BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

UNITY SCHOOL DISTRICT

Case 29
No. 56393
MA-10262

Appearances:

Mr. Stephen Pieroni, Staff Counsel and **Ms. Chris Galinat**, Associate Counsel, Wisconsin Education Association Council, on behalf of Northwest United Educators and John Schmidt.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Ms. Kathryn J. Prenn**, on behalf of Unity School District.

ARBITRATION AWARD

Northwest United Educators, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Unity School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on July 9 and 24, August 31 and September 1, 1998 in Balsam Lake, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by January 13, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties have stipulated there are no procedural issues and to the following statements of the substantive issues:

(1) Did the School District violate Article X of the parties' Collective Bargaining Agreement when it suspended Mr. Schmidt for five days without pay in February of 1998? If so, what remedy is appropriate?

(2) Did the School District violate Article X of the parties' Collective Bargaining Agreement when it nonrenewed Mr. Schmidt's teaching contract for the 1998-99 school year? If so, what remedy is appropriate?

The parties also jointly requested that the Arbitrator retain jurisdiction for remedy purposes should the grievance(s) be sustained.

CONTRACT PROVISIONS

The parties cite the following provision of their Agreement:

ARTICLE X – TEACHER DISCIPLINE

A. All teachers new to the school system shall serve a probationary period of six (6) months. During this probationary period, said teachers may be suspended, discharged or nonrenewed for any reason related to the teacher's classroom and/or said teacher's teaching effectiveness as determined by his/her immediate supervisor, without recourse to the grievance procedure.

B. No teacher shall be disciplined or reduced in compensation without just cause, nor after the completion of the probationary period, nonrenewed, discharged or suspended without just cause.

BACKGROUND

The grievant, John Schmidt, holds an M.A. degree in Teaching and a B.S. degree in Education/Music and was employed by the Unity School District as a full-time K-5 Music Teacher from 1989 through the 1997-98 school year. During that time, he also taught summer school and was Assistant High School Girls Track Coach, Assistant High School Football Coach, which included being the Eighth Grade Football Coach, coached and judged Odyssey of the Mind, and co-founded and advised the High Flyers program, an after-school aviation club. From 1983 until 1989, the grievant had taught at parochial schools in Michigan and Minnesota at the third, fourth and sixth grade levels. For the past seven years the grievant has also been assigned noon playground supervision for second grade and fifth grade. The grievant has also been active in the local Association and was Chair of its Negotiating Team in 1996-97 and 1997-98.

In May of 1990, the District's Middle School Principal and Athletic Director, Tom Witasek, issued the grievant a letter of reprimand for the "negative and sarcastic" tone he had used in speaking to two high school track managers in April of 1990. The grievant accepted the criticism and apologized to the students. Witasek also indicated in the letter that if the grievant demonstrated similar behavior in the future, he would be suspended or released from his coaching duties.

In September of 1992, the grievant received a written reprimand from Elementary Principal Bob Appelholm for slapping a student's hands and was warned that if such behavior persisted, disciplinary action that could range from suspension to termination would be taken.

In April of 1993, Appelholm issued the grievant a letter regarding his grabbing one of his students by the arm. In that letter, Appelholm stated:

> I am requesting that you maintain a hands off policy with all of your students. Unless a student is in danger of hurting another student or themselves, I believe it to be in the best interest of all staff members and students to maintain such a policy. Your cooperation is greatly appreciated.

The grievant was issued a written reprimand by the Athletic Director, Tom Witasek, on March 4, 1994 regarding an incident that occurred at a middle school girls' basketball game on February 28, 1994 in which the grievant was officiating. The grievant had been "extremely confrontive" with two students who were keeping score and running the clock, and when the game ended had grabbed one of the boys by the arm. At Witasek's direction, the grievant verbally apologized to the students and made written apologies to their parents. Witasek also recommended that the grievant not officiate any District athletic contests in the next school year and stated that if a similar situation occurred while he was acting as a coach for the District, he would recommend terminating the grievant's coaching contract and that additional action might also be appropriate.

In December of 1995, the grievant was given a written reprimand from the District Administrator, Glenn Schimke, for actions in November of 1995 in which the grievant allegedly yelled at three elementary students who had stepped inside the school building, picked one of them up under the arms and "threw" her outside such that she fell to her knees, and shoved another, who had come inside to stop a nosebleed, out the door. Schimke interviewed the girls and the grievant before issuing the letter and concluded that yelling and some form of physical contact had occurred. The letter directed the grievant to "immediately refrain from further yelling at or physically handling students" and advised that such behavior is "inappropriate and violates administrative rules and district policy, JKA – Corporal Punishment." In the letter, Schimke also noted prior similar incidents in the grievant's file and warned that, "In the future, further errors in professional judgment may result in

additional disciplinary action, including potential discharge (sic) employment, as circumstances warrant." The grievant had denied picking up or throwing anyone and indicated he was unaware the girl had a nosebleed and conceded only that if a student had refused his directive, he might have raised his voice and/or led her by the sleeve. The District's corporal punishment policy enclosed with Schmidt's letter had been approved in August of 1995 and provided, in relevant part, as follows:

CORPORAL PUNISHMENT
(Use of Force)

The School District of Unity and Wisconsin law prohibits corporal punishment. Corporal punishment which is "including, but not limited to paddling, slapping, or prolonged maintenance of physically painful positions, when used as a means of discipline," in schools. Reasonable and necessary force or restraint may be used by any official, employee or agent of the School Board to:

1. Quell a disturbance;

2. Prevent an act which threatens physical injury to any person;

3. Obtain possession of a weapon or other dangerous object within a student's control;

4. Defend oneself or others;

5. Protect property;

6. Remove a disruptive student from school premises, a school motor vehicle, or a school-sponsored activity;

7. Prevent a student from harming himself or herself;

8. Protect the safety of others; and

9. Maintain order and control.

Employees shall be subject to discipline, up to and including discharge, for engaging in corporal punishment in violation of the District policy.

CORPORAL PUNISHMENT
(Use of Force)

Administrative Regulation

District personnel who have used physical force or have witnessed the use of physical force shall report such use to the building principal. Said personnel shall also submit a written statement that same day describing the incident.

Building principals, upon becoming aware that physical force has been used, shall report and forward a copy of the written statement to the superintendent.

In September of 1996, Middle School Principal Erwin Roth issued the grievant a letter of reprimand for stating to another teacher, "You got fucked by the Administration twice," in regards to a deduction from that teacher's paycheck. The statement was made with high school students and a student teacher nearby. The letter warned that, "In the future, further errors in professional judgment may result in additional disciplinary action, including potential discharge from employment, as circumstances warrant."

On December 12, 1996, Roth issued the grievant a letter of reprimand for yelling "out of control" at a student in the hallway outside of Roth's office, calling the student a "liar" and telling the student to "just shut up". The letter indicated that such conduct was inappropriate and would not be tolerated in the future.

In October of 1997, based upon the written complaints from the St. Croix Tribe Home School Coordinator, Georgette DiCosimo, and Elementary Physical Education Teacher, Jacquelyn Reynolds, the grievant was questioned by Elementary Principal Meredith McGuire and Roth about allegations that he had grabbed two second grade boys by the arm when they had not stopped playing tetherball when he blew the whistle to come in from recess, shook their arms as he led them away from the tetherball area, and then blew his whistle close to their ears. McGuire and Roth met with him twice. The grievant admitted he had taken the boys by the arms and that he blew his whistle, but denied "grabbing" or "shaking" their arms and denied he blew his whistle so close and loud as to possibly damage their hearing. As a result of the incident, the grievant was issued the following letter notifying him that he was being given a three-day suspension without pay:

RE: Notice of Suspension

Dear Mr. Schmidt:

On October 3, 1997, I received a written report of an incident occurring on the elementary playground earlier that afternoon. A second written report was received from another staff member regarding that same incident on October 6, 1997. The reported incident involved allegations that you grabbed two elementary students by their arms, shook their arms and blew a whistle closely and loudly into their ears.

I met with you and Erwin Roth at 1:00 p.m. on Thursday, October 9, to discuss the allegations. During our meeting, you admitted that you had grabbed the arms of the two students. You also admitted that you had blown your whistle in their presence. You asked for copies of the written reports from the two staff members, and copies were provided to you. Following your review of the written reports, you indicated that you did not remember shaking the two students. Moreover, you had no recollection of being issued a previous letter warning you to implement a "hands off" policy with students.

Based on my investigation of this matter, it is my conclusion that you did grab the arms of two second grade boys on the playground over the noon hour on October 3, 1997. It is also my conclusion that you did jerk or shake them by the arm and that you unnecessarily blew your whistle closely and loudly into their ears.

Even though you do not remember previously being requested to maintain a "hands off" policy, that request is documented in a letter dated April 21, 1993, issued to you, and signed by you, from then Principal Robert Appelholm (copy enclosed). What is particularly alarming about this situation is that you were subsequently reprimanded for similar conduct in a letter dated December 19, 1995, issued to you by District Administrator Schimke. The 1995 incident also involved your inappropriate physical handling of a student. In that letter, you were advised that you should immediately refrain from further yelling at or physically handling students. You were also advised that such behavior is inappropriate and violates administrative rules and the District's policy regarding corporal punishment. Furthermore, District Administrator Schimke stated:

> *During our visit of 12/18/95, I pointed out a number of previous incidents related to inappropriate behavior with students currently documented in your file with Mr. Appelholm. In the future, further errors in professional judgment may result in additional disciplinary action, including potential discharge from employment, as circumstances warrant.*

> Less than two years later, the District is again confronted with a situation involving your inappropriate physical handling of students.
>
> Based on the foregoing, I have no alternative but to take firm disciplinary action which will emphasize the seriousness of your actions. Therefore, this letter is to inform you that you are hereby being placed on a three-day unpaid suspension beginning October 16, 1997 and continuing through October 20, 1997, inclusive.
>
> The message must be clearly received and understood. The District will not tolerate or condone this type of behavior. You are advised that further incidents of this nature will result in additional disciplinary action up to and including dismissal. Hopefully, you will use your time on suspension to think about your actions in this matter and to take steps to correct your conduct so as to ensure your continued employment with the District. If you fail to do so, you do so at your peril.
>
> Sincerely,
>
> Meredith McGuire /s/
> Meredith McGuire
> Elementary Principal

The grievant did not grieve any of the foregoing discipline.

In December of 1997, a tutor, Barbara McCoy, and a teacher, Rory Paulsen, in a classroom next to the grievant's classroom, complained that they had heard the grievant "scream and yell" at students in his classroom and that it went on intermittently from approximately 10:12 a.m. to 10:25 a.m. McGuire asked them to put their complaint in writing. Both had complained to Roth earlier in the year about the grievant's behavior with students and Roth had asked them at that time to document what they observed. McGuire and Roth discussed their complaint with the grievant who disagreed that he was that loud or that it went on for as long as McCoy and Paulsen claimed. He indicated a student had laid down on the floor and refused to get up. The wall separating the grievant's classroom from the room McCoy and Paulsen were in was a temporary wall and, as such, did not dampen the noise as much as usual.

Also in December of 1997, a teacher, Rene Holmdahl, had complained to McGuire about the way the grievant had spoken to her and had treated a handicapped student. The grievant was running the rehearsal for the Christmas program and was seated at the piano when the handicapped student said good-bye to him. Holmdahl indicated to McGuire that when she told the grievant that the student was trying to say good-bye to him, the grievant responded to her in what she felt was a rude and insulting manner. McGuire met with Holmdahl and the grievant to have them work it out between them, which was accomplished. As a result of these incidents, McGuire issued the Grievant the following letter:

December 23, 1997

Dear Mr. Schmidt:

On December 18th, a teacher asked to speak with me privately because of his concerns over the tone of your voice in speaking to students. This conversation was followed by two letters, one from the teacher who asked to speak with me, and the other from a different teacher who had also heard the incident. On December 19th, Mr. Roth and I spoke with you about the concerns expressed by these two teachers.

On December 8th, Mrs. Holmdahl approached me in a highly agitated state over your behavior toward her and your interactions with students during the Christmas Program rehearsal. The three of us sat down at the end of the school day so that she could express her feelings directly to you.

These two incidences follow previous situations in which your interactions with others has been less than professional. I am certain you must now realize how serious something of this nature is. You must at all times conduct yourself in a professional manner in speaking with colleagues and students.

It was agreed, during the conference on December 18th, that you would follow your classroom management plan. It was also agreed that when sending students out of class they would be sent to speak with a secretary instead of sitting in the hallway. When dealing with behavioral situations involving students, please, follow your classroom behavior management plan so that the students clearly understand what is expected of them. This will also list what ramification will occur if their behavior is not in accordance with the classroom rules. Failure to compile (sic) with the above mentioned changes may result in disciplinary action.

Sincerely,

Meredith McGuire
Unity Elementary Principal

I acknowledge receipt of this letter this 23rd day of December, 1997. My signature in no way indicates agreement with the contents of this letter.

John Schmidt

c: Personnel File
Glenn Schimke, District Administrator

The letter was not grieved.

The grievant's classroom management plan referenced in the letter had been developed earlier in that school year by him, at McGuire's direction, and stated:

Be Respectful

Be Courteous

Try

consequences
verbal warning(s)
loss of participation privileges
time out
time out (outside of class)
call parent
conference with principal
conference with parent/principal

On January 15, 1998, a second grade boy, M.B., was involved in an incident on the playground at noon recess, the facts of which are somewhat in dispute. After the recess, the grievant told M.B.'s classroom teacher, Greg Paulsen, that he had a problem with the boy at recess and asked if he could take M.B. to his room and give him a timeout and talk to him about what he had done. Paulsen said that it would be alright for the grievant to take M.B. to

his room. M.B. spent two class periods in the grievant's classroom that afternoon, thereby missing two periods of instruction in his regular classroom during that time. Also during that time, the grievant held music class in the classroom while M.B. sat in the back of the room.

On January 16, 1998, M.B.'s father, Mr. B., called to complain and ended up speaking to Mr. Roth, the Middle School Principal, to complain about the grievant's interactions with M.B. and his having kept M.B. in his classroom rather than allowing M.B. to attend his regular class during that time, and also about negative comments the grievant allegedly had made to M.B. Roth and McGuire met with the grievant on January 21, 1998 to discuss Mr. B's complaint. While he denied the other allegations, the grievant did not deny keeping M.B. in his classroom for approximately one and one-half (1 ½) hours, but indicated he felt it was appropriate. The grievant also denied grabbing another student's neck, as M.B. had apparently told his father, stating that he instead had pulled him by the hand, or telling M.B. there was "open enrollment" now and his parents should send him to Luck, St. Croix Falls or Amery. McGuire reviewed the playground discipline plan set forth in the "Student/Parent Handbook" for the 1997-98 school year with the grievant and asked that he follow that plan in the future. The "Student/Parent Handbook" stated in that regard:

> **Playground:** Discipline in this area will be administered by all staff members. In this area we are primarily concerned with the proper use of the equipment, compliance with stated rules, fighting, rough housing or play fighting. The proper use of the playground equipment and the playground rules will be discussed during the first week of school in the regular classroom and in PE classes. All students caught misbehaving on the playground will:
>
> 1. Receive a verbal warning on the 1st offense.
> 2. Receive 10 minutes of time-out on the 2nd offense.
> 3. Receive time-out during the remainder of the recess time, have a written report filed in the office, and receive a noon detention on the 3rd offense.
>
> The incidents of playground misbehavior and the consequences will not be cumulative during the year. Instead, each student will begin each recess with a "clean slate."

McGuire issued the grievant the following memorandum regarding the January 15th matter with M.B.:

> **To:** John Schmidt
>
> **CC:** Erwin Roth

From: Meredith McGuire

Date: January 21, 1998

Re: Thursday morning meeting

Thank you for sitting down with Mr. Roth and myself to discuss the incident with M.B. Please make every attempt in the future to follow the behavior management plans for both the playground and in your classroom. The discipline plan for the playground is listed on page 16 of the Parent/Student handbook. If, as a playground supervisor, you find the students are in need of a review of these rules, please talk with Sharon Stoll and/or Jackie Robinson (sic). These two P.E. teachers carefully went over the playground guidelines with the students at the beginning of the school year. I am sure they would be glad to review this with each class with the majority of the students' behavior warrants such action.

Again, thank you for discussing this situation with us and if either of us can be of assistance in the future, please seek out our help.

On January 28, 1998, M.B. was involved in an incident on the playground at the noon recess. The grievant testified that a second grade girl told him that M.B. had kicked her and that when he questioned M.B. about it, M.B. admitted he had done so. According to the grievant, other children witnessed the incident and confirmed that M.B. had kicked the girl. Recess ended and the grievant took M.B. and the girl to his classroom to have M.B. apologize to the girl. When asked to apologize, M.B. refused and then said he had not kicked the girl; rather, she had thrown snowballs in his face. The grievant then sent the girl to her classroom and kept M.B. in his room and asked him whether he (the grievant) should tape record him (MB) and play it back to him. The grievant's tape recorder was out on the table where it is always kept. The grievant denies he pretended to record M.B. or spoke into the microphone of the tape recorder. M.B. was then sent to his regular classroom. According to the grievant, M.B. was only in his room for approximately five to seven minutes.

M.B.'s parents contacted McGuire to complain about the grievant's interaction with M.B. on January 28, 1998. A meeting was subsequently held with McGuire, Roth, Schimke, M.B.'s parents and the grievant all being present. At that meeting, the allegation that the grievant threatened to tape record M.B. was discussed, as well as allegations as to the grievant's having made negative comments to M.B. and the January 15th incident where the grievant kept M.B. in the grievant's classroom for an hour and a half.

On February 6, 1998, McGuire issued the grievant a Letter of Suspension, which read, in relevant part, as follows:

RE: Letter of Suspension

Dear Mr. Schmidt:

On Tuesday, February 3, 1998 at 9:00 a.m. we met with M.B.'s parents (V. and S. B.), in the District Board Room with Erwin Roth, Middle School Principal and Glenn Schimke, Superintendent. M.B.'s parents expressed their concerns about your interactions with their son. During our meeting you admitted that you, once again, brought a student into your classroom to discipline, that you did threaten to tape record a child for accusational purposes, and used emotionally damaging, subjective statements. Your failure to follow the student handbook when disciplining a student as instructed, in both verbal and written form, on January 21, 1998, constitutes being insubordinate. Your actions of threatening a child with tape recording were both unprofessional and unacceptable.

During the 1997-98 school year, there have been three incidents of inappropriate interactions with students. Letters were written on October 15, 1997, December 23, 1997 and January 21, 1998. You were also suspended from October 16, 1997 through October 20, 1997 inclusive, for inappropriate actions when disciplining a student.

As a result of the most recent incident described above, I am hereby placing you on a five-day unpaid suspension beginning February 9, 1998, and continuing through February 13, 1998, inclusive. In my October 15, 1997, letter to you regarding your previous suspension, I placed you on clear notice that no further incidents of inappropriate interactions with students would be tolerated. I also informed you that if you were unable to correct your conduct, your failure would be at your peril. Therefore, this letter is to inform you that I will be recommending to the Board of Education that they commence the proceedings for the nonrenewal of your teaching contract.

Sincerely,

Meredith McGuire /s/
Meredith McGuire
Elementary Principal

M.B.'s parents subsequently filed a written complaint regarding the events of January 15th and 28th, as well as other allegations regarding comments or actions by the grievant with regard to M.B., which read, in relevant part, as follows:

> On or about June 10, 1997 Mr. Schmidt alleges (M.B.) lied to him in the hallway after lunch time during summer school. M.B.'s parents and M.B. were in the elementary office waiting to talk to Ms. Galupie (sp.) about the problem M.B. had that day. Mr. Schmidt came into the office and proceeded to call M.B. a liar and tell us that he wanted M.B. kicked out of summer school because they (the teachers) did not have to put up with kids that can't behave in summer school. He said this and more, very loud, in front of several people waiting in and around the office area including office staff. Mr. Schmidt was not instructing any of M.B.'s classes in summer school. We (M.B.'s parents) did talk to Mr. Appelholm, the elementary principal, and to Ms. Galupie (sp.) and it was decided that (M.B.) should be moved to a class with more structure than Ms. Galupie (sp.) but that he should remain in summer school because he loved school so much.
>
> On January 15, 1998, (M.B.) came home from school upset and crying. When we (M.B.'s parents) asked (M.B.) what was wrong he told us that Mr. Schmidt made him spend two class periods in his music room after noon recess and he (M.B.) was not able to make a going away card with the rest of his class for his intern teacher, Mrs. Gordon. (M.B.) went on to say that he was on the playground for noon recess that day, a girl in 2nd grade threw snowballs in his face while he was lying in the snow. He said his face was cold and she would not stop when he asked her to stop. He then said he called her a name and used profane language. The girl then went to tattle on (M.B.) to Mr. Schmidt, the playground monitor. (M.B.) said Mr. Schmidt did not believe him when he (M.B.) told Mr. Schmidt that the girl had been throwing snowballs at him and called him a liar. After recess Mr. Schmidt took (M.B.) back to the music room and that is where (M.B.) was made to stay while a kindergarten and first grade class came into the room, concurrently, for their music class. Mr. Schmidt also told (M.B.) that there was now open enrollment in Wisconsin and that he (M.B.) should tell his parents they should send him to Luck or St. Croix Falls or Amery schools so they (Unity faculty) would not have to put up with him anymore. (We were not aware of the newly passed law at the time.) On January 16, 1998 (Mr. B.) called the elementary school and requested to talk with the new elementary principal. She was not in that day so Mr. Roth the middle school principal called (Mr. B.) that afternoon and (Mr. B.) explained the situation to him. Mr. Roth also asked if we would mind if he talked to (M.B.) himself. (Mr. B.) said that would be fine.

On January 20, 1998 (M.B.) once again came home from school upset. We asked what was wrong and he (M.B.) proceeded to tell us that on the playground at noon a child had tattled on him (M.B.) and Mr. Schmidt again called him a liar and told him that he did not believe anything (M.B.) said. For the next few days it was a similar scenario almost every day. (M.B.) would come home from school upset and say that Mr. Schmidt would accuse him of lying and would tell (M.B.) "You're just trying to get me in trouble."

(M.B.) had missed several days of school in January with three bouts of strep-throat and one round with the stomach flu.

On January 28, 1998 (M.B.) again had a run in with Mr. Schmidt. It was again during the noon recess and Mr. Schmidt again brought (M.B.) back to the music room and (M.B.) was late getting back to his regular classroom and math class. This time, Mr. Schmidt put a tape recorder on the table and told (M.B.) he was going to admit on tape that he (M.B.) was lying. (M.B.) said Mr. Schmidt said into the tape recorder "Hello, this is Mr. Schmidt, today is Wednesday, January 28. I am here with (M.B.). . ." Mr. Schmidt did this without the knowledge or permission from us, M.B.'s parents. (M.B.) said Mr. Schmidt had his finger on the (record) button and he (M.B.) thought Mr. Schmidt had pressed it. I (Mrs. B) immediately upon hearing this story called Ms. McGuire the elementary principal. She told me she would do some checking and get back to me. On January 29, 1998 I called Mr. Roth, who (Mr. B) had originally talked to about the matter and told him I wanted something done about the harassment my 7 year-old child had been enduring from Mr. Schmidt. On January 30, 1998 Ms. McGuire called our home and talked to (Mr. B.) At that time she set up a meeting for us along with Mr. Schimke, Mr. Roth, Mr. Schmidt and herself for Tuesday, February 3, 1998 at 9:00 a.m.

At the above mentioned meeting Mr. Schmidt expressed his "frustration" with (M.B.) and (M.B.'s) "lying". Mr. Schmidt also admitted to threatening to record (M.B.) and that he did in fact have the tape recorder on the table in the manner (M.B.) had said he did. Mr. Schmidt also pointed out that Mr. Paulsen (M.B.'s regular teacher) had told him (M.B.) was the "most problemsome" child in his class. At which time I reminded Mr. Schmidt that (M.B.) is also the smartest child in that class. Ms. McGuire asked Mr. Schmidt if he had sought help from Mrs. Lilyquist, the guidance counselor, about the problems he was having disciplining (M.B.) or if he had asked for some alternative ways to deal with these problems. Mr. Schmidt responded no he had not asked for help, nor should he have been expected to. I voiced my concern that while on

> playground duty Mr. Schmidt would punish (M.B.) every time a child would tattle on him but Mr. Schmidt would find (M.B.) to be lying every time (M.B.) would report that someone was hurting him or breaking a rule. Mr. Schimke asked Mr. Schmidt if there were any witnesses to the incidents of (M.B.) lying. Mr. Schmidt said there was a witness but, when Mr. Schimke requested names. Mr. Schmidt was unable to provide any names of students or adults. The meeting lasted just over one hour.
>
> We (Mr. B. and Mrs. B) did request that Mr. Schmidt have no contact with M.B. at school. We requested that M.B. be removed from his present music class and that there be an alternative monitor on the playground at noon or whenever Mr. Schmidt would have that responsibility.

M.B.'s parents were advised by McGuire as to what steps were being taken to avoid contact between M.B. and the grievant, including having M.B. go to a physical education class instead of music and the presence of other playground monitors besides the grievant. The grievant was not expressly told that he was not to have any contact with M.B.

On or about February 15, 1998, the grievant prepared written rebuttals regarding his October, 1997 suspension, and the allegations that led to it, and the February 6, 1998 suspension letter and allegations. It is not clear from the record whether those rebuttals were ever submitted to the Board.

The administration subsequently recommended to the District's Board of Education that the grievant's teaching contract not be renewed for the 1998-99 school year. The grievant was notified the Board was considering that recommendation by the following letter of February 16, 1998 from the Board President:

> RE: Preliminary Notice of Consideration of Nonrenewal
>
> Dear Mr. Schmidt:
>
> Pursuant to Section 118.22 of the Wisconsin Statutes, you are hereby put on notice that the Board of Education is considering the recommendation of the Administration that your employment contract not be renewed. The reasons for this recommendation are the following:
>
> 1. Inappropriate disciplinary measures and interactions with students and/or staff members as documented by the following:

a. April 21, 1993, letter from Principal Appelholm regarding your grabbing a student.

b. December 19, 1995, letter of reprimand from District Administrator Schimke regarding your use of inappropriate disciplinary measures with students.

c. September 24, 1996, letter of reprimand from Principal Roth regarding your statement, "You got fucked by the Administration, twice" which was made within earshot of students.

d. December 12, 1996, letter of reprimand from Principal Roth regarding your yelling at a student, calling a student a "liar" and telling the student to "just shut up."

e. October 15, 1997, three-day unpaid suspension for grabbing two second grade students by the arm, shaking or jerking them and unnecessarily blowing a whistle closely and loudly into their ears.

f. December 23, 1997, letter from Principal McGuire regarding your interactions with colleagues and students and the necessity for you to follow your classroom behavior management plan.

g. February 6, 1998, five-day unpaid suspension for your inappropriate interactions with a student on January 2, 1998.

Please be advised that, pursuant to Section 118.22, Wisconsin Statutes, you have the right to file a request with the Board within five (5) days of your receipt of this notice for a hearing with the Board relative to the subject of nonrenewal of your contract.

Should you request a hearing with the Board, that hearing with (sic) be held in closed session unless you request that it be open to the public. You have the right to be represented by counsel of your choice at that session. You further have the right to call witnesses and submit evidence relevant to the subject of the nonrenewal of your contract. You have the right to cross examine and rebut any testimony which might be unfavorable to you.

Sincerely,

PER DIRECTION OF THE UNITY BOARD OF EDUCATION

Debbie Ince-Peterson /s/
By: Debbie Ince-Peterson
President

A grievance was timely filed regarding the grievant's five-day suspension. A hearing was held before the Board on March 25, 1998 regarding the recommendation to nonrenew the grievant's teaching contract. By letter of March 26, 1998, the grievant was notified that the Board had voted to nonrenew his teaching contract with the District. That nonrenewal was timely grieved, and at the request of NUE Executive Director Ken Berg, the parties agreed to combine the grievances on the five-day suspension and the nonrenewal for purposes of arbitration. Both of these matters were subsequently arbitrated before the undersigned.

POSITIONS OF THE PARTIES

District

The District first asserts that a review of the record reveals that the key facts are not in dispute. The grievant's immediate supervisor, Elementary Principal McGuire, testified that the Student/Parent Handbook was in place prior to her employment in the District, and that it had been issued to all parents during the first days of the 1997-98 school year. The grievant testified that he understood that the handbook was distributed to the parents, and that it had the weight of Board policy behind it. The handbook sets forth the three-step procedure for disciplining students' misbehavior on the playground.

The grievant served as one of the District's playground supervisors for the noon recess. Even though the grievant testified he was already familiar with the playground discipline plan prior to January 21, 1998, on that date McGuire and Middle School Principal Roth found it necessary to meet with the grievant regarding his failure to follow that plan. The incident precipitating that meeting involved M.B., a second-grade student who had misbehaved on the playground during the noon recess. Instead of following the three-step discipline plan, the grievant took the student to the music room for what became a "time out" lasting two class periods. After M.B.'s parents contacted the District regarding the incident, McGuire and Roth met with the grievant on January 21st, and during that meeting, and in a subsequent memo, the grievant was instructed to follow the playground discipline plan. Yet, on January 28, 1998,

the grievant again took M.B. to the music room at the end of the noon recess, rather than permitting him to return to his regular classroom. McGuire testified that she learned about the incident from M.B.'s parents, and that she "was in shock over the whole thing after everything had been spelled out so clearly to Mr. Schmidt that he would indeed have the child come in off the playground and come to his classroom." (Tr. 65, First Day).

This second incident led to a meeting with M.B.'s parents, the grievant, District Administrator Schimke, Principal McGuire, and Principal Roth on February 3, 1998. As detailed in the written complaint filed by M.B.'s parents, on January 28, 1998, the grievant took M.B. to the music room at the end of the noon recess, accused M.B. of lying, and threatened him with the use of a tape recorder. During the meeting, Schimke asked the grievant if he had threatened to use the tape recorder to which the grievant had responded, "Yes". Schimke's testimony in that regard is further substantiated by the testimony of Roth and McGuire, as well as written notes taken during the February 3, 1998 meeting. Further, the Grievant admitted at hearing that he had responded "Yes", to the question of whether he had threatened M.B. with a tape recorder. While there is conflicting testimony as to where the grievant placed the tape recorder during the January 28, 1998 session with M.B., there is no dispute that the tape recorder was in front of M.B. when the threat was made. There can be no doubt that the words and conduct of the grievant in the music room that day were threatening to the 7-year old. The grievant's repeated failure to follow the playground discipline plan led to the 5-day unpaid suspension and the recommendation for his non-renewal.

The District next asserts that the grievant's testimony is not credible. He had a difficult time explaining his actions regarding the January 28, 1998 incident. While acknowledging that the playground discipline plan tells parents how their students will be disciplined for misconduct on the playground, he had great difficulty explaining what step of the plan he was administering to M.B. on January 28th. That is because nowhere in the plan was the grievant authorized to escort M.B. from the playground past his classroom, which was just inside the doorway coming from the playground, and down the hallway approximately 190-200 feet to the music room. The grievant's attempt to explain away his actions in that regard are simply not credible.

The District asserts that the non-renewal is supported by the record. There is no disputing that the standard to be applied in this case is the just cause standard. While the definition of "just cause" provided by Arbitrator Daugherty in his decision in ENTERPRISE WIRE CO., 46 LA 359 (1966) sets forth seven questions, Daugherty acknowledged that "frequently. . .the facts are such that the guidelines cannot be applied with precision." (At 363). Not all arbitrators have accepted Daugherty's standard that a "no" answer to any of those seven questions indicates just cause for the discipline did not exist. Further, not all arbitrators have felt bound to a mechanical application of the Daugherty framework, but have

believed that a proper analysis of just cause can be conducted utilizing basic standards of fairness. The District cites a number of arbitration awards where arbitrators have indicated that there are two elements to the just cause standard: (1), demonstrating that the employe engaged in misconduct and secondly, determining the propriety of the level of discipline imposed.

In this case, the grievant was well aware of the District's expectations regarding his conduct. His personnel record is replete with formal and informal disciplinary actions and other efforts by supervisors directed at correcting his conduct prior to the January 21, 1998 memorandum. With the exception of the five-day unpaid suspension and the non-renewal at issue in this case, none of the prior disciplinary actions were grieved, and the only contemporaneously prepared response to prior disciplinary action was the grievant's December, 1995 response to a parent's complaint.

The District asserts that arbitrators have typically held that it is too late to challenge a disciplinary action in the grievance of a later action, and that the arbitrator may rely upon the employe's prior record as it stands. The District cites a number of awards in that regard and argues that it is too late for the grievant to argue that the prior disciplinary actions were without just cause or to assert that the District may not rely on those prior actions in this case. It is against this backdrop of prior discipline and directives that the District was once again faced in late January of 1998 with further inappropriate conduct by the grievant, resulting in the five-day unpaid suspension and the recommendation for non-renewal. The grievant's conduct is particularly egregious in that it was directed towards elementary students. Many employes who testified at the hearing stated unequivocally that such conduct toward students was not appropriate.

The grievant's conduct in again violating the District's playground discipline plan within days of the January 21, 1998 meeting with principals McGuire and Roth, demonstrates his arrogance and attitude. That the grievant has still not got the message was demonstrated by the hesitation he showed in responding to the question of whether it was inappropriate to call a student a "liar" and tell him to "just shut up", before answering the question in the affirmative.

Arbitrators have held that in applying the just cause standard, the arbitrator should not substitute his/her judgment for that of management unless the arbitrator finds that the penalty is "excessive, unreasonable, or that management has abused its discretion." Numerous arbitrators have held to the standard that management's decision should not be set aside unless the action was arbitrary, capricious, discriminatory, or excessively severe under the circumstances. The District asserts that in this case, the penalty was clearly reasonable, warranted and not arbitrary. It is reasonable of the District to expect that its teachers will

conduct themselves in a manner which does not threaten, intimidate or harm students and which does not detract from a positive learning environment and a professional educational settting. The grievant has repeatedly demonstrated he is unable to meet those expectations and unable to follow District directives in this regard, despite having been counseled and given numerous warnings and opportunities to correct his conduct.

In its reply brief, the District asserts that the Association is in essence arguing that it is really M.B., a 7-year old, who is on trial, rather than the grievant, and that but for the lies told by M.B., the grievant would not be facing a non-renewal. However, the key facts which led to the suspension and recommendation for non-renewal are undisputed, and are not in any way impacted by M.B.'s veracity or lack thereof.

The Association asserts that the grievant did not really violate the January 21, 1998 directive or, in the alternative, that he did not intend to violate the directive. While the Association correctly notes that the directive did not tell the grievant not to do certain things, this case turns on what the directive did tell the grievant to do, i.e., follow the playground discipline plan. The grievant was told to follow the plan in his conference with principals McGuire and Roth, and he was even given a copy of the handbook to be certain there was no possible way that he would not understand what to do when a student misbehaved on the playground. The Association attempts to rationalize why the grievant marched M.B. 190-200 feet down the hall to the music room after recess, rather than dealing with the matter on the playground and then allowing M.B. to return to his classroom, or, in the alternative, referring the matter to the principal, as required by step (3) of the playground discipline plan. That is an attempt to excuse the situation in which a teacher exercised his "discretion" by blatantly violating the administrative directive and Board policy. The assertion that there was too much noise and confusion on the playground for the grievant to deal with the situation is ludicrous. Obviously, the playground discipline plan is designed to be implemented on the playground. The administrative directive was clear and Board policy was clear and the grievant violated both. The argument that the grievant did not intend to violate the directive and policy is also unpersuasive. M.B. did not just appear in the music room after the noon recess on January 28th, and did not just happen to be removed from his regular class for a period of time after the noon recess.

The Association professes ignorance of any "emotionally damaging subjective statements" made to M.B. by the grievant while he had M.B. in the music room on January 28th, however, the Association states in its brief that "John admitted that he gestured to the tape recorder, stating, 'Do I have to tape you?'" While the Association asserts that the grievant escorted M.B. to the music room to have him apologize to another student, the grievant's written rebuttal to the February 6, 1998 suspension letter reveals what he is really up to:

> I asked Michael Burch if I should use a tape recorder to document the fact that he lies and falsely accuses other students frequently on the playground. I also think that its use would exonerate me from what I believe to be false accusations of wrongdoing. I do not believe that protecting my reputation or documenting my actions to protect and/or defend myself is unprofessional or unacceptable.

The District questions whether there can really be any doubt that calling a 7-year old a liar and asking him whether he has to be taped are emotionally damaging statements.

While the Association relies on the testimony of Greg Paulsen to support its theory that M.B. should really be on trial, yet as M.B.'s regular classroom teacher, Paulsen testified he did not find it necessary to grab or shake M.B., to jerk him around physically or to call him a liar to his face or tell him to "just shut up", or threaten to tape record him to get the truth out of him. Paulsen exercised his "discretion" and "professional judgment" appropriately and consulted with M.B.'s parents and professionals and sought their assistance in working with M.B., in sharp contrast to the grievant.

While the Association asks that the Arbitrator discount the testimony of M.B.'s parents, speculating that M.B. heard about open enrollment from them, they testified that they first heard about open enrollment from M.B. when he reported to them what the grievant had told him about going to another school. Also, the fact that M.B.'s mother gave the Association permission to contact his therapist and that this permission was later retracted, does not require the Arbitrator to strike her statements regarding the therapist's assessment of the situation. The lack of opportunity to cross-examine the therapist does not require the testimony be struck; rather it goes to the weight the testimony should be given. The District cites BAKER MARINE CORP., 77 LA 721 (1981) where, faced with a similar situation, the arbitrator held that "All that a fair and conscientious arbitrator can do under these circumstances is to scrutinize the hearsay evidence very closely, and to give it little or no weight if there is any indication that the evidence is untruthful, misleading, or biased." There is no indication that the evidence here is untruthful, misleading or biased, and appropriate weight should be given to Mrs. B.'s testimony.

Even though none of the prior disciplinary actions against the grievant were grieved, the Association now attempts to litigate the December 23, 1997 letter of reprimand and the October 15, 1997 three-day unpaid suspension. The District reasserts that it is too late to challenge those actions, and that the Arbitrator may rely upon that prior discipline as it stands. However, the District disputes the Association's reference to Joint Exhibit 5 as "Holmdahl's unsolicited complaint", and its assertion that the complaint was filed "long after" the reprimand was given. Holmdahl filed the complaint prior to the reprimand, and Joint Exhibit 5 is her recollection of the incident in response to a request from Principal McGuire in the

spring of 1998 for Ms. Holmdahl to write down what she recalled. The Association also asserted that Principal Roth told Rory Paulsen and McCoy to keep tabs on the grievant and that he issued a directive to that effect, but makes no citation to the record to support those allegations. That is not surprising since the record substantiates there was no such directive. McCoy testified that her reports to then Principal Appelholm and Principal Roth were unsolicited, and that she was not spying on the grievant, but was angry about being put in the situation of being next door and having to listen to the grievant yelling at the students in his classroom. Similarly, Paulsen testified that Roth did not ask him to keep the grievant under "surveillance" or anything like that. The Association attempts to downplay the situation regarding the three-day suspension by speculating that the boy held his hands to his ears because he was "apparently making a joke of hearing the whistle". Nothing in the record supports that speculation. The Association also asserts it is unlikely that Ms. DiCosimo really saw the grievant grab the two students' arms, however, that speculation rings hollow in light of her clear and unequivocal testimony on the point.

Finally, the District agrees that the grievant is a gifted individual who has devoted a lot of time to school and community programs and activities, but asserts that it was those positive attributes, which in part, allowed his employment to continue for as long as it did. However, the grievant's failure to recognize and acknowledge that he engaged in inappropriate disciplinary measures and interactions with students and staff, and his repeated manifestation of such conduct, ultimately and necessarily culminated in the decision to non-renew him. The District requests that for all of the foregoing reasons, the grievances be dismissed.

Association

The Association first asserts that it is a well-established principle of labor law that the employer has the burden of proving just cause existed for the discipline imposed and that only a substantial standard of proof will provide adequate protection for the grievant's significant property rights in this case. In that regard, the Association further asserts that the events that occurred between the grievant and the student M.B. do not warrant the five-day suspension, much less the non-renewal of the grievant's teaching contract.

Two incidents arose in January of 1998 between the grievant and M.B. The second incident resulted in both the grievant's suspension and his non-renewal. With regard to the first incident, M.B. had been misbehaving the entire recess. At the end of the recess, the grievant walked M.B. back to his classroom and spoke to his teacher, Greg Paulsen, about the child's behavior on the playground. He and the grievant agreed that it might be best for M.B. to serve a time-out in the grievant's room. M.B. did not protest having to serve the time-out and returned to the grievant's classroom with him and sat in the back while the grievant conducted two classes. The grievant then walked M.B. back to his classroom.

As a result of M.B.'s parent's complaining to the administration about the time-out, the grievant met with Principals McGuire and Roth. McGuire advised the grievant that the time-out was inappropriate and that he should follow the playground discipline rules when disciplining children, and should not take children back to his room for an extended time-out, the focus being on the extended time-out. The grievant was not told that he should not take children back to his room to discuss their misbehavior, and there was no discussion at all as to whether the grievant could speak to students in his room regarding their playground behavior. Further, neither Roth nor McGuire indicated the grievant had to rigidly follow the rules or be terminated. Roth's notes indicate that M.B.'s father related a litany of charges to Roth that M.B. had made against the grievant, including having told M.B. to "go to Luck or St. Croix School". M.B.'s father explained that the grievant was telling M.B. about the open enrollment option. The evidence, however, shows that the grievant did not have specific knowledge of open enrollment or that open enrollment had passed in this state. While Mr. B. stated he first heard of the open enrollment when his son told him what the grievant allegedly had said, he testified that he later confirmed that option existed by reading about it in local newspapers sometime after January 15, 1998. The local newspapers contained articles about school choice as early as November and December of 1997, and the B.'s most likely learned about the option from those articles since they submitted an application for open enrollment on February 3, 1998. Most likely, M.B. overheard his parents discussing open enrollment or heard it from another child and "as with many of his statements, blended fact and fiction to level an accusation against John."

The alleged comments by the grievant to M.B. were discussed at the January 21st meeting and the grievant denied making any of them. Presumably, McGuire did not credit M.B., since her January 21st letter does not reference any of those statements. Further, those statements sound like what a child would say, rather than an adult.

On January 28, 1998, a second-grade girl reported to the grievant that M.B. had kicked her in the stomach. The grievant spoke to other students in the area and then spoke to M.B., who admitted kicking the girl. The grievant wanted M.B. to apologize to the girl, who was upset, however, recess ended and the students needed to return inside. Since students were lining up and the grievant did not have time to deal with M.B. and the girl on the playground, he had them return with him to his classroom. Once in the classroom, the grievant asked M.B. to apologize. M.B. not only refused to apologize, but denied kicking the girl and denied admitting he kicked her. The grievant then told the girl to return to her classroom and expressed his frustration with M.B.'s lying, finally gesturing to a tape recorder on his desk and stating to the effect, "Should I tape record you, is that what I should do, you just admitted to me on the playground, I could play it back and now you would know that is what you said on the playground." The grievant did not tape record M.B.'s statements, although he later stated to administrators he sometimes considered it because of M.B.'s consistent lying. M.B. was in the grievant's classroom for less than five minutes on January 28th.

M.B.'s parents subsequently complained and after a meeting on February 3rd, McGuire issued a letter of suspension to the grievant, which also advised him of her intent to seek his non-renewal. Regarding the accusations in that letter, the grievant believed it was appropriate to have M.B. apologize to the girl and taking the children back to his classroom removed them from the noise and confusion occurring as the children were leaving the playground. It also showed the little girl that her concerns were being taken seriously. Had M.B. apologized, he would have been in the grievant's room for even a shorter period of time. Instead, he lied about what happened and lied about what he had said to the grievant on the playground. By simply allowing M.B. to leave without talking to him about his lying, M.B. would have received the message that he could lie with impunity. It was an appropriate exercise of discretion for the grievant to remove the children from the playground in order that M.B. apologize. The grievant exercised his judgment, and felt he had the right to bring a student to his room to resolve inappropriate behavior.

By all accounts, M.B. had severe behavioral problems. According to his homeroom teacher, M.B. has very little self-control and constantly interrupted class, and exhibited occasional violent behavior. M.B.'s parents testified that M.B.'s teacher would send home a daily report with M.B. regarding his behavior for that day. In dealing with such a child, the teacher must be permitted to exercise his judgment to respond to the situation at hand. McGuire admitted that whether or not it is appropriate to discuss a child's playground misbehavior in a classroom, depends on each situation and each individual. While admitting that professional judgment should be exercised, McGuire then referenced the grievant's "paper trail" as a reason he needed to exactly follow the rules. However, if the grievant could not exercise any discretion due to that paper trail, he should have been so advised, especially if the exercise of discretion would result in a loss of employment. The grievant was not so advised. Further, McGuire testified that she "didn't know that she ever knew what happened that caused John to bring in the children." This appears to conflict with McGuire's expressed opinion that each situation has to be judged on the specific circumstances. McGuire imposed the discipline and the non-renewal because the grievant brought a student in from the playground, however, if the appropriateness of the action is to be based on the circumstances, McGuire needed to determine what happened on the playground in order to properly judge the appropriateness of the actions.

McGuire's letter also accused the grievant of being insubordinate. An employe can be insubordinate in two ways, i.e., either by intentionally refusing to obey an order or by manifesting contempt for supervisory authority. KRC (HEWITT), INC. (Nielsen, 1998). A finding of insubordination requires that the refusal to follow orders be intentional and that the order be clear. Id. In this case, the grievant felt it was within the valid exercise of his discretion to bring the children back to his room to have M.B. apologize, and he had not received a directive at the January 21 meeting to not bring children back to his room to discuss their behavior. McGuire admitted that it was dependent upon the circumstances as to whether

a teacher could bring a child back to the classroom to discuss playground behavior. The grievant did not believe his conduct was prohibited, and under the circumstances, it cannot be viewed as insubordinate.

McGuire's letter also alleges emotionally-damaging, subjective statements by the grievant, but did not specify the statements she believed the grievant to have made. The three administrators who were at the meeting with M.B.'s parents did not testify as to the content of any such statements. As noted previously, McGuire's letter of January 21, 1998 did not mention any statements the grievant had allegedly made to M.B. Thus, it would seem that she did not credit M.B.'s accusations. Discipline can only be justified for conduct that the employer establishes occurred through reasonable proof. The District gave no indication it credited M.B.'s word regarding such statements and the testimony provided ample reason why M.B. is not to be believed. While M.B. told his father that the grievant had brought him into the classroom and required him to speak into a tape recorder, given M.B.'s lack of credibility and his pattern of lying about the grievant, M.B.'s statements cannot be given any credence.

While M.B.'s mother testified to behavioral changes she attributed to the grievant and also testified that the boy's therapist attributed the problems to the grievant, the latter was contradicted by M.B.'s father. Mr. B. testified that he was not aware of any problems between his son and the grievant during kindergarten or first grade until the beginning of summer school in 1997. Although Mrs. B. gave the Association permission to contact the boy's therapist, she later retracted that permission. The Association thus objects to her testimony regarding the therapist's statements and requests that those comments be stricken as highly prejudicial hearsay and because the Association has been denied the opportunity to verify them. The veracity of the statement is doubtful as well, considering the contradictory testimony of Mr. B. The highly personal reaction of Mr. and Mrs. B. to the grievant should not be considered a factor in this non-renewal. They overlook the fact that their son's behavioral problems started in first grade, and there had not been any incidents with the grievant at that time.

The Association also asserts that McGuire's December 23, 1997 letter of reprimand does not support the decision to non-renew the grievant. That letter referenced concerns expressed by teachers Renee Holmdahl, Rory Paulsen, and Barb McCoy. Holmdahl's concerns were in regard to the grievant not saying good-bye to a cognitively disabled student during rehearsal for the third-grade Christmas show and while the grievant was at the piano in the middle of conducting 80 children in rehearsal. The statement that he did not have time when told that the child was saying good-bye, was not meant to be an insult to the child. Both a special education aide and a special education teacher for the District testified that the grievant has been sensitive to the needs of special education students in the past, and has treated them with respect. Although Holmdahl apparently was also upset with a statement the grievant had made to her, she never testified and McGuire could not remember what Holmdahl

believed the grievant had said to her. Discipline cannot be justified on an unsubstantiated and unknown comment. Further, after Holmdahl spoke to McGuire about her concerns, McGuire mediated between Holmdahl and the grievant, and she testified that the latter gave his attention to Holmdahl's concerns, and that they came to an understanding about each other's concerns. McGuire did not indicate that she was going to discipline the grievant for his interactions with Holmdahl, however, McGuire told Holmdahl to file a written complaint. That unsolicited complaint was dated March 23, 1998, long after the letter of reprimand was issued to the grievant and two days before his private conference with the Board. Her complaint does not specify the comments allegedly made towards her. Any reference to Holmdahl or her concerns should be disregarded as they are unknown and unsupported.

Another incident referenced in the letter occurred on December 19, 1997 when the grievant raised his voice to deal with a student who was lying on the floor and spitting near the end of the class. The grievant kept the students after class a few minutes to discuss the behavior. The teachers in the next classroom Paulsen and McCoy, overheard the grievant, and they had been previously told by principal Roth to document the grievant's behavior. Although the grievant used a raised voice, McCoy's testimony that he screamed constantly for 12-13 minutes is a complete exaggeration. The letter she wrote that day indicated she could only make out a couple of sentences, even though she admitted she stopped working and just listened for about 10 minutes, and the walls between the classrooms were only temporary partitions, not real walls. Paulsen similarly testified he could only remember a few sentences, although he testified the yelling was intermittent. Further, Norma Rasmussen, a fourth-grade teacher who customarily arrived at the end of the class to pick up her students, did not remember any time when she waited outside the grievant's room and heard him yelling at the top of his lungs. Both McCoy and Paulsen had reason to embellish. Paulsen's wife is also a music teacher and obtained the grievant's position as a long-term substitute when he was terminated. McCoy did not like the grievant, and testified she had always been afraid of him, based upon "a look in the eye."

The Association asserts that the staff in the District is highly fractionalized and that this devisiveness actually appeared to be encouraged by Roth. If Roth was sufficiently concerned about the grievant's interactions with students, he should have brought it to the grievant's attention, rather than trying to make book on him. In response to Roth's directive, Paulsen had been documenting the grievant. That documentation cannot serve as a basis for discipline since Roth's directive contravened the collective bargaining agreement which provides that "Any monitoring and observation of a teacher shall be conducted openly and with knowledge of the teacher." Further, that documentation lists instances when the grievant allegedly sent children in the hallway for a time-out, however, he had not sent any children into the hallway for a time-out after having been told not to do so. Thus, a raised voice on one day and an unsubstantiated and allegedly rude comment is all the District was able to show with respect to the December 23, 1997 memo, and neither should serve as a basis for discipline.

The Association also asserts that the incidents of October 7, 1997 also do not support the non-renewal. At the end of recess on October 7, 1997, the grievant blew his whistle for the children to line up and return inside and two children refused to come, and continued playing tetherball. The grievant walked across the playground and told them to stop playing, but was ignored. He then took hold of their sleeves, to walk them away from the tetherball. When he stopped, the students continued to walk, and one of the students struggled, indicating he wanted to go back and play tetherball. The grievant talked to them about coming in when they heard the whistle, and one student said he had not heard it. The grievant then demonstrated by blowing his whistle once. One boy held his hands over his ears, apparently making a joke of hearing the whistle. The students then went back inside. Two employes on the playground, DiCosimo and Reynolds, submitted complaints to McGuire. DiCosimo alleged that the grievant had grabbed the students' arms and shaken them. Reynolds' letter was submitted a couple of days later and she stated that she could not tell whether the grievant had grabbed the student's sleeves or arms. Since they were standing together, it seems unlikely that if Reynolds was unable to tell from a distance of 120 feet, that DiCosimo could. It is not likely that at that distance either employe could determine whether the grievant was holding the students by the sleeve or by the arm. The grievant denied shaking the students and explained he held onto their sleeve to remove them from the tetherball area and speak to them. His former principal, Appelholm, had told him it was permissible to take a student by the sleeve. Further, it is not clear whether staff were in agreement about whether it was appropriate for a teacher to lead a child by the sleeve. While DiCosimo's complaint asserted the matter should be reported to social services, if DiCosimo or McGuire really believed it was a reportable matter, then they were obligated by law to do so. That neither did so undermines their testimony that they thought it was a reportable incident. McGuire also expressed concern that the grievant blew his whistle while standing with the children. However, the grievant testified he did not lean over and blow the whistle in their ear, but was standing up straight and his distance from them was no different than any other day when he blew his whistle for students to line up. Although following this incident, it would have been clear to the grievant that he could not lead children by their sleeves, prior to then, he had been informed by his former principal that it was permissible to do so. He also did not believe that demonstrating his whistle to the children was a problem, as it was essentially no different than what occurred on the playground every day. The grievant did not grieve the three-day suspension, even though he thought it was unfair, as he was advised by UniServ Director Berg to let it go because of the testimony of Reynolds and DiCosimo and because it did not appear that the grievant's job was on the line at the time.

The Association also asserts that in weighing the credibility of the witnesses, it should be taken into consideration that several of the District's witnesses were given to considerable embellishing in order to cast the grievant in a bad light. McGuire's testimony regarding the grievant's comment to a handicapped child at the Christmas pageant rehearsal was that the child was in a wheelchair, however, other witnesses contradicted her statement. She also

testified that the grievant made M.B. stand in the back of his classroom for an hour and a half when he served his time-out, however, the grievant testified the boy was seated in the back. McGuire could not recall whether she asked the grievant about it, nor is there any such allegation mentioned in her memo to the grievant of January 21, 1998. It seems inconceivable that if the grievant had made M.B. stand for that period of time, that McGuire would not have remembered discussing it with him or would not have put it in her memo. Roth was given to similar misstatements. He stated, after looking at his notes, that a student had overheard an inappropriate comment the grievant made. However, when asked to produce his notes, he admitted his notes in fact showed the student had not overheard the grievant's comment. In another instance, he testified that his memo was incorrect, and that John had told elementary, not middle school students, to "shut up". However, not only does Roth's memo reference middle school students, it differentiates between the elementary student about whom the middle school students made allegations and the middle school students to whom the grievant spoke.

The District's lack of fair treatment of the grievant should also be considered. McGuire informed Mr. and Mrs. B. that the grievant would have no contact with M.B. on the playground, yet did not notify the grievant in that regard. There was no agreement at the February 3, 1998 meeting between the administration, Mr. and Mrs. B. and the grievant that the latter would no longer supervise their boy, nor was the grievant provided with a copy of McGuire's letter to Mr. and Mrs. B. which lists the steps McGuire took to ensure that M.B. would have limited contact with the grievant. Although McGuire copied a number of people on that letter, she did not copy the grievant, nor had he seen it before this hearing. McGuire knew M.B. had a propensity to lie and that his parents were hostile toward the grievant, yet she took no action to inform the grievant to limit his contact with the boy. Under the circumstances, another incident that occurred in March appeared destined and perhaps intended. Toward the end of the school year, an incident also occurred with a fifth-grader who did not want to go inside at the end of recess, but wanted to continue playing tetherball. The grievant spoke to the boy about coming inside, and the boy became very angry. Later, Reynolds told the grievant that he had spoken to the student for far too long. Several days later, she submitted a letter to McGuire. The grievant went to McGuire about another matter and was told that the boy had threatened to kill him. She told the grievant to talk to the guidance counselor and that it was up to him whether to call the police. Their conversation was very brief and McGuire did not ask the grievant what had happened. Later, she issued the grievant a letter of reprimand. The letter does not tell the grievant what he may have said that was inappropriate and simply assumes that because the student was upset, the grievant had done something wrong. Although McGuire acknowledged on cross-examination that this was a child who overreacted, that factor does not appear to be a consideration in her letter. At a minimum, McGuire should have asked the grievant for his side of the story before issuing the reprimand.

The Association also asserts that Reynolds displayed hostility towards the grievant. She had refused to work on his musicals ever since 1991 when he had failed to recognize her assistance in a written thank-you note to the staff. Even though he later apologized for that oversight, Reynolds made it clear that her feeling towards the grievant could not be assuaged until he was fired. Her testimony was designed to advance the District's case, and her bias against the grievant should be taken into consideration in giving weight to her testimony.

Finally, the Association contends that the grievant was a gifted teacher and an asset to the school, and deserved more leniency than was provided by the District. By all accounts, the grievant was a gifted and dedicated teacher who invested extraordinary energies in the school community. Throughout his employment in Unity the grievant received consistently good evaluations from several different principals, some noting his excellent rapport with students. As his principal in 1996-97, Appelholm had no intention of recommending the Grievant's non-renewal.

The grievant's positive interaction with students was also confirmed by McKenzie and Paulsen. McKenzie testified that the grievant demonstrated a sensitivity to her student's special education needs, and that she had not seen him discipline students inappropriately. Those observations were echoed by Paulsen.

Appelholm testified, and the evidence showed, that when the grievant was confronted with an issue, he worked on it and improved. Appelholm testified that the grievant would do what he was told, even if he disagreed with the directive. When the grievant was disciplined, he was truthful and owned up to it, and accepted his punishment. Head Football Coach, Craig Miles, testified that he had a very workable relationship with the grievant, in that, though he had some things to work on, when confronted, he worked diligently to improve. McGuire also had knowledge of his willingness to work on issues when brought to his attention, e.g. after being instructed not to send a child in the hallway, he did not. She also testified that the grievant worked with a parent whose child did not want to attend music, and that the parent later told her things were going fine.

In its reply brief, the Association first notes that the District appears to have abandoned its claim that the grievant made demeaning comments to M.B., as its brief fails to mention those accusations. By doing so, the District implicitly agrees with the Association that M.B.'s accusations are untrustworthy. As a result, the basis for discipline has been narrowed considerably and is now focused on the District's claim that the grievant was obligated to rigidly apply playground supervision rules or lose his job. The evidence does not support the imposition of the harsh discipline imposed upon the grievant.

The District also adopts an ambiguous approach to the Arbitrator's role in reviewing the level of discipline imposed in this case. On one hand, the District cites the Arbitrator's award in SCHOOL DISTRICT OF SPRING VALLEY, in which it was held that the just cause standard requires a two-fold determination: 1) whether the employe engaged in improper conduct for which he has been disciplined; and 2) whether the discipline imposed is reasonably related to the employer's interest in discouraging or preventing such conduct. The District then suggests that in reviewing the degree of discipline imposed under a just cause standard, the Arbitrator should not set aside the District's decision unless it is determined that it acted arbitrarily or capriciously. The latter approach is inconsistent with mainstream arbitral precedent. Under an arbitrary or capricious standard, discipline will not normally be set aside or modified even though the arbitrator believes the degree of discipline was not just or equitable. Under a just cause standard, the concept of "basic fairness" is imbued in the arbitrator's decision-making in reviewing the degree of discipline imposed. It is the arbitrator's judgment that comes into play in weighing whether the level of discipline is reasonably related to the employer's interest in discouraging or preventing such conduct. That exercise of judgment must be objective and balanced, taking into consideration the legitimate interests of the grievant as well as the employer. An arbitrary and capricious standard is inconsistent with the just cause standard negotiated by the parties as it tips the scale in favor of the employer at the expense of the employe's legitimate interests. Applying the standard enunciated in SPRING VALLEY requires a finding that the grievant was not put on reasonable notice that he would be suspended and non-renewed for retaining M.B. in his music room for a few minutes after noon recess, for accusing M.B. of lying and for asking M.B. if his version should be tape recorded. The grievant genuinely believed M.B. kicked the girl, and there was a reasonable basis for him to believe that he had the authority to ask M.B. and the girl to return to the music room in order to bring the matter to an appropriate conclusion. There can be no dispute that the grievant genuinely believed M.B. then lied. The offhand reference to the tape recorder when M.B. reneged on his admission was not such an egregious offense that economic capital punishment is warranted. Contrary to the District's assertion, the grievant was not aware of the District's alleged expectations regarding his conduct, and the imposition of discipline was not reasonably related to the District's interest in discouraging or preventing such conduct. Had the District informed the grievant not to retain M.B. in the music room for an apology, even for a few minutes, the grievant's prior record demonstrates that he would have followed such a directive.

The District's interpretation of the playground supervision rules is overly rigid. The District asserts that it was the grievant's "repeated failure" to follow those rules that led to his non-renewal. However, the incident which led to the non-renewal occurred at the end of the recess period, and it was M.B.'s first offense of the day. Under the plan, he should have received a verbal warning. It was the grievant's belief that it was also appropriate for M.B. to apologize to the student he had kicked due to the seriousness of his misconduct. In addition, the student was upset and crying, and an apology may have helped calm her. The grievant

also believed it was appropriate to return to his classroom for the apology instead of keeping

them outside in the cold. However, once there, M.B. did not apologize, but lied, and under the playground discipline plan, the penalty for a second offense was a ten-minute time-out. Since that step could not be implemented, the grievant instead tried to talk to M.B. about his lying. As this incident illustrates, not every situation will fall within the confines spelled out in the plan, and in fact, McGuire admitted that for teachers other than the grievant, it would depend on the situation as to whether it was appropriate for a teacher to speak to a student in the classroom about conduct occurring on the playground.

The other incident involving playground rules occurred when the grievant brought M.B. to his room for a time-out due to his repeated misbehavior. The time-out lasted for approximately one and one-half hours and the grievant believed this was within the exercise of his professional discretion, and he had consulted with M.B.'s classroom teacher who agreed that it was permissible and appropriate. The directive which the District subsequently issued to the grievant informed him to avoid keeping M.B. in his classroom for an extended period of time. It is unreasonable to conclude that the grievant was put on notice that a few minutes' delay of M.B. to deal with a serious misbehavior fell within the scope of that directive.

The District asserts that the "fix" has still not taken hold of the grievant and cites the transcript to support the assertion. However, in the passage cited, the grievant admitted that it was inappropriate for him to call a student a liar and to tell students to just shut up. That the grievant may have thought about the answer prior to responding hardly shows that he did not recognize his actions were inappropriate. Further, the grievant's ability to respond to criticism and improve was testified to by his former principal Appelholm, the head football coach, and by McGuire in relating that once the grievant was instructed not to have children serve time-outs in the hallway, he complied.

With regard to the District's assertion that the grievant may not challenge prior discipline which was not grieved or rebutted, while the Arbitrator does not have authority to consider whether the prior discipline was appropriate, he should consider both parties' explanation of the prior incidents when determining whether just cause exists for the non-renewal.

The Association asserts that the evidence does not support a finding that just cause existed to suspend and to non-renew the grievant, and accordingly, the grievances should be sustained and the make-whole relief awarded.

DISCUSSION

The stipulated issues in this case require determinations as to whether the District violated Article X of the parties' Agreement when it suspended the grievant for five days without pay and when it nonrenewed his teaching contract. Article X provides that no teacher,

after the completion of the probationary period, shall be nonrenewed or suspended without just

cause. To establish that there was just cause, the District must demonstrate that the grievant engaged in the improper actions for which he was disciplined and that the level of discipline imposed is reasonably related to the District's interest in discouraging or preventing such conduct. Though the just cause standard can be stated many different ways, in this Arbitrator's experience, deciding whether just cause exists for the discipline in issue always requires a determination as to each of those elements. Depending upon the circumstances of each case, there also may be subelements, such as when the nature of the conduct in question is such that employes must first be placed on notice that engaging in such conduct will subject them to possible discipline.

There is some dispute in this case with regard to the treatment of previous discipline that had not been grieved. The issues and circumstances in each case must be considered in determining the weight prior ungrieved discipline will be given. In this case, the grievant had been active in the Association and was Chair of the Association's Negotiations Team, as well as having been President at one time. He was familiar with the parties' Agreement, and presumably with his rights under that Agreement to grieve and otherwise challenge discipline. The grievant chose not to challenge the discipline and let it stand. The Arbitrator is not going to revisit the merits of the allegations in those matters other than to note that in some of the instances of prior discipline the grievant at the time admitted to the actions for which he was being disciplined, and in others, he either denied engaging in the conduct and/or offered an explanation for his actions.

The grievant's prior discipline is relevant in this case. First, there is the common theme that runs through the grievant's discipline of inappropriate interaction with students, especially in disciplining them for misbehavior. If nothing else, this establishes that he has been previously warned about how he is to handle discipline situations with students, and about his propensity to lose his self-control and say or do things to students that were inappropriate or hurtful. The prior discipline also establishes that he has been warned on a number of occasions that continuing to engage in such conduct could result in further discipline, including dismissal from employment. The Association's protestations aside, the grievant cannot now reasonably claim to be surprised by the District's reaction to his conduct that resulted in these grievances.

In this case, according to the February 6, 1998 letter of suspension, the grievant was given a five-day suspension without pay for bringing a student (M.B.) into his classroom to discipline (for playground behavior), threatening to tape record the child for accusational purposes, using emotionally damaging, subjective statements, and being insubordinate by failing to follow the student handbook as to disciplining a student as he had been instructed on January 21, 1998, given the prior incidents that had resulted in the three-day suspension in October of 1997, and the letters of December 23, 1997 and January 21, 1998.

With regard to bringing M.B. into his classroom, the Association asserts that the grievant was previously only told not to keep a student in his classroom for disciplinary reasons for an extended period of time, and not that he could not bring a student back to his room at all. McGuire testified that when she and Roth met with the grievant on January 21st regarding the January 15th incident, the grievant was told he should follow the playground discipline plan in the Student Handbook. While McGuire and the grievant testified he was not expressly told that he could not bring a student back to his classroom to discuss misbehavior on the playground under any circumstances, McGuire testified it was her intent that the grievant follow the playground discipline plan and that is stated in her memorandum of January 21, 1998 to the grievant. The grievant acknowledges that he is familiar with that plan and testified that he was told in the meeting that if M.B. needed a timeout, it should not be in the grievant's room; rather, he should be sent to the office. While the grievant was not expressly told that he must rigidly follow the playground discipline plan or risk being terminated, given his previous problems with regard to handling student discipline, and the admonition he was given on January 21st to follow the plan, the grievant had to be aware that he risked further discipline if he failed to follow the plan. Under the playground discipline plan, students start each recess "with a clean slate" and receive a verbal warning for the first offense. It would appear that M.B.'s only offense at the time the grievant made his decision to take M.B. and the girl to his classroom was that he had allegedly kicked the little girl. Although having M.B. apologize to the girl, in addition to being given a verbal warning, would have been a reasonable exercise of discretion, that could easily have been accomplished on the playground by taking the children aside while the others were lining up to go inside. The grievant had to realize that by taking M.B. back to the music room instead of allowing him to go with the rest of his class, he was again not following the playground discipline plan, and was thereby risking further discipline.

As to the allegation that the grievant threatened to tape record M.B., the notes of McGuire, Roth and Schimke taken at the February 3, 1998 meeting with the grievant and M.B.'s parents are consistent as far as the grievant admitting that he threatened to tape record M.B. The grievant admitted that he said to M.B. "Should I tape record you, is that what I should do? You just admitted to me on the playground, I could play it back and now you'd know that's what you said on the playground." The tape recorder was in its regular place in the grievant's room, out on the table or desk. The grievant denied that he pushed the record button or spoke into the machine, as M.B. apparently told his parents. As is usually the case, the actual words and actions of those involved cannot be definitively established. What actually took place is likely somewhere between the grievant's recollection and M.B.'s perceptions. It does appear, however, that the grievant did accuse M.B. of lying and threaten to tape record him in his classroom.

The suspension letter also refers to the grievant using emotionally damaging, subjective statements to M.B. The Arbitrator is not clear as to what statements are being referenced

beyond the grievant's threat to tape record M.B. because he was lying. The other statements M.B.'s parents alleged the grievant had made to their son were ostensibly discussed with the grievant on January 21st and he was not disciplined. Other than M.B.'s parents repeating those allegations at the February 3rd meeting and in their written complaint, nothing else appears to have occurred that would give them more credence than what they were given on January 21st by McGuire and Roth.

The grievant's statements to M.B. about lying, along with the threat to tape record the seven-year old because of his lying, must be considered in the context of the grievant's relationship with the boy. There was the previous occasion in June of 1997 when the grievant had accused M.B. of lying at summer school and recommended that he not be permitted to stay in summer school. There is then the incident on January 15th which apparently upset the child sufficiently that his parents complained to McGuire and Roth about it. There is little question that the grievant viewed M.B. as a troublemaker and a liar, and that he let M.B. know how he felt about him. To the extent Mrs. B. testified that M.B.'s therapist attributed M.B.'s emotional problems to the grievant, however, that testimony is disregarded on the basis that its probative value is outweighed by its hearsay nature and its being unduly prejudicial. Under the circumstances, however, the grievant's threatening to tape record M.B. because he felt M.B. was again lying could reasonably be viewed as emotionally damaging to a seven year- old child.

Last is the question of whether the grievant's actions in taking M.B. back to his classroom on January 28th were insubordinate. The Association notes the circumstances under which insubordination may be found, including the intentional refusal to follow a clear order. As discussed above, while the grievant was not expressly told he could never bring a child back to his classroom to discuss playground misbehavior, it was made reasonably clear to him that he was to follow the playground discipline plan with regard to disciplining students for playground misconduct, and he was aware of what the playground discipline plan provided. The grievant attempted to explain that he had followed the plan, in that he gave M.B. a verbal reprimand on the playground and only brought M.B. and the girl back to his room so that M.B. could apologize, however, that explanation is not persuasive. As discussed above, the record shows it was not necessary to bring the students back to the grievant's room in order to have M.B. apologize. Under the circumstances, the grievant had to be aware he was not following the playground discipline plan when he brought the students back to his classroom, and he had been warned to do so just the week before in a situation involving the same student. The grievant clearly has little or no patience with lying by a student. While some might favor a somewhat stricter approach to student behavior/discipline than that taken by the District, neither the grievant nor the Arbitrator have the authority to establish District policy.

It is the role of the District's Board to establish District policy with regard to student

discipline, and the grievant must abide by that policy, whether or not he agrees with it. In this case, the grievant continued to handle student discipline his own way, regardless of having just been placed on notice that he was to follow the playground discipline plan.

It is concluded that the grievant engaged in the conduct for which he was suspended. Based upon the grievant's past disciplinary record, as well as the letter of January 21, 1998 notifying him that he was to follow the playground discipline plan, it is further concluded that the five-day unpaid suspension was warranted. The District has a legitimate and obvious interest in seeing to it that its employes follow Board policy with regard to the disciplining of its students and the grievant has demonstrated an inability to consistently do so over the years he has been in the District.

The grievant was subsequently also nonrenewed based upon his prior disciplinary record, including the October, 1997 suspension, the December 23, 1997, letter, and the February 6, 1998 five-day suspension at issue in this case. All of these matters have been addressed in some fashion above and the imposition of the five-day suspension has been upheld. It is therefore necessary to determine whether the grievant's record was such that nonrenewal of his teaching contract reasonably related to the District's interest in assuring that its employes follow Board policy with regard to student discipline. For the same reasons discussed above, including the grievant's demonstrated propensity to follow his own set of rules in disciplining students, it is concluded that nonrenewal of the grievant's teaching contract was justified. This conclusion is reached in spite of his nine years of teaching in the District, including service above and beyond that which was required by the contract. The parties agree the grievant is a gifted teacher and the record demonstrates his devotion to teaching. The record also demonstrates, however, that although the grievant has conformed his approach to student discipline to District policy, when admonished to do so, he has been unable to keep from eventually reverting to his own approach. Therefore, it is concluded that the District had just cause to impose the five-day unpaid suspension and just cause to nonrenew the grievant's teaching contract, and, thus, did not violate Article X of the parties' Agreement when it took those actions.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance as to the five-day suspension of John Schmidt without pay is denied.

The grievance as to the nonrenewal of John Schmidt's teaching contract for the 1998-1999 school year is denied.

Dated at Madison, Wisconsin this 8th day of July, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

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