

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ADAMS-FRIENDSHIP SCHOOL DISTRICT**

and

**ADAMS-FRIENDSHIP AREA EDUCATION ASSOCIATION**

Case 37  
No. 54681  
MA-9756

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Appearances:

Lathrop & Clark, Attorneys at Law, by **Mr. Michael Julka** and **Ms. Heidi S. Tepp**, 740 Regent Street, Suite 400, P. O. Box 1507, Madison, Wisconsin 53701-1507, for the District.

Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, by **Mr. James G. Birnbaum** and **Ms. Melissa Verbrick**, Legal Assistant, 300 North Second Street, Suite 300, P. O. Box 1297, LaCrosse, Wisconsin 54602-1297, for the Association.

**ARBITRATION AWARD**

Pursuant to a request by Adams-Friendship Area Education Association, herein the Association, and the subsequent concurrence by Adams-Friendship School District, herein the District, Dennis P. McGilligan was designated Arbitrator by the Wisconsin Employment Relations Commission pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was scheduled for April 10, 1997. Prior to the hearing, the District advised the Association's counsel that it intended to present evidence on an additional basis for the discipline - administrative reason 4, that the Grievant engaged in inappropriate physical contact with a female student, Wendy Bogseth, as evidenced by touching the student's buttocks at the motel pool. The Association took the position that the Arbitrator had no jurisdiction to hear said charge. The Association then filed a Motion to Preclude the Charge and Evidence dated April 21, 1997. Thereafter, the parties briefed the matter. Following submission of briefs, the Arbitrator granted the Association's Motion to Preclude the District from introducing any additional charges as a basis for its disciplinary action into the arbitration hearing beyond the charges relied upon by the Board in its November 4, 1996 decision to suspend the Grievant; but reserved ruling on any attempt by the District to introduce evidence with respect to any

additional charges in support of the other matters in dispute at hearing. A hearing was held on June 16, 1997, and continued on July 22, 1997. The hearing was transcribed. The parties completed their briefing schedule on November 18, 1997.

After considering the entire record, I issue the following decision and Award.

### ISSUES

The parties were unable to stipulate to the issues.

The Association frames the issues as follows:

I. Did the School District have "due cause" (Article 16(2)) to:

A. Suspend the Grievant without pay from November 5, 1996, through the remainder of the 1996-1997 school year (approximately \$25,000 loss of pay);

B. Order the Grievant to attend professional ethics and sensitivity training as approved by the School Board and supervised by the administration;

C. Deny the Grievant reimbursement for time and expenses he incurred in attending the mandated professional ethics and sensitivity training;

D. Deny the Grievant reimbursement for the cost of Additional Credit Remuneration (Article 8(e)) for credits taken during the summer between the 1996-1997 and 1997-1998 school term;

E. Continue to deny Grievant reimbursement for his out-of-pocket costs of Wendy Bogseth airline ticket to attend the school sanctioned and approved National DECA Convention in Orlando, Florida, in April of 1996.

II. What is the appropriate remedy in this matter?

The District frames the issues as follows:

1. Did the Adams-Friendship Area School District Board of Education have due cause to suspend the Grievant without pay commencing November 5, 1996, for the remainder of the 1996-1997 school year?

2. If not, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator finds that the issues as framed by the District are sufficient to decide the instant case.

### **FACTUAL BACKGROUND**

The Grievant, Jon Brost, is currently a teacher in the District and has been so employed since the fall of 1989. The Grievant teaches elective business courses in marketing and during the time of his employment has also been involved in co-curricular activities.

In addition to the Grievant's teaching responsibilities, he has and continues to be an advisor to the Distributive Education Clubs of America (DECA). DECA is an organization of students interested in business. The students participate in competitions and activities all having to do with business/marketing. Students participate and compete at local, district, state and national levels.

As DECA advisor the Grievant has developed a program at the District which has consistently rated as one of the best in the State of Wisconsin.

The Grievant's wife, Nancy Brost, is also a teacher in the District, teaching high school physical science and chemistry.

Prior to the events leading up to the instant dispute, the Grievant, in his capacity as DECA advisor, traveled out of town on a number of occasions with students. At no time prior to the instant dispute, was the Grievant ever counseled or disciplined with regard to any practice or procedure concerning out-of-town travel.

The District's Faculty Handbook provides solely regarding "Field Trips" that the trips "need to have principal approval." The Grievant complied with this policy with regard to the National DECA Convention occurring in April of 1996.

At the time of the dispute, there was no specific District policy with respect to keeping parents informed about field trips. However, if the District had received a complaint from a parent that they had not been properly advised about a field trip, a principal or supervisor would talk to the teacher involved "to find out what the situation was and then deal with it." Robert Beaver, Superintendent for the District, testified that he was unaware of any instances of field trips where parents were not advised. The Grievant is the only teacher who has ever been reprimanded or disciplined by the District for allegations concerning failure to notify parents of field trip details.

Wendy Bogseth was a junior in the Grievant's business classes during the 1995-96 school year. In addition to being a student in his classes, Wendy was also involved in the school DECA program.

In the early winter months of 1996, the District sent the Grievant and certain students to a State DECA Convention. During said Convention, students compete with regard to their individual DECA projects and officers for the state-wide organization are selected. Wendy was one of the students who attended the Convention representing the District.

At the time of the State DECA Convention, Wendy decided to compete for a state-wide office. She was encouraged by the Grievant to do so and was the only person on the slate of officers running for the state-wide office she sought. Despite the fact that she had no opposition, she, like all state-wide candidates, was required to participate in certain pre-election interviews. Despite being specifically informed as to her obligations as a state-wide candidate, Wendy failed to show up at a critical interview session. She forgot and instead went swimming.

As a result of her failure to attend this required interview, her candidacy was in jeopardy. Her actions precipitated anger and negative reaction causing her and the District program some embarrassment. The Grievant was required to "mend fences" for her and despite this behavior Wendy was elected to a state-wide office.

As a result of her election to a state-wide office, Wendy became eligible to attend the National DECA Convention. When Wendy's election was announced, the Grievant asked her if she wanted to go to the National Convention. Wendy indicated a desire to go and so, accordingly, the Grievant picked up the National Convention materials at the State Convention.

After the State DECA Convention, the Grievant testified that he met frequently with Wendy to discuss the travel and other details of the National Convention. Wendy, however, testified that there were not frequent meetings and that there were only two specific sit-down meetings at which details were discussed. In addition, the Grievant made three calls to the Bogseth residence with a general duration of approximately one minute each regarding the details of the upcoming convention.

At no time did Wendy ever express to the Grievant any reservations or hesitations regarding any of the travel and/or other arrangements prior to leaving for the National Convention.

In addition to his contact with Wendy, the Grievant also spoke with Wendy's mother, Charlene Bogseth, about the program. This occurred at the winter parent-teacher conference which took place on or about March 28, 1996. The Grievant testified that Mrs. Bogseth expressed to him her appreciation for his assistance in these special activities. Following this specific meeting, Mrs. Bogseth went back to Nancy Brost, the Grievant's wife, and complimented her on the efforts of the Grievant with regard to this matter. During the course of the aforesaid conference, Mrs. Bogseth specifically informed the Grievant that all he had to do was to provide the information to Wendy and Wendy would communicate the necessary information to her. She had expressed to the Grievant and other teachers in the past that she considered Wendy an adult and relied heavily upon Wendy to accurately relay information. Although the Grievant discussed

the dates and details of the convention, including what was

expected of Wendy at the convention, he did not provide an itinerary or details of the travel arrangements to Mrs. Bogseth at the aforesaid conference. This was consistent with his prior practice in regard to taking Wendy to conferences and conventions.

At no time did Mrs. Bogseth ever register any concern to the Grievant, to Nancy Brost, or to any School District representative regarding any travel arrangements with the National DECA Convention. She encouraged Wendy to talk with the Grievant about her concerns over the travel arrangements but Wendy failed to take her mother's advice.

In addition to the contact noted above, the Grievant sent home with Wendy extensive materials from the National Convention describing the details. Mrs. Bogseth signed an acknowledgement of the receipt of those materials.

In addition to the above, the Grievant began to make travel arrangements for the trip down to the National Convention. He investigated the possibility of traveling with DECA students from Northland High School in Minocqua, Wisconsin. However, after determining the cost of the flights and the time and date for leaving for the conference, he determined that the most inexpensive and expedient flight was a flight out of Madison, Wisconsin, which the Grievant booked. The Grievant paid for those airline tickets for himself and for Wendy on or about April 1, 1996.

It is customary among all DECA clubs to arrive either early or stay later at National Conventions. With regard to the Grievant and Wendy, the Grievant determined about a month before the convention that arriving a day early would be particularly helpful for a number of reasons. First, given the embarrassing circumstances surrounding Wendy's election at the State Convention, the Grievant wanted to make sure that she did not miss or arrive late for any convention activities. Second, one of the goals of the program is to facilitate student interaction and leadership by providing opportunities for Wendy to interact with other students. Leaving a day early provided that opportunity for Wendy to "shmooz" and get to know the other participants at the Convention. In addition, at the National Convention the State Coordinator puts the State officers to work in making preparations for the National Convention. The Grievant believed that Wendy may have had duties to perform with regard to those preparations. Finally, the Grievant knew that Shawn Umland and his DECA students from Minocqua were going down on Friday to prepare for competition and the Grievant wanted to be sure that he and Wendy were there on Friday also. By going down on Thursday, the Grievant knew "that a five-minute taxicab ride or whatever it is to get there, I'll be there by Friday morning on time and I won't be late like we were at State." As a result, the Grievant made arrangements for he and Wendy to arrive on Thursday night, a day and one-half before the Convention was to start.

At or about this same time, the Grievant informed Wendy that they would be leaving early because of the cost savings in the plane tickets. He also gave her an itinerary which included the flight schedules.

Also around this same time, Wendy informed her mother that she was a little nervous about the room situation for Thursday evening. Wendy testified that in a conversation with the Grievant, the Grievant had stated/questioned whether they should get one room or two. Wendy advised him that she wanted two rooms. He said okay. After hearing Wendy's concerns, Wendy's mother questioned whether she should go on the trip.

About two or three days before the scheduled Thursday departure, Wendy also spoke with a friend, April Bokota, regarding her concerns about the room situation. Wendy indicated to April that based upon her conversations with the Grievant she was nervous that there would be only one room for the first night. After talking with Wendy, April spoke with her stepfather, who is in hotel management with the Holiday Inn, and obtained telephone numbers for the Grievant to call to obtain reservations or discounts. April subsequently gave the telephone numbers to the Grievant, but he did not use them.

Approximately two or three days prior to leaving, the Grievant began exploring what hotel arrangements could be made concerning the date of their arrival. In that respect, he called some 800 numbers including an 800 number for the Residence Inn. The specific phone call by the Grievant to the Residence Inn occurred at the high school in the presence of both his wife and the Guidance Counselor, Jack Blosser. During the course of that conversation, the Grievant booked two rooms at a price of approximately \$60.00 per room at the Residence Inn in Orlando, Florida. In order to confirm those reservations, the 800 operator requested the Grievant to provide a credit card number. However, at the time he made the call, neither he nor his wife had their credit cards with them. Accordingly, he indicated that he would call back with the credit card number to complete the reservations process.

After making this telephone call, the Grievant advised Wendy that two rooms had been reserved. Based on this representation, Wendy no longer had any concerns about the trip.

On the evening of April 24, 1996, the Grievant placed a final call to the Bogseth residence. The purpose of the final call was to verify the last minute details with Wendy and specifically remind her to take her DECA jacket.

On April 25, 1996, the day they were leaving, the Grievant made another telephone call to confirm the reservations with his credit card number. The Grievant testified that he confirmed the two rooms at the Residence Inn in Orlando, Florida, during this call. No one was present with the Grievant when he placed this call.

On April 25, 1996, the Grievant and Wendy drove to Madison to catch their flight to Orlando, Florida. While in transit, the Grievant called his wife to arrange for a limousine to take both he and Wendy to the Residence Inn in Orlando, Florida, from the airport. They arrived in Florida at approximately 7:30 p.m. and were driven to the Residence Inn as previously arranged. When the Grievant tried to check in, he was informed that the motel had a reservation for only one room. The Grievant insisted that he had booked two rooms. The motel clerk checked a printout

showing that its records reflected a reservation for only one



room, and informed him of same. The Grievant became irate, demanded to speak with the manager, and informed a senior staff representative that the hotel had made a mistake because he had reserved two rooms.

After speaking with both motel representatives, and realizing that the motel had not reserved two rooms for him, the Grievant asked for another room. The Residence Inn indicated to him that there was only one room that was still available which was a suite at a \$200.00 price. The Grievant then determined that the room was too expensive and that it was late and left the lobby with the keys for only one room.

The Grievant explained what happened next:

We walked out into the outer vestibule area and out by the sidewalk and I said, well, let's go down to the room here and let's just, you know, throw our bags in and decide what we can do then. We got down to the room, and I said to her, I said, well, would it bother you, you know, if you slept up there on the bed and if I slept over here on the floor by the door. And she says, no. I said, well, I tell you what, I want to call my wife and I definitely want you to call your mom.

Wendy testified that she didn't want to stay in the same room with the Grievant but was too scared to say otherwise. At that moment, Wendy felt that she had no other options available to her.

The Grievant never suggested any alternatives to Wendy other than staying in the same room together. The Grievant made no attempt to obtain any other type of accommodations.

Public phones were available at the Residence Inn in Orlando, Florida, where the Grievant could have called other motels and where Wendy could have made a phone call to her mother.

Shortly thereafter, the Grievant called his wife. He described the circumstances in which they found themselves and sought her advice and counsel. She indicated that based on what he told her that there didn't seem to be any options but that he should call Mrs. Bogseth and make sure that she did not have any objections to the arrangement.

Wendy also called her mother sometime that evening. During the course of this telephone conversation, Wendy informed her mother of the circumstances with regard to the motel rooms. Wendy's mother asked Wendy if she was okay and Wendy replied that she was fine. She also asked Wendy if the Grievant was in the room with her and Wendy said yes. Wendy's mother became mad and told Wendy that she should not stay in the same room with the Grievant; rather, she should sleep in the lobby or do whatever she had to do, but not to sleep

in the same room as the Grievant. Wendy replied: "I'll be okay, mom. I'll be fine." At no time during the course of this phone conversation did Mrs. Bogseth ask to speak with the Grievant or instruct her daughter to communicate any message from her regarding the suggested arrangement.

Following the phone conversation between Wendy and her mother, the Grievant asked Wendy if her mother had any objections or concerns about this arrangement. Wendy informed the Grievant that everything was fine.

The Grievant and Wendy next went to McDonald's to eat dinner. While at McDonald's, the Grievant raised the issue of how they should deal with the marketing class regarding the issue of them staying in the same room. He was concerned that the students would make a bigger deal out of the situation than what it was. The Grievant informed Wendy that he was not going to bring up the situation unless somebody who asked had a need to know because it was not anybody's business. The Grievant asked Wendy not to mention it "because if somebody needs to know, I will just tell them what's happening."

Upon arriving back at the room from dinner, Wendy went into the bathroom of the motel room and changed into her swim wear. Thereafter, the Grievant changed into his swim wear in the same bathroom and they both went down to the pool area. Other changing areas were available near the pool area.

Upon arrival back at the room, both the Grievant and Wendy again changed in the bathroom out of their swim wear. They sat on the couch for a while and watched TV. Later Wendy indicated that she was tired and crawled into bed and started to read the Bible. The Grievant continued to watch TV.

Wendy testified that the Grievant subsequently asked her to come back over and watch TV again and patted the couch. Wendy stated that this gesture made her uncomfortable. In subsequent conversations with her mother, Wendy relayed this incident to her.

During this entire time Wendy testified that she was paranoid and very scared. She stated that she did not want to go to sleep before the Grievant so she waited until he shut off the TV and went to bed. She added she then went into the bathroom and did sit-ups for about a half hour because she wanted to make sure that the Grievant was asleep before she went to bed.

Wendy and the Grievant stayed in the same motel room on Thursday evening.

Upon awakening the next morning, Wendy and the Grievant went down to eat breakfast. Wendy went back to the room, changed in the room into her swim suit, and went to the pool. The Grievant took a shower, watched some TV and joined Wendy at the pool. While at the pool, the Grievant assisted Wendy in writing some letters.

At approximately 12:30 to 1:00 p.m. a limousine picked up the Grievant and Wendy and transported them to the hotel where the Convention was occurring. When they arrived at the hotel, the Grievant's room was available, but the room to be occupied by Wendy was not. They put her bag in the Grievant's room, she changed into her swim suit and they went to the pool so that Wendy could go swimming.

Later when they returned to the Grievant's room, Shawn Umland, the DECA advisor from the Lakeland School District, who was the Grievant's roommate, was present along with a couple of his students. Umland asked the Grievant how he was doing and the Grievant responded "Not very good." Umland asked why not, and the Grievant told him that they had some problems with the hotel the night before. According to Umland, the Grievant said "I have to tell you something. He says, Wendy and I had to stay together last night, and then he laughed and said jokingly, no, I'm just kidding. Geez, did we go through a nightmare last night with the hotel room, and then he proceeded to tell me . . ." No one had asked if the Grievant and Wendy had stayed in the same room. The Grievant simply volunteered the information. The Grievant made the statement because he didn't feel comfortable with the situation and thought this would ease any tension. The Grievant testified:

Wendy was right there, too, I said, well, we had slept in the same room together, and I said it very sarcastically and kiddingly and I said, I'm just joking and I rolled my eyes right away and the Lakeland kids and Wendy started laughing and Shawn was laughing, and I said, well, listen to this crap, and I said, this is the crap that we had to go through and I told him the whole situation with the rooms.

While the Grievant made the comment in a sarcastic joking manner, Wendy testified that she was embarrassed and felt stupid. However, Wendy did not appear to be offended and did not communicate same to the Grievant at any time material herein. The Lakeland students were not embarrassed or offended, nor did they embarrass or offend Wendy.

Shortly after the arrival of the Lakeland contingent and this incident, Wendy checked into her room which she shared with other State officers from Wisconsin.

Later that day Wendy was in her room with her roommates, including Tina Elsner, when the Grievant and Umland came by to take them out to lunch. In a kidding manner, the Grievant again stated "Wendy, did you tell them we slept together," or words to that effect. Again, nothing had prompted the comment and no one had asked a question about where they had stayed the previous evening. According to Wendy, the Grievant "was like, now, come on, tell them, tell them. This time I was mad, because it had already happened before and he kept saying, tell them what happened last night, and I said, nothing happened." Wendy added: "He was kidding. He was doing it kidding but he said it. I felt stupid. I didn't think it was something to kid about." However, at no time did Wendy and/or any other student present express by word or action any negative reaction to the statement the Grievant made.

The Grievant, Wendy and the Lakeland students then went to lunch together.

Following lunch, Wendy elected to go shopping with the Grievant, rather than return to the hotel with the Lakeland students.

Wendy testified that she was feeling very uncomfortable regarding the situation with the Grievant, but was afraid to say anything to him because she didn't want him to be mad. It was her perception, based on a previous experience with him, that he held grudges.

Sometime between Friday and Sunday, Wendy had conversations with other female students in the room in which she stayed. During the course of those conversations, they discussed the Grievant and Shawn Umland. Wendy stated that "they were saying that they felt uncomfortable around them because they were, you know, kind of flirtatious, and I said, well, yeah, that (sic) just how they are." The other students then responded that she (Wendy) seemed to have a good relationship with the Grievant. Wendy replied: "I'm a little uncomfortable too, and we just started talking about things that happened . . . and I was like telling them what he had said in the room about the sleeping together. And they were like, oh, my God, I can't believe he said that."

After discussing her feelings with her roommates, they encouraged her to talk with the State DECA Advisor, Marie Burbach. Late Sunday evening on April 28, 1996, Wendy went to Burbach with her concerns regarding how uncomfortable she was with the Grievant. After talking with Wendy, Burbach spoke with the Grievant in the early morning hours of Monday, April 29, 1996. She informed him of Wendy's concerns over the statements that he had made and about the motel arrangements. The Grievant testified that Burbach emphasized to him that there was no allegation of any type of sexual impropriety, but that Wendy just felt uneasy about the situation. She also indicated that she had spoken with Wendy's mother and intended to call the school. The Grievant testified that Burbach further told him that Wendy's mother was very complimentary of him and expressed confidence in him.

Following this meeting, the Grievant was extremely upset. He awakened Shawn Umland. Together he and Umland discussed the matter for several hours. During the course of this conversation the Grievant decided that under the circumstances he simply wanted to leave Orlando and return to Wisconsin. Umland testified:

He felt very uncomfortable staying there now with what Wendy stated, and says, you know, maybe it's best that I leave, and then he proceeded to ask Marie if it was okay if he left his student there unchaperoned and then called his wife . . . to tell her that he was coming home and he made the airline arrangements.

The Grievant subsequently left the Convention on Monday, April 29, 1996. Wendy stayed until the end of the conference under the supervision of Burbach. Both Umland and Jacob

Schindler, a student at Lakeland High School, testified that she was not subjected to any ridicule or embarrassment at the hands of any of the students at the Convention.

Early in the morning of April 29, 1996, Wendy's mother met with High School Principal James Jacobson and District Administrator Robert Beaver to discuss what she characterized as some "serious concerns" regarding Wendy and the Grievant's trip to Florida, including the situation where they had slept in the same room together and where some inappropriate and insensitive remarks had been made the following day regarding such arrangements.

Upon the Grievant's return to Wisconsin, he immediately telephoned Charlene Bogseth. Charlene Bogseth refused to talk to him. She was specifically instructed not to talk to him by the District.

On the evening of April 29, 1996, the Grievant was called by High School Principal James Jacobson, who stated "I have one question for you, did you stay in the same room" with Wendy. The Grievant indicated that yes he had. The Principal then indicated that he was being placed "on administrative leave with pay." The Grievant questioned the Principal as to whether or not he was interested in hearing his side of the story or the circumstances. The Principal indicated that he was not interested in hearing the Grievant's side of the story.

By memo dated April 30, 1996, the District informed the Grievant that he was on paid administrative leave effective that date. The Grievant was advised to turn in all his records regarding the trip, not to talk to Wendy, her mother and/or other staff members regarding the incident, and to make himself available during the course of the investigation for questioning.

High School Principal Jacobson was directed by Beaver to conduct the investigation. As part of his investigation, Jacobson interviewed the Grievant on several occasions. He also interviewed Wendy and her mother, and numerous individuals who were present at the Convention including Umland. For a variety of reasons the investigation extended through the summer and into the fall term of the 1996-97 school year. By letter dated September 24, 1996, the Residence Inn informed the District that "one studio suite was reserved for Mr. John Brost for the evening of April 25, 1996," and that there was another room available on that evening.

By letter dated October 18, 1996, District Administrator Beaver informed the Grievant that he was recommending to the Board of Education the immediate termination of the Grievant's teaching contract. Said letter listed the following seven (7) reasons for the recommendation of discharge:

1. Failure to follow administrative guidelines, as evidenced by:
  - a. Failure to obtain Board/administrative approval prior to making the trip;
  - b. Failure to ask for a purchase order for the trip.
2. Arranging for and staying overnight in the same motel room with a female high school student, Wendy Bogseth.

3. Repeated insensitive and unprofessional statements in Wendy Bogseth's presence relating to the motel arrangements referenced in paragraph 2 above.
4. Inappropriate physical contact with a female student, Wendy Bogseth, as evidenced by touching the student's buttocks at the motel pool.
5. Unprofessional, irresponsible conduct related to the handling of the Florida trip as evidenced by:
  - a. Asking student, Wendy Bogseth, whether you should reserve one motel room or two for the night of Thursday, April 25, 1996;
  - b. Failure to contact the student's parent regarding arrangements for the trip;
  - c. Not seeking to secure a second motel room or make other arrangements for overnight accommodations for the night of Thursday, April 25, 1996;
  - d. Flying home early without personally informing the student, the student's parent or administration of your plan;
  - c. (sic) Failing to keep appropriate records regarding arrangements and expenditures for the trip.
6. Unprofessional conduct and poor judgement (sic) as evidenced by repeated hugging and placing arm around female student, Wendy Bogseth.
7. Loss of administrative confidence/trust in you in your role as the DECA teacher.

District Administrator Beaver testified as to the following reasons for his recommendation to discharge the Grievant. One, it was the Grievant's responsibility to make sure the parent is informed of the arrangements for the trip, and that the student or parent need not request the information. Two, it was unacceptable for an instructor to put a sixteen year old student in the circumstances the Grievant placed Wendy in. "The instructors are responsible for the kids. The kids aren't responsible to make judgments." In Beaver's opinion, "this Grievant should have known that the room situation was inappropriate and taken care of the situation by making alternative arrangements, not asked Wendy and placed the burden on her to make the decision." Three, the statements made by the Grievant regarding the room situation were inappropriate due to the very nature of the statements themselves. "From the investigation, the indications were that it made her more uncomfortable . . . I think that Mr. Brost should have recognized that, but he repeated it . . . it could have gone unsaid . . . and everyone would have been better off. . . ." Four, during the course of the investigation everything indicated that the Grievant had not recognized that he had done anything wrong and that the Grievant was oblivious to the nature of the District's concerns and failed to comprehend the effect of his conduct on Wendy. Five, there was a question about the Grievant's future effectiveness. For example, "Can we

anticipate future programs that we could allow Mr. Brost to lead and expect that the parents are not going to question the district's judgment on in terms of letting him do that." Beaver added: "I was not sure and am not sure to this date that he can be as effective as he was prior to going to this national convention." Finally, the effect that the Grievant's actions had upon Wendy. She felt extremely uncomfortable both during the trip and when she returned to school. If the Grievant returned to school, it appeared that Wendy would not.

The Grievant requested an opportunity to be heard by the School Board. The Grievant appeared before the Board on or about November 4, 1996. Said meeting was an open meeting attended by a number of adults and students from the District. The High School Principal and District Administrator summarized for the Board the findings of the investigation and the reasons for the recommendation of discharge. The Grievant, and his attorney, James Birnbaum, answered questions and made a presentation on the Grievant's behalf.

After deliberations, a motion was made by one of the Board members, Charles Parr, that the Grievant be suspended without pay for the remainder of the 1996-97 school year based on administrative reasons 2, 3 and 5b, and that he be required to attend professional ethics and sensitivity training as approved by the School Board and supervised by the administration. Upon completion, he will be reinstated for the 1997-98 school year. The motion was carried on a vote of 6-3. The three board members who voted against the motion did so on the basis that they felt that the Grievant should have been terminated.

By letter dated November 7, 1996, the Grievant filed a grievance claiming that the District's decision to suspend him for the balance of the school year was in violation of the due cause standard for suspension or discipline found in the parties' collective bargaining agreement. On November 12, 1996, the Grievant's grievance was denied by Jacobson as unmeritorious. On November 14, 1996, the Grievant appealed Jacobson's denial of his grievance to Beaver. Thereafter, the parties processed the grievance to arbitration.

Students and parents have petitioned to have the Grievant not disciplined. Despite all of the Grievant's classes being electives, registration figures indicate all of his Fall 1997-98 school term classes are filled.

### **PERTINENT CONTRACTUAL PROVISIONS**

#### **Article 6 - Binding Arbitration**

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C. When a request has been made for arbitration by either the Association or the Board, the Wisconsin Employment Relations Commission shall be asked to appoint a member from the Commission or its staff to arbitrate the dispute.



D. The arbitrator shall meet with the representatives of both parties, hear evidence and give an opinion.

E. The arbitrator shall issue no opinions that will modify or amend any terms of this agreement. The decision of the arbitrator shall be final and binding upon both parties.

. . .

#### Article 16 - Disciplinary Procedure

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C. The Board of Education agrees to act in good faith and with due cause in the discipline, suspension or dismissal of any employee. No employee shall be suspended without pay without due cause.

### **POSITIONS OF THE PARTIES**

#### **Association's Position**

In its brief, the Association first argues that the Grievant did not arrange for and stay overnight in the same motel room with Wendy. In this regard, the Association initially argues that the Grievant did not premeditatedly book only one motel arrangement, and that upon learning of the "mistake" that had been made demanded that they be provided with a second room. The Association next argues that staying overnight was not a culpable act because of the lateness of their arrival and unfamiliarity with the community, because he asked Wendy, her mother and his wife if such an arrangement was acceptable and they said it was okay, and because pursuing other alternatives was not necessary or indicated.

The Association next argues that the Grievant did not make repeated, insensitive and unprofessional statements in Wendy's presence relating to the motel arrangements for the following reasons. One, the Grievant did not intend to cause embarrassment or in any way hold Wendy up for ridicule or negative attention. Two, in evaluating the words in context there is nothing culpable about what the Grievant said. The Grievant made light of the circumstances in the context of describing the unfortunate events of the evening before. Three, the utterances were non-offensive. In this regard, the only other adult present, a teacher from Lakeland School District, did not feel the words or manner of the utterances made by the Grievant were inappropriate. One of his students, Jacob Schindler, agreed. Although Tina Elsner testified otherwise, there is no record that anything he said was received in any negative fashion. Four, Wendy gave no indication that she was offended. To the contrary, she joined "in the joking atmosphere of the circumstance at the time" and made no physical or verbal expression of

displeasure at the remarks. There was no way that the Grievant could have been aware that she

was offended by the remarks. Five, there were no adverse consequences. No participants in the Convention were treated adversely as a result of same, and Wendy continued to participate in the conference activities and enjoy herself as if nothing had happened. Six, action against the Grievant because of Wendy's subjective beliefs sets a dangerous precedent and is unwarranted.

The Association also argues that the Grievant did not fail to contact the student's parent regarding arrangements for the trip. In support thereof, the Association maintains that the Grievant discussed the arrangements with Wendy's mother, her testimony to the contrary notwithstanding; that he followed the mother's instructions that he should communicate with her through Wendy; that the mother's testimony on this matter is not credible based on her denial of any knowledge of written materials that were delivered to her by Wendy regarding the Convention which was contradicted by her signature on the very documents in question; that the Grievant had numerous contacts and phone calls including the day before the conference with Wendy regarding the trip; that he followed all DECA and District rules on the subject; that he followed past practice regarding field trips in the District; and that he was treated differently than other teachers regarding the dispute.

In addition, the Association argues that the Grievant should not be disciplined for the unreasonable reaction of Wendy. In this regard, the Association maintains that Wendy's reaction to the motel arrangements and the Grievant's statements was unreasonable and "largely driven by a case of administrative and parental incompetence." Regarding administrative incompetence, the Association argues that the District should have asked the Grievant about the circumstances surrounding the events before suspending him. The Association adds that the District's directive that the Grievant not talk with Wendy or her mother denied the parties an opportunity to resolve the dispute before further action. The Association claims that the District failed to interview key adult witnesses like Jack Blosser, "who witnessed Jon Brost scheduling two rooms," and Shawn Umland, who was present when the Grievant made the remarks in dispute. In addition, the Association claims that the investigation dragged on too long, the discipline was not appropriate, and the District ignored significant community support for the Grievant. The Association adds that the manner in which the District prosecuted this case, including the public hearing in November of 1996, created the adverse community climate for Wendy. Finally, the Association claims that the District failed to deal with the obvious overreaction of Wendy. In this regard, the Association alleges that the District "failed to properly deal with the obvious perverted impressions of Wendy Bogseth and allowed her to languish with periods of obvious paranoia concerning this matter."

The Association also claims that Mrs. Bogseth is at fault for a variety of reasons including allowing Wendy to function as an adult regarding the arrangements for the trip, and failing to step in and take some action when Wendy expressed some uneasiness about the trip and the room arrangements.

Finally, the Association argues that Wendy's conduct should be taken into consideration in deciding the outcome of this case. In the opinion of the Association, Wendy cannot be considered

a credible witness based on her overreaction to the events in Florida, her lies and

their effect on the events that evolved, her actions, i.e. doing things with the Grievant which were contrary to her "terror," and her failure to honor her mother's instructions to sleep elsewhere.

Based on all of the above, the Association requests that the Grievant "generally be made whole and specifically awarded all back pay, compensation for all time and expenses incurred for attending ethics and sensitivity training, reimbursement for all credits earned during the summer of 1997, reimbursement for the airline tickets to Orlando, Florida, and a complete purge from his personnel file of any and all documents recording discipline arising out of the events of April, 1996."

In its reply brief, the Association reiterates many of the arguments contained in its brief. The Association also makes the following principal rebuttal arguments. One, the Grievant and Wendy left early for legitimate reasons and the Grievant in fact made two room reservations. Two, April Bokota suggested Innkeeper Fraud and therefore is not a reliable witness in support of the District's argument that the Grievant arranged for only one room in Florida. Three, the Grievant's call to make room reservations two to three days before the Convention was not a culpable act because the Grievant was able to make two room reservations and the delay in making the reservations did not contribute to the mix up involving the reservations themselves. Four, the District misstates the record when it argues that the Grievant agreed to the one room arrangement after Wendy indicated that it was okay with her. The Grievant agreed with the arrangement only after the concurrence of Wendy, her mother, and the Grievant's wife. Five, speculation about other possible accommodations was irrelevant since he had the consent of the aforesaid parties. Six, the Grievant's testimony concerning the availability of the credit card was consistent and truthful. In this regard, the Association claims that the Grievant's testimony concerning the availability of the credit card was not inconsistent between the Unemployment Compensation hearing and the arbitration hearing.

In addition, the Association argues that the Grievant did not make repeated, insensitive and unprofessional statements in Wendy's presence relating to the motel arrangements because said statements were not intrinsically inappropriate and because the Grievant did not breach his promise to Wendy not to disclose the one room incident to her class. In this regard, the Association maintains that while the Grievant suggested that nothing be said to the class upon their return to Wisconsin about staying in one room overnight, there was no indication that nothing would be said to anyone else at the Convention. The Association claims that it is reasonable to distinguish between what would be said at the Convention and what would be said back in the classroom for several reasons. One, "it is most likely at the Convention that some explanation may be required concerning their arrangements the day before the Convention." Two, the students at the Convention were students "who she would meet in many cases only one time." They were good and mature students and would not be inclined to hold her up to any disapproval or ridicule. Three, it is not a concession by the Grievant that the one room arrangement was improper when he discussed with Wendy what would be said upon their return to Wisconsin. He simply was recognizing the unfortunate circumstances.

Furthermore, the Grievant is entitled to notice that the District expected him to contact Wendy's parent regarding the arrangements for the Convention trip before the imposition of any discipline.

Finally, the Association argues that the discipline imposed on the Grievant is clearly excessive, unreasonable and an abuse of discretion for the following reasons. One, the SHELL LAKE case is distinguishable from the instant dispute because in SHELL LAKE the employe involved actually solicited a student for sexual intercourse. The conduct complained of herein does not rise to that same level. Two, contrary to the District's assertion, the WILMOT case actually supports the Grievant's position for a variety of reasons including the fact that unlike here the behavior of the teacher in the WILMOT case was intentional. In addition, the arbitrator reduced the penalty imposed therein which already was less severe than the penalty imposed herein. Finally, the conduct of the WILMOT teacher, which was conduct engaged in after a specific warning, is substantially more culpable than any actions alleged against the Grievant because the Grievant was unaware that staying in the same room was wrong, and the responsibility for the one room situation was not solely the Grievant's.

### **District's Position**

In its brief, the District first argues that a preponderance of the evidence is sufficient to meet its burden of proof on the merits of the instant grievance.

Secondly, the District maintains that it had due cause to suspend the Grievant without pay commencing November 5, 1996, for the remainder of the 1996-97 school year. In support thereof, the District argues that the standard to be applied by the Arbitrator is to determine whether the Grievant committed the acts cited as reasons for his suspension without pay and whether the discipline imposed is appropriate given the acts committed by the Grievant. Applying this standard, the District maintains that it has shown by a preponderance of the evidence that the Grievant committed the acts cited as reasons for imposing the aforesaid discipline. In this regard, the District argues that the evidence supports a finding that the Grievant engaged in the conduct complained of in reason number one; namely, that he arranged for and stayed overnight in the same motel room with a female high school student, Wendy Bogseth. In support of this contention, the District claims that the reasons given by the Grievant for leaving on Thursday are not supported by the facts, that the Grievant made a statement to Wendy prior to the trip regarding whether they should stay in the same room, that Wendy conveyed her concern about this to her mother and a friend, that a reservation for only one room had been made, and that the Grievant had the means and ability to make alternative arrangements but failed to do so, and that finally, the Grievant admits that he and Wendy stayed in the same motel room on Thursday, April 25, 1996.

The District argues with regard to reason number two, repeated and insensitive and unprofessional statements in Wendy's presence relating to the motel arrangements, that the Grievant admits on at least two occasions he made statements concerning the Thursday night room arrangements to third parties. The District notes that in each of these incidents the statements were

unsolicited, unnecessary and simply volunteered by the Grievant.

Finally, as to the third reason for the suspension, failure to contact the student's parent regarding arrangements for the trip, the District claims that the Grievant admits to engaging in the conduct which resulted in his suspension. In this regard, the District alleges that the Grievant "admits that he spoke with Wendy's mother regarding the trip to Florida on a single occasion" and that he never discussed with her the details of the travel arrangements or the room arrangements for their Thursday night stay.

Thirdly, the District argues that it has shown for the following reasons that the discipline imposed reasonably reflects the seriousness of the offense. In this regard, citing several arbitration awards, the District first argues that the discipline should stand unless it is clearly excessive, unreasonable or management has abused its discretion. The District claims that the Association has not demonstrated same.

Having established a basis for discipline, the District next argues that the Arbitrator, in determining the appropriate penalty for the Grievant's misconduct, must consider the special relationship of a teacher and his student. Citing SCHOOL DISTRICT OF SHELL LAKE, DEC. NO. 20024-A (CROWLEY, 5/83), AFF'D, DEC. NO. 20024-B (WERC, 6/84), the District claims that the Grievant did not conform to the standards expected of a professional teacher. In this regard, the District maintains that the Grievant did not need advance notice that his conduct in this case was inappropriate. According to the District, "he was expected to exercise good judgment," citing WILMOT UNION HIGH SCHOOL, DEC. NO. 18840-A (CROWLEY, 3/82) ENLARGED FINDINGS OF FACT, AMENDED CONCLUSION OF LAW AND AFFIRMED EXAMINER'S ORDER, DEC. NO. 18850-B (WERC, 1/83) in support thereof. In the opinion of the District, the Grievant knew that staying in the same room overnight with Wendy was inappropriate as evidenced by his own testimony and actions. Based on same, the District claims it is to be expected that Wendy was uncomfortable with the situation and reacted accordingly to the Grievant's comments to other parties. The District concludes that teachers are given a great deal of authority and discretion with regard to students and have an obligation to exercise this power in an appropriate fashion. The District is troubled "that the Grievant has basically acknowledged the conduct was wrong, yet has tried to blame everyone else for this situation." Finally, the District points out that it did not discharge the Grievant for his extreme misconduct, but rather imposed a lesser penalty.

Based on the foregoing, the District believes that the suspension without pay is appropriate, and that such a serious breach of trust and lack of judgment requires a serious form of discipline.

Based on all of the above, the District requests that the Arbitrator deny the grievance, deny the relief requested by the Association and find in favor of the District.

In its reply brief, the District makes the following rebuttal arguments. One, since the issue before the Arbitrator is established by the grievance documents themselves, the sole issue before the Arbitrator is whether the District had due cause to suspend the Grievant without pay for the remainder of the 1996-97 school year, and if not, what is the appropriate remedy. The



Arbitrator should reject any attempt by the Association to broaden the scope of the dispute to include issues like reimbursement of costs for additional credits or out-of-pocket costs incurred in connection with the Florida trip. Two, the Association's attempts to introduce unsupported factual evidence in its initial brief should be disregarded. In addition, the facts of the case are not limited to those listed in the Association's brief; those set forth in the District's primary brief must be reviewed by the Arbitrator as well. Three, the evidence supports a finding that the Grievant arranged for an overnight stay in the same room with Wendy. In this regard, the District notes that while the Grievant and his wife both indicated that Jack Blosser witnessed the Grievant's telephone call to book two rooms, "Mr. Blosser never testified at the arbitration proceeding. Thus, there is no independent verification of such allegation." The District also notes that it did not offer the testimony of April Bokota to suggest that there were other alternatives with regard to booking the rooms as suggested by the Association. Rather, "the testimony of April Bokota supports the testimony of Wendy Bogseth that the Grievant had asked Wendy whether she would want to stay in one room or two." Finally, the District points out that the entire sequence of events leads to only one conclusion, "that the Grievant arranged to stay overnight in the same room as Wendy Bogseth." The District adds that even if the Arbitrator decides that the evidence does not support a finding that the Grievant only reserved one room prior to the trip, "the Arbitrator cannot disregard the fact that the ultimate arrangements occurred when the Grievant asked Wendy if it was o.k. to stay in the same room and made the decision that they should do so."

The District maintains that staying the night in the same motel room with a female high school student is punishable conduct. In support thereof, the District makes the following principal points: despite the fact that Wendy's mother feels Wendy is a responsible individual this does not mean that as a sixteen year old she is capable of handling all situations at all times (It was not Wendy's responsibility to make the correct decision, but the Grievant's.); it was also not Wendy's mother's responsibility to have made sure that they did not stay in the same room together (Contrary to the Association's assertions, there was no need to pursue the matter further prior to the trip since the Grievant had informed Wendy that he had obtained two rooms and she no longer had any reservations about going on the trip. In addition, Mrs. Bogseth did not speak with him directly regarding the arrangements for Thursday night when she was called by Wendy because of "fear as to what repercussions it would have for her daughter.); the Grievant, as an adult supervisor, was responsible for making the appropriate determination at the time; since he admits "in retrospect" that staying in the same room with Wendy was not a viable alternative, why wasn't it at the time that it happened; the Grievant did nothing to obtain alternative accommodations; (Emphasis supplied) there is nothing in the record to support the Grievant's contention that the District would not have reimbursed him for these additional costs; the Grievant introduced no evidence to show that any of the alternatives suggested (such as calling other hotels or sleeping in the lobby) were not viable; and finally, common sense dictates that alternative arrangements should have been made.

The District also maintains that it is undisputed that the Grievant made repeated insensitive and unprofessional statements relating to the motel arrangements in Wendy's presence. In support

of this argument, the District makes the following principal points. One,

even if the Grievant's intent was not malicious, the effect was that Wendy was embarrassed and felt extremely uncomfortable by these statements. Two, the Grievant's contention that he was essentially forced to reveal the room arrangements when asked even the most basic questions regarding the accommodations for the prior evening is unbelievable. Three, it was not reasonable for the Grievant to discuss the circumstances of the Thursday night arrangement in an attempt to "deflect any possible negative implication" for Wendy and himself since none of these individuals would have ever been aware of the circumstances if he had simply said nothing. Four, the fact that Umland and Schindler were not offended by the statements does not mean they were not offensive to Wendy. "Moreover, Tina, a student Wendy's age, did find the statements offensive." Five, even though Wendy did not state at the time that she was offended or appear offended to the Grievant, Umland and others, she in fact testified that she was embarrassed by the statements and Tina Elsner specifically testified that she could tell from Wendy's reaction that Wendy was uncomfortable with the statements, a reaction that was corroborated by Wendy's statements to her later when they were alone. Six, contrary to the Grievant's contention that there were no adverse consequences to Wendy as a direct result of his statements, "making a student feel embarrassed and uncomfortable is an adverse consequence."

The District further argues that the facts do not support a finding that the Grievant discussed the arrangements for the trip with Wendy's mother. In this regard, the District reiterates that the Grievant did not discuss the details of the flight arrangements or provide her with an itinerary at any time material herein. Wendy herself, according to the District, did not have an itinerary for the flight until the morning they left. "Nor did the Grievant ever inform Wendy of the hotel they were staying at." In addition, Wendy did not testify as alleged by the Association that the Grievant "never" called her house concerning the trip. Instead, she testified that he did not call her house "a number of" times. Finally, the Grievant's assertion that the uncontroverted testimony is that there have been many field trips in the District in which parents were not informed is not supported by the record. To the contrary, Beaver testified that he was unaware of any instances of field trips without prior notice to parents. In conclusion, the District notes that in his brief the Grievant admits that it is the obligation of teachers to inform parents concerning the activities of their children; the Grievant did not do this.

Finally, the District argues that the Grievant's failure to take responsibility for his actions and instead to blame everyone else for the problems Wendy experienced in returning from the Florida trip further supports the Board's decision to discipline him. In this regard, the District maintains that it conducted a fair investigation and gave the Grievant an opportunity to discuss his side of the story by meeting with him several times and by giving him "numerous" opportunities to discuss the matter. The District notes that it was never advised that Blosser was present during the telephone call to make reservations so there was no reason to interview Blosser. The District points out that Umland testified that he submitted a written statement to the District regarding his impression of the matter and that he was interviewed by the District as part of the investigation process, both contrary to the Association's assertion that the District never talked to Umland. The District also claims that the Grievant's comments that Marie Burbach indicated that the complaints of Wendy were not serious and that Wendy's mother still

trusted the Grievant are self-serving and contrary to the record. In particular, the District points out that Marie Burbach's actions following Wendy's complaints to her show the seriousness of the allegations. The District adds that "if the Grievant did not believe that the allegations were serious or of a concern, he would not have made the decision to leave the conference and return to Adams." The District further rejects "the Grievant's assertion that Wendy only experienced an adverse reaction to the incident after the November Board hearing," noting that Wendy "specifically testified that problems started from the time she got home and continued thereafter" because some individuals did not believe her, made jokes about what happened or otherwise commented on the situation. Finally, the District argues that Wendy is not a "liar" because she was not forthright with her feelings regarding the room arrangements. The District points out that Wendy testified that she felt she had no choice but to go along with the Grievant's suggestions and did not want to have him be angry with her. The District also notes Beaver's testimony that it is not uncommon for students who are high achievers to not bring forth concerns they may have because they do not want to rock the boat. In conclusion, the District notes that it is amazing that the Grievant would suggest that if Wendy listened to her mother and obtained a second hotel room or slept out in the hallway to avoid the circumstances, the matter would never have happened. The District feels the Grievant is asserting that Wendy was responsible for exercising better judgment than he was required to use. The District does not think that the Grievant can abdicate his responsibility for his conduct by trying to blame Wendy.

### DISCUSSION

At issue is whether there was due cause to suspend the Grievant.

The District argues that there was due cause for the suspension while the Association takes the opposite position.

The Arbitrator believes that there are two basic and fundamental questions in any case involving due cause. One is whether the employe is guilty of the actions complained of which the District herein has the duty of so proving by clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second basic question is whether the punishment is contractually appropriate, given the offense.

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

The District suspended the Grievant for the following reasons:

2. Arranging for and staying overnight in the same motel room with a female high school student, Wendy Bogseth.

3. Repeated insensitive and unprofessional statements in Wendy Bogseth's presence relating to the motel arrangements referenced in paragraph 2 above.

...

5. Unprofessional, irresponsible conduct related to the handling of the Florida trip as evidenced by:

...

b. Failure to contact the student's parent regarding arrangements for the trip;

...

Regarding reason number one for the suspension, the District first alleges that the Grievant "arranged" to stay in one room with Wendy on the date in question. The District puts forward a number of arguments in support thereof. For each argument of the District, however, the Association advances an equally persuasive counter argument. For example, the District claims that the reasons given by the Grievant for leaving on Thursday are not supported by the facts. It is true, as pointed out by the District, that by leaving on Thursday, April 25, the cost savings obtained by leaving early were minimal. 1/ This casts some doubt on the Grievant's claim that he left early in order to save money. 2/ However, the Grievant also left early so that Wendy would not miss any activities which were occurring at the Convention on Friday. 3/ While there was no evidence presented in the record to show that the Convention started on Friday, making it necessary for the Grievant and Wendy to leave "a day early" on Thursday, it was customary for advisors and students to arrive early at national conferences and in some cases, stay after the conferences end. 4/ The record is also undisputed that at the State Convention Wendy missed a crucial meeting. The Grievant "did not want to take a chance on repeating a most embarrassing circumstance with regard to the National Convention. Therefore, the primary purpose was to avoid being late for the main convention." 5/ (Emphasis supplied) Finally, another reason for leaving early for the Convention was to make possible Wendy's interaction with other students and to be available in the event there was any pre-convention activities and work. 6/ The Grievant knew that Shawn Umland and his students would be there early on Friday ready to compete and he wanted to make sure that Wendy was there and ready to go too. 7/ Based on the foregoing, and the Grievant's record of improving the District's representation at these competitions/conferences, 8/ the Arbitrator finds that the Grievant had a legitimate reason for leaving early, the District's arguments to the contrary notwithstanding.

The District also claims that the Grievant made a reservation for only one room. In support thereof, the District introduced a letter from the Residence Inn which confirmed in writing that "one studio suite was reserved for Mr. John Brost for the evening of April 25, 1996." 9/

However, both the Grievant and his wife testified persuasively that he made

reservations for two rooms. 10/ And while it is true, as pointed out by the District, that no one was present with the Grievant when he made a second call to confirm the reservations, the District introduced no persuasive evidence or testimony that he made a reservation for only one room on that date. Finally, the Arbitrator takes arbitral notice of the fact, as evidenced by the Grievant's protestations when he attempted to check in at the registration desk of the Residence Inn in Orlando and learned that there was only one room reserved, 11/ that motels sometimes make mistakes when reserving rooms. Based on the above, the Arbitrator rejects this claim of the District.

More troubling, in the Arbitrator's opinion, is the District's allegation that the Grievant made a statement to Wendy prior to the trip regarding whether they should stay in the same room. Wendy testified clearly and with conviction that the Grievant raised this issue with her prior to the trip. 12/ She also testified that after the issue concerning the room arrangements for Thursday night was raised by the Grievant she felt extremely uncomfortable and afraid. 13/ While the Grievant emphatically denies ever making such a statement, 14/ he has offered no persuasive reason why Wendy would have fabricated such a statement, let alone gone on to contemporaneously express her concerns to not only a friend, April Bokota, 15/ but to her mother. 16/ Nevertheless, absent any additional persuasive evidence that the Grievant deliberately planned and "arranged for" one room, and based on all of the above, the Arbitrator finds that the District did not prove the first part of reason number one.

Regarding the second part of reason number one, the record is undisputed that the Grievant stayed in the same motel room with Wendy on the date in question. The Association, however, argues that this was not a "culpable act" for a variety of reasons. For example, the Association argues that the Grievant's action can be excused because of the lateness of their arrival and unfamiliarity with the community. However, the Grievant and Wendy arrived at the motel sometime shortly after 8:00 p.m., hardly a late arrival based on the Arbitrator's experience. A midnight arrival or an extremely long and arduous trip would have provided a better excuse for the Grievant's actions in the Arbitrator's opinion. Likewise, despite the fact that they were unfamiliar with the community, the Arbitrator believes that the Orlando area had other motels that might have accommodated the Grievant's need for two motel rooms. As pointed out by the District, the Grievant made no attempt to find alternative arrangements. (Emphasis added)

The Association also argues that it was not necessary to pursue alternative arrangements because both Wendy and her mother gave their permission to share a room. The Association adds that the Grievant called his wife and got her approval for the arrangement. The Arbitrator, however, agrees with the District when it states that it is inappropriate to attempt to shift the burden for the decision to stay in the same room on Wendy and/or her mother. Wendy basically was afraid to say no, and felt that she had no alternatives available to her. 17/ Wendy's mother was afraid to intervene directly because she feared "possible repercussions it would have for her daughter" if she did. She also told Wendy to sleep somewhere else, and relied on her response that everything would be "fine," especially since she was thousands of miles away and unable to do anything more at that point. 18/ The Grievant insists that he could rely on these

assurances to stay in the room with Wendy. However, he had basically presented Wendy, her mother, and his own wife with a fait accompli. He had turned down the offer of an additional room, had taken the keys for one room from the motel clerk, left the hotel lobby without attempting to find another motel with two rooms available, and was in the very room that the Residence Inn had for the both of them asking the three people in question to approve the aforesaid arrangement. The Arbitrator can understand how everyone felt there was little other choice at the time but to approve or go along with the proposed arrangement. However, as noted above, it was not their responsibility to make the right decision. "The Grievant, as the adult supervisor, was responsible for making the appropriate determination at that time." As pointed out by the District, "common sense dictates that alternative arrangements should have been made." The Arbitrator could better understand the Grievant's reasoning that he acted properly by relying on the aforesaid parties' approval if he had explored any other options, like attempting to obtain District approval to reserve the second higher priced room before turning down same or calling another motel, before putting the question to them. However, the Grievant did absolutely nothing to explore alternatives before seeking permission to stay in the same room with Wendy overnight. It appears, for whatever reason, that the Grievant decided that staying in the same room was the only option and then sought to validate that decision. The Grievant admits "in retrospect" that staying in the same room was not a viable alternative. 19/ It was not, in the Arbitrator's opinion, viable on the date in question either.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the Grievant is guilty of a "culpable act" by staying overnight in the same motel room with Wendy as alleged by the District.

Regarding reason number two for the suspension, the record is clear that the Grievant made at least two insensitive and unprofessional statements in Wendy Bogseth's presence relating to the motel arrangements.

In making this finding, the Arbitrator rejects the Association's arguments to the contrary. For example, the Association argues that the utterances were non-offensive because an adult teacher from Lakeland School District and one of his students testified that no one present felt the words or manner of the utterances made by the Grievant were inappropriate. However, Wendy felt that they were inappropriate. The Association contends that Wendy gave no indication that she was offended and even joined in the "joking atmosphere." However, Wendy testified that she felt stupid and embarrassed. 20/ In addition, a friend, Tina Elsner, testified that she could tell that Wendy was upset by those kind of remarks. 21/ Finally, while Wendy may at first have been intimidated into going along and not saying anything, 22/ the second time it happened Wendy got angry and quickly corrected any misinterpretations over what the Grievant was saying. 23/

The Association also argues that there were no adverse consequences as a result of the comments. In particular, the Association contends that no participants in the Convention treated her adversely as a result thereto, and that Wendy continued to participate in the conference as if nothing had happened. However, this argument ignores the fact that Wendy herself suffered



adverse consequences as a result of the remarks. Her roommates, knowing that she was uncomfortable about the situation and comments, advised her to go see Marie Burbach about the situation. 24/ Ultimately, after Marie confronted the Grievant about the situation and the Grievant decided to leave the Convention and return to Wisconsin, Wendy had to rely on a comparative stranger to assist and to chaperone her at the Convention. Finally, it appears that Wendy was "withdrawn," and "didn't look like she was having a good time" particularly when she was with the Grievant." 25/ Contrary to the Association's assertions, there were serious adverse consequences.

The Association further argues that punishing the Grievant because of Wendy's subjective beliefs sets a dangerous precedent and is unwarranted. The Arbitrator agrees with the Association that one must be careful about disciplining teachers "because students, several days after the fact, express displeasure with statements that the teacher makes." However, in the context of the arrangements the night before; based on the fact that even the Grievant understood there were those who might misinterpret what happened; 26/ based on the fact that he was motivated to make these unsolicited remarks because he was uncomfortable over what happened, and wanted to make himself feel better but instead made Wendy feel worse; 27/ (Emphasis added) and based on the fact that Wendy was trying to make a good impression in front of students and others that she barely knew at a national conference she had earned the right to attend because of her election as a state officer, 28/ the Arbitrator finds the remarks were highly inappropriate. The aforesaid remarks indicate poor professional judgment, particularly in light of the earlier poor choice in deciding to spend the night in the motel room with Wendy.

Finally, the Association argues that just because the Grievant made some suggestions that nothing be said to the class upon their return to Wisconsin about staying in one room over night there were no indications that nothing would be said to anyone else at the Convention. The Arbitrator finds this argument unpersuasive. In this regard, the Arbitrator notes while it is understandable that the Grievant would be concerned about impressions back in Wisconsin his lack of concern about impressions in Florida is perplexing. After all, it was the Grievant who orchestrated the early arrival at the Convention in order to get Wendy off on the right foot regarding the festivities. Yet, one of the first things he said to people they met was words to the effect of "Wendy, did you tell them we slept together last night." 29/ The Arbitrator does not believe this is the kind of statement a male teacher should make while chaperoning an under age female student at a National Convention, especially since they were attempting to represent the District and themselves in the best possible light at this conference.

The Association, however, argues contrary to the above that it was "likely" that some explanation might be required concerning their arrangements the day before the Convention. Why? As pointed out by the District, no one asked. Even if the issue arose, a simple "We stayed at the Residence Inn" would have sufficed in the opinion of the Arbitrator. The Association contends that the students at the Convention were good and mature students and would not be inclined to hold her up to any disapproval or ridicule. That appears to be true. In fact, after discussing the matter with Wendy they advised her that if she felt uncomfortable with the remarks that she should raise the matter with Convention officials. 30/ At least one of those students who

testified felt the remarks were inappropriate. 31/

Based on all of the above, the Arbitrator finds that the District has proved the second reason for suspension as well.

Regarding the third reason for suspension, however, the District's position must fail. It is true, as pointed out by the District, that it makes common sense for teachers to keep parents well informed of the details of school trips like the one Wendy took to the National Convention in Florida. In addition, Beaver testified that he was unaware of any instances of field trips without prior notice to parents. 32/ However, it is possible that he simply was not aware of instances where the District took a field trip without notifying the parent. 33/ It is also probable that the District had an inconsistent practice regarding same. 34/ In addition, the Grievant testified, unrefuted by the District, that the process and procedure that he followed with regard to this national DECA conference was no different than the procedure that he had followed previously with regard to another National Convention. 35/ At no time did the District ever inform the Grievant that his procedures in the past were in any way wanting, or subject to discipline. 36/ The record further indicates that he followed both DECA and District rules concerning notice to the parents and to the students who participate in field trips. 37/ It is true, as pointed out by the District, that the Grievant admits that he spoke with Mrs. Bogseth regarding the national DECA trip on a single occasion, at a parent/teacher conference approximately a month before the trip, and that this is the only conversation he had with her. 38/ However, it is undisputed that Mrs. Bogseth specifically instructed the Grievant that he should communicate with her through Wendy. 39/ And while the Arbitrator agrees with the District's contention that the Grievant could have done a better job of communicating the details of the trip to Wendy, it was unable to point to any District rules that the Grievant violated as a result of his actions in this area. Finally, as pointed out by the Association, the District provided no notice that the Grievant should have followed a different procedure and/or provided more advance detail to Wendy and her mother regarding the trip. Based on same, and all of the foregoing, the Arbitrator finds that the District did not prove charge number three.

Therefore, based on the above, the Arbitrator finds that there is a factual basis on which to suspend the Grievant, although not as much as claimed by the District. The remaining question is whether the punishment is appropriate for the offense.

A review of this question may be undertaken within the context of the issues raised by the Association in arguing against suspension.

The Association initially argues that the Grievant should not be disciplined for the unreasonable reaction of Wendy to the motel arrangements and the Grievant's statements which, according to the Association, was "largely driven by a case of administrative and parental incompetence." The Association essentially attempts to shift the blame to Wendy, her mother and the District for any adverse consequences resulting from the Florida trip. For the reasons discussed below, the Arbitrator rejects this attempt to shift responsibility.

There is nothing persuasive in the record to support a finding that Wendy suffered from

"perverted impressions," and "obvious paranoia concerning this matter." To the contrary, the

record indicates that Wendy was an outstanding, hard working student, 40/ who regularly participated in classroom activities and discussions, 41/ and who participated in the DECA program becoming one of the few students from her school to successfully compete at the State and National levels of the DECA program. 42/ The Arbitrator believes that it would be "unreasonable" for Wendy not to be upset with what took place. It is not appropriate professional behavior for a male teacher advisor to spend the night in the same motel room with his female student. 43/ Even the Grievant admitted that people might get the wrong impression and make a big deal of the situation. 44/ Not only was Wendy upset with what happened, 45/ but at least one of her fellow students shared her concern about staying with the Grievant in one room overnight and his subsequent comments regarding same 46/ and encouraged her (as other students did) to bring her complaints to the attention of convention officials. 47/ These events were "serious" enough for the state DECA advisor Marie Burbach to talk to the Grievant in the middle of the night and for the Grievant to subsequently leave the Convention early. Wendy's troubles did not end at the National Convention. They began almost immediately when she got home, 48/ and escalated after the November, 1996 Board hearing. 49/ Contrary to the Association's assertions, the Arbitrator can find nothing persuasive in the record to suggest that Wendy shares in any of the fault herein for the Grievant's actions and statements. It is true that Wendy "lied" when talking to the Grievant and her mother regarding the room arrangements. And it is possible that if she hadn't "lied" events would have turned out differently. However, given the circumstances it is understandable that she felt that she had no choice but to act as she did. In addition, it is the Grievant, not a sixteen year old student, who has ultimate responsibility herein.

Nor can the Arbitrator find any significant fault with the District's actions. It is true that the District did not allow the Grievant to explain what happened in any detail prior to placing him on paid administrative leave pending an investigation of the matter. However, the Association failed to establish that this failure harmed the Grievant in a material way. Two of the primary reasons for his suspension are undisputed: the Grievant slept in the same motel room with Wendy prior to the start of the National Convention and he made two unsolicited comments regarding same which served to embarrass and humiliate Wendy. In addition, the District conducted a thorough investigation of the matter during which it talked to the Grievant as well as other material parties. 50/ The Association complains that the investigation took too long and added to the problems the relevant parties experienced. That may be. However, the investigation dragged on in many instances for reasons not within the District's control. 51/ In addition, the Association failed to show that the delay in the investigation resulted in any harm to the Grievant or to his position. It is true that the Grievant's reputation may have been harmed as a result of these proceedings. 52/ It is also true that Wendy suffered adverse consequences for what occurred not only in school but in the community. 53/

In addition, the Association attacks other aspects of the District's handling of the matter. For example, the Association argues that the District's directive that the Grievant not talk with Wendy or her mother denied the parties an opportunity to resolve the dispute before further action. That may be. However, as pointed out by the District, such action was done "in order to preserve the integrity of the investigation procedure." The Association also argues that the public hearing in November of 1996 helped create the adverse community climate for Wendy.

The record supports a finding regarding same. However, also as pointed out by the District,

it "was the Grievant who requested that the Board hearing be held in open session . . . , the Board would have held the matter in closed session to keep the allegations as confidential as possible."

Furthermore, the Association argues that the District ignored significant community support for the Grievant. 54/ The Arbitrator is not persuaded, although the record contains no evidence regarding same, that the School Board failed to take this into consideration prior to suspending the Grievant, rather than accepting the administration's recommendation to terminate him. In any event, such support is not relevant to the Arbitrator's review of the instant dispute.

Finally, the Arbitrator turns his attention to the Association's claim that Wendy's mother shares some responsibility for what occurred. The Arbitrator agrees. Despite her concerns about the Grievant's reaction, 55/ the Arbitrator is of the opinion that Wendy's mother largely abdicated her parental responsibility to that of her daughter in the instant situation. Despite the fact that Wendy may have been a "very mature" sixteen year old, she was still a minor, and Mrs. Bogseth apparently ignored that reality at critical points along the way. Nevertheless, the Grievant, not Mrs. Bogseth, was ultimately responsible for what happened. Therefore, the Arbitrator also rejects this claim of the Association.

The Association next argues for a number of other reasons that the discipline imposed on the Grievant is excessive, unreasonable, inappropriate and an abuse of discretion.

In this regard, the Association initially maintains that the discipline imposed is too severe. However, the District administration originally recommended discharge of the Grievant based on seven proposed reasons. (Emphasis added) The District Board reduced the proposed penalty to suspension based on three of the reasons. The Association argues in support of the above that the administration "vastly overcharged Jon Brost in proposing discipline for him." However, the Association introduced no persuasive evidence in support of this argument. The Association does claim that the disputed matter was overcharged based on the fact "that the Administration was not even able to get its own School Board to support 75% of the accusations made against Jon Brost." However, the three School Board members who voted against suspending the Grievant, School Board president Carole Janssen, Janet Boddy and David Grabarski, voted against suspension because they felt the Grievant should be terminated. 56/ Therefore, the Arbitrator also rejects this argument.

The Association also argues that the Grievant "received a \$25,000 fine and endured an incredible punishment" largely because of the irresponsible actions of Wendy and her mother. The Arbitrator agrees that the Grievant received a harsh penalty. However, the Association's argument ignores the finding made above that the Grievant was primarily responsible for the conduct complained of. It also ignores the fact that the administration initially recommended the Grievant's discharge based on a number of even more serious charges, and that the Board ultimately reduced said penalty based on fewer findings of wrongdoing. As noted above, the Association makes a point of the fact that the Board only supported 75% of the administration's accusations against the Grievant. However, judging from the testimony of the Board members at hearing, the Grievant may have been two votes away from termination. Finally, while the

discipline imposed was stiff, as noted by the District, "the Grievant has shown that stern



discipline is necessary to impress upon him the seriousness of his conduct." (Emphasis supplied) Unfortunately, also as noted by the District, "(N)owhere does the Grievant accept that he had any part in the outcome." Given the seriousness of the offense, and the problems other school districts have experienced, particularly in the southern half of the State, with male teachers allegedly acting inappropriately with female students, the Arbitrator cannot find that the District acted improperly herein by imposing a stiff suspension and other requirements before the Grievant would be reinstated. Given the nature of its concerns, the District acted properly by addressing not only the Grievant's lack of professional judgment and inappropriate conduct but also the appearance of even greater impropriety.

The Association further argues that since the conduct complained of herein does not rise to the same level of conduct complained of in SCHOOL DISTRICT OF SHELL LAKE, SUPRA, the District's discipline is too severe. It is true, as pointed out by the Association, that the Grievant did not solicit Wendy for sexual intercourse as the teacher in SHELL LAKE did to one of his female students. However, the teacher in SHELL LAKE was discharged for his conduct, a more severe penalty than the Grievant who was only suspended for his actions. Therefore, that case is distinguishable from the instant dispute.

The Association also argues that WILMOT UNION HIGH SCHOOL, SUPRA, which was relied upon by the District to support its position that the Grievant knew that staying in the same room overnight with Wendy was inappropriate as evidenced by his own testimony and actions actually supports the Association's position. The Association reaches this conclusion for a variety of reasons including the fact that unlike the instant dispute the behavior of the teacher in the WILMOT case was intentional, the conduct of the WILMOT teacher was engaged in after a specific warning, thus is more culpable than any actions alleged against the Grievant because the Grievant was unaware that staying in the same room was wrong and because the one room situation was not solely the Grievant's responsibility and the penalty imposed in the WILMOT case was reduced though already less severe than the penalty imposed herein. However, the Arbitrator rejects the Association's reliance on these distinctions for the following reasons. One, like the teacher in WILMOT the Grievant did not exercise good professional judgment herein. Common sense requires that a male teacher does not stay in a motel room overnight with his minor female student unless all other alternatives have been exhausted (and even then probably not). Two, contrary to the Association's assertions, the conduct of the WILMOT teacher did not follow a specific warning to refrain from same 57/ and was only immaterially more intentional than the Grievant's actions and statements herein. Three, as evidenced by the District administration's initial charges, 58/ the Grievant's conduct, especially staying in the motel room with Wendy overnight, had the potential for more serious harm to everyone involved, especially the Grievant and Wendy, in the opinion of the Arbitrator, than the WILMOT teacher's showing of the "R" rated film "The Exorcist." Finally, as noted above, while several parties including the Grievant's own wife, shared in the decision that the Grievant stay in the motel room overnight with Wendy, ultimately the responsibility was his as Wendy's teacher, advisor and chaperone on this trip. As pointed out by the District, "the special relationship of a teacher and his student must be taken into account" when determining the appropriateness of the penalty imposed herein. The Arbitrator agrees with the District that the Grievant exercised unprofessional judgment worthy of suspension when he stayed in the motel

room overnight with

Wendy, and later made inappropriate comments regarding same. Based on same, the Arbitrator agrees with the District that the punishment imposed on the Grievant fits the crime. The District stated the rationale for its disciplinary action best at page 25 of its brief:

Teachers are given a great deal of authority and discretion with regard to students and must exercise this power in an appropriate fashion. Parents and administrators must be assured that when a male teacher takes a female student across the country he will not place the student in the type of position the Grievant placed Wendy. The Grievant's conduct in this instance is totally contrary to the trust which is placed in teachers and fully warranting the penalty imposed by the District.

Based on all of the above, and on the record as a whole, and absent any persuasive evidence or argument by the Association to the contrary, the Arbitrator finds that the District has sufficient factual basis upon which to suspend the Grievant, and that the penalty imposed is contractually appropriate given the offense. Therefore, the Arbitrator finds it reasonable to conclude that the answer to the issue as framed by the District is YES, the Adams-Friendship Area School District Board of Education had due cause to suspend the Grievant without pay commencing November 5, 1996, for the remainder of the 1996-97 school year. Having reached this decision, the Arbitrator finds that it would be inappropriate to address the other issues raised by the Association noted in the Issues section of this Award.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the Association. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the above, and the record as a whole, it is my

**AWARD**

That the grievance of Jon Brost is hereby denied and this matter is dismissed.

Dated at Madison, Wisconsin, this 18th day of February, 1998.

Dennis P. McGilligan /s/  
Dennis P. McGilligan, Arbitrator

**ENDNOTES**

- 1/ Approximately \$12. Tr. 556-58.
- 2/ Tr. 100.
- 3/ Tr. 555.
- 4/ Tr. 427-428.
- 5/ Tr. 494-495.
- 6/ Tr. 506.
- 7/ Tr. 560.
- 8/ Tr. 506.
- 9/ District Exhibit No. 1.
- 10/ Tr. 512, 459.
- 11/ Tr. 57-58, 109-110 and 520-521.
- 12/ Tr. 90-91.
- 13/ Tr. 90-92.
- 14/ Tr. 499.
- 15/ Tr. 92, 102, 221-22, 224, 226-27.
- 16/ Tr. 90-91, 272.
- 17/ Tr. 111-115.
- 18/ Tr. 280-281, 325.
- 19/ Tr. 523.
- 20/ Tr. 126.
- 21/ Tr. 240.

22/ District Administrator Robert Beaver testified that students like Wendy, who are outstanding kids and succeed at high levels, tend to be achievers. Beaver stated that such kids want to make people happy; that they want to accommodate people; and that they don't want people upset with them. Beaver added that they work hard and are easily intimidated. Students like Wendy, Beaver concluded, think they could be intimidated if they say something. "They think there could be repercussions if they say something." Tr. at 352.

23/ Tr. at 240.

24/ Tr. at 136, 252.

25/ Tr. at 253-254.

26/ Tr. at 71-72.

27/ Tr. at 541.

28/ Tr. at 88-89, 126-128, 506.

29/ Tr. 69, 70, 540.

30/ Tr. 240-243, 252.

31/ Tr. 243.

32/ Tr. 395-396.

33/ Tr. 396.

34/ ID.

35/ Tr. 488.

36/ Tr. 394, 488.

37/ Tr. 393, 489-490; Union Exhibit No. 2.

38/ Tr. 77-79

39/ Tr. 292.

40/ Tr. 352.

41/ Tr. 491.

42/ Tr. 483-484.

43/ Tr. 65-67.

44/ Tr. 563.

45/ Tr. 239

46/ Tr. 243.

47/ Tr. 134-135, 240-241.

48/ Tr. 142-143, 210.

49/ Tr. 149.

50/ Tr. 344, 362-363. The Association asserts the District failed to interview key witnesses like Jack Blosser who allegedly witnessed the Grievant scheduling two rooms, and Shawn Umland who witnessed key events. However, the Grievant admitted that at no time during the investigation did he inform the District that Blosser was present during the aforesaid telephone call. Tr. 561. In addition, Umland testified that he submitted a written statement to the District regarding his impression of the matter and that he was interviewed as part of the investigation process. Tr. 446-447, 449.

51/ Tr. 344.

52/ Tr. 478.

53/ Tr. 141-144, 149, 208-209, 212.

54/ Association Exhibit Nos. 3-8.

55/ Tr. 323-325.

56/ Tr. 263-264.

57/ WILMOT UNION HIGH SCHOOL DISTRICT, DEC. NO. 18840-A, at Findings of Fact Nos. 4-13, pp. 2-3 (Crowley, 3/82).

58/ Joint Exhibit No. 4.

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