

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**NEKOOSA SCHOOL DISTRICT**

and

**NEKOOSA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION**

Case 52  
No. 60154  
MA-11540

(Kathy Smith Grievance)

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Appearances:

**Dr. David J. Scarpino**, Superintendent of Schools, Nekoosa School District, 600 South Section Street, Nekoosa, Wisconsin 54457, on behalf of the District.

**Mr. Thomas S. Ivey, Jr.**, Executive Director, Central Wisconsin UniServ Council, P.O. Box 158, Mosinee, Wisconsin 54455, on behalf of the Grievant and the Association.

**ARBITRATION AWARD**

According to the terms of the 1999-2001 collective bargaining agreement between Nekoosa Board of Education (hereafter District) and Nekoosa Educational Support Personnel Association (hereafter Association), the parties requested that the Wisconsin Employment Relations Commission designate an impartial arbitrator to hear and resolve a dispute between them regarding the discipline of Kathleen (Kathy) Smith. Sharon A. Gallagher was designated Arbitrator by the Commission. A hearing in the matter was originally scheduled at Nekoosa, Wisconsin, for October 3, 2001, but was postponed, at the Association's request, to November 6, 2001. No stenographic transcript of the proceedings was made. The parties jointly agreed to present all evidence and argument on the date of hearing and to orally argue the case, waiving the right to file any briefs. The hearing was concluded on November 6, 2001, 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 were properly before the Arbitrator:

Did the District violate the terms and conditions of the Agreement when it reprimanded Kathy Smith for her handling of the situation in the boys' bathroom in the second grade area on April 11, 2001?

If so, what is the appropriate remedy?

### RELEVANT CONTRACT PROVISIONS

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#### ARTICLE II – MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights, include but are not limited to the following:

- A. To direct all operations of the school system;
- B. To establish and require observance of all reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees in positions within the school system;
- D. To suspend, discharge and take other disciplinary action against employees for cause;
- E. To take whatever action is necessary to comply with state or federal law and to comply with orders or settlements with state or federal agencies;
- F. To introduce new or improved methods or facilities;

- G. To change existing methods or facilities;
- H. To contract out for goods or services as long as bargaining unit employees are not deprived of their regular normal hours of work;
- I. To determine the methods, means and personnel by which school operations are to be conducted;
- J. To determine the educational policies of the school district;
- K. To manage and direct the work force, to make assignment of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees and to determine the competence and qualification of employees;

...

### ARTICLE III – DEFINITION OF EMPLOYEES

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#### F. EMPLOYEE CLASSIFICATION

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- 2. Cleaner  
Employees in this classification may be full-time or part-time, and may be calendar year or school year employees. Employees in this classification shall be responsible for assigned tasks including cleaning of the building to which they are assigned and assigned tasks in the efficient operation of all District approved events, games, or activities. Cleaners will also be responsible for any and all duties assigned by their immediate supervisor, the building principal or Superintendent of Schools.

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### ARTICLE V – EVALUATION/DISCIPLINE

The Board and the Association agree that the purpose of evaluation is to improve the delivery of services and performance of employees. Any employee who is shown to have any difficulty shall be provided with specific assistance to be provided by internal and/or external sources to correct the problem that the employee is having.

All probationary employees will be evaluated at least once but not more than three (3) times during their probationary period. Thereafter, all employees will receive an annual evaluation to rate the employee's performance. If the employee's performance is judged to be unsatisfactory in any major area of the employee's work, specific corrective activities will be given to the employee. If correction does not result, the employee will be suspended. The suspension shall state the reason(s) for the suspension, the length of time, the correction required, additional suggestions for correction, and a statement that if correction does not occur within twenty (20) working days upon return, the employee may be discharged. If no correction is made or unsatisfactory progress is made toward correction, the employee may be discharged. Discharge shall occur for a major offense, and will normally be preceded by suspension with or without pay.

Each employee will be provided with a copy of any material placed in his/her file, once the material has been initialed. They shall have the opportunity to react in writing to any material contained in the file. With the approval of the employee, the union representative may examine the contents of the employee's file.

Non probationary employees shall only be disciplined, suspended, reduced in rank or compensation, or discharged for just cause.

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### **BACKGROUND**

The grievant, Kathleen (Kathy) Smith, has been employed as a cleaner by the District for the past seven years at Humke Elementary School. Smith has been employed on the second shift, 3:00 p.m. to 11:00 p.m. Pamela Amundson is also employed on the second shift as a cleaner.

Approximately three years ago, Smith was in the maintenance room at the District when Humke Elementary Principal Leonard Englert (Englert) entered with a boy who had an eye patch over his eye. Englert had caught the boy in the kindergarten bathroom urinating all over the floor and the toilet. When Englert entered the maintenance room, Smith asked him who Englert wanted to clean the kindergarten bathroom and stated that Englert should decide. Englert said that the boy would clean the bathroom and Smith went and got supplies for this cleaning process and Englert left the maintenance room with the boy.

Teacher Jackie Look essentially confirmed herein that a student in her kindergarten class had been involved in urinating in inappropriate places and had, in fact, urinated on another student, as well as been involved in looking under the stalls and talking and roughhousing in the boys' bathroom. When Look was informed by the student who had been urinated on that this had occurred, she got Principal Englert involved in this situation. Look confirmed that Englert told her that he intended to make the boy clean the bathroom, although Look did not know whether, in fact, Englert had done so.

At the time of this incident three years ago, Smith stated that Englert had told her to give him a note if any vandalism occurred at the school and he would take care of it. 1/ Former employee Dan Gallagher 2/ and employee Jerry Bredl testified herein regarding their understanding of the District policy concerning cleaning up urine and excrement in the bathrooms. Bredl stated that his supervisor has never told him not to clean a bathroom; that he used to work second shift (although he now works first shift) and he has had messes in his bathrooms which he cleaned up, including cleaning up urine and feces spread around the bathroom. Bredl stated that he always cleaned up urine and excrement because he believed this was his job.

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*1/ Smith stated herein that Englert told her to leave the mess and then leave him a note and he would take care of the vandalism. Also, Smith stated herein that Englert told her to let him know or leave a note and leave the mess and he would take care of it.*

*2/ Dan Gallagher is no relation to the Arbitrator.*

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Former employee Gallagher stated that when he found messes in the bathroom, he always contacted either Englert or whoever was in charge of the building and then cleaned up the mess if Englert was not there because the bathroom could not be used until it was cleaned and there was a terrible odor. Gallagher stated that he never closed an entire bathroom during his tenure with the District by putting an "out of order" sign on it, although once he locked one stall and put an "out of order" sign on it, awaiting the principal's review of the situation. Gallagher stated that for approximately half of his 18 years at the District, he worked on the first shift and for the other half, he worked on the second shift.

Building and Grounds Supervisor Ed Robatcek stated that he is the person who normally deals with vandalism at the District; that he checks the school grounds and the exterior and interior of the school buildings and asks employees to notify him if vandalism occurs. If a cleaner finds vandalism, Robatcek expects the cleaner to write a note or call him and to clean up the mess. In the past, Robatcek stated he has never heard of students cleaning up bathroom messes like the one discovered on April 11<sup>th</sup>, although students have scrubbed off

graffiti on the outside of the building and swept up bark chips in the past that they have inappropriately spread around. Finally, Robotcek stated that at approximately 7:00 a.m. children begin to arrive at school for day care that is available there; and that regular classes begin at approximately 8:20 a.m.

Principal Englert has been employed by the District for approximately 12 years as the Humke Elementary Principal. Englert stated herein that he never told Smith or any other cleaner not to clean up urine and excrement in the bathroom. 3/ Englert stated that he has directed maintenance employees that whenever vandalism occurs that it should be cleaned up as soon as possible by a custodian or cleaner hired to do that work, but that Englert has asked employees that he be notified of all vandalism so that he can have students clean it up if that would be appropriate. Englert stated that leaving urine and feces on the floors and walls in the boys' bathroom is a health hazard and that that kind of mess should be cleaned up immediately. Englert stated that he has told employees, including Smith, that they can feel free to call him at home if there is a problem or question.

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*3/ Initially in his testimony, Englert did not recall the incident of approximately three years ago involving the boy with the patch over his eye who was a student of Ms. Look's. However, after Ms. Look testified, Englert confirmed that he recalled the problem with that boy in Look's class.*

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## FACTS

On April 11, 2001, Smith began her work as usual after 3:00 p.m. and went down to the second grade wing to clean the boys' bathroom. She began cleaning the bathroom but in the middle stall she found urine all over the stall, on the stall floor, in the toilet paper dispenser and in the toilet, and excrement was smeared behind the stall door and on the stall walls. At this point, Smith decided to stop cleaning the boys' bathroom and to put an "out of order" sign on the entry door to the boys' bathroom. She then saw Pam Amundson, second shift cleaner, and asked her to look at the mess that had been made by the boys. Amundson viewed it and asked if Smith would like her to help clean up the mess. 4/ Smith declined, saying that they should leave notes for Englert and Bredl because that is what she (Smith) had been told to do in the past. Thereafter, Smith wrote two notes (one to Jerry Bredl 5/ and the other to Mr. Englert), while on her break time. The notes read as follows:

I have a (sic) Out of Order sign on 2<sup>nd</sup> grade Boys' restroom door. they are still peeing on stalls, floors in stalls, toilet paper dispenser wiping poop on walls.

I have a wet mop bucket a big pail with rags in bucket paper towels and gloves as you walk in south maintenance room.  
All the boys down 2<sup>nd</sup> grade can clean it up.

Maybe they won't do that for awhile, or again.

. . .

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*4/ During her testimony, Smith denied that Amundson offered to help her clean up the mess on April 11, 2001. Amundson stated herein she asked if Smith needed help cleaning up the mess and that Smith replied as recounted above. I find that as there is no reason for Amundson to lie and because her credibility was not successfully attacked, Amundson's testimony is credited on this point.*

*5/ In her note to Jerry Bredl, Smith merely asked that Bredl pass on the note to Mr. Englert. The contents thereof were otherwise the same. Amundson was present when Smith wrote the notes.*

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Smith otherwise completed her work on April 11<sup>th</sup> and was on vacation on April 12<sup>th</sup>. On April 12, 2001, supervisor Ed Robotcek issued Smith the following letter:

## **MEMORANDUM OF RECORD**

### **KATHLEEN SMITH – April 12, 2001**

On Thursday, April 12, 2001, when I came to work I saw 2 letters you had written, one to Jerry Bredl and one to Leonard Englert stating that the second grade boys bathroom was out of order by your authority.

I went down to the bathroom and looked at the mess on the wall of 3 or 4 smears of excrement. Then I instructed Jerry Bredl to clean up the mess and mop the floor.

I will request Mr. Englert have a talk with the boys in that wing, but as I see it, according to your job description, "Cleaner" that it is in fact, your job to clean these bathrooms as you are assigned to that end of the building and that duty.

You spent more time writing a sign "Out of Order" and the two letters attached to this letter than what actual time you would have taken to clean up the entire bathroom.

In the future you will clean up all messes left like that and report it to me and Mr. Englert so that we can deal with it. It is not your place to discipline the children, but the (sic) is the responsibility of the school principal.

Due to the fact that I will be out of the District on vacation from April 12 – 23, please plan to meet with me about this matter on Wednesday, April 25, 2001 at 9:30 A.M. in my office. At that time you will be able to respond to my letter.

Robatcek stated herein that he issued Smith the written warning quoted above because she did not do her job on April 11<sup>th</sup>. Robatcek further stated that he has never told employees to leave messes in the bathrooms; that Smith did not call him on April 11<sup>th</sup>, although Smith knows that she can always call him if she has a question or a problem. Robatcek stated that Smith has called him during her shift in the past regarding other questions she has had concerning her work.

Principal Englert stated that custodians and cleaners do not have the authority to close an entire bathroom or even a stall; that they should clean up the mess and then report that there was a problem. Englert admitted that there are no District documents in existence stating how cleaners are expected to deal with these kinds of situations. Englert was emphatic that he had never directed anyone to leave a mess so that he could see it later.

Smith stated herein that she had had conversations with former employee Gallagher wherein he had told her that Englert had stated to him that he (Gallagher) should leave a note or notify Englert of any vandalism and that Englert would then take care of it. 6/ Smith stated that she expected Robatcek and Englert to take the second grade boys into the bathroom after the April 11<sup>th</sup> incident and show them how to use the bathroom properly and she expected that the boys would then clean up the mess that was left in the bathroom. Smith stated that she thought she was authorized to close a bathroom, although she admitted she was never told this by management. Smith also admitted she is responsible to clean and disinfect all bathrooms as part of her job duties and that she was assigned to clean the second grade boys' bathroom on the evening of April 11<sup>th</sup>. Smith stated that given the warning she received, she is now aware what she should do if a similar situation occurs in the future - that she should clean up the mess and then let Mr. Englert know that it occurred.

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*6/ In his testimony, Gallagher was not asked to confirm that he had told this to Smith.*

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On April 25, 2001, Smith responded to the letter she had received from Robatcek (dated April 12), as follows:



Received a letter from Ed Robotcek in the mail on April 13, 2001. This is in regard to the to the (sic) incident that took place on April 11, 2001. This was about the out of order sign and the pee on the stall floors in the stalls, toilet paper dispensers and wiping excrement on the walls. I talked to Ed about this problem over Spring Break. Also what was happening on boy's (sic) bathroom by office. That someone was crawling using their feet up the stall and walking on top of the urinals and peeing on them. And I was afraid one of the kids would get hurt. A while ago I was cleaning the North End. I was in the Maintenance room at the time when Mr. Englert stopped me Kathleen Smith and asked for a bucket and a rag and some rubber gloves. He also had a boy with a patch over his eye with him. Mr. Englert said he made a mess in the Kindergarten bathroom and that the boy was going to clean up the mess and maybe he won't do it again. Mr. Englert said if something like this ever happens again to leave it and leave him a note and he will take care of the situation. So April 11, 2001 when I went into the 2<sup>nd</sup> grade bathroom and found it like it was, I cleaned everything else. I left the pee on the floor and stall walls and Excrement on the wall. I Kathleen Smith left a note for Jerry Bradle (sic) a note of what happened and what I had did. I asked Jerry Bradle (sic) to give this note to Mr. Englert. It sounded like Ed would be on vacation the next day and I had vacation April 12, 2001 that is why I gave the note to Jerry to give to Mr. Englert. I also wrote a note to Ed on green paper from Jerry's desk about the bathrooms. This was done on my break not while I was working. So I thought I was doing my job after the conversation that I had With (sic) Mr. Englert on the problem with the Kindergarten bathroom incident.

...

On April 30, 2001, Robotcek issued Smith the following letter:

...

After considering your request for me to remove the Letter of Reprimand dated April 12, 2001, that I placed in your file, I find the following:

1. You failed to do your assigned job by not cleaning the excrement off of the bathroom wall, and scrubbing the bathroom floors.

2. You should not have taken yellow caution tape 7/ and closed the second grade boys (sic) bathroom because it was not within your authority.

As a result of these findings the letter will stand and not be removed from your file.

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*7/ There was no evidence submitted to show that Smith used yellow caution tape to close the bathroom on April 11<sup>th</sup>. Rather, Smith admittedly posted an "out of order" sign on the bathroom door.*

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The Union filed the instant grievance on or about May 5, 2001. On May 17, 2001, Dr. David J. Scarpino, Superintendent of Schools, denied Smith's grievance as follows:

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After interviewing Kathy Smith, Len Englert, and Ed Robatack (sic) about this matter, I find that Kathy Smith failed to do her assigned job of properly cleaning the boys (sic) bathroom at Humke Elementary School.

Mr. Robatcek, Building and Grounds supervisor, has the right to write an employee up for not doing his/her job and the employee has the right to react in writing to what the supervisor wrote about him/her. If Kathy Smith disagrees with the content of the letter of reprimand, she has the opportunity to react in writing. Please read Article V, Evaluation/Discipline page 9.

As a result of these findings, the grievance is denied and the letter of reprimand will remain in Kathy Smith's file.

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Thereafter, the Board of Education held a hearing on June 12, 2001, regarding Smith's grievance. On June 22, 2001, the Board issued the following findings with regard to that hearing: 8/

. . .

1. After listening to Kathy's side of the story, the Board wanted to hear from the building principal, Mr. Len Englert. Mr. Englert told the Board that he never told Kathy to not clean the bathrooms when the children intentionally or unintentionally make a mess.

2. Mr. Englert also told the Board that he never directed Kathy to close the bathroom in the event that the children intentionally or unintentionally make a mess.

3. When Board member Tom Pangburn asked Kathy, "Have you had this happen before m(what (sic) did you do? (sic) Kathy responded: "I've cleaned it up and I let Ed know about I it (sic) The Board wondered if Kathy cleaned up the mess before, why didn't she clean it up this time?"

Based upon the above gathered information, the Board denies your grievance. The Board wants to remind Kathy that she does have the option to write a letter of rebuttal to her letter reprimand (sic).

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*8/ During the instant hearing Board Representative Pangburn stated that Smith made a statement at the Board hearing which Smith denied making herein. As Smith's statement at the Board hearing on June 12, 2001, was not a part of the reason for disciplining her on April 30, 2001, it is unnecessary for the Arbitrator to resolve this credibility resolution and the evidence regarding this issue has not been considered in reaching the decision herein.*

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### **POSITIONS OF THE PARTIES**

The parties chose to orally argue the case and waive the right to file any briefs herein. Their arguments are summarized as follows:

#### **District**

The District argued that this case turns upon credibility resolutions raised in the testimony herein. The District noted that Smith asserted that Amundson never volunteered to help her clean up the mess Smith discovered in the second grade boys' bathroom on April 11. Yet, Amundson specifically stated herein that she volunteered to help. In addition, the District

pointed out that Smith stated herein that Englert is an honest person. The District asserted that it would make no sense for Building Principal Englert to tell a cleaner not to do their job. Englert testified herein that he has never seen an “out of order” sign on a bathroom in his 12 years with the District, and that he never directed anyone to leave a mess in the bathroom so that he could view it.

The District contended that Smith was attempting to blame others for her own mistakes. In the District’s view, there is no debate that Smith failed to perform her duties as assigned on April 11<sup>th</sup>; and that Smith admitted that she has cleaned up similar messes in the past, yet she failed to do so on April 11<sup>th</sup>. The District urged that Smith’s testimony was incredible. In this regard, the District noted that Smith initially admitted that Englert had told her, after both the boys’ bathroom mess three years ago as well as after the April 11<sup>th</sup> bathroom mess was discovered, that she could call him at home if she had any problems. Later, in her testimony, Smith retracted the statement saying that only after the April 11<sup>th</sup> incident had Englert told her to call him at home. The District urged, therefore, that the grievance be denied and that the discipline stand.

### **Association**

The Association argued that the letter of reprimand issued to Smith constituted discipline without cause. In this regard, the Association noted that Smith did not decide to leave the second grade boys’ bathroom in order to shirk her responsibilities. Rather, Smith had the best of intentions, based upon her experience and her understanding of what Mr. Englert wanted done in such situations. Furthermore, no evidence was submitted to show that Smith had been a problem employee or that she had had a history of doing substandard work. In fact, the evidence showed that Smith had no prior warnings and that the District had considered Smith a good employee and had considered her for a commendation in the past. Therefore, in the Association’s view, the District did not follow progressive discipline in this case.

The Association urged that Smith had had no forewarning that her acts of April 11<sup>th</sup> were inappropriate. Both former employee Dan Gallagher and Principal Englert stated herein that Englert had told employees not to clean up bathroom messes (such as the one Smith found on April 11<sup>th</sup>), but to let Englert see the messes before cleaning them.

The Association observed that Article V demonstrates that employee discipline should be progressive. Here, Smith merely followed Englert’s prior instructions to her and her actions of April 11<sup>th</sup> were, therefore, reasonable under the circumstances. The Association also noted that unit employees have not been evaluated and that the District could submit no documents to prove what Englert’s expectations were in circumstances such as those Smith

faced on April 11<sup>th</sup>. Therefore, the Union urged that Smith should not have been issued a written warning for following Principal Englert's prior directives and that the grievance should therefore be sustained and Smith's file should be expunged of any reference to the written warning issued on April 30, 2001.

### DISCUSSION

The record evidence showed that in the seven years she has been employed by the District, Kathleen Smith never received any warnings or any other disciplinary actions as a District cleaner employee prior to the written warning which led to the filing of the instant grievance. In addition, in the year prior to April 11, 2001, the District offered Smith a commendation for her good work which Smith declined for her own reasons. Thus, the record herein shows that Smith was a good employee with a clean work record prior to the District issuing her the written warning for her conduct on April 11, 2001.

The central question in this case is whether Smith knew or should have known that the District expected her to clean up the urine and fecal matter she found in the second grade boys' bathroom on the second shift on April 11. In this regard, I note that the evidence showed that such messes have happened repeatedly at the District and that the evidence was conflicting regarding what instructions, if any, employees had been given regarding how to treat urine and fecal matter discovered in the bathrooms at the District.

Smith testified herein that three years ago, Principal Englert told her not to clean up a bathroom mess involving urine made by a male kindergarten student (with an eye patch), instructing Smith that the student would clean up the mess and that if Smith ever discovered such a mess again, she should leave a note for Englert and leave the mess so that Englert could take care of it. 9/ In contrast, Englert flatly denied making these statements to Smith or any other District employee. Englert stated that he expects cleaning staff employees to clean up urine and fecal matter immediately because these present a health hazard. However, Englert also stated that he has told District cleaners to notify him of vandalism so that he can have students clean up the vandalism. In addition, Supervisor Robotcek stated that he is the person responsible to deal with vandalism at the District, not Englert. Neither Englert nor Robotcek made any distinction between the various types of vandalism.

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*9/ One could argue that this case is different from the one which occurred three years ago on which Smith relies, as the latter case involved urine only and Mr. Englert was present in the building and viewed the vandalism. I note also that Smith asked Englert who should clean up the mess on the prior occasion.*

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Several employees and one former employee testified herein regarding how they have dealt with bathroom messes involving urine and fecal matter. For example, leadman Jerry Bredl stated that Englert never told him not to clean up such messes and that he has cleaned up both urine and fecal matter immediately when he has discovered them. Retired employee Dan Gallagher (who worked both first and second shift during his tenure) stated that in the case of urine and fecal matter, he has cleaned up these messes (because the bathroom could not be safely used and the smell was very unpleasant) and he has then left a note for Englert. However, Gallagher also stated that Englert has indicated to him that he (Englert) wanted to see bathroom vandalism involving excrement before it was cleaned up. Gallagher stated that if Englert was not present in the school, he notified whoever was in charge and he then cleaned up the mess. Finally, Gallagher stated that he placed an “out of order” sign on a bathroom stall and locked the stall so that he could show the mess to supervision before cleaning it. 10/ Finally, cleaner Pamela Amundson implied in her testimony that she did not know how to deal with messes consisting of urine and fecal matter in District bathrooms by her interaction with Smith on the evening of April 11. Amundson was not asked questions directly regarding her understanding of how to deal with such messes.

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*10/ Gallagher was not asked what part of the instructions he received applied to his tenure on first shift and what applied to his tenure on second shift.*

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It is clear from this record that the District has not issued any documents, nor has it conducted any orientations or in-services informing employees how to deal with urine and fecal matter in the bathrooms, and that the District has failed to instruct employees regarding what constitutes vandalism and who at the District is responsible to deal with it. However, it is also clear that both Principal Englert and Supervisor Robotcek have told employees, including Smith, to call them at home if they have questions or problems at work after regular school hours.

In the Arbitrator’s opinion, the record demonstrates that it was not clear what the District expected Smith to do upon discovering the serious mess in the second grade boys’ bathroom on April 11<sup>th</sup>. I note that the situation which occurred three years ago involved only urine and that it occurred at a time when Englert was present in the building to give instructions. Assuming arguendo that at that time, Englert actually told Smith to leave such messes in the future for him to see, this was said in the context of Englert’s being available in the building to view the mess at that time and that Englert expected someone to clean the mess up that day. Englert never told Smith to leave such messes overnight and he never told her she could close a bathroom rather than clean up such a mess.

In any event, and assuming that Englert spoke over broadly to Smith three years ago, it is clear that if Smith had any questions or problems on her shift, she knew that she should call Robatcek or Englert after school hours. Smith admitted that she has done this in the past when she had a question or a problem at work. Yet, Smith failed to call anyone on April 11<sup>th</sup>.

The Arbitrator is struck by Englert's statement that leaving the bathroom dirty overnight posed a health hazard to students and staff. It is also significant that Smith admitted herein that prior to April 11, she had never been instructed that she had the authority to post a bathroom "out of order." Further, it is also undisputed on this record that no employee prior to Smith has ever posted an entire bathroom "out of order" in at least the past 12 years. Finally, Smith admitted herein that prior to April 11, 2001, she cleaned up both urine and excrement in District bathrooms and thereafter notified management.

Thus, whether the District managers in fact instructed employees what to do regarding urine and fecal messes in the bathrooms, it is a matter of common sense that such messes should not be left in District bathrooms overnight to be dealt with by the following shift, as students normally begin arriving at Humke Elementary at 7:00 a.m., just when the first shift begins. In this case, there is no evidence that any employee was ever told that it would be acceptable to leave urine and fecal matter in the bathrooms from one shift to the next. 10/

The Union argued that the discipline meted out against Smith was not progressive. In this regard, I note that generally a first instance of misconduct is normally punished by an oral warning. However, where an employee's misconduct is serious, employers can be privileged to skip this normal progressive discipline procedure (from oral to written to suspension to discharge) and issue discipline at a higher level for a first instance of misconduct. In the instant case, the District determined that Smith's conduct was serious enough to warrant a written warning despite her clean work record.

In the instant case, the District failed to distinguish between bathroom vandalism and other types of vandalism and it failed to clearly instruct employees how they were expected to deal with bathroom messes involving urine and fecal matter. Given the fact that the District contributed to Smith's confusion regarding what she should do on April 11<sup>th</sup> and the fact that Smith has been a good employee who had a clean work record prior to April 11<sup>th</sup>, it is the Arbitrator's view that the District should, in fairness, have issued Smith an oral warning for her misconduct on April 11<sup>th</sup>. However, by reducing the discipline in this case, the Arbitrator does not wish to detract from the fact that Smith's actions of April 11<sup>th</sup> in leaving a foul mess overnight in a District bathroom and posting the bathroom "out of order" certainly justified disciplinary action. 12/

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*12/ It is unnecessary to deal with the several credibility issues raised in this case given my analysis of the facts and circumstances.*

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The Union has argued that Article V – Evaluation/Discipline should apply to this case. I agree in part and disagree in part. The first paragraph of Article V addresses, in a general way, the purpose of evaluation and the second paragraph speaks to the evaluation of employees, both probationary and non-probationary. The instant case does not concern evaluations. The third paragraph of Article V addresses material which can be placed in an employee’s personnel file. This provision is not before me in this case. Paragraph four of Article V merely states the standard (also contained in Article II, Section D) that non-probationary employees are not to be disciplined, suspended or reduced in rank or compensation or discharged except for just cause. 13/ Although all of Article V was cited in the grievance, I believe only paragraph four thereof is relevant to this case and only it has been applied herein.

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*13/ I note that Article II, Section D, states a “cause” standard while Article V, paragraph four, states a “just cause” standard. To the extent there is any real difference between these two provisions, let me state that I have applied the just cause standard of Article V in this case.*

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Based upon all of the relevant evidence and argument in this case, I issue the following

### **AWARD**

The District did not violate the terms and conditions of the agreement when it reprimanded Kathy Smith for her handling of the situation in the boys’ bathroom in the second grade area on April 11, 2001. However, in all the circumstances of this case, the District, in fairness, should have issued Smith an oral warning for her misconduct on April 11, 2001. Therefore, the discipline given to Smith shall be reduced from a written warning to an oral warning. Therefore, the grievance is granted in part and denied in part.

Dated at Oshkosh, Wisconsin, this 7<sup>th</sup> day of January, 2002.

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