the District's failure (prior to 1993) to have a comprehensive, publicized policy against sexual harassment in place. It is also significant that in December, 1996, the DPI sustained the Hermundson appeal and found that in 1995 the District had failed to identify an appropriate sexual harassment policy and to properly publicize that policy to students, parents and staff.

The Association has also argued that because no misconduct was reported during 1995-96 regarding M.R. and because M.R.'s statements/conduct prior to 1997 were more severe than M.R.'s 1996-97 comments, the District should not have non-renewed M.R. in 1997. If these arguments were accepted, the District would have to start over with its disciplinary actions each time an employe "cleaned up" his/her act for a period of time, regardless of the seriousness of the employe's prior misconduct. Such an approach would be neither prudent nor appropriate in this case, given the egregious, essentially undisputed misconduct M.R. engaged in during 1994-95. On this point, I note that in 1994, M.R. received three letters of reprimand for numerous and various statements he made to female students. 15/ It is significant that M.R. failed to grieve the issuance of any of these letters. From the record evidence, it appears that between four and eight students and one parent complained to the District about M.R.'s statements/conduct during the 1994-95 school year which resulted in the issuance of the above-described reprimands and a suspension in May of 1995.

In addition, I find unpersuasive the Association's argument that because the District had been lenient in the past with M.R., that M.R. should be allowed to rely on this leniency in the future. In this regard, I do not believe that a reasonable person could conclude from the District's actions against M.R. in 1994-95 that it was lenient or that the District would overlook M.R.'s future transgressions. Indeed, the documents which memorialized the reprimands and suspension that M.R. received in 1994-95 are expressly to the contrary. As far back as 1984, M.R. was warned repeatedly and specifically not to engage in the kind of conduct for which he was non-renewed. M.R. never got the message and the District appropriately concluded in 1997 that M.R. could not or would not change his ways. Even assuming the District had been lax in the past in disciplining M.R., this does not mean that the District could not tighten its standards. Indeed, after December, 1996, the District was under a DPI order to improve its

track record in the area of sexual harassment. I believe Dr. Hitchens' administration did so in the case of M.R.

I turn now to the statements which led to M.R.'s non-renewal in 1997. In my opinion, the record herein shows that Principal Semingson's investigation was fair and exhaustive and that M.R. was given a full opportunity to hear and respond to the charges made against him. In this regard, I believe the record justified why M.R.'s comment relating to H.S.'s tight sweater was not reported to M.R. until December, 1996, and why no written complaint was filed thereon by Mrs. Sleep. In addition, I do not believe that Mrs. Sleep's concern over her daughter's ability to learn Math and her complaints regarding M.R.'s teaching style lessen the seriousness of the "tight sweater" comment which Dr. Hitchens (appropriately) felt should be referred to Semingson for investigation. Therefore, I am not persuaded by the Association's argument that M.R.'s "tight sweater" and "good looking bum" comments (which H.S. credibly testified to and M.R. admitted) were unreliable or unconvincing, as the Association claimed herein.

In addition, I note that M.R. admitted telling both the "Winnie the Shit" and "Hollow Weanies" jokes to students in his Math III class. Furthermore, several students stated that M.R. allowed his students to swear in class and that M.R. used the words "shit" and "damn" in class. 16/ These jokes and M.R.'s profane language are clearly inappropriate for the classroom. The fact that M.R. spoke this way before his students shows not only a lack of good judgment on his part, but also a failure to model appropriate behavior for his students and a disregard for the sensitivity of teenagers to sexual and inappropriate language and suggestions. A high school classroom is not a home, and M.R.'s students were not members of his family. Thus, the fact that M.R. would have told these jokes to his family in his own home is completely irrelevant to this case. As stated above, the fact that students did not volunteer complaints about M.R.'s jokes or his language and the fact that M.R. never intended to offend anyone by his language/comments does not mean that M.R.'s jokes and his language were any less offensive, distracting and inappropriate in classrooms full of young, impressionable students. Indeed, it is significant that M.R. stated herein that he would not tell (and has not told) these jokes again in a classroom setting. 17/

In these circumstances and given M.R.'s history of past discipline for the same kind of misconduct, I believe the District produced clear and convincing evidence that M.R. failed to follow District directives to cease inappropriate verbal interaction with students including telling inappropriate jokes and that therefore, M.R. failed to follow Board policy prohibiting sexual harassment. 18/

In regard to whether M.R. failed to establish an orderly and non-threatening classroom environment, one need only look closely at Semingson's report of the verbal and physical harassment reported by the twelve students interviewed to conclude that M.R. failed to create and maintain a non-threatening environment for learning in his classroom. 19/ In all of the circumstances of this case and given M.R.'s many admissions of misconduct in 1994, 1995 and

1996, I believe the District proved all of its reasons for non-renewal of M.R. by clear and convincing

evidence.

The only issue that remains is the "double jeopardy" issue raised by the Association. On this point, Dr. Hitchens testified in direct contradiction to M.R. Dr. Hitchens stated that he made it clear to M.R. in their discussions in late December, 1996 and early January, 1997, that his offer of a one-day suspension and severance package was conditioned upon M.R. resigning. Dr. Hitchens explained that when his offer of settlement fell through after January 10, 1997, he decided not to seek an increased suspension penalty (along with non-renewal), as he ultimately hoped M.R. would accept his (Hitchens') settlement proposal and resign. Hitchens' testimony is fully supported by his memo of January 13th. Both Hitchens' testimony and his January 13th memo require that the Association's double jeopardy arguments be rejected. In my view, it is clear that the District intended to suspend for one day and non-renew M.R. for his conduct in 1996 and that this did not constitute double jeopardy -- punishment twice for the same transgression or the increase of a penalty already imposed.

Although an Arbitrator may or may not agree with the level of punishment meted out by an employer, arbitrators generally will not second-guess the employer's decisions in this area. Based upon the record herein, I see no reason to disturb the District's decision regarding the level of punishment given to M.R.: M.R.'s conduct was pervasive and severe. The District properly considered M.R.'s past inappropriate conduct in determining the penalty to be assessed in 1997.

Similarly, the record fails to demonstrate that M.R. was non-renewed because he declined Hitchens' settlement offer. Hitchens' January 13th memo stands to the contrary. If M.R. did not understand that the severance package offer was tied to M.R.'s accepting a one-day suspension and submitting his resignation, as he claimed, he could have questioned Hitchens on this point. M.R. failed to do this. In all of the circumstances of this case and based upon Dr. Hitchens credibility as a witness as well as the clear language of Hitchens' January 13th memo, I do not believe M.R. was subjected to double jeopardy, and I issue the following

#### **AWARD**

The District had just cause to non-renew the Grievant. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 10th day of February, 1998.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator



**ENDNOTES**

1/ District Administrator Marine's March 31, 1992, letter to M.R. read in relevant part, as follows:

A female student indicated to Mr. Tocko that at about 11:05 A.M. on Thursday, March 12, 1992, while waiting in the main hall for a ride home, she told you that she was going home and going to be missing your class that afternoon. She asked if you would miss her. She said that you responded by putting both arms around her and giving her a hug and kissing her on the neck two or three times and saying that you would, indeed, miss her.

This student advised Mr. Tocko that she did not solicit, welcome or appreciate the above-described encounter with you on the 12th. She indicated that although you never kissed her before you had hugged her before and that you hug female students often. These types of physical contacts are subject to interpretation, often misinterpreted by adolescents. Students frequently misunderstand, are confused by or are embarrassed by physical contact from middle aged teachers of the opposite sex no matter what that teachers (sic) intentions at the time may have been.

I have cautioned you in the past to refrain from making physical contact with students (especially female students).

I expect you to immediately refrain from making any physical contact with students. Future violations of this mandate will result in serious disciplinary action, including the possibility of suspension and discharge. You should be aware of the fact that the district is required to refer this type of incident to the Department of Social Services. I also advise you not to discuss this specific situation with this student as it may be to your advantage that she forget about it as soon as possible.

2/ A memo from Mr. Tocko to M.R. dated September 7, 1994 read in relevant part as follows:

...

Just some brief notes on our conversation between the four of us, Ron Harper, Dr. Zavada, you and myself on 9-6-94 at 1:00.

I had three students. . . leave your class on Friday, September 2nd, 1994 and go to Mrs. Solberg's office concerned that they were uncomfortable in your class because of what they interpreted as innuendos, double meanings and remarks made to them or about them in class.

We had talked last spring about this kind of thing happening and unfortunately they can become very serious accusations and often taken out of context by students (sic) parents, community, etc.

I shared with you some of the things they mentioned, i.e. sleeping in class and not getting enough sleep the night before and why, short shorts, only if approved by you, car wash in bikini, and in relationship to mathematical operations doing it from the front or the rear. I imagine that you don't remember saying some things, but you do remember other remarks. We also talked briefly about taking points off of a test because of behavior not related to the time of the test.

Suggested (sic) that your remarks be relevant to the subject at hand and although this may restrict you in the way you usually like to operate your classroom, this probably would be the best approach at this time. Avoid all remarks that could be of double meaning, sexual or bringing attention to individuals.

3/ A memo placed in M.R.'s personnel file from Mr. Tocko dated October 12, 1994 read in relevant part as follows:

...

On 10-11-94 I shared with him a concern of a parent that their daughter was not doing well in his class and she was afraid to ask questions primarily because of a fear of being touched. I shared this with Mark and of course he said that he was conscious of that and would be super conscious of not touching girls.

...

4/ The memo from Tocko to Zavada read in relevant part as follows:

...

\_\_\_\_\_ was brought to my office at 12:30 on Thursday, November 17, 1994 by Mrs. Solberg. She related to me that Mr. Ryser had made a comment to her during 5th period Geometry class on November 16, 1994. \_\_\_\_ was using an eraser which looks much like a pen. Mr. Ryser asked her if it was a birth

control method. She told him the comment was inappropriate and to stop making such comments.

The next day, Mr. Ryser talked to her at lunch time in the hallway and asked if they could just forget what happened and give him one more chance. He said that they had a good relationship the day before and didn't want is (sic) spoiled by one comment.

...

A memo to M.R. from Tocko, recounted M.R.'s response when asked on November 30, 1994, about the above incident, as follows:

...

Mr. Ryser admitted that the report was accurate and he was sorry that it happened. His comment was said jokingly, but he noticed that \_\_\_\_ reacted seriously to the comment. He realized this and apologized for such.

...

5/ The December 1, 1994 written reprimand from Tocko to M.R. read in relevant part as follows:

...

After reviewing the circumstances involving the second incident of sexual harassment reported to me this school year, it is necessary to request that you discontinue any and all acts which are sexually explicit or offensive to students.

This is the first step in the process which could lead to dismissal.

...

6/ Mrs. Hermundson's letter of complaint read in relevant part as follows:

...

I am writing to file a formal grievance as outlined in your discrimination complaint procedures. It is my belief that the principles and regulations of s. 118.13 have been inadequately applied. My concerns revolve around the

unwanted and unwelcome sexual behavior exhibited by Mr. Ryser and the follow up procedure when female students reported these actions.

This type of sexual harassment occurring centers on a hostile environment. Mr. Ryser's classroom is cluttered with repeated actions of a sexual nature including lewd comments and innuendos. These actions unreasonably interfere with the academic performance of the students. They have had the effect of creating an intimidating, hostile and offensive school environment.

My daughter, T., has reported witnessing the following treatment by Mr. Ryser during the first semester of the 1994-1995 school year:

Mr. Ryser tells female student he would date her if he were younger.  
Mr. Ryser tells female student he likes how her sweater fits.  
Mr. Ryser asks female student if her unusual pencil is a birth control device.  
Mr. Ryser rubs female student's shoulders.

The following were actions directed at my daughter as witnessed by others:

Mr. Ryser tells T. she is sexy. Witness, B., Fall 1994  
Mr. Ryser gives T. and two other girls the finger. Witnesses, J. and C., Nov. 16, 1994  
Mr. Ryser rubs T.'s shirt asking if it is felt. She responds no and he says now it is. Witness, S., Jan. 9, 1995.

This is just a sampling of comments and actions reported by my daughter. She has shared other comments reported by girls in which she was not a witness. These comments and actions are unwelcome and offensive.

The girls have reported their concerns to school officials. I am troubled by the districts (sic) procedure for follow up on student initiated complaints. My daughter and two other girls wrote up a summary of the incident in which Mr. Ryser gave them the finger. This was given to Mr. Tocko and he interviewed them as well. They were not told of the discrimination complaint procedure. No timelines were followed to respond to their concerns. When I asked Mr. Tocko about this situation he felt no obligation to inform me and told me T.'s written statement was turned over to an attorney. I have requested a copy of T.'s statement and an explanation of why it was turned over to an attorney. I have received no reply.

Recently Mr. Tocko has individually spoken with players of the boys varsity basketball team about comments supposedly made by their coach. He advised each of them of the procedure to file a written complaint. Female students went to him with specific examples of inappropriate behavior and they were not provided with policy explanations yet he sought out male students to file complaints. This discrepancy in treatment is unacceptable.

...

7/ Elementary Principal and Title IX Coordinator Semingson's interviews with M.R.'s students in late February and early March, 1995, produced the following relevant information contained in Semingson's March 16, 1995 report:

#### ISSUE

##### Gender Equity

##### Comments by students

"Girls seem to get off easier in Ryser's class." "M.R. hollers at the guys a lot."  
"Girls can get assignments in late." Girls get more preferential treatment (implied). "Mr. Ryser doesn't give equal treatment." Incident: Both girls and boys had incompletes; both got two weeks to make up two tests; two girls only had to make up one test, all the rest had to take two tests. "Mr. Ryser is a real jerk to lots of the guys, especially [named two male students]. He took a lot of group points away from [named one male student]." "Some teachers favor guys, some favor girls." Who? "Mr. Ryser." "He helps girls but not boys, it's getting a little better though." "I've never heard him yell at a girl yet." "If you make trouble (implying a guy) in Mr. Ryser's class, you'll really get it." Mr. Ryser favors girls, he helps them first, boys are left on their own." "He's really hard on guys. Girls, he treats decent, except for the sex jokes."

##### Verbal Sexual Harassment

"Mr. Ryser said jokes [with sexual overtones] that aren't appreciated." Mr. Ryser has a reputation of saying things with sexual overtones. Mr. Ryser has a reputation of making passes or advances toward students. Said a joke to a about a (sic) "Hooter" t-shirt (sexual overtones) referring to a female student. M.R. said girls could wear short shorts upon approval from him. "If I were younger, I would ask you out [to girl]". What were you doing last night? [with sexual overtones]" "How many guys have you been with [sexual overtones]." "Here, hold my testis"

while handing a girl a stack of tests. Girl said "that's gross". "What's the matter, [to boy], didn't you satisfy her [about girlfriend] last night?" Said a joke about "dog shit". When student told M.R. she didn't like what was said because of the sexual overtones, M.R. said "deal with it". "That's his famous phrase." [a]nother statement was "what are you going to do, take me to court?" M.R. to girl: "You sure look sexy today." Stopped class, says to class, we'll have to wait [girls name] has to go to the bathroom."

#### Physical Sexual Harassment

Mr. Ryser rubbed student's shirt on the shoulder and back area, said "Is this felt?" Ans: "No" M.R.: "Well it is now." Touched student and said "I'm just playing with you." M.R. patted a student's stomach, "what have you been doing?" "M.R. leans really close, sometimes touches you, makes you feel really uncomfortable." A female asked M.R. to stop touching her, he still did. Rubbed shoulders of a girl, said "you look real tense today" She "shrugged him off, he had to know I didn't like it. It (sic) did it a lot."

#### Other

Have you attempted to get him to stop. Some have. They've talked to him, to Mrs. Solberg, to Mr. Tocko. "He's hard to beat, so why try?" He doesn't like some students. He's really hard on them. Harasses them a lot. "We can't wear low cut shirts. He [Mr. Ryser] stands behind you and looks down your shirt." "He's a pervert." M.R. said to other student, "you don't remember me flipping [girls name] off, do you?"

8/ Dr. Zavada's letter suspending M.R. for three days read in relevant part as follows:

...

As you are aware, the Administration has recently conducted an investigation of complaints filed against you pursuant to the District's discrimination complaint procedure. The complaints contain several allegations of inappropriate statements and conduct by you in violation of the District's sexual harassment policy. The Administration's investigation included interviews with several students, as well as a meeting with you and your representative on March 10, 1995.

Based on the Administration's investigation, I have concluded that the allegations that you have made sexually explicit statements, as well as statements with sexual overtones to students, are substantiated. Of further concern is that, during our meeting on March 10, 1995, you acknowledged that you are a "touchy person."

You were previously issued a letter of reprimand on December 1, 1994, in which you were directed to "discontinue any and all acts which are sexually explicit or offensive to students." That same letter advised you that the letter was the first step in the process which could lead to dismissal. The December 1 letter of reprimand followed other efforts by the Administration to work with you in correcting your conduct. In addition, the District's staff was provided an extensive in-service program on sexual harassment during the fall of 1993-94 school year. Yet, despite these previous efforts to work with you, you continue to engage in conduct in violation of the District's sexual harassment policy. Therefore, this letter is to advise you that you will be placed on a three day suspension without pay. The suspension will begin on March 24, 1995. Your first day back at work will be Wednesday, March 29, 1995.

...

Mark, you are encouraged to use the time you are on suspension to reconsider your actions in this matter. The District will not tolerate any further inappropriate statements or conduct by you. If there are further incidents, you will be subject to further disciplinary action up to and including dismissal. The inappropriate statements and conduct must cease. If you engage in such conduct in the future, you will do so at your peril.

...

9/ The Association offered into evidence written recommendations for M.R. which were sought by him after his non-renewal at the District. Three of these recommendations came from teachers at Eau Claire North High School where M.R. was a long-term substitute for approximately six weeks in the mathematics program there after his non-renewal by the District. It should be noted that none of the writers of these three recommendations were aware of M.R.'s non-renewal. In addition, former principal Tocko wrote M.R. a recommendation after M.R.'s non-renewal which stated that M.R. had "a very professional attitude" and "a willingness to change" and that Tocko would recommend M.R. "without any reservation" for future employment. Former District Administrator Zavada also wrote a recommendation for M.R. after his non-renewal at the District. However, Zavada made no mention of M.R.'s involvement with students and his ability in that area. Finally, an affidavit was received into the record from former District teacher Connolly and a recommendation from an employe of the CESA 10. The

representative from CESA 10 made no mention of M.R.'s student involvement and abilities; former

teacher Connolly indicated that he did not believe that M.R.'s history with the District would keep him from being a good teacher in the future.

10/ Mrs. Sleep also stated that after her daughter received a B- at the nine-week grading period, her daughter was very upset as she did not believe her work was up to that level. At the end of the second nine-week period, Mrs. Sleep's daughter received a much lower grade (D+) and Mrs. Sleep and her daughter both stated that they felt her work had improved, not dropped off. Mrs. Sleep stated that her daughter reported that M.R. refused to help her at all in class after Mrs. Sleep talked to Dr. Hitchens. Finally, Mrs. Sleep stated that Dr. Hitchens did not ask her to write down her concerns regarding M.R.'s class or his treatment of her daughter.

11/ I credit Dr. Hitchens' account of these discussions over M.R.'s. M.R.'s demeanor on the witness stand in this case as well as contradictory statements he made on December 19th in his meeting with the District demonstrated that M.R. is not a credible witness. Specifically, M.R.'s "Winnie the Ship" statement in the December 19, 1996 meeting with Hitchens was a feeble attempt to explain his conduct which in the context of the joke, made no sense, and only served to prove that he (M.R.) could not be trusted.

12/ The parties' February 24, 1997 complaint read as follows:

...

I am writing this letter as a follow-up to our phone conversation from January 13, 1997. When we discussed my concerns about Mr. Ryser. I am having a problem with his style of teaching. I just don't feel it is effective for youth to be allowed (or even at times encouraged) to "goof around", talk and makes jokes, etc., when they're supposed to be working. I think it would be a wonderful concept to allow kids to have some freedom and be in a more relaxed atmosphere. This is what, I believe, Mr. Ryser is attempting to accomplish. But what seems to be happening is the kids get out of control and Mr. Ryser loses control and tries to bring them back and in the process gets frustrated and in the heat of frustration kicks the kid out or does some other drastic punishment. I have talked with numerous students and parents who agree that this is very confusing for these kids and although some can probably handle it OK too many are getting lost due to this inconsistent process. I am all for kids having fun while they learn and I certainly don't condone rude or obnoxious behavior, but I think we have to look at the whole picture here. Is it really not (sic) all of these kids' fault. Forgive me, Mr. Harper for always using you as an example. But I knew I personally had Mr. Ryser and Mr. Harper when I was in school and if you look at their "track records" you'd see that Mr. Harper rarely has behavior problems with students as compared with Mr. Ryser. The difference here is that

Page 32  
MA-9898

Mr. Harper, too, enjoys having fun in class but he is very consistent about his rules



and the kids know it. I think its (sic) so important for these kids to learn these subjects, let's get our acts together so we don't have to waste a bunch of everyones (sic) time taking disciplinary action that wouldn't even be necessary if certain teachers, not even just Mr. Ryser, would understand the importance of consistency (sic) and other factors that affect childhood behaviors, especially adolescent behaviors.

Come on, I'm just an average person. These teachers supposedly have Bachelor's degrees and ongoing conferences, trainings and workshops. I would think they should be able to figure out appropriate methods to use with the age group of children that they are dealing with.

I have 3 more children that will be going through this school system after Jason and I will not tolerate ignorance to methods of dealing with children from anyone who comes in contact with my kids. It is my right and their right to have competent people working with them. If not, I definitely will not let it slide. I will take any action I can to change the situation. Thank you for your time in reading this.

...

13/ In his testimony, Mr. Tocko denied being a social friend of M.R. I find this difficult to believe, given the glowing recommendation Tocko gave M.R. after the latter's non-renewal.

14/ Contrary to the Association's argument, I do not believe that this case requires the application of the "beyond a reasonable doubt" standard. Given the substance of the allegations made against M.R. and the lack of any pending criminal action against him, I believe the lesser standard of clear and convincing evidence should be applied herein.

15/ I note that in 1994 M.R. failed to deny making a statement regarding performing math problems from the front or the rear, as recounted in Principal Tocko's reprimand of September 7, 1994. In my view, these facts call into question M.R.'s denial that he made a strikingly similar comment in 1996.

16/ The Association argued that the District never found that M.R. used profane language in his classes. This argument is unpersuasive based upon Semingson's report and other record evidence herein.

17/ The Association argued that the two jokes M.R. told, although off-color, should not have been sufficient basis upon which to non-renew M.R. I agree. However, it is abundantly clear from Semingson's report that M.R. engaged in other significant verbal and physical sexual harassment of female students which formed the basis (along with his jokes) for M.R.'s non-renewal.

18/ Based upon H.S.' testimony herein, M.R.'s "smelled good" comment could have been made regarding H.S.' gum. However, I note that at the time M.R. made the comment to her, H.S. believed the comment was inappropriate and personal and that H.S. did not recall that she was chewing gum in class when M.R. made the comment to her.

19/ The parent complaint made orally on January 13, 1997, and received in writing on February 24, 1997, showed that at least in some respects, M.R.'s conduct may not have changed despite M.R.'s knowledge of the District's on-going investigation regarding his conduct. In addition, I find it reasonable that the District did not formally proceed regarding this complaint.