

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**NORTHERN EDUCATION SUPPORT TEAM**

and

**LAC DU FLAMBEAU SCHOOL DISTRICT**

Case 24  
No. 59202  
MA-11218

(Christensen Grievance)

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Appearances:

**Mr. Gene Degner**, Executive Director, Northern Tier UniServ – Central, 1901 West River Street, P.O. Box 1400, Rhinelander, WI 54501, on behalf of the Grievant.

O'Brien, Anderson, Burgy, Garbowicz & Brown, by **Attorney Steven C. Garbowicz**, Arbutus Court. P. O. Box 639, Eagle River, WI 54521, on behalf of the District.

**ARBITRATION AWARD**

According to the terms of the 1998-2000 collective bargaining agreement between Northern Educational Support Team (Union) and Joint School District No. 1, Town of Lac du Flambeau (District), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the discharge of Grievant Gerald Christensen. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled for and held on December 18, 2000, at Lac du Flambeau, Wisconsin. A stenographic transcript of the proceedings was made and received by the undersigned on January 9, 2001. The parties agreed to file their initial briefs directly with each other postmarked 30 days after their receipt of the transcript, with a copy to the Arbitrator. The parties reserved the right to file reply briefs. By March 8, 2001, the parties advised that they would not file reply briefs in this matter and the record was then closed.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUES

The parties stipulated that the following issues should be determined in this case:

Did the District violate Article V, B and Article XVI of the master agreement when it terminated the Grievant? If so, what is the appropriate remedy?

## REVELVANT CONTRACT PROVISIONS

### ARTICLE V – EMPLOYE RIGHTS

...

B. No employe shall be required to appear before the Board or its agents concerning any matter which could adversely affect the wages, hours, or conditions of employment unless there has been prior written notice given of the reason for such a meeting or interview. The employe shall be entitled to have a representative of NEST present during such interview.

...

### ARTICLE XVI – DISCIPLINE PROCEDURE

A. All new employes 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 employe 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 employe and the union.

C. All employes shall at all times be entitled to have present a representative of the union when being discipline [sic] for any infraction of the rules or delinquency in job performance.

## BACKGROUND

The District employs approximately eight custodians. In approximately October, 1998, the Grievant, Gerald Christensen was hired as a full-time custodian by the District. Prior to his hire as a full-time custodian, the District had employed Christensen as a part-time

custodian. Until his discharge on July 28, 2000, the Grievant worked the 3 p.m. to 11 p.m. shift during the school year but had different hours during the summer, starting in the morning between 5 a.m. and 10 a.m. The Grievant never received an orientation or training period after the District hired him. Nor did the District give the Grievant any information regarding how to access the District Employee Assistance Program (EAP). The job description for the calendar year custodian position in the District reads in relevant part as follows:

. . .

Reports to:	Director of Building and Grounds
Education:	High School Diploma/GED
Starting Pay:	Level II, (\$9.52 - \$10.82 per hour)
Closing Date:	August 4, 2000

Duties include, but are not limited to the following:

1. Daily clean rooms, hallways, offices, entrances and bathrooms.
2. Maintain security.
3. Assist teacher needs; such as additional desks, soap, paper towels and supplies.
4. Occasional dump runs.
5. Help with and deliver in-coming and out-going supplies and equipment.
6. Assist in student discipline.
7. Ready building for extra-curricular activities or evening activities.
8. Board meeting preparation.
9. Maintain confidentiality.
10. Any other duty as requested by office or administration.

. . .

During his tenure as full-time custodian, the Grievant was assigned to clean the “primary wing” of the District’s facility, which includes the primary grade classrooms. During the 1999-2000 school year, while the Grievant was assigned to clean the primary wing, Teacher Susan Ziebart was in charge of that wing. In this capacity, Ziebart fielded all concerns and complaints regarding the primary wing as well as organizing activities having to do with the primary grades. Teacher Ziebart stated that she had received no complaints regarding the Grievant’s work in the primary wing during the 1999-2000 school year and that there were no problems with the Grievant’s work or his demeanor during the 1999-2000 school year.

On or about July 28, 2000, Building and Grounds Director William Cross terminated the Grievant. Prior to his termination, the Grievant had received several warnings from Cross

regarding his absenteeism and/or failure to call in prior to not coming into work on various days. On June 30, 1999, Cross issued the Grievant the following written warning:

...

This letter is to inform you that days absent from work and not calling in are the reasons for this warning. You were given a verbal warning the last time you were off without pay and unexcused absences.

This letter will be placed in your personnel file, and the next occurrence you will be given a three-day suspension. Any occurrence after three-day suspension will be grounds for termination of employment.

...

Approximately one month later on August 3, 1999, Cross issued the Grievant another written warning, which included a three-day suspension without pay:

...

On June 30, 1999, you were given a letter stating that if you had another unexcused absence that you would be given a three-day suspension without pay. You were absent on July 30, 1999, which was an unexcused absence. You elected to start your three days off without pay on August 2<sup>nd</sup> through August 4<sup>th</sup>. If you are having problems and you need help, you should request help. Your employment status now stands that you could be terminated at the time of another unexcused absence.

...

On August 11, 1999, Cross issued another letter to the Grievant, urging him to make use of the District's Employee Assistance Program (EAP) 1/ and giving the Grievant time off on sick leave status, as follows:

...

This letter is to inform you that the School District has an Employee Assistance Program set up for employee's [sic] with personal problems. I would like to see you use this program or seek help from other resources.

I have put you on sick leave status as of August 5, 1999 through August 25, 1999 and you return to work full time.

. . .

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*1/ The District placed EAP brochures in employee mailboxes once each year and had an EAP poster in the Teachers Lounge (which is not used by custodians for their breaks). The District submitted no evidence to prove that the Grievant ever saw or received any EAP information.*

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Approximately four months later, on December 15, 1999, Cross issued the Grievant the following memo, suspending him for three working days:

. . .

This memo is to inform you that as of December 16, 1999 you are hereby suspended for three working days due to your failure to call in on December 14, 1999. It is your responsibility to inform the School District your reason for not reporting to work. Also, since you planned on leaving work early on December 10, 1999, you asked your fellow worker's to punch you out at 9:00 p.m.

I strongly recommend that you seek help and counseling through the Employee Assistance Program for your problems. The next occurrence calls for termination; you have been warned prior to these last occurrences verbally as well as written notices.

. . .

Again, approximately four months later, Cross issued the Grievant the following letter, suspending him for one week without pay:

. . .

You have failed to call in when you have been scheduled to work. On past occasions you have been warned both verbally and with written correspondence, regarding this matter. You are here by [sic] suspended without pay for one week. The next occurrence will be grounds for termination. If you are having personal problems, you are advised to seek help with the Employee Assistance Program.

. . .

Christensen did not grieve any of the above disciplinary actions taken against him. Christensen stated that he was unaware that a grievance could be filed regarding these matters. In regard to the April 25, 2000 suspension, the Grievant stated that he could not call into work because he was incarcerated in the Vilas County Jail on the day that he was to work and that the police would not allow him an extra call to the District. In addition, as the Vilas County Jail is not in Lac du Flambeau, Wisconsin, the Grievant asserted that the District would not have taken a collect call from him in any event. Within a day or two of April 25, 2000, the Grievant told William Cross that he did not call in because he had been incarcerated on the date in question. Cross did not recall this conversation.

In regard to the written warning the Grievant received on June 30, 1999, the Grievant stated that he called in on the day in question and took a floating holiday rather than lose the day that year, as it was the end of the District's fiscal year. The Grievant filled out a leave slip for this day and did not understand why he had been issued the warning on June 30, 1999. Despite these facts, the Grievant did not object to or file a grievance regarding these two disciplinary actions. Christenson did not offer any explanations for the other warnings/suspensions issued to him.

The District has an Employee Assistance Program (EAP) which reads in relevant part as follows:

1. The EAP is a diagnostic and referral service available, on a voluntary basis, to all employees, spouses and dependent children (including those employees and families on district approved leaves) to overcome personal and family problems that affect job performance. For clarification purposes, "personal problems" may include, but not be limited to: stress, financial, physical, chemical dependency, emotional, marital, legal and family discord.
2. The EAP will be available to all employee groups on a year-round basis. Individuals may use the appropriate existing fringe benefit packages for appointments and professional services.
3. Job security and promotional opportunities will not be jeopardized by a request and/or referral to the program. Participation in this program does not, however, remove the responsibility of the employee to perform his/her job.
4. The program can be used by the employee requesting the service, or by the union representative or supervisor/administrator offering the service to an employee based on job performance problems.
5. Assessment/diagnosis is the responsibility of the screening resource agency and will not be a function of district staff or administrators.

6. State and federal confidentiality guidelines will be strictly adhered to by the district and the screening resource when processing all referrals.
7. Employees are encouraged to seek assistance through the EAP contact person(s). Names of the contact person(s) will be presented at the start of each school year.

As a part of the District's EAP, the District provided the following "Wellness Program Mission Statement":

The Lac du Flambeau Public School Wellness Program is designed to provide an opportunity for employees and their family members to develop healthier lifestyles by adopting habits and attitudes that contribute in a positive way to their health and wellbeing. It is expected that participants will experience greater productivity and fewer health problems. Another major goal of the program is to help reduce the costs associated with ill health and injuries among the participants.

Over time, the program should also contribute in a tangible way to the development of a healthier school culture, where wellness oriented behaviors are encouraged and supported without condemning in any way those who do not choose to participate or pursue healthy lifestyle choices.

Some of the general goals that guide our program are as follows:

- Provide trained Volunteer Resource Coordinators for support and referral assistance.
- Provide a Wellness Committee to plan activities throughout the school year.
- Provide programs and activities that are interesting and satisfying to employees.
- Promote employee participation in wellness activities.
- Reduce health risks among employees and their family members.
- Improve health screening test scores.
- Improve work efficiency, productivity, and morale.
- Contribute to lower rates of sick leave absenteeism.
- Contribute to the stabilization of health benefit costs.

### **FACTS**

The incident which triggered the Grievant's discharge occurred on July 21, 2000. On that day, the Grievant arrived at work and went to the Head Start area kitchen to make some coffee. Fellow custodian Ken Jack came into the kitchen and began talking to the Grievant.

Jack had been working outside on the District grounds. Jack was irate because Building and Grounds Director Cross had put Kevin Allen (a newly hired full-time custodian) in charge of the grounds crew as lead grounds keeper. Jack told the Grievant that he thought he (Jack) should have been given the lead grounds keeper position as he had been employed by the District longer than Kevin Allen. The Grievant replied that he thought that Allen was a better grounds keeper than Jack. At this point, Jack and the Grievant began shouting at each other and Jack swore at the Grievant. The Grievant swore back at Jack and this point Jack left the kitchen and the argument was over. The Grievant stated without contradiction that both he and Jack raised their voices but did not call each other names during the argument.

Approximately 30 minutes later, the Grievant had a conversation with Anita Snow (employed in the Head Start area) and John Snow (a fellow custodian) in the Head Start kitchen area. John spoke to the Grievant and stated that he had heard that the Grievant and Ken Jack had quarreled. John Snow then stated that he had had a quarrel with Ken Jack that day and asked the Grievant why Ken was so upset. The Grievant told John Snow why he had quarreled with Ken Jack — because the Grievant felt that Kevin Allen was a better grounds leadman than Ken Jack would have been. At this point, Anita Snow got into the conversation, apparently indicating that she believed that Ken Jack was a very good grounds keeper. At this point, the Grievant stated to Anita Snow “You don’t know what you’re talking about. Don’t get in the conversation unless you know what you’re talking about.” Ultimately, the Grievant stated to Snow “To hell with you, I’ll see you later. I’m getting the hell out of here.”

The Grievant stated (without contradiction) that no physical confrontation occurred between him, John and Anita Snow; that although both Anita Snow and the Grievant raised their voices during their confrontation, neither one called the other names and the Grievant did not touch Anita Snow during their conversation. The Grievant stated that he apologized to Anita Snow shortly after their argument because he felt it was wrong for him to raise his voice and quarrel with her. The Grievant stated that Anita Snow accepted his apology and forgave him.

After the Grievant apologized to Anita Snow, he called the District Administrator Vought and asked if he could take leave that afternoon. District Administrator Vought granted the Grievant’s request to take off that day and signed a leave slip for him. District Administrator Vought told the Grievant that they would sort out the arguments/confrontations the following week.

When Building and Grounds Director Cross came to work around 10:00 a.m. on July 21<sup>st</sup>, he was told by the building secretary that there had been a fight in the building and that the Grievant, John Snow and Ken Jack had been involved. Cross attempted to investigate the fight by asking John Snow and Ken Jack what had happened. (Cross did not ask the Grievant for his version of what occurred on July 21<sup>st</sup> as the Grievant had already gone home on leave.) Neither Snow nor Jack admitted to engaging in any misconduct.



On Tuesday, July 25, 2000, District Administrator Vought and Cross held a meeting in which Ken Jack, John Snow and the Grievant were asked about what had occurred on July 21<sup>st</sup>. No one advised these employees that they had a right to a union steward at this meeting. The three employees basically stated that nothing had happened on July 21<sup>st</sup>. At this meeting, Cross did not ask the Grievant about his confrontation with Anita Snow on July 21<sup>st</sup>.

After this meeting, Cross went to Anita Snow and asked her to write a statement regarding what had happened between her and the Grievant on July 21<sup>st</sup>. Cross never asked the Grievant for his version of what had occurred between him and Anita Snow on July 21<sup>st</sup> and Cross never asked Snow what words the Grievant used in their July 21<sup>st</sup> confrontation. 2/

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*2/ Anita Snow was not a witness in the instant hearing nor did the District offer Anita Snow's statement as evidence in this record. Cross apparently also received statements from John Snow and Ken Jack regarding what occurred on July 21<sup>st</sup>, but these statements were not offered and these employees were not called as witnesses herein. Therefore, the Grievant's testimony regarding what occurred on July 21<sup>st</sup> between him, Anita Snow and Ken Jack must be credited in its entirety.*

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At some point after July 25, 2000, Cross decided to terminate the Grievant. Cross took this action without a recommendation in support of termination by the District Administrator. On July 28, 2000, William Cross handed the Grievant a termination letter without discussing its contents with the Grievant. The Grievant stated that this letter made no reference to the EAP. This letter, however, was lost as the Grievant misplaced it and the District did not keep a copy thereof. Therefore, on August 1, 2000, Director of Building and Grounds Cross issued the following letter to the Grievant:

. . .

This letter is to reaffirm the decision to terminate your employment with the Lac du Flambeau Public School effective July 29, 2000. You were given ample verbal and written warnings and time to seek help through the School Employee Assistance Program or other similar programs of your choice. Your failure to follow this recommendation, the warnings and the subsequent altercation with fellow employees are the reasons for your termination.

. . .

The Grievant stated herein that he had no idea that his actions on July 21<sup>st</sup> were being investigated. 3/ After his discharge, the Grievant showed his discharge letter to District Administrator Vought.

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*3/ In his testimony, Cross asserted that the Grievant threatened him when he gave him his discharge letter — that the Grievant stated he was going to get back at Cross or he was going to get rid of Cross.*

*The Grievant was never asked to confirm or deny making these statements to Cross on the day of his discharge. However, the Grievant stated that he was very upset over his discharge and that it had come as a surprise to him. This is understandable. As Cross remembered very little detail regarding his contacts and conversations with Christenson over Christenson's tenure with the District and because I find Christenson a credible witness, I do not find Cross' assertions credible.*

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Cross stated herein that he decided to discharge the Grievant because of his constant absenteeism and failure to call in, because the Grievant failed to get treatment for his problems in the EAP and because Christenson cursed at Anita Snow in the Head Start kitchen on July 21, 2000. During the hearing in this case, Cross also asserted that there had been teacher complaints about the Grievant's work either in 1999 or 2000 and that there had been reports that the Grievant came to work with alcohol on his breath. As the latter two reasons were neither corroborated by any witnesses in the instant hearing nor previously cited as reasons for the Grievant's discharge and as the Grievant was never disciplined therefor, I have disregarded all evidence on those points.

### **POSITIONS OF THE PARTIES**

#### **The District**

The District urged that it had just cause to terminate the Grievant. The District noted that over a 13-month period, the Grievant had had at least five incidents of discipline; that the Grievant had been warned and advised repeatedly regarding what he should do and that he could be suspended and/or terminated for continued violations of District rules and policies. Yet, the Grievant ignored the District's clear warnings and on July 21, 2000, the Grievant engaged in an unacceptable confrontation with a female employee, Anita Snow, for which he had to apologize. In the District's view, this was the last straw.

The District noted that Supervisor Cross interviewed employees and took statements regarding what the Grievant's role was in the July 21, 2000 incident. Cross determined that the Grievant's apology to Snow was not sufficient to correct the situation and, taking into account the Grievant's prior disciplinary record, as well as the Grievant's refusal to go to the District's EAP, Supervisor Cross terminated the Grievant. The District also noted that the Grievant had received an unsatisfactory performance evaluation in February, 2000. Thus, the District urged that it had no alternative but to discharge the Grievant.

The District contended that the Grievant was given sufficient opportunity to correct his deficiencies. The District noted that the Grievant had been warned repeatedly about his failure to call in and about his absenteeism. In these circumstances, the District noted that it should have simply followed its own memos and discharged the Grievant earlier. However, the District claimed it tried to give the Grievant extra help and assistance to become a productive employee.

In regard to the violation of Article V of the collective bargaining agreement, the District noted that the Grievant never asked for Union representation during any of his interviews with District management and that the Grievant admitted that he knew nothing about the operation of the contract. In these circumstances, the District argued that it should not have to educate union members on the applicability of and use of their own union contract. As the District never denied the Grievant Union representation and as the Grievant never asked the District for Union representation, no violation of Article V should be found. The District therefore urged that the grievance be denied and dismissed in its entirety.

### **The Union**

The Union argued that the District lacked just cause to terminate the Grievant. Although the Grievant admittedly had received prior warnings and discipline from the District, the Union noted that the discipline was for attendance and/or call-in problems, which have nothing to do with the Grievant's purported inability to get along with employees on July 21<sup>st</sup>. The Union also urged that one verbal confrontation could not support a discharge. Here, the District denied the Grievant due process by essentially punishing him twice for past offenses.

The Union noted that regarding the July 21<sup>st</sup> altercations, Supervisor Cross had no evidence that a physical confrontation ever occurred between any employees. Indeed, Cross never asked the Grievant for his version of what occurred between the Grievant and Anita Snow on July 21<sup>st</sup>. Rather, Cross merely concluded that the Grievant had engaged in an altercation with employee Anita Snow based a written statement submitted by Snow at Cross' request and this formed the major basis for the Grievants' discharge.

The Union urged that the Grievant's prior work record should not have been considered as no similar incidents (absenteeism and failure to call in) had occurred on July 21<sup>st</sup>. Thus, Supervisor Cross discharged the Grievant for past incidents for which the Grievant had already been disciplined as well as for an uncorroborated confrontation that the Grievant had with employee Anita Snow. Furthermore, the Union noted that the District appeared to have discharged the Grievant for failure to attend the District's EAP. On this point, the Union urged that the District's EAP states specifically that it is a voluntary program and that employees cannot be forced to attend it. In addition, the Union noted that the District never gave the Grievant sufficient information to allow him to access the EAP.

The Union also noted that the District failed to make its work expectations clear for the Grievant. In this regard, the Union noted that the Grievant never received any training; and that although Supervisor Cross asserted that teachers had complained about the Grievant's work, the teacher who testified herein failed to confirm Cross's statement that teachers had complained. In regard to the value of the District's prior disciplinary actions against the Grievant, the Union noted that the documents of record showed that Cross had failed to properly investigate these incidents and had failed to specifically state the purpose of the warnings and the actions that should be taken by the Grievant to avoid future problems.

Indeed, the Union noted that Supervisor Cross's testimony was incredible as he failed to demonstrate that he knew what due process would require in a collective bargaining context. The Union also contended that Cross repeatedly stated that he could not remember or could not recall the facts during both his direct and cross examination in this case. In any event, the Union argued that if the District had followed Article V and given the Grievant proper Union representation, the Grievant would not have been terminated in this case. In all of these circumstances, the Union urged that the grievance be sustained in its entirety, that the Grievant be made whole and reinstated to his position.

### DISCUSSION

Article XVI requires the District to have "just cause" before it may discharge an employee. Article XVI, Section C and Article V, Section B, also guarantee employees will have Union representation at interviews regarding matters that could adversely affect wages, hours or conditions of employment, as well as whenever the employee is being disciplined for any infraction of rules or delinquency in job performance. It is in this context that the discharge of Gerald Christenson must be judged.

According to the termination letter of August 1, 2000, the District discharged the Grievant based upon his past disciplinary record, Cross's investigation of incidents on July 21<sup>st</sup> and the Grievant's refusal to attend the District's EAP. Christenson's past disciplinary record includes a written warning dated June 30, 1999 for failing to call-in an absence and one three-day suspension dated August 3, 1999, again for absenteeism without excuse, which indicated that if the Grievant was having problems and needed help, he should "request help," without specific reference to the District's EAP. On August 11, 1999, the District issued a letter to the Grievant urging him to use the District's EAP and granting him time off on sick leave from August 5, 1999, through August 25, 1999. In my view, this August 11, 1999 letter does not constitute discipline as it failed to recount any incidents of misconduct, which triggered the issuance of the letter.

Four months later, on December 15, 1999, the District issued the Grievant another three-day suspension for failing to call-in and asking a fellow employee to punch the Grievant out. This letter also strongly recommended that Christenson seek help and counseling through the EAP program. Finally, in April, 2000, the District gave the Grievant a one-week suspension without pay for failing to call-in when scheduled to work. This letter also stated that if Christenson was having "personal problems" he was "advised to seek help with the Employee Assistance Program."

The difficulty with the District's approach and analysis in the case is that all of the prior disciplinary actions taken against Gerald Christenson had to do with absenteeism and/or failure to call-in his absences. In addition, for each of these infractions, Christenson suffered

disciplinary action ranging from a written warning to a one-week suspension. 4/ Therefore, the Union's argument that the District was essentially subjecting Christenson to double jeopardy (punishing him twice for offenses he had committed in the past) is well taken.

In my view, the prior disciplinary actions taken by the District against Christenson were not relevant to the incident which occurred on July 21, 2000, and as such, the District was not privileged to use Christenson's prior disciplinary record as a basis for bootstrapping his discharge for wholly unconnected and unrelated reasons. Indeed, I note that Christenson's evaluation indicated that he had no difficulty getting along with his fellow workers. In addition, evidence from teacher Ziebart indicated that she had received no complaints regarding the Grievant's work or his demeanor while at work in the primary wing during the 1999-2000 school year. In these circumstances, the District's use of Christenson's past work record as support for his discharge was wholly inappropriate.

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*4/ The Union argued that the District failed to properly train the Grievant and that it never gave him an orientation program. Although this is regrettable, I do not find it particularly relevant to this case. The Union also complained herein about the quality of Cross' investigation of the Grievant's prior misconduct regarding call-ins and absenteeism. The time to complain of these deficiencies is long past and as Christenson failed to file any grievances regarding the discipline issued, I find this evidence irrelevant.*

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The second reason for Christenson's discharge was the July 21<sup>st</sup> incident. It is clear from this record that the District performed an insufficient investigation of the altercations which occurred on July 21, 2000, thus denying Christenson due process. In this regard, I note that Supervisor Cross never sought the Grievant's version of what occurred on July 21<sup>st</sup>, preferring to rely solely upon a written statement by Anita Snow. Furthermore, in my view, this record failed to prove that any physical altercation occurred on July 21<sup>st</sup>. Indeed, the meeting, which Cross held with Superintendent Vought after the July 21<sup>st</sup> incident, failed to garner any admissions from any of the employees that an altercation had occurred. It is significant that none of the other employees who were reportedly involved in the various confrontations that day were called as witnesses in this case.

Thus, I am left with the Grievant's account of his interactions with Ken Jack and Anita Snow on July 21<sup>st</sup>. The Grievant's conversation with Jack was entirely uneventful. Although the Grievant admitted using the word "hell" twice during his conversation with Snow, I find that the Grievant's verbal confrontation with Snow was merely a verbal disagreement which involved no physical contact and that the Grievant was remorseful after engaging in this disagreement and sought Snow's forgiveness, which Snow readily gave, according to the Grievant. In these circumstances, the altercation with Snow (if you could call it that) was insufficient basis upon which to terminate the Grievant.

The District's third reason for discharging Christenson was his failure to attend the District's EAP. This reason for discharge must also fail. I note in particular that the policy itself states that attendance at the EAP is completely voluntary and that employees cannot be forced to attend the program. The simple fact that the District listed Christenson's failure to attend the EAP as a reason for his discharge, demonstrates that the District was violating its own policy by attempting to force Christenson to use the EAP in this manner.

Furthermore, I note that the evidence failed to show that the District gave the Grievant sufficient information to access the EAP. It is also significant that in the various warnings which Christenson received, the EAP was not mentioned in either the warning of June 30, 1999 or the three-day suspension dated August 3, 1999. On August 11, 1999, Cross mentioned the EAP for the first time and did not make Christenson's attendance at the EAP mandatory in that letter or in the subsequent suspension letters of December 15, 1999, and April 25, 2000. In those letters, Cross "advised" Christenson to use the EAP or he recommended EAP use, but Cross did not require Christenson to use the EAP or risk discharge. In these circumstances, this reason for discharge must fail as well.

The Union has argued that Christenson was denied union representation as guaranteed by Articles V and XVI of the collective bargaining agreement in his various contacts with Supervisor Cross. The contract language is clear that union representatives are guaranteed to employees in interviews regarding matters that could adversely affect their wages, hours and conditions of employment and where employees are being disciplined for any infraction of the rules or delinquency in job performance. Given the broadness of the language in Articles V and XVI, it is clear that the District is under an affirmative obligation to assure that employees receive union representation in interviews involving matters which could adversely affect their wages, hours and working conditions, as well as where the employee may be disciplined. Thus, the District failed to afford Christenson union representation in the meeting which Christenson had with Cross regarding his termination and for that reason, I find that the District violated the collective bargaining agreement in that area as well. 5/

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*5/ The Union has argued that the District failed to afford Christenson proper union representation during all of the disciplinary interviews he had prior to his discharge. Given the fact that the grievance covers only the Grievant's discharge and that the Grievant failed to grieve any of the prior disciplinary actions against him in a timely fashion, the only allegation properly before me is that Christenson was denied proper union representation at his interview regarding his discharge and that is the sole basis for my ruling herein.*

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Based upon the relevant evidence and argument, as well as the above analysis, I issue the following

**AWARD**

The District violated Article V, Section B and Article XVI, Sections B and C of the Master Agreement when it terminated the Grievant without just cause and when it denied him Union representation. The District shall, therefore, immediately reinstate Gerald Christenson to his former position of Calendar Year Custodian with full back pay and benefits. The District shall also expunge Gerald Christenson's personnel records of any and all reference to the discharge with occurred on or about August 1, 2000. 5/ The District is also ordered to offer employees NEST representation whenever they are involved in Article V, Section B, and Article XVI, Section C, situations.

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*5/ I shall retain jurisdiction for purposes of the remedy only for a period of sixty (60) days after the issuance of this award.*

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Dated at Oshkosh, Wisconsin, this 2<sup>nd</sup> day of April, 2001.

Sharon A. Gallagher /s/  
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Sharon A. Gallagher, Arbitrator