

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

LAC DU FLAMBEAU SCHOOL DISTRICT

Case 23
No. 58971
MA-11139

Appearances:

For the Lac du Flambeau School District: **Attorney Steven C. Garbowitz**, O'Brien, Anderson, Burgy, Garbowitz & Brown, LLP, 221 1st Street, Eagle River, Wisconsin 54121-0639.

For the Northern Educational Support Team (NEST): **Mr. Eugene Degner**, P.O. Box 1400, Rhineland, WI 54501.

ARBITRATION AWARD

The Lac du Flambeau School District (hereinafter referred to as District or Employer) and Northern Educational Support Team (hereinafter referred to as NEST or Union) are parties to a collective bargaining agreement covering the years 1998-99 and 1999-2000. The agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On June 15, 2000, the Union filed with the Wisconsin Employment Relations Commission a request to appoint a WERC commissioner or staff member to arbitrate a grievance that had arisen between the parties. Commissioner A. Henry Hempe was appointed to hear and decide said dispute. A hearing was conducted on September 19, 2000 in Lac du Flambeau, Wisconsin. A transcript of the hearing was prepared. Each party filed an initial brief on November 10, 2000. By letter dated November 14 and received November 16, 2000, the District indicated that it did not intend to file a reply brief. By letter dated November 15, and received November 20, 2000, the Union indicated it did not intend to file a reply brief.

STATEMENT OF THE ISSUE

The parties do not agree on a statement of the issue.

The District suggests the issue be stated as follows: Did the School District of Lac du Flambeau have just cause to terminate Julienne Cross from her employment with the Lac du Flambeau School District?

NEST suggests the issue be stated as follows: Did the School District violate Julienne Cross's rights under the collective bargaining agreement, specifically the discipline procedure?

If so, what is the appropriate remedy?

I define the issue as follows: Did the Lac du Flambeau School District violate the just cause provision contained in Article XVI, B of the collective bargaining agreement between the parties when it terminated the employment of Julienne Cross as a Head Start Teacher Aide?

If so, what is the appropriate remedy?

FACTS OF THE CASE

On January 4, 1999, the grievant, Julienne Cross, transferred from her position as an *EEN Aide* in the Lac du Flambeau School District Head Start program to that of a Head Start *Teacher Aide*.

As an EEN Aide, Ms. Cross had had the principal responsibility of shadowing one EEN student and providing assistance to that student as needed. As a Teacher Aide, however, Ms. Cross had broadened responsibilities. Her new duties included assisting the teacher with daily routines in the classroom, attending to sanitation needs of equipment, informing the teacher of changes in behavior or concerns about students, and sundry clerical tasks.

Ms. Cross' job description as a Head Start Teacher Aide also listed the scope of her work relationships as including "dealing effectively with both pleasant and difficult staff, students, teachers, parents of students, and community situations."

On May 17, 1999, Head Start Acting Director (now Director) April Collins evaluated Ms. Cross' job performance as a Head Start *Teacher Aide*. Only a few weaknesses were noted; none were identified as being a critical performance deficiency. Overall, Ms. Cross

appeared to fare reasonably well on the evaluation form. 1/ That evaluation appears to be the only formal record of Ms. Cross's performance as a Head Start Teacher Aide.

1/ For instance, Section Two consisted of a Performance Rating. The Performance Rating listed eleven categorical inquiries (A – K), with three possible responses for the evaluator in each category: "Yes," "No," and "Needs Work." Ms. Cross received only two "Needs Work" responses from the evaluator; all of the other categories merited a "Yes" (i.e., satisfactory) response. Sections Three and Four identified strengths and weaknesses; and Section Four contained an "Individualized Self Improvement Plan. The "weaknesses" noted seem relatively minor for a beginning aide, e.g., "lack of experience in designing an appropriate program with costumes." Ms. Cross was also faulted for (not) "using time efficiently" and apparently needed improvement in "record keeping."

Other documents related to Ms. Cross' experience as a teacher's aide were also received into evidence. These documents included a New Employee Orientation Checklist, the job description for the Head Start Aide position in effect when Ms. Cross was hired, a new job description for the position dated April 5, 1999, and a copy of the Tribal Early/Head Start Code of Ethics. Each document had been signed or initialed by Ms. Cross.

As an aide, Ms. Cross was also subject to the CDA (Child Development Associate) Training Plan that required her to take certain classes to assist her in the effective performance of her responsibilities. The coursework was to be completed within an 18-month period.

On or about September 17, 1999, Ms. Cross requested that she be transferred to a then vacant *teaching position* in the Head Start program. Director Collins offered no objection to the requested transfer, and the District Superintendent approved it. Within a month of starting her teaching responsibilities, however, Ms. Cross began to encounter difficulties. In addition, several memorandums documenting various performance deficiencies of Ms. Cross (as a Head Start teacher), and one notice of a one-day suspension were also received. 2/

2/ The memorandums and reprimands dealt with a range of topics, including leaving the classroom for reasons other than a normal break, "chain of command," proper call-in procedures and classroom/teacher guidance issues. The suspension was for failure to follow proper "call-in" procedures.

According to a summary prepared by the District in March 2000 by Director Collins, 3/ a litany of complaints had been lodged against Ms. Cross. The complaints begin with October 1999: 4/

3/ Tr. 61.

4/ District Exhibit 1.

<u>Date</u>	<u>Complainant(s)</u>	<u>Complaint Allegations</u>	<u>Disposition</u>
10-19-99	Terri Daubon* Shannon Lerdal**	JC smelled of smoke	Verbal warning
10-20-99	Alicia Thompson**	JC left classroom w/o notifying her aide	Verbal warning
10-20-99	Julia Chapman (Ed. Coord.)	Same as above	Same as above
10-25-99	Terri Daubon* Ann Allen	JC left child on playground	Verbal warning
12-6-99	Shannon Lerdal**	Child crying; JC used excessive force	None listed
1-4-00	Julia Chapman (Ed. Coord.)	Informed by 5 persons that JC took kids outside in cold weather, contrary to instructions	None listed
1-28-00	Amy Poupart (parent)	JC's classroom messy, chaotic	None listed
2-9-00	Mabel Soulier**	On 1/27, JC had bad attitude, was abusive to aide	Verbal warning to JC & aide
2-11-00	Amy Poupart (parent)	JC lacks teaching skills	Discussed w/JC
2-15-00	Mabel Soulier**	JC left students alone at end of school day (3:25)	None listed
2-23-00	Roger Stone Patty Clark (parents)	Lack of communication w/parents; only 1 home visit; child fears being hit by another child	Parent/teacher discussion
3-1-00	Roger Stone	Child's behavior gotten worse	None listed

*Designates Head Start teacher in Lac du Flambeau School District.

**Designates Head Start aide in Lac du Flambeau School District.

The District had other complaints of its own against Ms. Cross. On November 22, 1999, Ms. Cross had received a 1-day suspension for failing to call in by 6:00 a.m. to advise the school that she wouldn't be able to come to work due to the illness of her child.

As a Head Start teacher, Ms. Cross was also required to take coursework leading to certification as a Child Development Associate. She received "incompletes" in two courses, and needed to repeat a third. Based on this record, the District terminated Ms. Cross' employment in January 2000. But following the filing of a grievance that challenged such termination, the District reconsidered its action and reinstated Ms. Cross as a Head Start teacher.

On March 2, 2000 Director Collins "reassigned" Ms. Cross to the position of Teacher's Aide, effective March 6, 2000, replacing her with Mabel Soulier, up to then Ms. Cross' Teacher's Aide. The Director advised Ms. Cross of her "reassignment" by a memo. The same memo also directed Ms. Cross to attend and participate in the Employee Assistance Program for counseling "to resolve personal and professional issues." A date, time, and place certain was listed, along with the name of the psychologist with whom Ms. Cross was to meet.

Ms. Cross consulted Tribal Chairman Tom Maulson for advice. 5/ He suggested that Ms. Cross agree to attend the scheduled EAP session only with her attorney being present. In a note to Acting Director Collins dated March 8, 2000, Ms. Cross did precisely that.

5/ Director Collins had also required Mabel Soulier to attend the same EAP meeting with Carl Adler. Ms. Soulier did report for the meeting as scheduled.

Two days earlier, Ms. Cross had resurrected an earlier complaint alleging child abuse that she had made verbally in September 1999. She sent her resurrected written complaint to three School District administrators, the Superintendent, Director Collins, and Federal Program Administrator Sue Wolfe. She also sent a copy to the Indian Child Welfare Committee. In her both her initial verbal and subsequent written complaints, Ms. Cross accused both Head Start Teacher Terri Daubon and Head Start Teacher Aide Shannon Lerdal, by name, of abusive conduct towards a child in their care. No child's name was included in Ms. Cross' written complaint, but a description of the incident included the gender and age of the child.

As a result of her written complaint, Ms. Cross was charged by the District with violating its policy of confidentiality.

In a letter dated March 9, 2000, Acting Director Collins fired Ms. Cross from her Teacher Aide position. In her letter, the Director noted that since Ms. Cross' "reassignment" to the position of Head Start Aide, she learned that Ms. Cross ". . . had sent a letter out to various people regarding a confidential issue." Director Collins further alleged that she had received a written report ". . . stating that you told other staff people that you were writing up people." Finally, the Director Collins wrote:

"In addition, as a condition for your employment you were required to attend and participate in the Employee Assistance Program (EAP) for counseling to resolve personal and professional issues on March 8, 2000, I received a written notice from you stating you would not attend the EAP session. Since you made this choice, you leave me with no other alternative but to terminate you from your position immediately. This is effective March 9, 2000 at 11:00 a.m."

At hearing , Director Collins asserted Ms. Cross was fired for 3 reasons: 1) breach of confidentiality; 2) lack of performance; 3) failure to attend the EAP session.

Ms. Cross testified in her own defense. She suggested that the attacks on her seemed to emanate in main from the same people, namely Mabel Soulier, Terri Daubon, Shannon Lerdal and Amy Poupart. She believes that Mabel Soulier is a good friend of Terri Daubon and a confidante of Amy Poupart. Shannon Lerdal was an aide for Terri Daubon. Prior to hearing Ms. Cross was apparently unaware of the relationship between Director Collins and Mabel Soulier.

Ms. Cross described herself as an artistic person who introduced different ethnic cultures to her class, including Native American and African-American. She said she frequently took her class to the Science Room, that her class helped her put up huge mobiles and made hats for different themes. Ms. Cross indicated that she'd lead her class on parades around the school, that her class did a garden that it harvested and made "stone soup." Ms. Cross had a puppet stage built in her classroom and provided puppets. She further directed a class Christmas play. Ms. Cross believes her teaching style differs from that of some other teachers.

With respect to the "confidentiality" issue, Ms. Cross explained that she had initially reported the child abuse incident to Family Services Coordinator, Louella Babbie Cobb. After reporting the incident, Ms. Cross was told that as a "mandated reporter" her child abuse complaints should be sent directly to the Indian Child Welfare (Committee) and the Vilas County (Social Services Department).

Ms. Cross said she had finally put her child abuse complaint in writing for at least two reasons:

“I didn’t feel that – I guess I felt like I was being singled out and why was no one else getting reprimanded when everyone was doing these kind of things that I was not – I’m not being accused of child abuse . . . And then I felt it was not handled at the time (when she’d made her verbal complaint.) I didn’t see – I was never told anything about it . . .” Tr. 161.

Ms. Cross indicated that while she was a teacher she was in charge of 19 children, some with special needs. She also testified that during her experience as a Head Start teacher, 4 different aides had been assigned to her class: Shannon Lerdal, Alicia Thompson, an unnamed 60-year old volunteer, and Mabel Soulier. Director Collins reassigned Shannon Lerdal to Terri Daubon’s classroom. The 60-year old volunteer and the teenaged Alicia Thompson worked apparently worked harmoniously with Ms. Cross (as had Shannon Lerdal), but were inexperienced. Finally, Mabel Soulier was hired in January 2000, and assigned to Ms. Cross’ classroom.

Ms. Cross testified that following her demotion to Teacher Aide she worked only one day, March 6. Although she had been enrolled in the required CDA coursework at the time of her employment she had to drop out in order to qualify for Unemployment Compensation.

Further facts will be developed in the course of this award.

POSITIONS OF THE PARTIES

School District

The District begins with a recitation of a seven-part definition of “just cause,” which it attributes to “numerous courts and arbitrators:”

- 1) Did the employee have knowledge of the probable consequences of the alleged conduct?
- 2) Was the rule or order reasonable?
- 3) Was there a reasonable effort by the employer before filing charges to determine whether a rule or order was violated?
- 4) Was that substantial effort fair and objective?
- 5) Was there substantial evidence that the employee violated the rule or order?
- 6) Was the employer applying the rule or order fairly?
- 7) Is the proposed discipline reasonably related to the employee’s record with the employer?

The District points to Ms. Cross' initials or signatures on job descriptions and Code of Ethics requirements as evidence that she knew what was required of her. The District moves on to argue that many of the facets of work involved with being an aide are also present for a Head Start teacher, including certain required CDA coursework. Julienne's problems did not start when she was a teacher, but rather when she was an aide, according to the District.

Focusing on Julienne Cross' experience as a teacher, the District points to performance deficiencies in September and October that led to her being warned that serious consequences could result if she left her classroom for any reason other than a normal break. A month after this, the District recounts, Ms. Cross had to be reminded of appropriate procedures to be followed when calling in that she will be absent or tardy. Ms. Cross subsequently received a 1-day suspension for failing to follow correct call-in procedures, the District notes.

The District reviews the formal evaluation as a teacher that Ms. Cross received. The District notes that she did not fare well in this area, receiving ratings in most categories of either average or below average. The District contends that the last two pages of the evaluation indicate serious problems in the area of working with co-workers.

The District believes other facts as well demonstrate Julienne's difficulty with the concept of teamwork. It points to an early February meeting with the Acting Director held in an effort to resolve disputes with the classroom aide as well as another February incident in which the children in Ms. Cross' classroom were allegedly left without supervision by a teacher or aide.

The District cites Ms. Cross' difficulties in the CDA coursework as a further indication of her employment troubles.

The District describes Julienne's reassignment as an aide not as a demotion, but instead as an attempt to increase her skill level. According to the District, the child abuse report then filed by Julienne not only deviated from District policy, but represented an attempt by Julienne to lash out at her opponents. The District argues that had Julienne sent her child abuse complaint to only Vilas County (Social Services Department) no action against Julienne would have taken place. Because of apparent hostility towards co-workers perceived by the District Julienne was ordered to report to an Employee Assistance Program meeting. Julienne refused.

The District argues that a series of issues developed with Julienne in her role as a Head Start teacher. The District lists these as control of children, organizing time management issues, conflicts with her aide, and failure to complete CDA coursework. Thus, says the District, to prevent further turmoil with the children in the classroom, Julienne was reassigned as an aide.

The District believes that the number of verbal warnings, written reprimands, a suspension, letters indicating possible termination if conduct was not reformed should have alerted Julienne that she would be fired if she didn't go to the EAP meeting. Yet, the District states, it is very clear that Julienne "point blank" refused to attend the EAP meeting, as evidenced by her note.

The District contends that its order to Julienne that she attend the EAP meeting was reasonable. The District claims the program was designed to help Julienne resolve the problems with her co-workers as well as any personal problems that she may have had that were adversely affecting her ability to do her job. The District also believes it has complied with its duty of fairness, as well, arguing that not only Julienne, but also her aide, Mabel Soulier, was required to attend the scheduled EAP session. The District finds further justification for its EAP order to Julienne because of the confidentiality rule that Julienne allegedly violated.

As to the confidentiality issue, the District first notes that Julienne admits to sending the child abuse report. The District argues that the information contained in Julienne's report was confidential, contending that not only the Federal Government requires confidentiality as to the Head Start program, but the State of Wisconsin requires it as to student affairs by virtue of its Pupil Confidentiality Statute. According to the District, there is no evidence to suggest that a report of child abuse is anything but confidential.

Finally, the District argues the termination was reasonably related to the employee's record in the department. Given the number of verbal warnings, written reprimands, and a suspension, termination was the only alternative left.

The District is not impressed by the Union's argument that in conjunction with the earlier demotion, the termination constitutes a double penalty for one offense. Most of the incidents involving Julienne that were reduced to verbal warnings and written reprimands involved conduct that would not be tolerated elsewhere, according to the District.

In summary the District argues that the reasons for which Julienne was discharged (besides the EAP order) transcend her time as a teacher and date back to her time as an aide. Instead of discharging her as a teacher, however, the District claims that it attempted to give Julienne another chance by transferring her to an aide position.

The majority of Julienne's problems, says the District, were related to herself, not her co-workers. Since Julienne chose to reject all the offers of assistance proffered by her employer, the District asserts that her continued employment became impossible. Dismissal, says the District, was the only alternative remaining, and thus the grievance should be dismissed.

Union

The Union admits that Ms. Cross does not have an unblemished record, but argues that it does not meet the standard of “just cause” for discharge.

In support of this contention, the Union first asserts that termination of Ms. Cross’ employment constitutes “double-jeopardy.” The Union notes that Ms. Cross had already been reduced from a Head Start teacher to a Head Start Aide on March 2, 2000, effective March 6, 2000. Then, according to the Union, without an evaluation of Ms. Cross’ work in the position to which she had been reduced, she was fired for reasons related to her performance as a teacher.

In any event, says the Union, Ms. Cross was not allowed to prove herself as an aide following her demotion to that position. The Union believes Ms. Cross should have had a reasonable time to reacquaint herself with her new assignment before being discharged. Moreover, the Union adds, nothing in the record showed the District was unhappy with Ms. Cross’ previous work record as an aide.

The Union next argues that the District’s complaints about Ms. Cross’ work record relate to her responsibilities as a Head Start teacher. The Union urges that once Ms. Cross was removed as a Head Start teacher, the District’s complaints about her performance in that position should have been disregarded.

The Union asserts that a triangle of persons – Terri Daubon, Mabel Soulier and Amy Poupart – were the instigators of seven complaints against Ms. Cross, some of which were quite petty. The Union suggests that Ms. Cross was not the lone culprit in the instances cited by this trio, and that if the District had addressed the internal problems evidenced by the allegations of the three there probably would have been no need for a grievance arbitration hearing.

Finally, the Union contends that the reasons for discharge listed by Acting Director Collins are all bogus:

- 1) The confidential information released by Ms. Cross was given only to the District employees who were in charge or Ms. Cross’ superiors, and does not constitute a violation of Wisconsin confidentiality statutes.
- 2) The allegation that Ms. Cross was “writing up” other employees was ridiculous on its face and would have been found to be false and without merit with even a minimal investigation.
- 3) The directive that Ms. Cross attend an EAP session as a condition of employment violated the voluntary and confidential nature of that program and placed Ms. Cross’ employment in jeopardy, both contrary to explicit EAP policy.

In addition, the Union notes that Ms. Cross did not refuse to attend an EAP counseling session, but on the advice of a tribal elder stated she would not attend without her attorney being present.

As a remedy, the Union asks for reinstatement of Ms. Cross to her position as a Head Start Aide, along with a provision that she be made whole for any losses suffered as a result of her discharge.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – NEGOTIATIONS PROCEDURES

A. * * * *

B. Except as this Agreement shall hereinafter otherwise provide, all terms and conditions of employment applicable on the effective date of this agreement to employees covered by this Agreement as established by the rules, regulations and/or policies of the Board in force on said date, shall continue to be so applicable during the terms of this Agreement.

C. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

* * *

ARTICLE VI – GRIEVANCE PROCEDURE

A. * * * *

B. * * * *

Step 1: * * * *

Step 2: * * * *

Step 3: * * * *

Step 4: If no adjustment is reached under Step 3 it may be appealed to arbitration. * * * *

Step 5: Either party may request the Wisconsin Employment Relations Commission to appoint a member of their staff to act as an arbitrator. The decision of the arbitrator shall be final and binding. The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement. His/her decision and award shall be based solely upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented.

* * *

ARTICLE XVI – DISCIPLINE PROCEDURE

- A. All new employees shall serve a six (6) month probationary period. During such period they shall not be entitled to just cause for discharge.
- B. After serving a six (6) month probationary period, no employee shall be discharged, suspended, disciplined, or reprimanded, or reduced in rank or compensation without just cause. Information forming the basis for disciplinary action shall be made available to the employee and the union.
- C. * * * *

DISCUSSION

Julienne Cross was hired as a Head Start Teacher's Aide in January 1999. Following the successful completion of a six-month probationary period, Ms. Cross applied for and was awarded a Head Start teaching position. She began her teaching responsibilities in September 1999.

Ms. Cross remained a Head Start teacher until March 2000. By memo dated March 6, 2000 from Head Start Director April Collins, Ms. Cross was returned to her aide position. But on March 9, 2000, after working at her reassigned aide responsibilities for only one-day, Ms. Cross received a second memo from Director Collins advising her that she was being discharged. At hearing, Director Collins stated that Ms. Cross was discharged from the aide position to which she had just been reassigned. 6/

6/ Tr. 142.

On this record, the District argues that it had just cause for the discharge. I do not agree. In my view, the District lacked "just cause" to discharge Ms. Cross. I base my conclusion on three independent grounds, each established by the record:

- 1) District records established that Ms. Cross's record as an aide was at least satisfactory;
- 2) Just cause for discharge as a teacher's aide is not established by alleged deficiencies in Ms. Cross's record as a teacher;
- 3) Ms. Cross' qualified refusal to submit to EPA counseling did not establish a just cause basis for discharge.

Satisfactory Record as an Aide

Beginning in January 1999, Ms. Cross successfully served a 6-month probationary period as a Head Start teacher's aide. During her probationary period, Ms. Cross was evaluated only once. That evaluation, dated May 17, 1999, reveals only a few performance weaknesses, none of which appear to have been critical. 7/

7/ *Q. (to April Collins). "So it would be fair to say that there was nothing in this evaluation that would have caused you to recommend her discharge or discharge her as a teachers aide in Head Start at that point; is that true?"*

A. "True." *Tr. 144.*

Q. (to April Collins). "I found nothing in her formal evaluation indicating a dissatisfaction by you with her in the class room while she was a teachers aide.

A. *Correct. Tr. 146.*

At hearing, Director Collins contended that even as an aide Ms. Cross experienced problems "clashing with staff." 8/ But the record contradicts that allegation: in her written evaluation of Ms. Cross' job performance as an aide written in May 1999, Supervisor Collins found Ms. Cross to be "courteous and cooperative with fellow staff, students and (the) public and accepts and implements constructive criticism." 9/

8/ *Tr. 93*

9/ *Joint Exhibit 31.*

Thus, the District finds itself in the unenviable posture of trying to establish "just cause" for its discharge of an employee even though the District's own records fail to provide sufficient evidence that the employee's overall performance was unsatisfactory *in the job from which she was fired.* 10/ Instead the District's records arguably constitute affirmative evidence that *as an aide* the employee was at least satisfactory. Following her demotion from her teaching position, Ms. Cross worked as an aide for only one day. No complaints were recorded against her. Very clearly, Ms. Cross's employment record as an aide offers no just cause basis for her subsequent discharge.

10/ *Supra at Tr. 144.*

**Just Cause for Dismissal as Teacher's Aide
Not Established by Alleged Deficiencies in Ms. Cross's Record as a Teacher**

Understandably then, the District broadens the scope of its vision, and focuses on Ms. Cross' record as a Head Start teacher. Arguing that many of the facets of work involved with being an aide are also present for a Head Start teacher, the District cites Ms. Cross's record as a Head Start teacher as a "just cause" basis " for the discharge.

In support of this contention, the District recites twelve complaints, 11/ each of which relates to some incident that occurred after Ms. Cross became a Head Start Teacher. 12/ Some complaints appear trivial, even petty (e.g., "smelling of smoke"); others appear on their face to be more serious (e.g., leaving children unattended, leaving classroom without notifying aide, leaving child on playground, taking children outside in cold weather contrary to instructions).

11/ District Exhibit 1.

12/ Tr. 145.

I find the District's initial premise questionable. Certainly, there are similarities between a teaching position and an aide position: the duties of each are performed in the classroom and involve substantial interaction with students, parents, and other staff members. But a comparison of the respective job descriptions for both teacher and aide reveals a substantial difference as well: each reflects the underlying policy that the teacher is in charge of the classroom, and the aide's role is substantially a supportive one of the teacher. 13/ Moreover, there appears to be a fundamental unfairness in recycling the same complaints originally used to justify a demotion for the purpose of justifying a subsequent discharge of the same individual from the position to which that employee had been demoted.

13/ Joint Exhibits 5 & 6 (Job Descriptions for Head Start Aide); Joint Exhibit 7 (Job Description for Head Start Teacher).

However, since Director Collins asserted at hearing that "lack of performance" was one of three causes for Ms. Cross' discharge, 14/ and since it is unclear which of the complaints resulted in Ms. Cross' demotion to aide, review and analysis of all of them is appropriate and may be helpful.

14/ Tr. 118.

We begin with the twelve complaints listed in the District's Summary (District's Exhibit 1). Two appear to refer to the same incident (Ms. Cross left her classroom without notifying her aide), thus reducing the total number of complaints by one. Five of the remaining complaints were brought by fellow teachers or aides: Terri Daubon, Shannon Lerdal and Mabel Soulier are all "repeat" complainants. A parent, Amy Poupart, is responsible for two more of the complaints. Roger Stone, another parent, is also responsible for two complaints (in one the child's mother joined him). The two Stone complaints are only one week apart.

Two complaints were filed by Julia Chapman, a Head Start administrator. One of those was identical to that brought by Teacher Aide Alicia Thompson (grievant left classroom without first notifying her aide). The other was based on the reports of five unidentified persons who said the grievant had taken her class outside for recess even though Head Start administrators had deemed the weather too cold for recess.

The complaint summary begins with one filed by Head Start Teacher Terri Daubon and her Head Start Aide Shannon Lerdal. They claimed that on October 19, 1999, Ms. Cross "smelled of smoke," for which Ms. Cross was given a verbal warning. On October 25, fellow-teacher, Terri Daubon, this time in tandem with an Ann Allen, made another complaint against Ms. Cross. This time the complaint was that Ms. Cross had left a child on the playground. Ms. Cross was again verbally reprimanded. There is no evidence in the record that Ms. Cross' explanation of this incident was ever sought, or that any investigation of the Daubon-Allen allegations was ever conducted. Ms. Cross, however, offered a reasonable explanation of the event ^{15/} that the District chose not to rebut.

15/ At hearing, Ms. Cross testified that on the day this incident occurred, she had an inexperienced, teenaged aide assisting her, that the child had deliberately hidden himself, that she discussed the child's action with him when he returned to the classroom, and that he promised not to repeat it. According to Ms. Cross, the boy has kept his promise. Tr. 178. The District offered no contradicting testimony.

The next complaint listed against Ms. Cross is dated October 20, 1999. In the summary Alicia Thompson, a teenager and apparently as inexperienced as an aide as was Ms. Cross as a teacher, is reported as complaining that Ms. Cross left the classroom without notifying the aide. No other particulars are given. No substantiation is provided. The Summary indicates that Ms. Cross received a verbal warning; however, it appears that this incident may have been included as one of the two for which Ms. Cross actually received a

written reprimand. 16/ The testimony did not indicate whether the aide had remained in the classroom with the children during Ms. Cross' absence or whether the children had been left unsupervised.

16/ Joint Exhibit 11.

On December 6, 1999, Teacher Aide Shannon Lerdal accused Ms. Cross of causing a child to cry through the use of excessive force. No disposition was listed; inasmuch as the District did not pursue this potentially serious allegation at hearing I shall disregard it.

Neither is a disposition listed for the complaint of January 4, 2000 from five unidentified persons. At hearing, however, Ms. Cross defended herself against this charge. She explained that she had received the administrative directive against taking the children outside only after the children had already donned their winter outerwear, that they were all enthusiastic about sledding outside, and that she had taken them outside only for a walk around the building to demonstrate that it was too cold for an extended outdoor recess. 17/ I find this explanation reasonable. It is not clear the District had ever sought one.

17/ Tr. 177.

In January 2000, a new aide was assigned to Ms. Cross. Mabel Soulier, Director Collins' niece by a former marriage of the Director, was placed by Director Collins in Ms. Cross' classroom. Ms. Soulier was the last in a succession of 4 aides that had been assigned to Ms. Cross: Shannon Lerdal (reassigned to Terri Daubon), Alicia Thompson (inexperienced, teenager), and an unnamed 60-year old volunteer.

Ms. Cross described Ms. Soulier as a good friend of Cross' apparent protagonist, Terri Daubon. In addition, Ms. Cross believes Ms. Soulier to have been a "confidante" of complaining classroom parent Amy Poupart. 18/

18/ In January 2000, Ms. Poupart wrote that she had found Ms. Cross' s classroom to be messy and chaotic; in February 2000, Ms. Poupart alleged that Ms. Cross lacked teaching skills. The District's Summary shows merely that the parent's complaint was discussed with Ms. Cross.)

Overt friction was not long in developing between Ms. Cross and her latest aide. 19/ On February 9, 2000, Ms. Soulier complained that Ms. Cross had a bad attitude and was abusive to her. Both women received a verbal warning.

*19/ Ms. Cross testified "And then when Mabel Soulier started, she worked against me, not with me."
Tr. 170.*

In mid-February, Ms. Soulier accused Ms. Cross of leaving students alone at the end of the school day. The District's Summary of complaints against Ms. Cross contains no disposition with respect to this allegation, but Director Collins testified that she met with both Ms. Cross and Ms. Soulier. Both received verbal warnings that were memorialized in writing. 20/

20/ Joint Exhibit 25. At hearing, Ms. Cross explained that at the time she had allegedly left unsupervised children in her classroom she was outside the building with other children from her classroom and had directed Aide Mabel Soulier to stay with the smaller group of children that had remained in the classroom.

Despite her apparent awareness of the obvious friction that had developed between Mabel Soulier and Julienne Cross, 21/ Ms. Collins did not assign Ms. Soulier to aide duties with another teacher. Ms. Collins explained her reason:

"One of the reasons is because of the age group we're dealing with. The issue of attachment and bonding is very important and it's very important that at that age it's consistent that the same teacher and the same aide be in the classroom with the children. As a matter of fact, in the Head Start improvement plan, that was one of the reasons stated in there, is that the Head Start and the teacher aide will remain in that classroom with the same group of children for two years . . ." 22/

21/ Tr. 174.

22/ Tr. 141.

In theory this rationale appears sound. Yet it did not appear to serve as an impediment to Director Collins when she moved three previous aides out of Ms. Cross' classroom between September 1999 and January 2000. Given this history of aide reassignment coupled with the hostility that had developed between Ms. Soulier and Ms. Cross, I find the explanation unenlightening.

Finally, on February 23 and March 1, 2000, a classroom father, joined initially by the child's mother, made several complaints that included a lack of communication, only one visit to the home, fears of his child, and the deteriorating behavior of his child. The father's concerns do not appear unusual for many parents. Under disposition, the District Summary shows only that a parent-teacher conference took place, a routine enough method of resolution. Clearly, the District believed the matter would be resolved. Given a reasonable amount of time, perhaps it would have. But Ms. Cross was relieved of her teaching responsibilities on March 2, and was thus deprived of the opportunity to resolve those concerns in a satisfactory manner to both child and parent.

It is instructive that the same disposition (verbal warning) was made for the trivial ("smelling of smoke") as for what appear to be more serious (leaving the classroom without notifying the aide; leaving a child on the playground; bad attitude, abusiveness to aide). No disposition is listed on the summary for what are arguably the most serious complaints (use of excessive force on a child; taking class outside in cold weather contrary to instructions; classroom messy and chaotic; leaving students alone at the end of the school day).

Based on the disposition record listed in the District's Summary, a logical inference is that the District did not regard the conduct described in any of the complaints listed in its summary as particularly egregious or remarkable. The Summary lists no disposition of the complaints as greater than a verbal warning. In some instances the only disposition noted was that a parent-teacher conference was arranged. In others no disposition is listed at all, leading to the inference that none was made. Had the District determined that the matters covered by the complaints constituted serious performance deficiencies, I would think its dispositions would so reflect. They do not. Under this circumstance, a logical conclusion is that the District did not regard any of these offenses, individually or in their entirety, as constituting just cause for discharge. Nor do I.

However, at hearing the District attempted to augment its Summary of complaints with other evidence and testimony. For instance, it appears that Ms. Cross received a written warning from Ms. Collins for leaving her children's group on October 19, 20, and earlier, on September 7. 23/ [One of those instances may have also been covered in the District's Summary prepared by Director Collins for which only a verbal warning is listed.]

23/ *Joint Exhibit 11.*

Director Collins also testified that she imposed a one-day suspension to Ms. Cross for her failure to call-in her anticipated absence or tardiness by the required early morning time (6:00 a.m.) on November 22, 1999. 24/ (There had been two previous tardy call-ins of illness for which a written warning was issued. 25/ Both occurred in early February 1999 when Ms. Cross was still a beginning aide.)

24/ Joint Exhibit 12.

25/ Joint Exhibit 24.

But the record also contains Ms. Cross' explanation for the November instance given at hearing: on the morning of November 22, 1999 her young son had an asthma attack *after* the appointed hour for Ms. Cross to call-in had already passed. Ms. Cross ministered to her son's medical needs, then called-in at her first opportunity. The record contains no evidence that the District was aware of the emergency medical situation Ms. Cross faced that morning. Notwithstanding the apparent recidivist nature of this offense (3rd), under the circumstances it does not appear to be a serious breach of work rules by the grievant. A work rule should not be invoked to discipline an employee for failing to perform an impossible act. Surely Director Collins is not suggesting that Ms. Cross should have ignored her maternal responsibilities to her son merely because she had discovered her son's illness *after* the allowable time to call-in an anticipated tardiness or absence.

In the course of her testimony, Director Collins referred to students that turned up "missing" from Julienne Cross' classroom or supervision. The Director indicated that she herself had observed that a student was "missing" from the classroom on two occasions. The Director explained that what she meant by the term "missing" was that a student had run away. She said that in one case the child ran down the hallway to the classroom where he knew his grandmother would be. The Director did not describe any other specific instance. No instances of this nature had been recorded in the District's Summary of complaints that Director Collins had prepared.

When Ms. Cross testified, she explained that the child in question had been in a small group of children who were all under the supervision of her aide at the time, Mabel Soulier. The District did not contest Ms. Cross' explanation. Nor does it does appear that any discipline was given to either Ms. Cross or her aide, 26/ suggesting that at the time of the incident Director Collins had found no fault with either.

26/ The incident reported by Director Collins had sparked a letter from the child's parents. The matter was discussed between the parents and Ms. Cross and resolved to the apparent satisfaction of all. Tr. 175 - 6.

Director Collins also testified that Ms. Cross was unsatisfactory in the classroom in other ways besides inadequate supervision. For instance, Ms. Collins stated that lesson plans were not being turned in on time, that home visits were not completed, and that Ms. Cross' attendance at classes leading to a Child Development Associate (CDA) certification was a problem. 27/

27/ Tr. 32.

But the documents submitted ostensibly in support of this testimony give a contrasting picture. As to tardy lesson plan submission, the Staff Monthly Summary Report issued at the end of October 1999 states: "Lesson plans posted and reviewed. Hands in plans on time and has done two weeks at a time." 28/ The Staff Monthly Summary Report issued at the end of November 1999 states: "She gets her (lesson) plans in on time and has made improvements in writing them out." 29/

28/ Joint Exhibit 13.

29/ Joint Exhibit 14.

As to home visits, the Summary Reports do document that approximately one-half of the visits (actually, 8 out of 19) had not been completed and the necessary paperwork had not been prepared for the ones that had. But the October Summary Report also explains that some of the parents were not cooperating in scheduling the required home visits, and that Ms. Cross would reschedule. 30/ Moreover, these deficiencies do not appear to be particularly unusual for a beginning teacher, particularly one without formal teacher training.

30/ Joint Exhibit 13.

With respect to CDA class attendance, both the October and November Summary Reports indicate that Ms. Cross was attending her CDA classes. 31/

31/ Joint Exhibits 13 & 14.

Totally overlooked in testimony were positive performance notations, particularly in the November Report: “ *Some improvements have been in classroom environment. . . Creativity is shown in activities and in parent involvement.*” 32/

32/ Joint Exhibit 14. Neither of these Monthly Summary Reports were prepared by Director Collins, but by Head Start Education Coordinator Julia Chapman. Director Collins reviewed both, however, for each contains a notation that Ms. Collins identified as her handwriting. Tr. 33 - 4.

Based on these District records, the force of District charges that Ms. Cross was ineffective in the classroom is considerably reduced.

Also overlooked by the District is the fact that *all of the documented complaints against Ms. Cross appear to have been made after Ms. Cross had become a whistle-blower.* The “whistle-blowing” occurred in September 1999, 33/ when Ms. Cross witnessed what she believed to have been an act of child abuse by another Head Start teacher. Ms. Cross reported the event to then Acting Director Collins, who also acted as Ms. Cross’ immediate supervisor.

33/ Ms. Cross was not sure what month the incident occurred. However, Director Collins was able to document the incident’s occurrence in September

Ms. Cross received a mixed response. She reports that one program administrator observed that the accused teacher was “up to her old stuff again.” 34/ Director Collins merely instructed Ms. Cross that all child abuse complaints were to be sent to the Indian Child Welfare Committee or the Vilas County Department of Social Services. 35/ Ms. Cross was never advised of the outcome of the merits of her complaint.

34/ Tr. 160.

35/ Tr. 159.

Significantly, the two persons named as abusers by Ms. Cross were Head Start Teacher Terri Daubon and Head Start Teacher Aide Shannon Lerdal. Ms. Daubon and Ms. Lerdal, of course, subsequently became “repeat” complainants against Ms. Cross. This sequence, along with the relatively petty nature of their first complaint, (Ms. Cross allegedly smelled of smoke) at least raises the question of whether the Daubon-Lerdal complaints were not largely retaliatory.

The District also charges that Ms. Cross violated her pledge to maintain confidentiality, a charge the District views as quite serious. 36/ The District argues that by resurrecting her September child abuse complaint and sending copies to persons not authorized to receive them, Ms. Cross was guilty of transmitting confidential information.

36/ Director Collins’ letter of discharge to Ms. Cross characterizes Ms. Cross’ sending “. . . a written report to various people regarding a confidential issue” as “inappropriate” that “does not follow proper procedure.” Joint Exhibit 30.

The confidentiality pledge signed by Ms. Cross is part of a document entitled “PRINCIPLES AS MY PERSONAL CODE OF ETHICS.” The portion dealing with confidentiality reads, “I dedicate myself to maintaining high professional standards, safeguarding confidentiality, and performing with intelligence, commitment and enthusiasm.”

The District acknowledges that no child’s name was included in Ms. Cross’s written report, but argues that inasmuch as their respective genders and ages were included their identities were ascertainable. Ms. Cross acknowledged having sent the report to School District Superintendent Richard Vought, Federal Program Coordinator Sue Wolf 37/ and the Indian Welfare Committee. 38/ But Director Collins stated, “(t)here was no purpose to have sent this report to Mr. Vought or to Sue Wolfe,” adding, “(t)he only person this (report) should have went and doesn’t even have to come in the form of a report is Vilas County.” 39/

37/ Ms. Wolf was also described by Director Collins as the Area Program Director. Tr. 131.

38/ The District charges that Ms. Cross also sent her report to the Head Start Policy Committee, a charge denied by Ms. Cross. The District introduced no evidence in support of this allegation.

39/ Tr. 73.

Absent an understandable desire to suppress information that may be deemed by Head Start insiders to be unfavorable to the Head Start program, I am not sure I understand the basis for Director Collins' concern in this instance. I am at a loss to understand how providing the District Superintendent a copy of a complaint alleging misconduct by school district employees can be deemed a violation of "confidentiality." I am at a similar loss to understand why including Sue Wolfe, who is described by Director Collins as the person who "oversees the program," 40/ is not also entitled to a copy of the complaint. Parenthetically, I might add that supplying only the gender and age of the alleged victims to persons or entities authorized to receive such information seems to me to be neither detrimental to the victims nor intrusive of their privacy.

40/ Tr. 131.

Moreover, the confidentiality pledge signed by Ms. Cross did not include a prohibition against relaying reports of possible child abuse to the District Superintendent the Federal Program Director, or the Indian Child Welfare Committee. The Superintendent, after all, is responsible for maintaining a safe habitat for District students. Federal Program Coordinator Sue Wolfe who "oversees the program" would also seem to have an obvious interest, for child abuse is an event that may impact negatively on future federal funding. Finally, by Director Collins' own description, the Indian Child Welfare Committee works in conjunction with the Family Resource Center in Lac du Flambeau, and *not only receives reports of child abuse and neglect for the Lac du Flambeau Native American children, but is part of the Vilas County Social Services Department.* 41/

41/ Tr. 67 - 8.

In short, to interpret the confidentiality pledge as broadly as the District now proposes would be, in my view, contrary to the public policy of the State and detrimental to the best interests of the very children the pledge seeks to protect. Even if Ms. Cross's motivation in releasing her report included an element of retribution against persons she regarded as her persecutors, under all of the circumstances I am not persuaded that she violated the pledge of confidentiality she signed.

Finally, Director Collins' letter of discharge to Ms. Cross claimed Director Collins had received a written report ". . . stating that you told other staff people that you were writing

up people.” At the hearing, however, Director Collins was unable to substantiate that charge. In fact she denied having any knowledge of whether Ms. Cross had actually “written up anybody.” 42/ It is also clear Director Collins did not bother to investigate this charge, though she included the accusation in her letter of discharge: “She was walking around with a tablet is all was stated, a memo given to me stating that she was writing up people . . . I did not check it out, I did not ask her for the tablet, no.” 43/

42/ Tr. 136 – 7.

43/ *Supra.*

In summary, I do not believe the complaints recorded by the District against Ms. Cross while she served as a Head Start teacher constitute a just cause basis for discharge from her from her position as an aide. None of them afford any reasonable basis for a belief that Ms. Cross’ performance as an aide was lacking in any serious respect or offer a reasonable crosscheck to Ms. Cross’ ability to function successfully in the aide position.

As acknowledged by the Association, Ms. Cross’ record as a Head Start teacher is not flawless. But the peccadilloes recorded by the District seem more attributable to Ms. Cross’ status as a neophyte classroom teacher who lacked formal training than to general ineptitude or malign motives. Whether they constitute just cause for dismissal as a teacher I do not here determine. In my view, however, they do not constitute sufficient justification for the discharge of Ms. Cross as an aide.

**An Employee Refusal to Submit to EAP Counseling
Is Not a Just Cause Basis for Discharge**

According to Director Collins, Ms. Cross was discharged from employment for three reasons: 1) breach of confidentiality, 2) lack of performance, 3) refusal to attend an EAP counseling that she was ordered to attend as a condition of employment.

But Director Collins was unequivocal in her testimony that the District was ready to forgive both the alleged “breach of confidentiality” and “lack of performance”.44/ The District’s offer of forgiveness, though, was in effect a conditional one: the District would forgive *if* Ms. Cross availed herself of psychological counseling to be provided by the School District’s Employee Assistance Program (EAP). The offer was contained in a memo from Director Collins to Ms. Cross that also “reassigned” Ms. Cross to her former aide position. After advising Ms. Cross of her demotion from teacher to aide, and further inviting her to terminate her employment if she disagreed with the demotion, the memo continued:

“As a condition of employment you are required to attend and participate in the Employee Assistance Program for counseling to resolve personal and professional issues. On Wednesday March 8, 2000 at 1:00 p.m. you are scheduled to meet with Carl Adler of Koller Behavioral Health Services.” 45/

44/ *At hearing, Director Cross was asked the following questions and gave the following answers:*

Q. Now, had she attended the EAP meeting, however, is it true you were prepared to overlook the other two inadequacies, the breach of confidentiality and the problems in the classroom if she had gone to that EAP meeting?

A. That was the final –

Q. That was the straw that broke the camel’s back?

A. It was really important in order to work with the staff, I mean, and the children. To me that was a very – that was essential. We can’t teach children if we’re not healthy ourselves.

Q. I’m not being critical of your reasoning on this, but my question is, if she would have attended that EAP meeting, she would have kept her position as an aide; is that true, assuming no other incidents happened since then?

A. I would say –

Q. Is that true?

A. I would say – I would say so, yes.

Tr. 147 – 8.

45/ *District Exhibit 2.*

At hearing, Director Collins expanded on her reasoning:

Q. Now how did you believe her EAP attendance would directly assist her in her professional development as a teachers aide in the Head Start program?

A I felt it would be able to help her not only professionally but personally in working.

Q. Were you aware of any personal – and you don’t have to tell me what they were – but were you aware of any personal problems that Ms. Cross was having at the time or did you just not know?

A. Well, some, you know.

Q. And did you relate those personal problems to her professional achievements or lack of achievements?

A. I would say yes, if I understand your question right. 46/

46/ Tr. 148.

In short, Director Collins ordered Ms. Cross to receive counseling from a therapist of the District's choice for what the Director perceived as both personal and professional problems.

Ms. Cross answered with what appears to be an acceptance (or a refusal). But whether deemed an acceptance or a refusal, it was as carefully qualified as was the District's "offer" of forgiveness to which it responded. Acting on advice she had sought and received from the Tribal Chief, Tom Maulson, on March 8 she wrote and delivered a note to Director Collins indicating that she would not attend the scheduled session unless her attorney could also be present. 47/ At hearing, Ms. Cross explained her thinking:

Q. For the record, would you tell us why you did not attend that session?

A. At that time I felt that all my rights were being violated. I felt like I was being forced into things and that I didn't feel like going to that meeting that day. And I had told April twice, I tried to make it very clear that I would not attend the meeting today. I felt backed against a corner. I called up Tom Maulson who is the grand T and someone who's - I respect, and he said, Julianne, just tell them not without an attorney, and that's what I did. It's not that I did not want to attend.

Q. For the record, who is Tom Maulson?

A. He was the tribal chief.

Q. Did you indicate in writing to April that you would not be attending?

A. That day. Just that day, yes, I did.

Q. That day?

A. Just that day. There was not anything I would not attend in the future. It was my first day as a teacher (sic). It was very hard for me. 48/

47/ Union Exhibit 2.

48/ Tr. 152 - 3.

Neither party addresses the issue of whether the labor agreement between the parties grants the employer to mandate counseling under the aegis of the Employee Assistance Program. Their omission suggests that neither regard the ordered counseling as “discipline” as the term is used in Article II, A, 4 in which (t)he maintenance of discipline of students and employe control and use of school system and facilities” appears as a management right retained and reserved by the employer.

I am also persuaded that Director Collins did not intend mandatory counseling as a tool of discipline. She was articulate on that point in her direct examination:

Q. What was the purpose of the EAP suggestion?

A. To attempt to make better relationships with the staff person, to help address some of these issues that were coming up as part of not only Julienne herself but also as part of her job and relationship working with other people. So it’s more than just staff. It was for her also, resulting in professional and personal relationships. 49/

49/ Tr. 84.

I do not doubt that Director Collins had a sincere desire to alleviate the stress and acrimony between Julienne Cross and Mabel Soulier and others. Obviously, a stressful and uncooperative relationship between teacher and aide or any co-employees is not conducive to fostering the best interests of the students. Nor do I underestimate the frustration Director Collins must have been experiencing in March 2000: her attempts to direct and counsel both women into improving their working relationship had not been successful and there was no reason to believe that future counseling efforts by her would yield a different result. Neither did she wish to discharge either employee.

Her solution - third party counseling - is understandable. Mandatory counseling, however, is not always a remedy that can be imposed on an unwilling employee. Furthermore, it appears that Director Collins’ counseling objectives may have impermissibly extended beyond the work environment, as is suggested by her allusion in her memo to “personal issues” she thought Ms. Cross needed to resolve.

Thus forcing an employee to submit to counseling to resolve “personal issues” can constitute an impermissible invasion of privacy. If the counseling will ultimately lead to an intrusion into a matter or matters that the employee has a right to keep private and such an

intrusion would be offensive to a reasonable person, it does not appear that the employee is required to submit to the counseling. 50/

50/ Hill, Marvin F., Jr. and Wright, James A., Employee Lifestyle and Off-Duty Conduct Regulation, Bureau of National Affairs, Inc., Washington D.C. (1993) at 33. Also see Restatement (Second) of Torts, sec. 652B.

This is not to say that an employer is not permitted to direct an employee to cease engaging in offensive, disruptive or quarrelsome conduct. But the means through which such an employee chooses to effect the change desired by the employer cannot be dictated or imposed by the employer. The ultimate sanction, of course, if the desired change in conduct does not occur is discharge. In the instant matter, Director Cross conceded that she had never told Ms. Cross that her relationship with her Head Start Aide or other teachers had to improve or Ms. Cross would be terminated. 51/

51/ Tr. 149.

It is quite clear, however, that Director Collins was of the opinion that Ms. Cross had both some personal and professional issues, the resolution of which required the professional assistance of a competent psychologist. 52/ It is equally clear that Director Cross believed she had the authority to order Ms. Cross into a counseling program. 53/ If Director Collins was correct that Ms. Cross had personal emotional issues and needed professional help to resolve them, no guarantees could be given that the scheduled counseling sessions would not lead to intrusions into matters that Ms. Cross had a right to keep private. (Parenthetically, it should be noted that although Director Collins appears to be a competent, caring administrator, she does not have an educational background that qualifies her to make psychological assessments of this nature. 54/ In fairness to her, however, she was doubtlessly reacting to what she believed were poor relationships between Ms. Cross and other staff members – particularly in light of Ms. Cross’ weekly complaints about Mabel Soulier). 55/ Acting on her opinion, the Director directed Ms. Cross to attend and participate in psychological counseling.

52/ Tr. 81, 84, 119, 148.

53/ Tr. 120 – 1.

54/ Tr. 148 – 9.

55/ Tr. 174.

There is no evidence that Ms. Cross knew in advance that the counseling would also involve Mabel Soulier, the aide with whom she was having difficulty, or that it would essentially consist of a form of conflict resolution. On the contrary, Ms. Cross felt attacked, trapped, and being forced into something about which she felt very insecure. Ms. Cross then asked for advice from a tribal elder whom she trusted. She followed his advice: she said she would go to the scheduled meeting if her attorney could also attend. Director Collins refused that condition.

Under all of the circumstances, I do not find Ms. Cross' conduct unreasonable. In my opinion, until she had the purpose and procedures of the scheduled session explained to her she was not in a position to make an informed decision. To refuse to attend the session under these circumstances was within Ms. Cross' rights.

Moreover, the counseling session was offered under the aegis of the Lac du Flambeau School District's Employee Assistance Program. According to the District's literature, it ". . . is a diagnostic and referral service, *on a voluntary basis* . . . (in which) (*j*)*job security and promotional opportunities will not be jeopardized by a request and/or referral to the program.*" 56/ (Emphasis supplied) If job security and promotional opportunities will not be jeopardized by referral to the program, then it would seem the converse should also be true: job security and promotional opportunities should not be jeopardized by a refusal to participate in the program.

56/ Joint Exhibit 32.

I do not pretend to know whether Ms. Cross has "personal issues" for which resolution requires professional counseling. I am not qualified to make this kind of assessment. (I can say I saw no evidence of any such issues in her demeanor as she testified). Clearly, Ms. Cross had what appears to be an adversarial relationship with several co-employees, but there are a number of possible causes for this, unrelated to any "personal issues" of Ms. Cross.

Nor do I disagree that counseling focused on conflict resolution could be helpful and may be necessary in restoring a reasonable harmony in the Lac du Flambeau Head Start workplace. Clearly this was the ultimate objective of Director Collins. But Ms. Cross cannot be forced to counseling if she will not volunteer for it. Based on her testimony at hearing, it sounds as if Ms. Cross is willing to consider participation in a well-defined professionally conducted conflict resolution program, reasonably protective of her privacy, for the purpose of enhancing the relationships between her and her co-workers. Almost needless to add,

however, her job cannot be held hostage to her continued willingness to do so.

Page 30
MA-11139

Unfortunately, Ms. Cross was fired because of her refusal to attend and participate in an initial counseling session without the security of her attorney being present. Inasmuch as I find her refusal to be a reasonable exercise of her legal right to privacy, such refusal did not constitute just cause for her discharge.

Conclusion

Julienne Cross did not deserve to be fired from her job as an aide because of any deficiencies in her performance while she was an aide. There is nothing in her record as an aide that remotely approaches “just cause” for discharge.

Neither do any or all of her alleged performance flaws while she was a teacher constitute just cause for discharge from her job as an aide for several reasons:

- 1) The requirements of a teaching position appear to be substantially more demanding than those of an aide, and having been used once to demote, cannot be reused to discharge from the new position.
- 2) The flaws noted in Ms. Cross’ performance do not appear to be unusual for a neophyte teacher with no formal training.
- 3) Ms. Cross was able to provide reasonable, plausible explanations for the more serious complaints made by the District.
- 4) Considered individually or in their entirety and in conjunction with the explanations provided by Ms. Cross, the complaints are simply insufficient to constitute just cause for discharge.

Finally, Julienne’s refusal to attend an initial counseling session with her attorney being present does not constitute “just cause” for her discharge. She has a constitutional right to privacy. Under the circumstances that led to her qualified refusal she had no reasonable assurance that the counseling session would not be impermissibly intrusive and thus violate her right to privacy.

AWARD

The grievance is sustained. The Lac du Flambeau School District is directed to reinstate Julienne Cross to the employment she held when she was discharged and is further directed to

make Ms. Cross whole with respect to any losses she incurred (including wages, benefits and seniority) as a consequence of her discharge, less any monies she either received or could have received because of her discharge.

I shall retain jurisdiction over this matter for a period of 60 days hereafter in the event the parties have any questions concerning the implementation of this award.

Dated at Madison, Wisconsin this 9th day of February, 2001.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator