BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY EDUCATION ASSOCIATION

and

GREEN BAY AREA PUBLIC SCHOOL DISTRICT

Case 207
No. 58408
MA-10948

Appearances:

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker** and **Attorney Daniel Barker,** Ten East Doty, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Green Bay Area Public School District.

Kelly & Petranech, by **Attorney Robert C. Kelly,** 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Green Bay Education Association.

Hanaway, Weidner, Bachhuber, Woodward & Maloney, S.C., by **Attorney Brian M. Maloney,** 345 South Jefferson Street, Green Bay, Wisconsin 54301-4522, appearing on behalf of the Grievant.

ARBITRATION AWARD

Green Bay Education Association, hereinafter Union, and Green Bay Area Public School District, hereinafter District, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties, by joint request received by the Commission on January 12, 2000, requested the appointment of staff member Marshall Gratz to serve as Arbitrator. Mr. Gratz was appointed by the Commission to serve as Arbitrator on January 13, 2000. Following pre-hearing motions, Mr. Gratz found it necessary because of workload concerns to withdraw as Arbitrator on January 21, 2000. The parties then jointly requested the appointment of Commissioner Paul A. Hahn as Arbitrator. Mr. Hahn was appointed on January 26, 2000. The hearing in this matter was held on April 13 and 14, 2000. The hearing took place in the District School Board conference room, at the District's offices in Green Bay, Wisconsin. The hearing was transcribed. The parties were given the opportunity and filed post hearing briefs. The parties' initial post hearing briefs were received by the Arbitrator on June 26, 2000. The parties were given the opportunity and filed reply briefs which were received on July 13, 2000. The record was closed on July 14, 2000.

ISSUE

Union

Did the District violate the terms and conditions of the 1997-1999 collective bargaining agreement, and more particularly Articles II-A-4 and Article XIX-C thereof, when it discharged (Grievant) from his employment as a teacher? If so, what is the remedy?

District

Did the District have cause to discharge (Grievant) from his employment? If not, what is the appropriate remedy?

Arbitrator

Did the District have just cause to discharge the Grievant from his employment as a teacher under the terms of the 1997-1999 collective bargaining agreement? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II
MANAGEMENT RIGHTS

A. The Board, on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities of the State of Wisconsin, and of the United States, relative to management and direction of a properly and efficiently operating school district. These rights include, without limitation because of enumeration, the right of the District:

1. To the executive management and administrative control of the school system and its properties, programs and facilities.
2. To determine the mission and goals of the District.
3. To determine and supervise the program of instruction in the District.
4. To hire all employees and, subject to the provisions of the law and this Agreement, involuntarily transfer employees for cause and to discipline, demote, suspend, nonrenew and/or discharge employees for just cause.

5. To establish and maintain evaluation standards and procedures for assessing the qualifications and competency of its employees.
6. To utilize personnel, methods and means in the most appropriate and efficient manner possible.
7. To determine the allocation and assignment of work to the employees of the District subject to the provisions of law and this Agreement.
8. To determine the size and composition of the work force; to establish new jobs and abolish or change existing jobs; and to lay off employees.

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes; the Municipal Employment Relations Act, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and the laws of the State of Wisconsin, and the Constitution and laws of the United States.

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ARTICLE V
GRIEVANCE PROCEDURE

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D. Initiation and Processing.

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3. . . . The arbitrator shall have no power to add to or subtract from or modify any term(s) of this Agreement. The cost of the arbitrator and the transcript shall be split equally between the parties.

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ARTICLE XIX
TEACHER RIGHTS AND RESPONSIBILITIES

. . .

C. The private life of a teacher is not within the appropriate concern or attention of the Board except as it may directly prevent the teacher from properly performing his/her assigned functions during the workday.

. . .

E. No teacher will be disciplined, reprimanded, reduced in rank or compensation, suspended, demoted, transferred, terminated or otherwise deprived of any professional advantage without cause. In no case will this be done publicly, except when necessary for the Board to take official action. Any such action, excluding nonrenewal but including adverse evaluation of teacher performance, will be subject to the grievance procedure set forth in this Agreement.

STATEMENT OF THE CASE

This grievance involves the Green Bay Education Association and the Green Bay Area Public School District as set forth in Article I, Recognition of the parties' collective bargaining agreement. (Arb. Ex. A) 1/ The Union alleges that the District violated the parties' collective bargaining agreement when the District discharged the Grievant on April 1, 1999, for Grievant's communications and physical contact with a 17-year old female student who during the time of these proceedings was a student at East DePere High School in the Unified School District of DePere, Wisconsin.

1/ I find that neither party at either the Board hearing or the arbitration hearing introduced the entire collective bargaining agreement as an exhibit. Therefore, by my own motion I am marking the parties' 1997-1999 labor agreement Exhibit A to the arbitration record.

Grievant is male. Grievant began working as a music teacher at Green Bay Southwest High School in 1994. His duties at Southwest included teaching choir, assisting with the band, directing the school musical and directing various ensemble groups. In addition, Grievant accepted extra curricular assignments involving the girls tennis team, debating, and as the District's solo ensemble festival manager. Grievant and his students at Southwest participated in public performances. Grievant also was involved in community musical organizations. Grievant was described by his Southwest Principal as being Southwest's finest teacher who in his five years with the School District had greatly increased the participation by students in Southwest's music program, was involved in the School's at-risk program, as well as working with kids in the community. Grievant had never been disciplined by the District until the matter before this arbitration.

One of Grievant's outside activities was employment as a conductor with the Green Bay Youth Symphony Orchestra conducting the middle level of the three youth orchestras. Through Grievant's involvement with the Green Bay Youth Symphony, the Grievant met a female DePere student's mother in 1998, who introduced Grievant to her daughter who was a member of one of the three youth orchestras within the Green Bay Symphony, though not the orchestra directed by Grievant. The mother felt that the Grievant could help her daughter, (hereinafter (S)), with voice lessons for the musicals that (S) was involved in as an East DePere High School student. The student and Grievant during the 1998-1999 school year developed a relationship leading to Grievant's termination on April1, 1999. The Grievant never taught or supervised (S) as a student at East DePere High School or as a member of one of the three Green Bay Youth Symphony Orchestras. 2/

2/ The record before the Board, including Transcript and Exhibits, became Exhibit #1 at the arbitration hearing. References will be to Bd. [Board hearing] and Arb. [arbitration hearing].

In the summer of 1998, Grievant and (S) began to communicate by phone and e-mail. (Arb. Ex. 1.K and Arb. Ex. 2) The communications gradually became flirtatious in nature and eventually involved explicit suggestions and commentaries regarding sexual contact between Grievant and (S). (Arb. Ex. 2) Most of these communications were by e-mail between Grievant and (S). (Arb. Ex. 2 is a compilation of those e-mails and involves approximately 160 e-mail contacts from May 11, 1998 through January 10, 1999).

On October 2, 1998, Grievant and (S) met at a music store in Green Bay where (S) worked a part-time job. Grievant and (S) went in Grievant's car to get Grievant a cup of coffee and on the way back to the music store parked in an industrial parking lot where physical contact (a kiss) took place between Grievant and (S). (The parties dispute the extent of that "kiss"). The Grievant and (S) had discussed Grievant collecting a "birthday kiss" from (S) in their e-mail communications. (Arb. Ex. 2)

On October 4, 1998, a Sunday, which was the usual day for the late afternoon practices for the Green Bay Area Youth Symphony, the Grievant and (S) met upstairs at East DePere High School, the practice location. The parties dispute what took place at that meeting between Grievant and (S); the District posits that kissing and fondling took place; the Union argues that no contact took place. Either way, an argument ensued between the Grievant and (S) and they decided not to have further contact between each other. However, the e-mail contacts continued and Grievant and (S) arranged to meet at his house for Grievant to give (S) voice lessons to help with her role in the musical *South Pacific,* which was to be performed at East DePere High School. Again, the parties dispute what happened at Grievant's home on Sunday, October 11, prior to the Youth Symphony rehearsal; the District alleges that Grievant

was involved in physical contact with (S), including kissing, fondling and a massage; the Union alleges that no physical contact other than a goodbye hug from (S) to Grievant occurred. Grievant and (S) next planned to get together on Sunday, October 18, 1999 at either Grievant's home or at (S)'s parents' home. However, Grievant was sick on October 18th and cancelled this meeting which never took place.

During the course of the fall of 1998, the Grievant and (S) engaged in writing, through their e-mail communications, a romance novel where each would start a description of physical and sexual contact which was to be continued by the other. Over the course of their relationship, which ended with the last e-mail on January 10, 1999, the descriptions grew more explicit and Grievant and (S) fantasized physical and sexual contact between themselves. (Arb. Ex. 2)

The next contact between Grievant and (S), where they would be alone, was to take place on Sunday, November 1, 1999. This contact again was to be at Grievant's home for Grievant's assistance to (S) in a voice lesson. The parties again dispute what happened on November 1st. The District alleges that (S) did in fact go to Grievant's home where the Grievant gave (S) a lotion massage and forced her to perform oral sex; the Union alleges that the Grievant during the morning of November 1st cancelled their meeting on November 1st and that such a meeting and therefore the forced oral sex never occurred. Following November 1, 1998, the frequency of e-mails and conversations between Grievant and (S) were drastically reduced and Grievant and (S) never met again alone.

On January 6, 1999, (S) e-mailed the Grievant that "someone" told her that Grievant had said that she, (S), was obsessed with him. While (S) would not reveal to Grievant who that individual was, it was (S)'s mother. This information upset and angered (S). On January 12, 1999, (S) talked with the head of the Green Bay Symphony Youth Orchestra, who is also a teacher at (S)'s high school, regarding the incident of a kiss in the car on October 2, 1998 and kissing and fondling of her while at Grievant's home on October 11, 1998. This teacher, Alpha Mendelson, spoke with her principal Matt Weller on January 12th. Weller within the next couple of days met with Grievant's principal, Donald Jensen, at Southwest High School. Jensen then informed administrators of the Green Bay School District who, on January 19, 1999, met with Weller and for the first time interviewed (S). On January 20, 1999 the Grievant was suspended with pay following a meeting with representatives of the District and Grievant and his Union representative and private attorney. On January 27, 1999 (S) filed charges with the Green Bay police department alleging that the Grievant had forced her to have oral sex with him. (Arb. Ex. 1.Z)

On February 2, 1999, the District notified Grievant that it would hold a hearing to consider whether to discharge him from his employment, listing various alternative reasons why the District Administration recommended dismissal. (Arb. Ex. 1) Those reasons included ". . . engaged in inappropriate physical contact with a minor student, personal contacts,

personal communications, manipulative behavior and emotional involvement with said student; lying about that involvement; encouraging and directing the student to lie about the involvement; encouraging and directing the student through threats and emotional manipulation not to reveal anything about that involvement; and instructing the student to destroy evidence of (Grievant's) inappropriate contact, involvement and communication; Grievant knew that his conduct with the student was wrong and that if it was discovered he would lose his job; and Grievant's conduct toward and contacts with the student were sexually motivated." (Brd. Ex., Notice of Board of Education action to Grievant dated February 2, 1999; part of Arb. Ex. 1) (Brd. Ex., Amended notice of Board of Education action to Grievant dated March 3, 1999, part of Arb. Ex. 1)

The Board held hearings on March 8, 9 and 31, 1999 to determine whether it would terminate Grievant's employment. The Board on April 1, 1999 issued its findings and terminated Grievant's employment essentially based on the reasons generally set forth above. (Arb. Ex. 1)

The Union grieved the discharge of the Grievant. The parties processed the grievance through the grievance procedure of the parties' collective bargaining agreement and the Union appealed the matter to arbitration. (The parties did not introduce into the arbitration record any history of the Grievance proceedings between the Union and the District). At the arbitration hearing, no issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on April 13 and 14 in the Board Room of the District's offices in the City of Green Bay, Wisconsin. On April 14 the hearing concluded at 1:10 p.m. In response to (S)'s allegations of a forcible sexual assault on November 1, 1998, Grievant was charged with two criminal offenses. In May of 2000, shortly after this arbitration hearing concluded, a jury found the Grievant not guilty of all criminal offenses. Following the results of the criminal trial the parties requested that I re-open the arbitration hearing for submission of further evidence, including the transcript of the criminal hearing. This request which I treated as a motion was denied with the exception of receiving the undisputed evidence that Grievant had been found not guilty of any criminal offenses and for the submission of any additional e-mail communications between Grievant and (S). Both parties submitted additional e-mails which were made exhibits to the arbitration record.

POSITIONS OF THE PARTIES

Union

The main thrust of the Union's argument is that all of the activities of the Grievant were legal, were intended to be private, and were conducted off-duty. These activities, submits the Union, did not involve any District student, program or equipment and, more importantly, did not prevent Grievant from properly performing his assigned functions at the District during the work day. The Union strongly argues that the Union and the District have agreed by contract

language what is the nexus between a teacher's private life and his/her employment that can be scrutinized by the District's Board. Nexus under Article XIX – C of the collective bargaining agreement requires that the teacher's "private life" to be "an appropriate concern" of the Board must ". . . directly prevent the teacher from properly performing his/her assigned functions during the work day." Otherwise, argues the Union, the private life of the Grievant, pursuant to the labor agreement between the parties, is not within the appropriate concern or attention of the Board.

The Union points out that the District bears the burden of proof in this matter and must prove that the activities for which the Grievant was discharged actually occurred. The Union submits that the most significant of Grievant's alleged transgressions, i.e., that he sexually assaulted (S) in his home on November 1, 1998, has already been found by a criminal court jury in May of 2000 to not have occurred. The Union posits that absent these criminal charges, a result which the Union argues the Arbitrator must honor, the only other remaining allegations against the Grievant involve the e-mail exchange between Grievant and (S) and the single kiss given to Grievant by (S).

As described in the statement of the case, the Union denies and submits that the record evidence substantiates that there was no physical contact between Grievant and (S) on October 4 at East DePere High School during the Youth Symphony practice and that there was no physical contact between the Grievant and (S) at Grievant's home on October 11, except when (S) asked and was given permission by Grievant to give him a parting hug. The Union submits that (S) was never even at Grievant's home on November 1, 1998 when the District alleges that (S) was sexually assaulted by the Grievant.

The Union takes the position that the e-mail communications between Grievant and (S) were intended by the two to be purely private and points out that the e-mails were never conducted on District premises, nor via District computers and were merely personal communications between Grievant and (S) that should have been outside the District's proper attention or concern no matter how imprudent or distasteful the District's Board may have found them. The Union argues that even if there were physical contact between Grievant and (S) in the form of (S)'s kiss to Grievant on October 2, that kiss occurred off District premises and while Grievant was off duty. The Union argues that the District produced no evidence indicating that Grievant's private interactions with (S) directly prevented him from properly performing his assigned functions during the work day at Southwest High School. The Union avers that it is undisputed that Grievant's work performance remained satisfactory at all material times in 1998 and during the time of the interactions between Grievant and (S). The Union submits that in the end, the District lacked just cause to discipline Grievant for his private interactions with (S).

The Union goes on to state that if some legitimate contractual basis did exist to justify discipline in this matter, discharge was too severe a sanction. The Union points out that

Grievant was at all times during his five years' employment a respected and talented teacher, noted for his ability to instill knowledge and enthusiasm in students. Further, Grievant had never been disciplined before and had shown no propensity for misconduct in his employment. Grievant, the Union submits, acknowledged before the Arbitrator that engaging in a relationship with (S) was a poor choice and reflected bad judgment in his personal life but that his private actions in his personal life did not justify discharge. Therefore, the Union submits that the grievance be upheld and reinstatement at a minimum be ordered if full relief is not granted.

District

The initial argument of the District is supported by treatise cited at page 30 of its initial post hearing brief in which the author of that treatise and thus the District argues that "teachers have a great deal of influence over students, and proper professional conduct requires them to respect the natural boundary between teacher and student." Explaining this concept to teachers, commentator William David Stufft noted that teachers must establish boundaries because students need teachers to be role models that they can trust to do the right thing. From this point the District argues the Grievant crossed that teacher-student boundary with (S) and therefore discharge by the District was appropriate.

The District argues that the relationship between the Grievant and (S) was one of teacher to student because their personal relationship grew out of and remained intertwined with their instructional one, emphasizing that Grievant gave (S) private voice lessons initially for a state honors choir and later for help with a school musical. The District points out that Grievant himself described himself as teacher and counselor when advising (S) to cover up their relationship to one of (S)'s male friends.

Citing another treatise, the District argues that when teachers engage in a sexual relationship with their students, they cross the aforementioned boundary and that such relationship need not be physical, although in this case it clearly was. The District points out that both the Green Bay School District and the Green Bay Education Association publish guidelines to familiarize teachers with sexual harassment and the boundaries that must exist between student and teacher.

The District argues that the record shows that the Grievant crossed the line when he failed to negatively respond to (S)'s continued efforts at a flirtatious and sexual relationship, and, rather than putting an end to the relationship that he should have seen was unprofessional and inappropriate, he continued to encourage (S), leaving it up to (S) to determine where that relationship should go. As another example of Grievant crossing the line, the District cites the erotic "stories" that Grievant and (S) participated in which included pornographic detail and to which Grievant willingly participated and encouraged (S) to continue in even more graphic

detail which ultimately led to not creating a "romance story" but creating the type of physical relationship each desired with the other. The District submits that no School District can retain a teacher who engages in such erotic behavior with a student and a student that the District argues was a student of the Grievant. Further, the District argues, not only did the Grievant and (S) engage in this type of e-mail eroticism, the Grievant manipulated (S) by encouraging her and demanding her to lie and threatening her if she did not, in order to cover up their e-mail and physical relationship which Grievant realized could result in the loss of his teaching position.

The District argues that there is credible evidence in the record to support inappropriate physical contact with (S) that crossed the student-teacher boundary. The District argues that the record evidence shows that the Grievant's testimony was implausible and was fabricated on key issues relating to the physical contact and that ultimately he lied about this contact which in and of itself should result in his discharge. In particular, the District argues the evidence proves that Grievant lied about the November 1, 1998 sexual assault by Grievant and that the e-mail communications prove that a meeting between the two was scheduled and did happen on November 1st and that (S)'s story is more plausible that the sexual assault occurred, than is Grievant's denial that he did not meet with (S) on November 1st. Responding to the Union's claim that the testimony shows that (S) continued the e-mail relationship with Grievant even after this alleged November 1 assault, the District argues that this was perfectly understandable as (S) was merely following Grievant's directive to act as though nothing had happened in order to cover up the assault on November 1st. The District argues that it is plausible that the reason that (S) did not immediately accuse Grievant of the assault was because of her embarrassment and that it would have shown how foolishly she had acted. The District argues that it is evident from the record that after November 1, 1998, (S) no longer wrote to Grievant, through their e-mails, regarding any physical contact.

The District admits (S)'s confusion regarding dates but submits this is understandable since she had tried to put the events out of her mind. By the time of the Board hearing in 1999 and the arbitration hearing in 2000 it is understandable that (S) would have difficulty accurately recalling dates. The District points out that when (S)'s recollection was refreshed with the actual record of e-mails in Exhibit 2 of the arbitration hearing she was able to get her dates right. The District summarizes this line of argument by pointing out that (S) was an honor student whose teachers had given her a high integrity rating and would not logically open herself up to such negative and embarrassing attention or publicize her most personal sexual feelings unless something really happened.

The District argues that even if Grievant did not affirmatively recognize that his relationship with (S) was wrong, the Grievant should have known that his conduct was in fact improper and that based upon his own testimony he knew it was improper and for that reason he should be discharged.

The District then addresses the contractual argument of the Union that Grievant's relationship with (S) did not impact on his ability to do his job with the District and that his conduct was part of his personal life that did not affect his duties with the District. Responding to the Union, the District takes the position that a nexus between his conduct with (S) and his District employment exists. The District argues that the clause in the labor agreement that provides that a private life of a teacher is not within the appropriate concern or attention of the Board except as may directly affect the teacher from properly performing his/her assigned duties during the work day, is simply a nexus requirement which required the District to demonstrate a nexus between Grievant's off-duty conduct and the Grievant's job duties. Citing case law, the Board takes the position that in this case Grievant's off-duty conduct meets the nexus requirement and that it was not simply private conduct and was within the School Board's appropriate concern. The District argues that Grievant's conduct with (S) satisfied both alternative nexus requirements; had a relationship to his assigned duties, and it was also the subject of public notoriety. The District cites case law that found teachers unfit to teach because of poor judgment or lack of concern for the emotional welfare of a public school student. To not discharge Grievant, the District avers, would jeopardize the District's creditability in dealing with sex abuse cases. The District argues that because the Grievant often had one-on-one lessons with his students at the Southwest high school, his off-duty activity with (S), involving the same type of one-on-one contact, would be highly relevant to how he could be expected to perform his required one-on-one teaching duties within the District.

The District then makes the argument that Grievant's conduct directly relates to his teaching duties because it significantly impairs his effectiveness as a role model for the students in his classes and that his teaching duties require Grievant to command respect from his students as a role model. Citing case law that supports a position that a teacher serves as a role model for his or her students, the District argues that Grievant's failure to conduct himself as a role model impairs his effectiveness as a teacher. The District submits that it is reasonable to expect the District's teachers to be role models in the Green Bay community. The District cites cases in which teachers were found guilty of criminal activity and destroyed their role model in the community, justifying their discharges in the cited cases. The District points out that this matter has now received significant publicity which it may not have had at the Board and arbitration hearing because of the "highly public sex-crime trial." The District argues that given the substantial public notoriety of the sex crime trial, retaining Grievant in light of this publicity would negatively affect the District, and it would negatively affect Grievant's effectiveness as a teacher. The District submits that had Grievant not been discharged by the District the Green Bay community would have been up in arms over the District's failure to take action.

In summary, the District argues that no penalty other than discharge would be appropriate in this case because Grievant lied at the arbitration hearing, and minimized his conduct through both lack of judgment and lack of remorse. The District argues that the

evidence shows that Grievant does not realize that what he did was wrong. The District points out that Grievant acted deliberately to try and cover up the relationship between him and (S) and when that relationship came to light Grievant defended himself at the arbitration hearing by claiming he had done nothing unprofessional. The District argues that Grievant's untrue and deceptive testimony before the Arbitrator is reason enough to refuse reinstatement. Taken together, all these facts, the District argues, demonstrate that discharge is the only appropriate consequence for the Grievant's actions. Whether or not the Grievant had physical contact with (S), the District cannot trust him with students, the Grievant can no longer be a role model and retaining Grievant would be inconsistent with the District's mission for providing a safe environment for children. For these reasons the District asks that the grievance be denied.

DISCUSSION

This is a case involving the discharge of the Grievant, a teacher in the Green Bay School District. Grievant was discharged for his relationship with a seventeen year old female student in the Unified School District of DePere. This is also a case of contract interpretation. The parties' labor agreement provides in Article XIX, sub paragraph C that the District cannot concern itself with the private affairs of a teacher unless the private conduct directly affects the ability of the teacher to carry out his assigned teaching duties**.**

ARTICLE XIX
TEACHER RIGHTS AND RESPONSIBILITIES

. . .

C. The private life of a teacher is not within the appropriate concern or attention of the Board except as it may directly prevent the teacher from properly performing his/her assigned functions during the workday.

The labor agreement also gives the District the right to discipline and discharge for just cause.

ARTICLE II
MANAGEMENT RIGHTS

. . .

4. To hire all employees and, subject to the provisions of the law and this Agreement, involuntarily transfer employees for cause and to discipline, demote, suspend, nonrenew and/or discharge employees for just cause.

My task as arbitrator is to decide whether on the record of evidence and in accordance with the labor agreement, the District had just cause to discharge Grievant. The record in this case does not make this task simple.

This case involves the unique situation of a discharge based on a private e-mail relationship between Grievant and (S), a student in another public school district. It also involves allegations of improper physical contact, including an allegation of forced oral sex that led to criminal charges against the Grievant. These criminal charges resulted in a five day criminal trial which occurred a month after the hearing in this matter. Grievant was found not guilty of any criminal offenses. The parties, while citing many discipline cases involving sexual contact that led to discipline, did not cite any case to me involving a similar e-mail relationship, and my own research did not uncover any such fact situation. This case also hinges to a significant degree (the parties give this varying weight as noted above) on whether there is a nexus between Grievant's off-duty conduct and his teaching duties in the District under the language of the Labor Agreement.

Grievant was described by his principal at Southwest High School (hereinafter Southwest) as an outstanding teacher; the best teacher at Southwest. (Brd. Tr. p. 404) Grievant was 28 and then 29 during the events involved. He had built the music program at Southwest substantially since his employment in 1994. (Brd. Tr. p. 404) Grievant was involved in community affairs and his church. The District would probably describe him as a good role model if it had not been for his actions that led to his discharge. (S)'s birthday in September of 1998 made her age 17 through the course of the events that led to Grievant's discharge on April 1, 1999. (Brd. Tr. p. 20) (S) was a student at East DePere High School, a public School District totally unrelated to the Green Bay Area School District where Grievant taught. (S) was an honor student who was given high integrity ratings by her teachers. (Brd. Tr. pp. 20-23; Arb. Exs. 9 & 10) (S) was a member of one of the orchestras in the Green Bay Area Youth Symphony where she met Grievant. (Brd. Tr. pp. 24-26) (S) taught viola lessons on private basis. (Arb. Ex. 2 p. 37) She also on at least one occasion sang professionally. (Arb. Ex. 2 p. 123) Both Grievant and (S) were computer literate, at least to the extent that they had no trouble carrying on an e-mail relationship. Grievant testified that e-mail was how he normally communicated and could not remember when he had last written a letter. (Arb. Tr. p. 270)

The e-mail relationship between Grievant and (S) began, at least with the first e-mail of record, on May 11, 1998 and ended with the last e-mail of record on January 10, 1999. As I have alluded to earlier, discharge due to an e-mail relationship may be a case of first impression. The e-mails introduced into the record constitute approximately 160 separate e-mails printed out on 165 pages, (Arb. Ex. 2) plus arbitration exhibits 20-25. The parties have not argued that the e-mails were privileged and the District argues that once (S)'s father printed several of them from the family computer that (S) used and gave them to the District they were no longer private.

I find that the e-mails when written, if "written" is the right word, and exchanged between Grievant and (S) were not intended and could not have been intended to have been read by a third person. In no instance were the e-mails ever, in the transmission process, copied to a third person. Written and telephonic "conversation" are, I believe, seldom meant to be made public or generally shared. I cannot but believe that e-mail communications are intended to be any different. I believe that people say things in the privacy of writing (e-mail) that they would never say face to face, and that is the case here. This theory probably supports the Union's position that the e-mails were more fantasy than reality and did not in any way interfere with Grievant's teaching duties. But at the same time, I cannot overlook these e-mails because they are at the heart of the District's case and there is little question their often erotic nature raises legitimate issues regarding whether this relationship was proper and would affect Grievant's ability to continue to teach in the District.

Both parties understandably use the e-mails to their best advantage. The District believes the e-mails, their content, is reason enough for discharge. The Union argues the e-mails were private, off-duty conduct, not preventing Grievant from properly performing his job. A lengthy discussion of these e-mails would, I believe, consume this decision and is not necessary. If this e-mail exchange had been between Grievant and a student within the District, I believe it would be clear that this off-duty conduct would have to be a concern of the District Board. Grievant's and (S)'s e-mail exchange amply demonstrate that this was not e-mail correspondence one would reasonably expect between a teacher and a student. 3/

3/ (S): ". . . I really want to kiss you, I've always wanted to, since the first day I sang with you in the choir room. And then I was totally infatuated with you and told my Mom that I was going to marry you. And that was all before Chris and I were as we are now, so you'd think that now I'd be like, "no sorry" but I still want to kiss you. I don't understand myself! You have to promise me, though, if this does happen on Saturday, no one can find out, because if my Mom or any of those people or Chris or Jon for that matter ever found out, we'd both be dead! You don't kiss and tell, do you? Well see you Friday, I'll be the totally irresistible brunette in the sexy outfit who you just won't be able to resist. In fact, you'll go home fantasizing about running your hands up and down her body as her breathing gets heavier. You'll rub up and down, harder and harder, but very slow, especially on the chest and stomach area, as to tease her. Then she takes one of your hands and places it on her. . . Love you." (Arb. Ex. 24)

Grievant: "wow—I must say that the message you sent certainly didn't keep to your principle of only giving away a little bit at a time --- it was a very intense message and I shall try to respond but all I can say is WOW (like I am sure will be my reaction when I see the sexy outfit tomorrow!!!!!—hhhhhhmmmmmmmmm ;*

Anyway—regarding collecting—it would be great but don't feel as if you need to or that you are being forced to do it---it must be your choice---as far as other things I can not help you of course you have my complete trust---I will never ever say a word and I do trust you in the same way---it shall be our secret---I understand also your need for caution so I shall leave the planning in your hands

Speaking of hands, I believe you left off with she placed his hand upon her…

Cheek so she could feel his soft skin against her face-the rubbing felt great but they knew they wanted more—as she kissed his hand and he caressed her face they pulled each other so tight together that any observer would not know w where one began and the next one ended---he held her close and tight for what seemed like forever –their breathing grew heavier until she.…

Good night sweet princess
Soon you may have your wish.…" (Arb. Ex. 2, p. 58)

(Grievant): "Re: I was expecting 'directions and details' _ _ _ _ _ _
Sounds like a plan---we won't flirt at symphony—then Jon will have nothing to worry about---what time will things transpire---will you bring any lotion that you want---you need lotion for the proper massage---also---you were wise earlier to say that we could stretch for one more week-—if you can't come over here---I should come over when?

Don't make a big deal about coming over here to your mom---its not a battle worth fighting for and I can go over there

Anyway---hope to have email when I get back from church---" (Arb. Ex. 2, p. 77)

(Grievant): "I guess that you won't be going online tonight, you're probably in bed sleeping, and that's where you should be (too bad I'm not there too) Just kidding; or am I; He, he! Well, goodnight, hope to hear from you soon! Love 'ya Em; (You know what? This may sound weird, but I REALLY love flirting with you!) Hope that you don't mind;" (Arb. Ex. 2, p. 98)

(S): "Going to bed @ 9:30!! I missed you by like 2 minutes … that sucks!

Well, I'm going to bed soon to … but … I have some things to tell you first… I really looked hot today??? That's so nice of you to say, I wasn't even wearing black, because I was running out of black outfits like you like! I tried to wear black all the time because you said that you liked it!!!

I don't know if I should tell you all of my dream over the Internet … it would be fun to tell you, and or act out parts of them! Here's a little 'mood setter,' however. You were going to Madison, and you took me with you (of course, no one knew that) My Mom thought that I went down with Sarah, and Hillbill (who I hung around with in the day) thought that I was there with my Mom and I was just ditching her. So, anyway, we were there together in our hotel room, and I, of course, got a wonderful message, and you were 'going wild' because I had some awesome underwear on, and you loved it! Well, so you're giving me my massage, and, of course, the bra couldn't stay on, it was on the floor and I was laying on my back and you were massaging my chest, and then you laid on top of me and … of … that's all for now! When are you going to be home from Madison??? On Sunday afternoon? My full body massage involves everything … and a lot of kissing … everywhere … I mean, if you could handle that … more details later!
Now, I'd better have an e-mail when I get home from school because you have the whole day to write one!
Love you (Arb. Ex. 2, p. 105)

Grievant: I slowly roll you over your head is cradled gently in my lap---I massage for what seems hours your front and chest—your seductive skirt keeps getting pushed—inch by inch lower until

finally your underwear is revealed. I quickly switch places and remove your skirt. I begin to massage the feet and the legs at first tentatively and then moving further and further upward. My hands are

placed gently on your thighs and I caress and flirt with your underwear.. My hand is on the side and slips underneath to your stomach area---I can feel warmth with my inner arm as I flirt seductively with your belly button. From here I sit beside you and return once again to your chest, where I linger. My hands slowly slide down your side—in what seems like forever hitting your hips and the underwear. My hand s slide, on both sides underneath and your arch your back up as if to say they must come off. I slowly slide your underwear off and your are laying there---your eyes closed---your lips raised in a smile. I begin to caress again your feet and begin to work up your legs---unsure how to proceed I hesitate waiting for you to ……your turn.

(S): I begin to caress again your feet and begin to work up your legs---unsure how to proceed I hesitate waiting for you to ……take my hand and move it back up to where your underwear. They you (meaning you now, not me) slowly slide your hand back up to my stomach and caress it for a few seconds, until, finally sliding your hand under my underwear and into me. You rock your fingers, slowly at first, but then harder, going back and forth , faster and faster, and I begin to breath very heavy, I even let out a small yell because it feels so good.
And then…
Your turn! (Arb. Ex. 21, pp. 2-3)

Nor do these e-mails convincingly support the creditability of either Grievant or (S). I find it incredulous that in the mist of an erotic exchange of e-mails that Grievant expects me to believe that a reference to 7.5 inches rather than 9 on re-measuring so as not to mislead (S) refers to scratches on his car. (Arb. Tr. 100, Ex. 2 p. 113) But I find equally incredulous that (S)'s continued reference to her being "hot" or wearing "hot" clothes in her e-mails to Grievant was the work of an innocent and gullible seventeen year old. (Arb. Ex. 2) The heart of this case, along with the alleged physical contact, is whether these e-mails, under the privacy language of the labor agreement in Article XIX, Section C, support just cause for discharge. Further, I do not believe it is expedient to dwell on who was lying and who was not. The issue is who is more creditable and whether given that creditability or lack thereof the District has met its burden to prove just cause for discharge.

I initially turn to the alleged incidents of physical contact. I believe the record supports that there were at least three situations where Grievant and (S) were alone: October 2, 4 and 11, 1998. The parties totally disagree about an alleged meeting between the two on November 1, 1998 when the alleged sexual assault took place; the Union arguing not only did it not happen, the Grievant and (S) were never together on November 1st. The parties disagree also on what physical contact took place, if any, on the three October dates. As stated above, the District agrees in its post hearing brief (p. 52) that (S) had her dates confused but excuses that because of the embarrassment to (S) and the passage of time. It is also evident that (S) was not clear as to what happened on those dates and changed her testimony on the alleged physical contacts. (Arb. Ex. 1 L) (Brd. Tr. pp. 159-160, 194)

The October 2, 1998 incident:

Following initiation of their e-mail contact in May of 1998, and prior to the October 2 incident (S) began to flirt via e-mail with the Grievant. (Arb. Ex. 2, pp. 15 & 16). 4/ On August 20, 1998, (S) sent Grievant a computer generated instaKiss. (Arb. Ex. 2, p. 17)

Shortly thereafter (S) sent Grievant an e-mail on August 24th in which she tells Grievant he can collect a real birthday kiss if Grievant wants. (Arb. Ex. 2, p. 23) Grievant responds that same day that he will have to collect soon. (Arb. Ex. 2, p. 25) (S) responded still on August 26th that she was ready any time Grievant wanted to collect his birthday present of a kiss. (Arb. Ex. 2, p. 26) This e-mail banter continued throughout September with (S) emphasizing that she really wanted to kiss Grievant. (Arb. Ex. 24) They set a time to meet on Friday, October 2, 1998 at a music store in Green Bay where (S) worked. Grievant stated in an e-mail on September 30th that whether Grievant collected the birthday kiss was up to (S). (Arb. Ex. 2, p. 58) On October 2, Grievant picked (S) up at the store; they went for a short drive, evidently parked in a parking lot on the way back to the store and a kiss at that point occurred. Grievant testified that (S) gave him a brief kiss; (S) states a kiss took place, implying it was more mutual than just one way as described by Grievant. (Arb. Ex. 1 L and Arb. Tr. pp. 50-51) The record supports that a kiss took place and for reasons that I will discuss with the next contact on October 4th, I am inclined to believe the kiss was mutual and more than the kiss described by Grievant in his testimony.

4/ It should be noted that unless stated otherwise all communications are by e-mail and all are in Exhibit 2 of the Arbitration record and will be referred to by the page number of the exhibit.

October 4,1998 incident:

During this time period, Fall of 1998, the Grievant was directing a youth orchestra, one of the three in the Green Bay Area Youth Symphony. (S) was playing in one of these orchestras, but not the one the Grievant directed. The rehearsals took place on Sunday afternoon and Grievant and (S) saw each other there on a regular basis, though the October 4 incident was the only one in the record where the two were alone. The practices took place at DePere High School. On October 4th the Grievant and (S) went upstairs together during a rehearsal break. At this point, the stories of the Grievant and (S) differ substantially. (S) testified at the hearing before the Board that Grievant kissed her and grabbed her buttocks. (Brd. Tr. pp. 182-184). The Grievant testified at the arbitration hearing that no kiss or any physical contact occurred. (Arb. Tr. p. 291) Grievant also testified that the two argued when Grievant told (S) that he did not want a physical relationship and that (S) threatened to go "Monica" on him. (Arb. Tr. pp. 291, 342)

On the same day as this incident at 9:00 p.m., (S) sent the Grievant an e-mail in which she mentions nothing about kissing at the rehearsal but merely apologizes for not saying

goodbye and thanks Grievant for helping her with her lines. (Arb. Ex. 2, p. 62) Then the next day on October 5th, (S) sent Grievant an e-mail stating that they shouldn't have done what they did upstairs at the rehearsal and that she is afraid that her boyfriend doesn't believe her that

they were just going over her lines for a musical. The Grievant responds with a long e-mail in which he directs (S) to cover up what happened, though it is interesting that neither Grievant or (S) specifically refer to what they were covering up, what exactly happened or specifically where it happened. (Arb. Ex 2, pp.64-66) In the District's view, the Grievant manipulates (S) by telling her how to cover the incident up and that if (S) comes forward that Grievant will make sure no one believes her. Grievant also states in this e-mail that if anyone finds out that it could cost him his job. (Arb. Ex. 2, pp. 64-66)

An e-mail that neither party cited in their post hearing briefs makes the District's argument that kissing and fondling took place on October 4 at DePere High School less sure in my mind. On October 6, (S) wrote Grievant a long e-mail which states that (S) does not want to break off the relationship with Grievant and references a "fight" on October 4 with Grievant and also mentions that she doesn't feel guilty to her boyfriend because ". . . I was just giving a friend a well deserved birthday present." (Arb. Ex. 2 p. 67) This e-mail would seem to substantiate Grievant's testimony that rather than physical contact on October 4th, there was an argument over further contact between them, and they were glad they didn't go any further with the kiss in the Grievant's car on October 2nd. This theory would support the District's position that what happened on October 2nd was more than a brief kiss and disprove Grievant's testimony about the October 2nd incident. I cannot deal in the speculation by the District as to what more logically would have been written in the ensuing e-mails if Grievant had told the truth. If Grievant and (S) had acted logically, I would not be writing this decision. I therefore do not find the evidence strong enough to make a finding that physical contact occurred at DePere High School on October 4,1998.

The October 11, 1998 incident:

The parties agree that the Grievant and (S) met at Grievant's home on this date ostensibly for Grievant to help (S) with her vocal music for *South Pacific,* the musical in which (S) was playing the lead role. Grievant claims that they did in fact practice (S)'s music and the only physical contact was a brief hug that Grievant permitted (S) to give him after he refused to allow her to give him a kiss. (Arb. Tr. pp. 84 and 305) In the run up to this meeting, (S) in several e-mails to Grievant refers to getting a massage from Grievant at his home. (Arb. Ex 2, pp. 74-77). Although (S)'s testimony before the Board and its hearing was confused as to dates and what happened she did testify at both hearings that at his home Grievant kissed her and rubbed her breasts though not against her will. (Brd. Tr. pps. 152-153, Arb. Tr p. 176) (S) then in two e-mails on October 11 and 12 thanked Grievant for the nice time at his home and asked if Grievant is okay with what happened at his home on October 11th. (Arb. Ex. 2, pp. 79 and 80).

Again, one could reasonably accept the position of either party on this meeting at Grievant's home. If I consider the amount of evidence, testimony and e-mails, then the story

of (S) is more persuasive and given the evident contact on October 2, I am more inclined to accept the version of (S) in this case even though (S) again in her follow up e-mails does not refer to what happened at Grievant's house that was a "good time"; it would not be unreasonable to also accept that the good time was as Grievant described it, voice lessons and companionship, which (S) craved in her e-mails.

The November 1, 1998 incident:

The fourth physical one-on-one contact alleged is the forced oral sex at Grievant's home on November 1, 1998. I note here that the Grievant and (S) were scheduled to meet at either Grievant's home or at (S)'s home on October 18, 1998; both Grievant and (S) testified and the parties agree that because Grievant was ill this meeting never took place.

The lead up to this alleged meeting involves some of the more erotic e-mails which the District argues are grounds enough for me to uphold a just cause discharge. In late October, 1998, (S) in her e-mails was asking the Grievant to perform a full body massage on her. (S) also describes a sexual dream involving Grievant in graphic detail and by e-mail relates that dream to Grievant. (Arb. Ex. 21, pp. 2-3 and Arb Ex. 2, p. 105 on 10/25/98) Grievant responded in kind and discusses the underwear of (S). (Ex.2, p. 109 on 10/26/98). Grievant does say in this e-mail that if they do get together there can be no physical contact.

(S) testified at both hearings that she went to Grievant's home on November 1, 1998 and that Grievant forced her to perform oral sex on Grievant. (Brd. Tr. pp. 78-80, Ex. 1.L and Z) Grievant denies that he committed this act and denies that (S) was even at his home on November 1st. (Arb. Tr. pp. 145-146, 315) Grievant submitted his personal calendar that shows that he crossed off the meeting with (S) and submitted a telephone company log that shows he called (S) at her home in late morning on November 1st and by his version cancelled the meeting; Grievant testified that he went to a friend's home that afternoon to watch a football game. (Arb. Ex. 3, 6 and Arb. Tr. p. 315) The District counters that (S) is more likely to be telling the truth. (S) testified that within two or three days after the incident she wrote her mother a letter, which she never intended to give her mother, to apologize for what had happened. (Brd. Tr. p. 77, Arb. Ex. 1.I and G.) This letter is undated and was never shown until the Board hearing. The Union counters that the day after the alleged incident on November 1st, (S) sent Grievant an e-mail wherein (S) talks about what happened at school that day, Monday, November 2, 1998, asks if the two of them can continue flirting and asks if they can get together sometime. (Arb. Ex. 25) Grievant responds indicating that he would still like to see (S). (Arb. Ex. 2, p. 114.) The Union argues that nowhere in these e-mails directly after the November 1 alleged incident is there any mention that the two got together at all on

November 1st or that if they did there was any physical contact. The Union submits this is clear evidence that Grievant's story is the one to be believed.

The incident as described by (S) is undisputedly a crime under Wisconsin Statutes and the Union through its Business Representative agreed that if this incident, forced oral sex, occurred it would be just cause for Grievant's discharge. (Brd. Tr. pps. 616-620) This allegation by (S) which was the last happening that she related to anyone in an official capacity (January 27, 1999 to the Green Bay Police) (Arb. Ex. 1.Z) led to Grievant being charged by the Brown County District Attorney with a crime. The charges were filed at about the time of the Board hearing in late March of 1999. This charges were tried, as noted above, in a five day criminal trial and a twelve person jury found Grievant innocent of all criminal charges.

There are three issues related to the alleged November 1, 1998 act: one, did it happen, two, what is the District's burden of proof and three, to what extent am I bound to follow the decision of the jury in criminal court. It is clear under applicable arbitration case law that I am not bound to follow the decision of the jury, no more than if the jury had found the Grievant guilty. 5/ Treatises have been written by arbitrators on what burden of proof should be used in a case like this where a criminal offense involving moral turpitude is present. Is the burden beyond a reasonable doubt or because this is an employment matter is the burden clear and convincing. Most arbitrators would agree the burden is more than preponderance of the evidence. 6/

5/ The Arbitrator is of the view that an arbitration proceeding is in many respects a proceeding de novo; the decision and award in each case must be made on the basis of the evidence submitted during the course of the hearing and subject to its own applicable standards. The majority of arbitrators share that view, and recognize their unique and individual responsibilities as creatures of the contract to review and ascertain the facts of the matter, independently and on their own. Thus, as the Elkouris have stated:

> ***The mere fact that an employee has been acquitted of criminal charges based upon the incident for which management has assessed discipline likewise does not preclude an arbitrator from upholding management's actions where adequate evidence is presented to convince him of the employee's guilt or misconduct.***
>
> ***Elkouri and Elkouri, How Arbitration Works (3d Ed. 1973), pp. 637, 638.***

INDIANA BELL TELEPHONE COMPANY, INC., 93 LA 981, 986 (GOLDSTEIN, 1989).

6/ Common Law of the Workplace, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, BNA (1998) p. 178 section 6.10 MICHIGAN STATE POLICE, 87 LA 59, 66-67 (BORLAND, 1985)

I find under either of the higher burdens the District has not proved that (S) met at

Grievant's home and was forced to perform oral sex on Grievant. The two protagonists totally disagree. The e-mails are inconclusive. Although Grievant and (S) were carrying on an erotic exchange of e-mails before this event, they had been doing this for months prior to November 1st. Their description of a sexual encounter between a man and a woman that led to

(S)'s sexual dreams about Grievant and Grievant's responding to them do not support a determination that the events described by (S) happened. (S)'s alleged description of the event in an undelivered letter to her mother is weakened by the subsequent e-mails that the two had between each other; further, the letter was undated. Certainly the dearth of e-mails after November 1st might suggest something had happened, but one has to make a supposition, the same as one has to make a supposition that (S)'s continued desire to see and be in contact with Grievant was merely to cover up a "gross" event. The Grievant and (S) may have been together and something as described by (S) may have happened, but I cannot uphold a discharge of the Grievant on the evidence before me of the November 1st incident; it fairly stated is just too inconclusive.

The District argues that the two contacts I have found did occur even without the November incident, and the e-mails are grounds for discharge under the labor agreement. I have said earlier that I did not intend to discuss in detail the approximate 160 e-mails between the Grievant and (S). The e-mails are in the record before me which again also includes the complete record of the hearing before the School Board of the District. I have in footnote 3 cited examples of the sexual nature of the e-mails and the attempt at manipulation and cover-up by the Grievant. I believe even though a highly intelligent 17 year old female student, who was not at risk, as described in the treatises cited by the District was a willing participant, the relationship was improper and not one that should be expected from a person in the teaching profession. However, I must consider the facts of this case under the language of the labor agreement. My personal beliefs and opinions cannot ignore the language of the labor agreement that the parties have agreed govern their relationship. Given my findings above I must determine whether there was just cause to discharge the Grievant given the "privacy" language of the Labor Agreement.

Arbitration case law has referred to the issue before me as to whether there was a nexus between the employee's off duty conduct and the job. To find a nexus various criteria have been considered. In addition and critically in this case, the nexus issues must be considered under the contract language in the agreement before me that states as follows:

ARTICLE XIX
TEACHER RIGHTS AND RESPONSIBILITIES

. . .

C. The private life of a teacher is not within the appropriate concern or attention of the Board except as it may directly prevent the teacher from properly performing his/her assigned functions during the workday.

There is no lack of arbitration case law concerned with a nexus or connection between the off-duty conduct of an employe and his on-duty responsibilities. Most of these cases,

including those cases cited to me by the parties, do not contain the "privacy" clause that is present in Article XIX. As cited by the parties, arbitrators have used various criteria to discuss nexus.

> . . . There must be a nexus, a connection between the off-duty conduct of the Grievant and his on-duty responsibilities. That connection must be tangible. Mere assertion by the Employer that a connection exists does not make it so. JACKSON TOWNSHIP, 112 LA 811, 812 (GRAHAM, 1999).

> While it is true that the Employer does not by virtue of the employment relationship become a guardian of the employes' every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer's business, the employer has the right to terminate the relationship if the employe's wrongful actions injuriously affect the business.
>
> The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its merits. CITY OF NEW HOPE, 89 LA 427, 430 (BARD, 1987), citing INLAND CONTAINER CORP., 28 LA 312, 314 (FERGUSON, 1957).

> Employers have no general authority to punish employes for off-duty misconduct, even illegal misconduct. To the contrary, they may discipline employes only when the misconduct has some significant effect on the employer. The "nexus" requirement is often satisfied by a showing of adverse publicity but here the press failed to mention the Grievant's job. In other cases firm evidence that the employee would not be able to work with his former co-workers will satisfy the nexus requirement.
>
> Management's final argument is that nexus may be presumed in cases of "egregious" off-duty misconduct. Presumptions of nexus all too easily swallow up the general rule: An employer will automatically assume some harm from every employes' breach of the law, even if the public is unaware or unconcerned. For that reason presumptions should be used only in the clearest

of cases; in all others the employers must supply some credible evidence of a connection between the offense and the job. U.S. POSTAL SERVICE, 89 LA, 495, 500 (NOLAN, 1987).

In two cases where there was a privacy clause, discipline was upheld but the arbitrators did not discuss the privacy clauses. 7/

7/ In SCHOOL BOARD OF ORANGE COUNTY there was a privacy clause similar to the privacy clause before me but the arbitrator totally ignored the clause in his decision and never even mentioned it finding that careless off-duty driving related to an employe who drives a school bus. SCHOOL BOARD OF ORANGE COUNTY, 108 LA 216 (THORNELL, 1997). In BYRON CENTER PUBLIC SCHOOLS, the arbitrator did not have to consider the privacy clause because the employe teacher was disciplined for insubordination for acts occurring in the classroom not for his homosexual lifestyle which would have been the only thing that could have related to the privacy clause. BYRON CENTER PUBLIC SCHOOLS, 112 LA 140 (SUGERMAN, 1998).

In CITY OF TORONTO, a privacy clause stated that a police officer could not be disciplined for off-duty conduct except for commission of serious crimes. The act committed by the officer was not a crime so the discharge of the officer was not upheld. CITY OF TORONTO (OHIO), 102 LA 645 (DUFF, 1994). In MUSKEGON HEIGHTS POLICE the arbitrator did not find any nexus and there was not a privacy clause present. Citing an arbitration law journal five test article the arbitrator found that the criminal charges were dismissed, the employe did not use his status as a police officer in any manner, there was no evidence that the officer was prone to the behavior and the evidence showed that the officer could still function as an officer. Therefore, the arbitrator found no connection between the officer's off-duty behavior and his on-duty job. CITY OF MUSKEGON HEIGHTS POLICE DEPARTMENT, 88 LA 675, 678-679 (GIROLAMO, 1987).

A school district held that discharge was too severe for non-sexual touching of students. INDEPENDENT SCHOOL DISTRICT NO. 225, 102 LA 993 (DALEY, 1994). A school district had no cause to discharge a male teacher with a 20-year clear record on the basis of how adolescent female students perceived his words or action. DISTRICT OF COLUMBIA PUBLIC SCHOOLS, 105 LA 1037 (JOHNSON, 1995). Allegations of sexual assault by a male teacher of a female minor in another state warranted investigation where there was a nexus between the conduct and the teacher's job. MADISON METROPOLITAN SCHOOL DISTRICT, 106 LA 852 (DICHTER, 1996). I do not view this last case, which involved the Madison, Wisconsin School District, to be inapposite to the situation before me. Clearly, when (S) filed charges with the Green Bay Police on January 27, 1999, that Grievant had sexually assaulted her on November 1, 1998, the District had to take some action because neither party in this hearing argued that sexual assault did not have any nexus to Grievant's teaching position with the Green Bay School

District.

In this case, the Board of the District conducted an investigation and held a three-day hearing where Grievant was given the opportunity to present witnesses, testify and offer what

ever evidence the Grievant wished to in defense of the allegations made against him by (S) and to the e-mail communications between (S) and Grievant as of record as of the time of the Board hearing. I do not sit in judgment whether the Board should have suspended Grievant until it had the results of the criminal trial; it is obvious the Board felt it had just cause based on their investigation and the results of the three-day Board hearing.

It is clear in this case that nexus between Grievant's off-duty conduct and his on-duty teaching position must be found not only under the arbitral standards discussed above but as determined by Article XIX, Subsection C of the parties' labor agreement. It must be determined whether Grievant's actions prevented the Grievant from properly performing his assigned functions during the work day and whether Grievant's actions "may prevent" Grievant's ability to be a teacher within the District in the future.

I find in this case that for the period of relationship between the Grievant and (S) from May 11, 1998 to the last e-mail contact in January 10, 1999, the relationship had no effect on Grievant's assigned teaching duties and did not adversely affect anything Grievant did for the District or the Green Bay Community. Such finding is supported by the evidence including testimony from District administrators. (Bd. Tr. p. 404, Arb. Tr. pp. 231-232) I further do not accept the District argument that (S) was a student of Grievant in the context of the labor agreement between the parties or under the parties' policies regarding sexual harassment and guidelines for avoiding improper contact with students. (Arb. Ex. A and Arb. Ex. 1N, O, P) I do not believe it merits further analysis of that issue as to do so I believe ignores the aforementioned documents. I interpret those documents to not say any student but a student within the District; the District has not proved to my satisfaction that any other understanding was intended.

Therefore, the District must prove that the Grievant's off duty conduct makes the Grievant unfit to teach in the District in the future. The District makes two strong arguments that Grievant's conduct was immoral and that Grievant can no longer be a role model for his students, thus providing the nexus discussed above between Grievant's relationship with (S) and his teaching duties.

Two United States Supreme Court cases have been cited which discuss the role model theory. The first of these cases involved a teacher in Pennsylvania who refused to answer questions asked by his Superintendent relating to Communist party affiliation and activities after being warned that the inquiry related to his fitness to be a teacher and that refusal to answer might lead to his dismissal. Citing ADLER V. BOARD OF EDUCATION, 342 U.S. 485, 493 (1952), the Court stated:

> A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the

> school authorities have the right and the duty to screen the officials, teachers, and employes as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted.

The Court went on to say that "we find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness." The Court ultimately in a split decision upheld the dismissal of the teacher for a violation of the Pennsylvania Public School Code on the ground of "incompetency" evidenced by the teacher's refusal of his Superintendent's request to confirm or refute information as to the teacher's loyalty. BEILAN V. BOARD OF EDUCATION, 357 U.S. 399, 405-406 (1958). In another United States Supreme Court case, relied on by the District, the Court in determining whether a New York statute could forbid permanent certification as a public school teacher to any person not a citizen of the United States stated:

> Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.
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> AMBACH V. NORWICK 441 U.S. 68, 79 (1979).

The District draws support from two arbitration cases, SHAWANO-GRESHAM SCHOOL DISTRICT and MELROSE-MINDORO SCHOOL DISTRICT in which Arbitrators Yaeger and Crowley upheld discharges based significantly on their acceptance of the role model standard. Arbitrator Yaeger rejected the Union's argument in SHAWANO-GRESHAM SCHOOL DISTRICT that the Wisconsin Court of Appeals has held that a "role model" standard based upon community standards is inherently inconsistent and cannot be used to establish the required nexus between immoral conduct and the health, welfare, safety or education of any pupil. Yaeger stated that in his case the "role model" standard is being applied locally not state-wide as in the Court of Appeals decision and consistent with Shawano-Mindoro District's own standards seen through the eyes of their elected officials. Arbitrator Yaeger held "It does not have to be consistent with another school district's 'role model' standards. Weasler is under

contract to Shawano-Gresham School District and must adhere to that District's rules and policies. Merely, because this District has different 'role model' standards than other Districts does not make them unenforceable." 8/

8/ In Arbitrator Yaeger's SHAWANO-GRESHAM SCHOOL DISTRICT case the teacher's discharge was upheld for the teacher's illegal activity in allowing his son to grow marijuana plants at his home. SHAWANO-GRESHAM SCHOOL DISTRICT, WERC CASE 19, NO. 53417, MA-9349. In MELROSE-MINDORO SCHOOL DISTRICT, Arbitrator Crowley citing Arbitrator Yaeger's comments in SHAWANO-GRESHAM upheld the discharge for a teacher who was charged for possession of marijuana, cocaine and his admission that he had used both. Arbitrator Crowley in his decision held "Certain offenses carry with them a stigma that others do not and those with a stigma may directly effect the work of a teacher. With regard to drug-related offenses, whether on or off school property, they have developed such a stigma which does affect the District. Just as arbitrators determine whether just cause exists for discipline or discharge, they can determine whether or not a district properly applied the role model standard." MELROSE-MINDORO SCHOOL DISTRICT, WERC CASE 21, NO. 55238, MA-9942.

It should be noted that in both Arbitrator Yaeger's and Crowley's cases, the labor agreements did not have a "privacy clause." Further, it should be noted that in both of these cases the accused was found guilty of criminal conduct. In this case, I have found that the Grievant was not engaged in any criminal conduct which is also the finding of the criminal court jury. It is, I believe, much easier to find a violation of a role model standard when in fact criminal conduct is involved.

As cited by the parties and by Arbitrator Yaeger, the Court of Appeals for the State of Wisconsin held, in a teacher license revocation case involving Wisconsin Statute 118.19 and Department of Public Instruction Administrative Code Chapter II PI 3.04, that the Department could not use a role model standard in revoking the license of a teacher guilty of two homosexual acts. In that case, it was the first time the Department of Public Instruction had used a role model standard. The Court found that the teacher's offenses must be considered by the Department in the revocation hearing and not community reaction to those offenses. THOMPSON V. DPI, 197 WIS.2D 688, 700-701 (1995).

In discussing immoral conduct or moral turpitude, the California Supreme Court has held that immoral conduct means or indicates unfitness to teach but that the school district employer has no power over the private life of the teacher unless the private acts demonstrate unfitness to no longer enjoy the privileges of the profession. In other words, the Court held that private conduct is of concern to those who employ teachers only to the extent it mars him as a teacher. Moral turpitude or immoral conduct are terms too broad; it has to relate to unfitness to teach.

Thus an individual can be removed from the teaching profession only upon a

showing that his retention in the profession proposes a significant danger of harm to either students, school employes, or others who might be affected by his actions as a teacher.

Further quoting, the Court said:

Power of the State to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual to live his private life, apart from his job, as he deems fit. 9/

9/ MORRISON V. STATE BOARD OF EDUCATION, 461 PACIFIC 2D, 375, 389, 391 AND 394 (1969). The Court set forth the following "that unfitness may be determined by: (1) likelihood the conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) proximity or remoteness in time of conduct; (4) type of teaching certification held; (5) extenuating or aggravating circumstances; (6) Praiseworthiness or blameworthiness of motives resulting in conduct; (7) Likelihood of the recurrence of the questioned conduct; (8) extent to which discipline may inflict an adverse or chilling effect upon the constitutional rights of the teacher or other teachers. Page 391.

In another case, the Chicago Board of Education discharged a teacher for possession of marijuana because it was clearly illegal conduct. In that case the Illinois Supreme Court focused on the likelihood that the act may recur and considered whether the teacher's action was redeemable. The court found the action to be non-redeemable and that no warning to the teacher was required when criminal activity was involved. Therefore the Board of Education could not remedy the teacher's action with a warning. 10/

10/ CHICAGO BOARD OF EDUCATION V. PAYNE, 430 N.E. 2D 310, 316 (1981).

In BROWN COUNTY, Arbitrator Strycker upheld a thirty-day suspension where a social worker had a sexual relationship with his client when the client was 17. Arbitrator Strycker found it morally and professionally wrong in that particular case since the client viewed the Grievant as an authority figure. BROWN COUNTY, WERC CASE 533, NO. 51067, MA-8481 (STRYCKER, 1995). The Wisconsin Supreme Court has also discussed moral conduct in a case in which a teacher in the Milwaukee School District discussed sexual activity in class in a manner that the Court found exceeded the recognized bounds of propriety. The Court stated that ". . . a teacher exerts considerable influence in molding the social and moral outlook of his students by his own precept, deportment and example." The Court upheld the discharge of the

teacher by the Milwaukee Board of School Directors. STATE EX. REL. WASLEWSKI V. BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, 14 WIS.2D 243, 258 (1961). Lastly, in ELVIN V. CITY OF WATERVILLE the Maine Supreme Court upheld the discharge of a teacher who had sexual relations with a sixteen year old student in another district. 11/

11/ This case has some similarities with the case before me. The female 4th grade teacher pleaded to a criminal charge of sex abuse to a minor. The teacher knew before their relationship that the student had psychological problems which were aggravated by that relationship. However in my case there is no evidence of harm to (S) and while Grievant may have shown a lack of concern for (S)'s emotional welfare, I regard the lack of proven criminal conduct by Grievant to be a critical difference. However, I do agree that Grievant as did the teacher in ELVIN exercised poor judgement. There was not any discussion by the Maine Supreme Court of any contractual privacy clause. ELVIN V. CITY OF WATERVILLE, 573 A. 2D 381, 383 (ME., 1990).

It has to be noted in the cases discussed that in many of them the discharged teacher or employe was guilty of a criminal offense which is not true in this case. No one would probably define immoral conduct in violation of a role model standard to be limited to criminal conduct, but it makes discipline under a role model standard easier to substantiate. And it must be noted that in none of those cases was there any real attempt to define exactly what is a role model teacher.

Certainly a role model might be a teacher who is involved with student activities, mentoring students, saving at-risk students and a teacher who is involved with students in the community, as well as a teacher who attends student activities and participates without pay in the extra-curricular activities of students. That individual however might merely be an average classroom teacher as it relates to the subject he teaches. Then, there may be the teacher who is an excellent classroom subject teacher, but essentially goes home at the end of the day and is not involved with students at all beyond his classroom. That teacher, by a role model standard alone, might not be thought of as a role model and yet there may be parents and students who are more concerned about the teacher being an excellent classroom and subject teacher than being all those other things to students. It is clear in this case that Grievant was both as described by his principal at Southwest.

I do not discount the role model standard or the District's heavy emphasis on it, but I think it can be reasonably stated that as a society we have made too much of the role model standard for K-12 teachers. Teachers today are asked to be substitute parents, and social workers, and generally be all things for their students. The Green Bay District's role model standard was not explained or delineated. It was merely whatever the District thought it should be, and it was made easier because of the fact that criminal charges were involved.

As far as immoral conduct, no one, including the Union, disputes that forced oral sex

would be immoral and by definition would be a criminal act. Absent a finding of guilt by either this arbitrator or the criminal court jury of a criminal act, Grievant's conduct seems more to be improper and unprofessional, which I find it is, rather than some moral turpitude

violation. I also do not believe the actions of Grievant, reprehensible as they were, endangered the well being of (S) or any District student to meet the definition of immoral conduct. 12/

12/ PI 34.35(1)(c): "Immoral conduct" means conduct or behavior which is contrary to commonly accepted moral or ethical standards and endanger the health, welfare, safety or education of any pupil. PI 34.35 License Revocation, Department of Pubic Instruction, State of Wisconsin.

Having discussed the facts and the relevant case law in this matter, I now turn to determining whether there was just cause to terminate the Grievant's employment with the Green Bay Area School District.

This has been a troubling case. Absent the October 2nd and October 11th physical contacts that I have found probable though not conclusive as to the exact contact, this is a discharge case based on private communications between two people. These e-mail communications are similar to telephonic and letter communications. Again, I believe it can be stated that individuals would not put into words their thoughts and fantasies (evident in this case) if they had any idea that they would be made public. The e-mails in this case are not criminal acts nor are any statements made in them. They were made by a seventeen year old girl and twenty-nine year old man who clearly did not intend for them to be public. The e-mails and physical contacts are not criminal acts which are significantly present in the cases regarding the nexus between off-duty conduct and the employe's job. In reality the e-mails might never have come to light except for Grievant telling (S)'s mother in January of 1999 that he wished (S) would in essence leave him alone. Shortly thereafter, in an apparent case of get even by (S), (S) began to parcel out her string of charges and make public the first e-mails. The scenario is strikingly similar to a sexual harassment case when a charge is brought after one party to the relationship is jilted by the other.

I have cited above the accepted tests and criteria that arbitrators and the courts have used to determine whether nexus is present in this case. But the parties' labor agreement requires me to also determine whether a nexus is present under specific contract language.

Article XIX
Teacher rights and responsibilities

. . .

C. The private life of a teacher is not within the appropriate concern or attention of the Board except as it may directly prevent the teacher from properly performing his/her assigned functions during the workday.

Under this specific contract language and the applicable case law and the record in this case, I find that the District did not have just cause to discharge Grievant from his teaching position with the Green Bay Area School District.

There is no evidence in the record that Grievant's relationship with (S) prevented Grievant from properly performing his assigned duties for the District. To the contrary the evidence is clear from two District administrators that during the period in issue the Grievant performed in a superior manner as to his teaching and extra curricular activities on behalf of the District.

The contract language cited above (the privacy clause) uses the word "may" which allows the District to be "concerned" whether Grievant's relationship with (S) and the particulars thereof will or could affect his job performance in the future. I find that there is little evidence in the record that would support a decision that Grievant could not carry out his teaching and other responsibilities if he returned to his position at Southwest High School. No teachers testified that they would refuse to work with the Grievant. The Grievant at the Board hearing in March of 1999 that led to Grievant's termination was positively supported by students and their parents; the notoriety, if any, did not deter these individuals from their support. No evidence was presented that Grievant was, is or will be prone to this behavior in the future. It is clear he had his opportunities at Southwest but drew the line with Green Bay District students. Nor do I find any evidence in the record that Southwest and the District's reputation will be or was injured by this incident. A public school system like the District is in essence a monopoly and despite the District's speculation, there is no evidence that the District will lose students to other school districts if Grievant returns to his position. Perhaps fewer students will take music from Grievant and maybe some of Grievant's former colleagues will refuse to work with him, but that is speculation, not evidence of record, and I cannot end a teacher's professional career on speculation.

I am not unsympathetic to the concerns of the District or the position it was in when it began to learn of (S)'s charges in January of 1999 and began to read the e-mail correspondence. Once (S) made her charge of sexual assault to the Green Bay police on January 27, 1999, it was not arbitrary to remove the Grievant from the classroom even though the Grievant was not indicted until about the time of the Board hearing in March of 1999 and even though the criminal trial was not held for more than another year in May of 2000. The District had many options and chose discharge and the District's Board made the decision after a three day due process hearing at which, because of the pending criminal matter, the Grievant chose not to testify. I simply do not believe the record and the labor agreement language support discharge.

The District's main argument in this case and its most significant effort is to argue that the e-mails, which the District has consistently argued are grounds enough for discharge, demonstrate and prove that the Grievant can no longer be a role model and that Grievant was

unprofessional in his conduct with (S) which was also immoral. I agree that I consider Grievant's conduct unprofessional. As to Grievant's conduct being immoral, I do not believe the conduct was immoral within the DPI's own definition referenced above. Generally, immoral conduct has been found in the context of acts which are criminal which I have found not to be the case here. As to role model, I subscribe to the decision of the Court of Appeals in THOMPSON V. DPI that it is an "amorphous" word that cannot be defined whether as a statewide standard or by community. Clearly, as seen through the eyes of the District's administrators, Grievant would not be a role model. I just do not agree that on the evidence before me that a role model standard can justify the discharge of the Grievant when considered with the contract language which I am bound, as the parties have agreed, to follow and uphold. Further, by the District proceeding through its own hearing and an arbitration hearing in an attempt to discharge Grievant, the District cannot be accused of failing to prosecute sex abuse cases. The District should suffer no loss of creditability in its responsibility for protecting the welfare of its students.

I however do not completely discount the role model standard which to me means that at the least a teacher must exercise good judgement and in the case of a professional teacher exercising good judgement must be part of the job. What Grievant did was to have an improper and unprofessional relationship with a student in another school district which was wrong and by Grievant's own admission an exercise of poor judgement. Poor judgement "may directly prevent" Grievant's ability to teach and "perform his assigned functions" in the future. While I have not upheld discharge, I believe discipline is warranted under the well accepted theory that discipline should be used to correct behavior. I find that it is appropriate in this case to send Grievant a warning and put Grievant on notice that his behavior in this case was unacceptable and showed poor judgement. Discipline also provides a record in Grievant's personnel file that similar behavior in the future could lead to further discipline. Hopefully, this award will impress upon the Grievant, if the course of two administrative hearings and a criminal trial have not, the seriousness of his actions. Should the Grievant engage in similar conduct in the future, I believe the District will have a strong case that Grievant's lack of judgement does directly prevent his teaching of the District's students.

Based on the foregoing and the record as a whole I issue the following

AWARD

The District did not have just cause under the 1997-1999 collective bargaining

agreement to discharge the Grievant from his employment as a teacher with the District. The grievance is sustained.

REMEDY

The Grievant will within ten days of this decision be reinstated to the position with the District he held at the time of his suspension in March of 1999 and subsequent discharge April 1, 1999. The Grievant will be reinstated without backpay or benefits but will suffer no loss of seniority or accrued benefits.

Dated at Madison, Wisconsin this 1st day of September, 2000.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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