BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HURLEY EDUCATION ASSOCIATION

and

HURLEY SCHOOL DISTRICT

Case 43
No. 58444
MA-10958

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServ – Central, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Association.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn,** 3624 Oakwood Hills Parkway, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

Hurley Education Association, hereinafter referred to as the Association, and the Hurley School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an Arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held on April 25, 2000 in Hurley, Wisconsin. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on July 12, 2000.

BACKGROUND

The grievant has been employed by the District as a teacher since 1988. In the 1999-2000 school year, the grievant taught grade 5 and had seventeen students in her class including two LD students. The grievant at the beginning of the year observed severe deficiencies in the

ability of the LD students to do 5th grade work and so she talked with the LD teacher, Nicki Pieczynski, about what to do with these students. The grievant apparently felt that Pieczynski was not assisting her appropriately and Pieczynski apparently felt that the grievant was not working with her in setting aside the times that Pieczynski could work with these students. This conflict resulted in the grievant contacting other teachers to discuss Pieczynski's performance and Pieczynski contacting her supervisor, Nancy Chartier, the District's Pupil Services Director. Two other teachers also contacted Chartier about the conflict. On October 4, 1999, Chartier informed the grievant that she and the Elementary Principal, Paul Peterson, wished to meet with her that afternoon. The meeting took place in Mr. Peterson's office and Chartier told the grievant that employes had contacted her about the grievant's discussing what Pieczynski was doing and told her that this type of cancerous behavior had to cease. The grievant stated she resented that remark and Chartier apologized for coming on so strong. The grievant expressed concerns about the LD students and the trouble she had working with Pieczynski. Chartier discussed changing the grading scale and modifying the assignments for these students. At the end of the meeting, the grievant thanked Chartier and Peterson for their time and the techniques to help the students.

A second meeting was held on October 12, 1999 with the grievant, Pieczynski, Chartier and Peterson present to attempt to get the grievant and Pieczynski working collaboratively. The grievant testified Chartier stated she had a reprimand written up. (TR-20) Chartier denied it (TR-77) and Peterson testified he did not believe it happened. (TR-109) The grievant has not been given or shown any reprimand. Chartier stated at the meeting that the behavior and unprofessionalism is going to stop. (TR-78) On October 18, 1999, the Association filed a grievance claiming that Chartier subjected the grievant to a hostile environment. (Ex-2) The grievance was denied and processed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue. The issue proposed by the Association is as follows:

> Did the actions of the Special Ed. Director cause a hostile work environment, conditions which are covered by the collective bargaining agreement, and, as such, violate the rights of the grievant in her employment with the Hurley School District?
>
> If so, what is the appropriate remedy?

The District views the issues as:

1. Did the District take disciplinary action against the grievant?

2. Does the creation of a hostile working environment constitute a violation of the collective bargaining agreement?

If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the District create a "hostile work environment" which violated the rights of the grievant under the collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 5 – MANAGEMENT RIGHTS

It is recognized that the Employer retains rights of possession, care, control, and management that it has by law, and that the Employer will continue to retain the rights and responsibilities to operate and manage the school system, its programs, facilities, properties, and employee activities. It is recognized that these express rights include, but are not limited to, the following operational and managerial rights:

1. To direct all operations of the school system: To plan, direct, and control school activities.
2. To establish and require observance of current reasonable work rules and schedules of work, and to establish new rules and regulations.
3. To determine the financial policies of the District.
4. To maintain effective and/or efficient school system operations.
5. To determine the educational policies of the school district.
6. To determine location of the schools and other facilities, including the right to establish new and to relocate old facilities.
7. To determine the supervisory and administrative organization of the school system and to select the employees to fill those positions.
8. To determine safety, health, and property protective measures for the welfare of students and employees.
9. To direct and arrange the teaching staff, including the right to hire, promote, transfer, schedule and assign, suspend, discharge, or discipline teachers.

10. To determine the size of the teaching staff, policies affecting the selection of teachers and standards for judging teacher performance.
11. To create, combine, modify, or eliminate teaching positions.
12. To determine methods of instruction, selection of teaching aide and textbooks and materials, class schedules, and hours of instruction.
13. To contract through CESA for goods and services.

The Employer retains the right to exercise these functions during the term of this Agreement, except when such functions and rights are inconsistent or restricted by the terms of this Agreement. It is essential that such functions and rights conform with state and federal statutes, laws, and administrative guidelines.

The Employer recognizes its obligation to bargain the impact of any changes in hours, wages, and/or conditions of employment during the terms (sic) of this Agreement.

. . .

ARTICLE 7 – CONDITIONS OF CONTRACT

. . .

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

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

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

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

2. Procedure: Grievances shall be handled as follows:

. . .

E. The Employer within five (5) school days of the receipt of the written grievance from the District Administrator and the Grievance Representative shall meet, in executive session, and attempt to solve the problem. The teacher may be heard personally or be represented by the Grievance Representative and up to five (5) other representatives of his choice. The Employer will be represented by the Board of Education, the Administrator, and the School Attorney. The Employer, within ten (10) school days of said session, shall render its decision in writing to the teacher and the Grievance Representative.

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

Association's Position

The Association contends that the actions of the Special Education Director caused a hostile environment and, as such, acted as a reprimand against the grievant. It asserts that the grievant felt she was totally disrespected by Chartier. It submits that at the October 4th or 6th

meeting, Chartier was hostile right away and the grievant told her she resented the comments made about herself. It insists that Chartier's comments were uncalled for. It notes a week later Chartier told the grievant she had a reprimand written up for her, that the grievant was unprofessional and Chartier was not going to put up with it anymore and was not going to put up with 9 – 5ers. It argues that these threats were a vile form of intimidation with no intent that they be carried out, and none were carried out, however Chartier did attempt to intimidate the grievant by telling her she was not to speak with Board members. It claims that the above actions have caused a very uncomfortable working environment for the grievant and, as such, has formed a hostile environment and constitutes discipline without just cause.

The Association maintains that a working environment free from hostility is guaranteed under the collective bargaining agreement. It cites the Management Rights clause that the District has the right "to maintain effective and/or efficient school system operations." It alleges that creating an environment by intimidation and continuous threats does not lead to an effective or efficient school operation. It also cites the grievance procedure and argues that the behavior of Chartier towards the grievant is an "inequitable application" of the provision of the agreement that a teacher shall not be disciplined without just cause. In summary, the Association believes the Special Ed. Director acted in an unprofessional manner and continued to act in such a manner causing a hostile working environment for the grievant. It asks that the grievance be sustained and the Special Ed. Director be ordered to cease and desist from such behavior towards the grievant.

District's Position

The District contends that the case is not about disciplinary action being taken without just cause. It notes that while the Association references Article 7, there can be no violation as no disciplinary action has ever occurred as the grievant has never been reprimanded. It insists the alleged violation of Article 7 lacks merit. The District states that it has expressed performance concerns with the grievant and discussed various areas where the grievant could improve but these fall far short of discipline even if they had been reduced to writing. Inasmuch as the grievant was not disciplined, the District insists it does not need to make a just cause argument.

The District observes that there is no reference to hostile working environment in the collective bargaining agreement, therefore the grievance is not substantively arbitrable. It submits that the term "hostile working environment" is not expressed or implied in the collective bargaining agreement and in order for a grievance to be valid, there must be a violation, misinterpretation, or inequitable application of a provision in the collective bargaining agreement. It concludes that the Association's allegations do not fall within the definition of a grievance and it is not substantively arbitrable and must be dismissed.

The District asserts that the grievant's testimony throughout the hearing was inconsistent and lacks credibility. It claims that the inconsistencies are too numerous to cite and lists some examples such as her not knowing the date of the first meeting or the day of the week it was held, her testimony that at the October 12th meeting, a reprimand had been drafted and was ready to be put in her file, but none was ever seen or placed in her file and Chartier testified there was no reprimand letter and Peterson testified that no reprimand was ever mentioned at the October 12th meeting. The District notes another area of inconsistency is the grievant's testimony regarding her education and knowledge of incorporating IEP's into the classroom at first testifying she lacked training and later admitting she did have training and experience and was responsible for incorporating IEP modifications. It points out that the grievant's testimony was evasive regarding the "hostile working environment" claim. The District notes the Parent-Student Handbook contains a form for it but the grievant testified the form would go to the State DPI office rather than the local Association, yet the form indicates a copy goes to the local employe complaint officer. The District observes that the grievant did not maintain a pre-determined classroom schedule which in turn prevented Pieczynski from being able to meet with student D.B. and this is another example of her ignoring the policies established by the District.

The District contends that the arbitrator lacks the authority to compel the District to provide the relief requested by the grievant. It submits that although the grievant has requested an apology be posted, a review of case law produced no precedent for an arbitrator to order an apology indicating perhaps that the grievance procedure is not intended to deal with hurt feelings or personality conflicts. It insists the grievant has made much ado about nothing as Chartier's comment was directed to the grievant's activities and not her personality and the apology the grievant is looking for was already received as Chartier apologized not once but three times. It observes that the grievant wants to force the District to accept responsibility for the grievant's egregious conduct. It requests that the grievance be dismissed in its entirety.

Association's Reply

The Association takes exception to the District's characterization of the statement of the case in that it is attempting to excuse Pieczynski and fault the grievant for asking for services needed to carry out the IEP for student D.B. The Association claims the grievant first brought the problem to Pieczynski and then to Principal Peterson who involved the Special Education Director. It asserts that at the October meeting the Special Education Director took exception to someone criticizing one of her staff and lashed out at the grievant. The Association admits that the grievant was never given a letter of reprimand or a suspension but claims the Special Education Director continued to taunt the grievant after the early October meeting when the issue should have been resolved. The Association observes that the District asserts that Pieczynski expressed concerns about the grievant when the opposite was true. It alleges that

the District is blaming the grievant because she has a Special Education background and the District fails to take into consideration that the grievant is a normal classroom teacher and should not be blamed for requesting the services of the Special Education Instructor.

The Association maintains that this kind of covert and subtle action taken by the District has caused the hostile working environment for the grievant. It seeks the grievance be sustained and the Special Education Director be ordered to cease and desist such behavior towards the grievant.

District's Position

The District points out three misrepresentations of the testimony in the Association's brief. It states that contrary to the Association's assertion that the grievant took exception to a remark while she was asking about services for one of her students, the October 4, 1999 meeting was called because of concerns about the grievant's failure to make lesson plan modifications and concerns about the grievant's lack of professionalism toward staff members. The second misrepresentation is the claim that Chartier has continued adverse actions against the grievant which is contrary to the grievant's own testimony that she has had no reason to meet with Chartier since October, 1999 and has had no problems with her since then. The third misrepresentation is statements attributed to Superintendent Richie stating "boys will be boys." It notes that this is contrary to Richie's testimony and the term never appears in the transcript.

It notes that the Association on page 2 of its brief argues that Chartier made "vile threats" to the grievant and has attempted to intimidate her. It points out that both Principal Peterson and Chartier's testimony reveal no threats or intimidation efforts have been made. Referring to page 7 of the Association's brief where reference to reprimands is made, Chartier, Peterson and Richie all testified that the term "reprimand" was not used in the meeting with the grievant and no discipline paperwork has been generated and the grievant admitted she has never been reprimanded. The District argues that numerous meetings were held with the grievant to discuss her teaching deficiencies and lack of professionalism.

The District reiterates that contrary to the Associations' argument, the collective bargaining agreement does not reference, either express or implied, the term "hostile working environment," so the Association's claim cannot be substantiated. It again points out that hostile work environment concerns are handled in the District Handbook resolution process. The District argues that the Association is misconstruing the agreement in its attempt to bolster its argument but the Management Rights clause is reserved to the District to exercise and the grievance procedure is not applicable as the grievant has not been reprimanded so there cannot be a violation of the just cause standard. The District observes that the Association never discussed "just cause" during the hearing. It concludes that this case is about a teacher not

liking her supervisor but rather than working to gain respect, she has filed a grievance. It asserts that this is an abuse of the arbitral system. The District believes the grievant's request must be denied.

DISCUSSION

It is undisputed that the grievant was not given a written reprimand, a verbal reprimand or any other traditional disciplinary action such that the just cause requirements of Article 7 apply to the instant case. The Association has alleged that the District has created a "hostile work environment" which has acted as a reprimand against the grievant. The parties' collective bargaining agreement does not contain the term "hostile work environment" so there is no contractual definition of what that means or that there are any consequences attached to it. As it is not in the contract, there is no contractual violation. Additionally, the evidence failed to prove there was a "hostile work environment."

The Parent-Student Handbook (Ex-10) has a provision on Sexual Harassment on page 29 and refers to "unwelcome verbal or physical conduct of a sexual nature" and then states as follows:

> 3. Such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or offensive employment or education environment. . . .

The Association has adopted parts of this language to arrive at the term "hostile work environment." Instead of applying it to sexual harassment, the Association has applied it to the supervisor-employe relationship.

The grievant testified that in a meeting on October 4th or 6th, 1999 with Principal Peterson and Special Education Director Chartier, the Special Education Director stated she was not going to put up her type of cancer around here and the grievant stated she resented that remark and the Special Education Director apologized and did not use the remark again. The Director had concerns about the grievant contacting other teachers about the LD teacher. Certainly, if the grievant had a problem with the LD teacher, she should have taken it up with her supervisor and not other peers. Whether this conduct is appropriately described as cancerous or not makes no difference as the grievant objected and the supervisor apologized and that was the end of it. This simply fails to amount to conduct which could be described as creating a "hostile work environment." This is especially true when the meeting continued and was productive and the grievant thanked both supervisors.

The grievant testified that at a second meeting on or about October 12, 1999, the Special Education Director stated she had a reprimand written up right now and did she want it in her file. It is undisputed that no reprimand was ever seen by the grievant or given to her.

Furthermore, both the Special Education Director and the Principal testified it did not happen. The Association has the burden of proof that this occurred and, on the record, the evidence was insufficient to establish that any discussion about a reprimand occurred.

Certainly, it is not unusual for a supervisor to warn employes that if their conduct violates rules or directives that the employe may be reprimanded. A word to the wise can hardly be found to be creating a "hostile work environment." The record indicated that the grievant had no further discussions with the Special Education Director since October, 1999.

It is concluded that the evidence is insufficient to establish that the Special Education Director made threats that were a vile form of intimidation such that she created a 'hostile work environment" for the grievant. As the evidence failed to establish any "hostile work environment," the grievance must fail.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned makes the following

AWARD

The District did not create a "hostile work environment" which violated the rights of the grievant under the collective bargaining agreement and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin this 9th day of August, 2000.

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

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