

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OREGON EDUCATION ASSOCIATION

and

**THE BOARD OF EDUCATION
OF THE OREGON SCHOOL DISTRICT**

Case 32
No. 57539
MA-10668

(Phyllis Foulkes Grievance)

Appearances:

Attorney Stephen Pieroni, Staff Counsel, and **Ms. Rebecca L. Ferber**, Legal Counsel, on behalf of the Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney James K. Ruhly** and **Attorney Douglas E. Witte**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Oregon, Wisconsin, on December 14 and 16, 1999; January 4 and January 7; February 8 and 24; March 13 and 14; and May 1 and May 2, 2000. There, the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed. The Association presented closing argument at the hearing and then filed a brief. The District filed a brief and reply brief which were received by October 19, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the District violate Article 1.05.04A of the contract when it instituted a second evaluation of grievant Phyllis Foulkes' performance in January, 1999, and, if so, what is the appropriate penalty?

BACKGROUND

Grievant Foulkes, a special education teacher, was hired at the beginning of the 1997-1998 school year and she therefore was a probationary employee for two years under the parties' collective bargaining agreement. She received a positive evaluation on January 14, 1998, covering part of her first year's work from former High School Principal Jacque Potter, who is now retired (Joint Exhibit 8).

For the next school year, Potter conducted four separate classroom observations before preparing a written evaluation on November 9, 1998, covering Foulke's work (Joint Exhibit 9). It contained eight categories marked with twos. All other categories were marked with ones. There were no threes. Potter that day discussed the evaluation with Foulkes and testified that she then never told Foulkes she was off probation; that Foulkes "didn't want any two's" in her evaluation and "wanted them all changed to one's"; and that Foulkes similarly did not want a Plan of Improvement, as suggested by Potter.

She also said that "I couldn't seem to work with her in a positive way"; that she subsequently prepared a "Goal Focus", which stated the same thing in a slightly different format than her original Plan for Improvement; and that a Plan for Improvement does not have anything to do with a renewal or non-renewal because it is only designed to help a teacher set goals over the next few months or years.

On cross-examination, Potter said that if nothing else happened after her November, 1998 evaluation, there would not have been any reason for her to recommend Foulkes' non-renewal. She also said that she felt frustrated when she met with Foulkes on November 9, 1998, and December 18, 1998, because Foulkes was "somewhat resistant" and "argumentative".

Potter said that she ultimately supported Foulkes' non-renewal because she felt it was "hopeless" and because Foulkes failed to work with subsequent administrators in following a Goal Plan and that she herself eventually offered to call her Plan for Improvement whatever Foulkes and the Association wanted to call it.

Potter was recalled to testify on February 24, 2000, at which time she said that Foulkes should have addressed her classroom when one of her students used the word “faggot” in the fall of 1998; that she in the spring of 1998 tried to convince Foulkes to speak to the student who swore at her after she hung up his phone in such a way that he could “save some face” in order to “acknowledge their feelings”; that Foulkes should not have sent two students to her office after a boy refused to stop carrying a girl in the hall; and that she similarly should not have sent a student to her office who had been drinking a can of pop in the hall. She also said that Foulkes erred in reporting that a former middle school student was involved with a gun incident, which is why she gave Foulkes a two on her November 9, 1998, evaluation relating to not following proper procedures.

High School Principal Robert Scott testified that he asked Assistant High School Principal Anita Koehler to serve as a facilitator between Foulkes and Potter after Potter told him in November, 1998, she was having difficulty communicating with Foulkes; that Foulkes filed a grievance on December 10, 1998 (Joint Exhibit 2), which protested Potter’s evaluation; that he discussed the grievance with Foulkes and an Association representative on January 6, 7, and 12, 1999; and that it was ultimately agreed that Potter’s initial Plan for Improvement would be called a Written Plan of Goal Focus. He also said that Potter at his direction prepared a detailed response (Joint Exhibit 15), to Foulkes’ request for greater specificity in Potter’s November 9, 1998, evaluation and that Foulkes thereafter wanted yet greater specificity.

Scott added that he first thought about a second evaluation on January 7, 1999, because “My goal to work through the grievance process was to be able to resolve these issues that would allow both Ms. Potter and Ms. Foulkes to get to the real essence. . .of taking some areas that she needed to work on and to improve and be able to do that.” He said that Foulkes at a January 12, 1999, meeting replied that she did not want a second evaluation; that he nevertheless ordered that one be conducted because “it’s important that both parties agree on the overall accuracy of the evaluation” to determine whether there was “an unwillingness to accept here or work on feedback”; and because he wanted to see if Foulkes exhibited a “pattern” of behavior similar to the behavior she allegedly exhibited at a January 5, 1999, IEP conference.

Scott denied ever telling Director of Special Education and Pupil Services Catherine Kooistra or Koehler to prepare a negative evaluation on Foulkes and stated that he expressly told them to be as “fair and equitable as possible.” He also denied that Foulkes’ grievance activity had anything to do with his decision to order a second evaluation and to subsequently recommend Foulkes’ non-renewal and he said his decision to non-renew her was based on Koehler and Kooistra’s joint recommendation.

On cross-examination, he acknowledged that Potter in January, 1999, was not recommending Foulke's non-renewal; that Foulkes never stated she was opposed to having Potter re-evaluate her again; that he then knew Kooistra had reservations about the way Foulkes conducted herself at IEP's involving students R.H. and D.B.; and that some of the District's other special education teachers reported positive things about Foulkes.

Recalled as a witness on May 2, 2000, Scott testified that another probationary employee was given a second evaluation after the first evaluation was disregarded pursuant to that teacher and the Association's request. He said that he turned down Foulkes' request that no second evaluation be conducted because he believed Potter's initial evaluation was "sharply disputed" by Foulkes; because Foulkes' rebuttal claimed "she performs a variety of skills that were not observed" in the first evaluation; and because he needed to "have information to make a personnel decision within the timelines" governing non-renewal. He said that no written response was ever made to Foulkes' written rebuttal because the contract does not require it; that he refused to agree to a formative evaluation because it would not be part of Foulkes' personnel file and thus could not be relied upon in determining whether Foulkes should be non-renewed; and that he did not agree to her request that there be one more evaluation covering one class per week for ten weeks because that would push the completion of such an evaluation past the non-renewal deadline.

On cross-examination, Scott said that resolution of Foulkes' initial grievance (Joint Exhibit 2), which was subsequently withdrawn, would not have resolved other disputed issues raised by Potter involving such issues as confidentiality and human relations. He added that Potter's evaluation "did not appear to me to be a solid evaluation to make a personnel decision. . .and a timeline to make a personnel decision, that's why I made the decision to go with the second." He said that it was not unreasonable for Foulkes to request that Potter provide her with specific examples of her alleged teaching deficiencies; that Foulkes' rebuttal to Potter's November 9, 1998, evaluation was not discussed in "our meetings"; that he never asked Potter whether she would have recommended Foulke's renewal based on her November 9, 1998, evaluation because he was focusing on "the performance issues"; and that Potter eventually agreed with Koehler and Kooistra's recommendation that Foulkes be non-renewed.

He stated that he was unsure whether the issue of changing the twos to ones and an administration response to Foulkes' rebuttal ever came up after January 7, 1999; that "contractually we did not have to provide specifics for a perceived need" to conduct another evaluation; and that he never told Foulkes about the concerns Kooistra had raised regarding a January 5, 1999, IEP meeting.

Asked why he ordered a second evaluation after Foulkes had told him she could live with Potter's evaluation, he replied:

I had the concern that given the conversations prior to that meeting where Phyllis said, "I can live with this evaluation," there had still been no agreement, consensus about the issues that pertain to Ms. Foulkes in human relations, her relationship with students that Ms. Potter agreed to. That was contested all the way along. I did not see that as all of a sudden, well, after this much contention, this much dispute that all of a sudden there is a second evaluation that would automatically go away. I had some concerns about that. So I still thought that no matter what, there's still that dispute about that evaluation, and I needed to – I thought it was more important to have a second evaluation that we could make the personnel decision.

On re-direct, he was asked whether he could have lived with Potter's November 9, 1998, evaluation as the basis for making a decision about Foulkes' renewal or non-renewal, to which he replied:

- A. That would have been a close call for me personally. Given the concerns that were raised about every point of the evaluation that was not a one, I had issues or concerns about Ms. Foulkes' ability to hear feedback, to attempt to understand it and to want to improve on those, so that would have been a very close call for me.

Assistant High School Principal Koehler met with Foulkes and Potter in November, 1999, after Scott had told her there was a "stalemate" between Foulkes and Potter relating to Potter's November 9, 1998, evaluation. Koehler testified that she unsuccessfully tried to work out the problems between Foulkes and Potter; that Foulkes' complaints relating to the evaluation changed over time; and that Foulkes "did not agree with Ms. Potter's assessment of her as a teacher and that there just seemed to be disagreement with that."

Koehler subsequently became Foulkes' primary evaluator in January, 1999, after Scott asked her to do so. She said that Scott wanted another evaluation because "he really didn't know what to think or what was going on"; that Foulkes told her she did not want another evaluation; that she and Kooistra nonetheless engaged in the evaluation process; that Foulkes rejected a request for a fourth classroom observation; and that she and Kooistra prepared an evaluation which recommended that Foulkes be non-renewed (Joint Exhibit 11). Asked whether Scott or District Superintendent Linda Barrows had "given you any direction as to what kind of a recommendation to make", she answered: "Absolutely not."

She said that while "the very last thing that personally I wanted to do in my first year at Oregon High School was to be part of a non-renewal. . .", she (and Kooistra) ultimately recommended Foulkes' non-renewal on February 15, 1999, when they met with her on that day. She said, "My perception was that she was not cooperative in the evaluation process";

that “She seemed resistant to our attempting to help”; and that “She would respond sometimes in a tone that was very angry toward us.”

On cross-examination, Koehler said that Foulkes asked her to observe an entire ten-session teaching unit that stretched out over ten weeks, which Koehler refused to do because it extended past the non-renewal deadline; that Potter refused to respond to Foulkes’ rebuttal to Potter’s original evaluation; that Potter specifically mentioned certain “teachable moments” which required Foulkes to address specific issues before moving on; that she did not look at Potter’s original evaluation before she, Koehler, conducted her own evaluation; that one of Foulkes’ primary strengths was her “ability and willingness to work. . .” with students because that demonstrated her “sincere warmth”; and that another strength centered on her “time commitment” to her job.

She added that much of Foulkes’ improvement noted in her second observation was “not sustained” by the time of her third observation; that she told Scott that Foulkes either “could not or would not want to improve. . .”; that Foulkes had exhibited “a bit of hostility and uncooperation. . .”; that Foulkes maintained that a Plan of Improvement could only be used when there were three’s in a teacher’s evaluation, which was incorrect; and that Potter eventually changed the Plan of Improvement to a “Goal Focus” pursuant to Foulkes’ request.

Koehler was recalled as a witness on March 14, 2000 and May 1, 2000, and testified that Foulkes did a “nice job during the IEP meeting” involving student R.H. She also said that Scott in early January, 1999, told her he wanted a second evaluation of Foulkes because he was unsure whether Potter or Foulkes were accurate regarding their views of Foulkes’ work and that she then suggested Kooistra should be a second evaluator. Koehler added that she and Kooistra on February 15, 1999, both decided that Foulkes should be non-renewed and that she believed Foulkes put up a “great deal of resistance” and that she “would not look at her own weaknesses and areas that she needed to improve. . .”

She said that Foulkes initially agreed to her request for a fourth classroom observation, but that Association Representative Jill Von Ohlen on the next day stated “they did not want us to come for another observation”, and that no additional observation was ever conducted. She also said that she did not initially know whether Scott would support her recommendation for Foulkes’ non-renewal.

Koehler added that Foulkes’ “actions and the words she was using indicated that she was not willing to improve”; that she evaluated Foulkes’ instructional skills even though Scott never asked her to do so; that no one ever told her that Foulkes had failed to meet the objectives in Potter’s Plan for Improvement; that whenever she met with Foulkes, her tones were “somewhat hostile”; that Von Ohlen told her Foulkes “was very angry and hurt”; and

that Foulkes gave no indication she agreed with Potter's criticisms relating to the nagging of students and confidentiality. She also said that Scott decided there would be no formative evaluation and that she recommended Foulke's non-renewal because: "she was not willing to look at her own weaknesses, nor was she willing to work with us to improve in any way."

She also said that Scott told her he "was not sure how much of the stalemate of the current evaluation process was due to Ms. Potter or how much of it was due to Ms. Foulkes, and that he wanted another opinion, he wanted a clean, fresh start to go in and evaluate again."

Director of Special Education and Pupil Services Kooistra testified that Scott in January, 1999, asked her to be Foulkes' secondary evaluator; that she did not read Potter's earlier evaluation of Foulkes until after she had prepared her own evaluation; that Foulkes opposed a second evaluation; that she and Koehler prepared separate evaluations of Foulkes and then combined them into one; that Foulkes during a math observation was "defensive" and "angry"; that there was improvement in her second observation of Foulkes' work; and that in the third observation, "we saw things kind of trickling off again." She added that Foulkes "emphatically denied us the opportunity to. . ." conduct a fourth classroom observation; that she recommended Foulkes' non-renewal; and that Scott did not influence her recommendation in any way.

On cross-examination, Kooistra said that she in January, 1999, had called Foulkes "Phil" in a meeting; that Foulkes told her she did not like to be called by that name; and that she, Kooistra, replied that she did not like being called by her last name - which is something that Foulkes apparently never did. Kooistra stated that the mother of one of Foulkes' pupils, D.B., had told her that Foulkes had really tried to work with her son; that Foulkes had treated D.B. "quite harshly" and had demeaned him at a January 5, 1999, IEP meeting; and that Foulkes had difficulty with student R.H. She also said that "Foulkes wasn't listening in the post-observation conferences. That's gravely concerning to me" and that she also was discouraged about what she saw in Foulke's classroom. On the plus side, Kooistra said that Foulkes is a "warm" and "caring individual" and that she did a "terrific job including the kids with severe cognitive disabilities in her class and demonstrating respect to them and modeling what inclusion should be."

She also said that Foulkes "has very weak instructional skills"; that she "absolutely" had not received any instructions from Scott as to what kind of conclusions to reach in her evaluation process; that when Foulkes' teaching deficiencies were noted in the evaluation process, Foulkes claimed that "someone or something" else was the problem; and that, "There were a lot of excuses."

Recalled as a witness, Kooistra testified that she was “upset” and “frustrated” at student D.B.’s January 5, 1999, IEP meeting because her integrity had been called into question and because so many adults were talking about D.B.. She added that D.B.’s mother telephoned her about a month later and that she “perceived the meeting as a disaster.”

On cross-examination, she said that Foulkes’ instruction skills were “quite lacking”; that “The difficulty was that she wouldn’t work with us”; and that “she was resistant and hostile was a very big factor in considering non-renewal.” She also stated that Potter never told her before the evaluation process whether Foulkes was a “strong or weak” teacher; that Foulkes “used a lot of body language and vocal tone that demonstrated sarcasm, hostility”; and that Foulkes was the most deficient teacher she had ever evaluated;

For her part, Foulkes testified that she did not disagree with any of Potter’s comments relating to her earlier January 14, 1998, evaluation which covered part of her first year’s teaching (Joint Exhibit 8), and that Potter then told her she was doing a good job. She explained the disciplinary actions she took against certain students who were necking in the hallway; who were eating where they should not have been eating; who used the term “faggot”; and who told her after she had hung up a telephone that the student should not have been using: “I can’t believe you fucking did that, you bitch, you fucking bitch.”

She said that Potter on November 9, 1998, told her she was off probation; that she did not learn until November 16, 1998, that she would have a Plan for Improvement; and that she and Potter discussed the Plan for Improvement on November 18, 1998, at which time Potter told her that she was bringing Koehler into the situation “because I was so deficient and I needed two administrators”. She added that the Plan for Improvement became an issue for her because she believed such plans only occur “When you have received three’s on your evaluation” and because she was “almost offended that I had two good evaluations and then they would go back now and put me on a Plan for Improvement.”

Foulkes prepared a detailed rebuttal to Potter’s comments (Joint Exhibit 10), and met with Potter, Koehler, and others regarding Potter’s November 9, 1998, evaluation. She stated that there was no discussion at a November 20, 1998, meeting over whether her two’s should be raised to one’s and that the question of whether a Plan for Improvement was needed was then discussed. She added that the administration never agreed to call its Plan of Improvement a Professional Growth Plan as she requested and that teacher Von Ohlen once had her numbers changed in her evaluation. Foulkes added: “I never had an issue with the two’s. My issue was with the Plan for Improvement”. She also said that she agreed at a January 6, 1999, meeting that the two’s would not be changed to one’s and that she on January 21, 1999, retracted her earlier acceptance of the Plan for Professional Growth (Goal Focus), that Potter had prepared because Potter had not changed its content which was identical to Potter’s initial Plan for Improvement.

Foulkes also testified that Scott refused her request for a formulative evaluation; that she by the end of January, 1999, did not trust Scott, Potter, Kooistra, and Koehler; and that she did not agree to a fourth evaluation because the administration “wasn’t willing to work with me” and because an educational assistant had been pulled out of her classroom. She said that she and Von Ohlen met with Scott, Kooistra, and Koehler on February 15, 1999, to discuss her second evaluation that had been prepared by Kooistra and Koehler (Joint Exhibit 11), and that Koehler told her “they were recommending me for non-renewal and that I could look at the evaluation tool and that I should return it tomorrow, signed” – and that she did so two days later. Foulkes gave detailed testimony in response to the criticisms contained in her second evaluation and answered, “Absolutely not” when asked if, as charged, she purposefully resisted administrative suggestions on how to improve her teaching skills.

On cross-examination, she said that she “Absolutely” agreed management believed she should handle disciplinary matters differently, but that she was “very frustrated because the administration was unwilling to have a dialogue regarding the incidents.” She acknowledged that her detailed rebuttal to Potter’s evaluation (Joint Exhibit 10), sought to have all eight of the two’s therein changed to one’s and that all comments under the two’s be deleted; that she on January 24, 1999, requested there be classroom observations spread out over ten weeks; that she knew her second evaluation had to be completed by February 15, 1999; and that she had a “communication clash” with Potter and Kooistra. She also said that the administration “Sometime in December after the rebuttal was submitted” offered to change the title of the Plan for Improvement to Goal Focus, which she still found objectionable because, “They didn’t change any of the information.”

Recalled as a witness on May 2, 2000, Foulkes testified that she never acted inappropriately when dealing with student R.H.; that she made a good faith effort to respond to Kooistra and Koehler’s post-observation comments; that she agreed there was a “trust issue” between her versus Kooistra and Koehler; and that she and Von Ohlen first brought to Potter’s attention a situation involving a student who had a gun violation outside of school.

District Superintendent Barrows testified the District had “never done a formative in place of a summative evaluation for a probationary teacher, no” because the “formative focuses in on just a narrow band and cannot become part of the personnel record.” She also said that the District in the past had used Plans for Improvement even if a teacher only had ones or twos and no threes and she identified four separate instances of where that had happened (District Exhibits 58-62).

Dan Hanson, the Association’s grievance chair, attended various meetings between Foulkes, Potter, and Koehler and testified about what was there discussed. He said that Foulkes did not really care if the two’s on her November, 1998 evaluation were changed to one’s, and that the “big issue” centered on whether she would be placed under a Plan of

Improvement – which Foulkes and the Association believed was reserved only for teachers who were deficient in their teaching. He also said that Potter did not properly respond to Foulkes' requests for greater specificity of Potter's comments.

On cross-examination, Hanson agreed that Foulkes did not accept the factual basis for the two's she had received under the Human Relations section of her evaluation and "all of the examples given by the administration." He also said that Foulkes continued to ask the District for a written rebuttal to her response to Potter's evaluation even after he had told Foulkes that the administration did not have to provide such a written rebuttal.

Special education teacher Cheryl Gulbrand testified on behalf of the Association. She said that she observed Foulkes teach and that Foulkes was a good teacher, one who is very committed. She also said that she attended the IEP meeting involving student D.B. and that Foulkes was not harsh with that student.

Special education teacher Melanie Neal, also called by the Association, testified that Foulkes handled herself properly at a November, 1998, IEP meeting involving student R.H. She also said that she often asked Foulkes advice regarding educational issues and that "Foulkes was the organizer of the department, really."

Special education teacher Kristine Gunderyon-Goetz testified on behalf of the Association that Foulkes is a very good teacher and stated that she took detailed notes at many of the meetings involving Foulkes' evaluation (Association Exhibits 1-11).

Special education teacher Barbara Bandt, who is now employed elsewhere, said that Foulkes as a newer teacher "fit in extremely well"; that she was the "organizer of the group" of other special education teachers; and that it was never difficult to work with her. Bandt testified about the notes she took at several meetings relating to Foulke's evaluation and said that she at the end of a February 1, 1999, meeting spoke to Kooistra and Koehler because, "I saw the meeting not going well" and because they may have perceived Foulkes as being "adversarial", but that in her perspective, "I saw her being very frustrated, in tears." She also said that Foulkes did not act inappropriately at the January 5, 1999, IEP meeting involving student D.B..

Special education teacher Ohlen, a member of the Association's grievance committee, testified about the extensive notes she took at various meetings. She told Koehler and Kooistra on February 2, 1999, that Foulkes did not want a fourth observation and that she was "a little suspicious from the very beginning" about Foulkes' second evaluation because the meetings weren't "a friendly atmosphere"; because the administrators failed to provide concrete examples of Foulkes' alleged teaching deficiencies; and because the administrators "were not

willing to go into the formative mode”, i.e., to conduct an informal evaluation that does not go into a teacher’s file.

Teacher Judy Spiwak testified about the notes she prepared at January 28, 1999 and February 11, 1999, meetings involving Foulkes.

POSITIONS OF THE PARTIES

The Association contends that the District subjected Foulkes to a second evaluation because she filed her December 10, 1998, and January 18, 1999, grievances, and that the District thereby violated Article 1.05.04A of the contract which prohibits the District from discriminating against any teachers who are involved in grievance activities. It thus claims that Scott “orchestrated” Foulkes’ non-renewal by imposing a second evaluation in the 1998-1999 school year and by selecting Kooistra and Koehler who “he knew would go along with the decision to non-renew the grievant”; that Foulkes completed her Plan for Improvement drawn up by Potter and that the District’s administrators therefore turned to the evaluation process itself to justify her non-renewal; that the administrators’ refusal to agree to a formative evaluation was evidence of their pre-fixed determination to non-renew her; and that Koehler and Kooistra’s testimony proves they “zealously pursued the grievant’s non-renewal in retaliation for her filing grievances.” The Association maintains that even if the District had valid, non-discriminatory reasons for non-renewing Foulkes, the District’s actions still were based, at least in part, in retaliation to Foulkes’ grievance activity – in violation of MUSKEGO-NORWAY CONSOLIDATED SCHOOLS JT. DISTRICT No. 9, v. WERB, 35 WIS. 2ND 540 (1967):

The Association also contends that the District’s conduct “strikes at the heart of its relationship with the Association” because the conduct “violated two sacrosanct principles that this Association has elected to defend at any cost.”, i.e., that the administration retaliated against Foulkes for exercising her right to utilize the parties’ grievance procedure, and that the administration engaged in a “gross abuse of its authority by manipulating the evaluation process in order to justify its retaliation against Foulkes.” The Association adds that “no District employee will be safe from this type of egregious behavior if the employer is not held accountable for its conduct.” As a remedy, the Association requests a traditional make-whole remedy which includes Foulkes’ reinstatement and a backpay award and a cease and desist order.

The District maintains that it properly terminated Foulkes “based upon the results of the contractually agreed-upon evaluation process”; that the Association has failed to prove that “the District is in violation of or compliance with the contractual evaluation procedures constitutes animus”; that the Association has failed to prove that Foulkes’ second evaluation was invalid; and that the Association has failed to prove “that any administration official was hostile to or bore animus towards Ms. Foulkes because she filed a grievance.” The District

also asserts that “Scott had valid concerns and a contractual decision to make which warranted a second evaluation” and that Scott’s “choice of evaluators for a second evaluation was logical.”

The District adds that “If the Association prevails here, then probationary periods will be materially weakened as a screening tool. . .” and that, “While this case only involves one teacher, it really is a challenge to the entire evaluation process used in Oregon and puts the “probationary period” to a severe test. The District thus asserts that the grievant’s “theory here is that by filing a grievance and really digging in, a teacher can paralyze a District into inaction. That position cannot prevail.”

DISCUSSION

A few preliminary points must be made about this matter.

The first involves the size of the voluminous record that was produced during ten days of hearing and which produced 2,442 pages of transcript. It is impossible to detail here every single factual dispute between the parties, just as it is impossible to go over every piece of testimony offered by the various witnesses at the hearing. It also is impossible to address every single contention made in the parties’ briefs. Hence, what follows are what I believe to be the most salient aspects of the case. This is not to suggest that the entire record has not been considered. It has.

Secondly, if the issue were before me, I would probably find that the District lacked just cause to terminate Foulkes, as the District failed to give Foulkes sufficient time to rectify all of the alleged deficiencies noted in her second evaluation which was given to her on February 15, 1999. The just cause standard, presupposes, after all, that employees will be given enough time to remedy alleged work deficiencies. By not giving Foulkes any time to improve – after Potter had given her a favorable evaluation on November 9, 1998, and after Potter had earlier given Foulkes a favorable evaluation for the 1997-1998 school year - this important standard was not met.

But thirdly, it is important to note that the just cause standard has no application to this situation. I nevertheless must mention just cause because Foulkes, as a probationary employee, was excluded from the just cause requirement. Hence, the District’s actions cannot be judged under the just cause standard, but rather, by the much narrower standard of whether, as alleged by the Association, the District retaliated against her in violation of Article 1.05.04(A) of the contract because she grieved Potter’s November 9, 1998, evaluation.

Moreover, since the issue here does not arise under the just cause standard, it is the Association, and not the District, that bears the burden of proving that the District's actions were driven by animus. Again, it is important to point this out because an employer under the just cause standard normally bears the burden of proving that it had just cause to discipline an employee. That is not true here.

This case, therefore, stands or falls entirely on whether the Association has proven that the District's actions were driven by such animus. If the Association can prove such animus, the grievance will be sustained; if it does not, the grievance must be denied. Moreover, if such animus is proven, it is immaterial whether the District had other, non-discriminatory grounds to terminate Foulkes since any such "mixed motive" is still prohibited. See *MUSKEGO-NORWAY, SUPRA*.

Both parties recognize that much of this case turns on credibility and whether their own witnesses should be credited or discredited. That is why both parties have spent so much time defending the credibility of their own witnesses and attacking the credibility of the other side's witnesses. It is impossible to here address every single such testimonial conflict. Hence, what follows is what I consider to be the key credibility questions.

These credibility questions are particularly difficult because it was impossible at times for the key witnesses to precisely recall who said what; who did what; and why they did what they did in the events leading up to Foulkes' termination. That is why some witnesses gave testimony that was either wrong, incomplete and/or very difficult to recall. That does not necessarily mean they lied. It only means they had difficulty in trying to remember all of the daily minutiae that exists in an educational setting.

The essence of this case therefore boils down to whether High School Principal Scott, Assistant High School Principal Koehler, and Director of Special Education and Pupil Services Kooistra should be credited when they all testified that the decision to first reevaluate Foulkes (Scott's decision), and to later recommend her termination (their joint decision), were not based on her grievance activity.

On this issue, there is no evidence that they – or anyone else on the District's behalf for that matter - ever expressed any direct animus towards Foulkes' grievance activity or any other union activity. Hence, the Association's case rests on the theory that such animus can be inferred because the totality of the record shows that their professed reasons for treating Foulkes the way they did are untrue, and that their untrue, professed reasons have been concocted to cover up their true motivation, i.e., to get even with Foulkes because of her concerted, protected activities relating to the filing of her grievances.

In this connection, the record establishes that Foulkes probably would have been retained as a teacher if she did not file her grievance. Thus, Potter acknowledged that her initial November 9, 1998, evaluation of Foulkes' work was generally favorable and that she would have recommended Foulkes' rehire if there were no additional evaluations for the rest of the 1998-1999 school year.

This fact is very important because it shows that Potter in November, 1998, believed that Foulkes was a good teacher – just as she earlier believed Foulkes was a good teacher when she evaluated Foulkes in the prior school year. Her prior actions therefore call into question the validity of the subsequent February 15, 1999 evaluation prepared by Koehler and Kooistra which found Foulkes to be unqualified to teach any longer. Indeed, Kooistra testified that Foulkes was the single most unqualified teacher she had ever evaluated. Inasmuch as Potter's prior two evaluations of Foulkes' work (Joint Exhibits 8 and 9), concluded that Foulkes *was* a good teacher, it is difficult to accept Kooistra's assessment – particularly when it is matched up with the testimony of teachers Gulbrand, Neal, Gundryon-Goetz, and Bandt who all testified that Foulkes is a good teacher.

It likewise is difficult to accept at face value many of the criticisms levied against Foulkes, as the record establishes that she did *not* act inappropriately when she disciplined students who were necking in the hallway, who were eating where they should not have been eating, who used the term "faggot", and who told her: "I can't believe you fucking did that, you bitch, you fucking bitch." Indeed, it seems odd that Potter would tell Foulkes that she was required to speak to the latter student so that he could "save some face" in order to "acknowledge their feelings."

I also find that Foulkes acted professionally in her dealings at the January 5, 1999, IEP meeting involving student D.B.; that Kooistra's criticisms of Foulkes at that meeting were unwarranted; that Foulkes acted appropriately in bringing the gun incident to Potter's attention; and that Foulkes did the best she could do with student R.H. Indeed, the record shows that many of the criticisms levied against Foulkes were overblown and/or without merit. That is why, again, her termination probably would be overturned if she were covered by the just cause standard.

This sequence of events in many circumstances would lead to a finding that the employer's decision to terminate someone must have been based on some intervening event - such as filing a grievance or some other concerted, protected activity. That, of course, would be improper under MUSKEGO-NORWAY, SUPRA.

Here, though, there was an intervening event which could have caused such a dramatic change in the District's own evaluations. That was Foulkes' response to Potter's initial November 9, 1998, evaluation and her subsequent response to the District's efforts to conduct a second evaluation and to conduct further classroom observations of her work.

For, it is clear that: (1), Potter in November, 1998, was genuinely concerned over Foulke's response to her November 9, 1998, evaluation; (2), Potter then brought the matter to Scott's attention because she was frustrated in dealing with Foulkes; and (3), Scott then assigned Koehler to work with Potter and Foulkes in an attempt to bridge their differences. All of this occurred before Foulkes filed any grievance, thereby proving that it was totally unrelated to her grievance activity.

The Association contends that this version of events was "concocted" by Potter to cover up the subsequent efforts to terminate Foulkes because of her grievance activity. This "concoction" theory, though, is rebutted by Foulkes' own admission that she met with Potter and Koehler in November, 1998, before she filed any grievances, and that Potter then told her Koehler was being brought in "because I was so deficient and I needed two administrators." That being so, I credit Potter and Koehler's testimony that they then were concerned about Foulkes' response to her November 9, 1998, evaluation and that Scott also shared that concern since he assigned Koehler to work with Potter and Foulkes at that time.

Foulkes' subsequent actions reinforced the administration's perception that she was refusing to acknowledge that any of Potter's substantive criticisms were warranted and that Foulkes had to improve in certain areas. Thus, Foulkes insisted that the District could not issue her a Plan for Improvement because she did not have any threes in her evaluation. She made that assertion even though there is no contractual support for it and even though Superintendent Barrows testified without contradiction that the District on about four occasions had issued Plans for Improvement to teachers who did not receive any threes. (District Exhibits 58-62) Moreover, while Foulkes claimed that she only was concerned with the title "Plan for Improvement" in Potter's evaluation, she, in fact, wanted Potter's adverse comments therein deleted after the District had agreed to use another title. Foulkes similarly wanted the twos on her evaluation changed to ones before she dropped that demand in January of 1999. She also insisted that the administration had to reply in writing to her rebuttal of Potter's evaluation even though the contract contains no such requirement.

Foulkes certainly was entitled to challenge her evaluation, as the record shows that many of the criticisms levied against her were unfounded. However, it also is true that she herself contributed to the deadlock over the evaluation process by repeatedly making demands that were without merit and by questioning almost all of the criticisms levied against her. Indeed, Association representative Hanson himself admitted that Foulkes did not accept the factual basis for the twos she had received under Human Relations.

All this led Potter to testify that she "couldn't seem to work with [Foulkes] in a positive way"; that "it was hopeless" to do so; and that Foulkes became "somewhat resistant and argumentative."

Koehler testified that Foulkes “did not agree with Ms. Potter’s assessment of her as a teacher and that there just seemed to be disagreement with that.” Koehler added that “My perception was that she was not cooperative in the evaluation process”; that “She seemed resistant to our attempting to help”; that, “She would respond sometimes in a tone that was very angry toward us”; that she exhibited “a bit of hostility and uncooperation”; that she put up a “great deal of resistance”; and that she “would not look at her own weaknesses and areas that she needed to improve. . .”

Kooistra testified that Foulkes was “defensive and angry”; that being “resistant and hostile was a very big factor in considering non-renewal”; that Foulkes “used a lot of body language and vocal tone that demonstrated sarcasm, hostility”; and that “The difficulty was that she wouldn’t work with us.”

Special education teacher Bandt testified that she spoke to Koehler and Kooistra after a February 1, 1999, meeting because “I saw the meeting not going well” and because they may have perceived Foulkes as being “adversarial”. She said of Foulkes: “I saw her being very frustrated, in tears.” Special education teacher Ohlen told Koehler and Kooistra at about that time that Foulkes did not want a fourth observation in part because the meetings “weren’t a friendly atmosphere.”

Foulkes herself acknowledged that she had a “communication clash” with Potter and Kooistra and that there was a “trust issue” between her, Kooistra and Koehler.

This testimony points to one inescapable conclusion: the meetings between Foulkes and school administrators had become so poisonous that it became almost impossible for Foulkes to take administration criticisms to heart, just as it became almost impossible for school administrators to respond to Foulkes’ legitimate concerns over how she was being evaluated.

If Foulkes had not grieved her initial November 9, 1998, evaluation from Potter, none of this would have happened, because she probably would have been renewed. But, by filing her grievances by thereby challenging many of Potter’s comments, Foulkes set off the Law of Unintended Consequences which holds that the commission of one act generates a result that is totally unanticipated and/or directly counter to the result originally sought. Here, by questioning Potter’s original evaluation, Foulkes set off the chain of events which ultimately led Scott, Potter, Kooistra and Koehler to reasonably believe that Foulkes was unreceptive to criticisms over her teaching and that she would not improve once she was off probation. While this conclusion may have been wrong, it nevertheless was based on facts which supported that view.

Since the very purpose of a probationary period is to ascertain an employee's ability and their willingness to improve, I credit Scott's testimony that he ordered a second evaluation because he was genuinely concerned over what parts of Potter's original evaluation were valid after Foulkes herself had challenged so much of it. I also credit the combined testimony of Scott, Koehler and Kooistra who all testified that their decision to recommend Foulkes' non-renewal was not based in any way on Foulkes' grievance activity.

This is not to say that all of their criticisms of Foulkes were accurate. To the contrary, the record shows that some of these criticisms had no merit. But, that is a separate question of whether they reasonably believed in those criticisms and whether their joint decision to recommend her non-renewal was based on her grievance activity. Having examined this record closely, I conclude that the Association has failed to meet its burden of proving that animus played any role in their joint decision.

For contrary to the Association's claims, I find that Scott acted in good faith in: (1), not agreeing to a formative evaluation, as it could not be used in determining whether Foulkes should have been renewed; and (2), assigning Koehler and Kooistra to evaluate Foulkes, since Koehler was initially assigned in November, 1998, to work with Potter and Foulkes in an attempt to resolve their deficiencies and since Kooistra was in charge of special education.

I again want to point out, however, that I would not sustain her non-renewal under a just cause standard for the reasons stated above. In addition, it is important to note that Foulkes found herself in a no-win situation which resulted in greater and greater questioning of her teaching ability whenever she tried to answer criticisms levied against her. That is why Foulkes' commendable work performance was better reflected in Potter's earlier two evaluations, rather than the one prepared by Kooistra and Koehler on February 15, 1999.

The question before me, however, does not involve just cause. It, instead, turns on the separate question of whether the Association has met its burden of proving that animus played a role in the decision to subject Foulkes to a second evaluation and to then non-renew her. For the reasons set forth above, I find that that burden has not been met.

In light of the above, it is my

AWARD

1. That the District did not violate Article 1.05.04(A) of the contract when it instituted a second evaluation of grievant Phyllis Foulkes' performance in January, 1999, and when it subsequently non-renewed her.

2. That her grievance is therefore denied.

Dated at Madison, Wisconsin this 17th day of January, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

