

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MERRILL TEACHERS ASSOCIATION

and

MERRILL AREA PUBLIC SCHOOLS

Case 37
No. 59660
MA-11369

(Washington School Mural Grievance)

Appearances:

Mr. Thomas S. Ivey, Jr., Executive Director, Central Wisconsin UniServ Council-North, 2805 Emery Drive, P.O. Box 1606, Wausau, WI 54402-1606, appearing on behalf of the Association.

Mr. Dean R. Dietrich with **Mr. Bryan Kleinmaier** on the brief, Ruder, Ware & Michler, S.C., 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of the District.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' July 1, 1999 - June 30, 2001 collective bargaining agreement (Agreement).

The dispute was heard at the District Administration Building in Merrill, Wisconsin, on August 7, 2001. The proceeding was not transcribed, but the parties authorized the Arbitrator to maintain an audio tape recording of the evidence and arguments for the Arbitrator's exclusive use in award preparation.

Exchanges of the parties' post-hearing briefs and reply briefs were completed on November 20, 2001, marking the close of the hearing.

ISSUES

The parties authorized the Arbitrator to formulate a statement of the issues for determination based on the evidence and arguments presented. In their briefs, the parties proposed the following issues statements:

The Association proposes that the issues be:

Did the District violate the Agreement when they didn't pay for work and materials done August 8-15, 2000? If so, what should the remedy be?

The District proposes that the issues be:

Whether the District violated the Agreement by refusing to pay the four teachers who removed the paint covering the mural at Washington Elementary School during August of 2000? If so what is the appropriate remedy?

The Arbitrator frames the issues as follows:

1. Did the District violate the Agreement by refusing to pay the Grievants (Vicky Van Straten, Jessica Pelka, Lynn Schroeder and Ardis Marquis) for the time and materials involved in their removal of paint covering the mural at Washington Elementary School during August of 2000?

2. If so, what is the appropriate remedy?

PORTIONS OF THE AGREEMENT

Article 3.0: Board Function

Section 3.1

The Board of Education of the Merrill Area Public Schools hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, of the United States, and all applicable court rulings.

Article 14.0: Grievance Procedure

Section 14.1

Definition:

For the purposes of this agreement, a grievance is defined as any problem involving the meaning, interpretation, and application of the provisions of this agreement.

. . .

Section 14.3

Procedures:

. . .

STEP V. . . . The arbitrator will be without power or authority to make any decision which requires the commission of an act prohibited by law or which is violative of the terms of this agreement.

Article 18.0: Teaching Assignment

Section 18.1

Teaching periods, preparation periods, and other assignments are determined by the building principal based on professional preparation and program needs.

. . .

Section 18.4

District staff may be required to participate in two paid events per year. All non-paid events are considered voluntary and teachers may leave anytime after the student day ends on the school day following the unpaid event.

Article 20.0: Payroll Deduction

Section 20.1

Required deductions are federal and state income tax, STRS and FICA. Staff members may elect U.S. Bond payments, tax-sheltered annuities, or additional

insurance protection upon application to the Business Office. Tax-sheltered annuities are available through the following companies: [list omitted].

Article 25.0: Summer Assignments

Section 25.1

Assignments such as curricular development, in-service activities, short term administrative assignments, outside the 38 week contract to be at the rate of \$300 per week for the 1999-2001 school years on a half-time basis (20 hours) or equivalent thereof.

Section 25.2

The professional staff members assigned to teach summer school shall be compensated at the rate:

Summer school pay schedule

1st year	\$15.50 per hour
2nd year	\$16.00 per hour
3rd year	\$15.50 per hour
4th year	\$17.00 per hour
5th year	\$17.50 per hour

If a professional staff member does not teach summer school at least once during a five (5) year period, they will return to the first year step where compensated

All teachers will start at the first year level beginning in the summer of the year 2000.

Section 30.0: Teacher Discipline

Section 30.1

Alleged breaches of discipline shall be promptly reported to the offending employee. In the event said breach of discipline may or could result in termination of employment, written notification that such a breach has occurred shall be promptly forwarded to the employee and the MTA.

Section 30.3

No teacher, except those serving their probationary period, will be non-renewed except for cause.

. . .

Section 30.5

No teacher shall be suspended except for cause.

Section 30.6

All information forming the basis of disciplinary action shall be made available to the employee.

Section 30.07

When in the judgment of the superintendent, a condition or situation warrants, the superintendent may suspend a staff member with pay pending action by the Board.

Section 30.8

Because such action could only follow a serious problem, the superintendent shall file written charges with the board of Education and shall forward copies of said charges to the suspended staff member.

Section 30.9

The Board shall schedule a hearing, if desired by the employee, to act on the charges. The employee may be accompanied by counsel, if so desired.

Extra Pay Schedule

Teachers (K-12) will be compensated for work performed after the regular school day at the rate per assignment as listed below.

Ticket Sellers	\$17
Ticket Takers	\$17
Supervisors of Events	\$17
Scorekeepers	\$17
Timers	\$17

Announcers	\$17
Track timers	\$17
Dance/Party chaperones	\$17
Supervisors for plays	\$17
Super. For Concerts K-12	\$17
Super. for Musicals K-12	\$17

Bus chaperones will be compensated at the rate of \$21 per trip if the trip is less than 100 miles and \$26 per trip if the round trip exceeds 100 miles.

Appendix B — 2000-2001 Salary Schedule [a conventional salary grid containing annual salaries with 14 steps and 12 columns of increasing educational attainment]

BACKGROUND

The District is a K-12 public school district serving the Merrill, Wisconsin area in north central Wisconsin. The Association represents a bargaining unit of professional teaching personnel of the District. The District and Association have been parties to a series of collective bargaining agreements, including the Agreement.

Four members of the Association bargaining unit are the subject of the grievance filed in this case by the Association. They are Vicky Van Straten, Jessica Pelka, Lynn Schroeder and Ardis Marquis (Grievants). Each of the Grievants was employed by the District at Washington (elementary) School throughout at least the two school years preceding and the school year following the summer of 2000. Except for Pelka, who had worked for the District just two years as of the summer of 2000, the Grievants had all worked for many additional years at Washington School, as well.

The instant dispute concerns actions of the Grievants and the District during the summer of 2000 in relation to a mural that was painted on the wall of the Washington School library in 1983. The mural was created under an "Artist in Residence" program, with help from students and teachers.

In May of 1999, Washington Head Custodian Bob Pike surveyed the Washington staff, asking whether the employees favored painting over the mural, not painting over the mural or had no preference. Pike delivered the survey results to Washington Principal Garth Swanson. When the rest of the library walls were subsequently repainted by the District's paint crew at Swanson's direction during the summer of 1999, the mural was not painted over.

In July of 2000, Grievants Schroeder, Van Straten and Pelka attended a two-day District workshop on "Phonemic Awareness" at Washington that was presented during the

morning hours of July 11 and 12. Grievant Marquis was in the building on those days fixing up and painting a closet being converted to a "book room" in preparation for the upcoming school year, for which Marquis was being paid under a grant. Grievant Pelka remained in the building after the morning workshop sessions to assist Grievant Marquis with the "book room" project. Grievants Schroeder, Van Straten and Marquis along with teacher Carol Wegner remained in the building after the July 11 workshop to work on a damaged bulletin board in the library and a trophy case in the hallway.

During the course of their activities on July 11, the Grievants and Wegner discussed what else they could do to improve the appearance and functionality of the building. They discussed their belief that the May, 1999 survey had shown a substantial majority of Washington staff in favor of having the mural painted over and that the mural was too "busy" to permit Wegner to hang her students' work in the library. On the counter of the Library, they discovered a paintbrush and a can of latex paint that matched the color of paint used to paint the other sections of the library in the summer of 1999 and decided to paint over the mural. They then and there decided that the mural should be painted over. Grievants Schroeder and Van Straten proceeded to paint over the mural with a first coat on July 11 and with a second coat on July 12. Grievant Pelka applied a third coat over the mural on July 13 and added a contrasting plum-color stripe to match the stripe painted on the other library walls. Neither Wegner nor Grievant Marquis painted over the mural.

The workshop was a paid activity, but except for Marquis' being compensated for her work on the "book room," none of the employees requested or received pay for their above-noted after-workshop activities on July 11 and 12 or for their activities on July 13.

After the Grievants began the paint-over of the mural, Custodians Pike and Mark Voight assisted the Grievants with the paint-over in various ways by obtaining and providing additional paint when requested by the Grievants and by moving ladders and offering painting tips.

Swanson was out of town on vacation when the mural was painted over. It is undisputed that neither he nor any other District supervisor or administrator expressly authorized anyone to paint over the mural. It is also undisputed that in the Spring of 2000, Grievant Schroeder and other teachers had "informal conversations" with Swanson about improving the appearance of the school in anticipation of the initiation of the SAGE program there the following fall; that Swanson approved all of Schroeder's specific suggestions for spruce-up projects; but that neither Schroeder nor anyone else suggested to Swanson or received Swanson's approval for painting over the mural. However, it is also undisputed that following his return from vacation, Swanson told Marquis that he thought the paint-over of the mural looked nice and brightened up the area and that he liked what the teachers had done.

On July 26, 2000, District Superintendent Frank Harrington received a letter from a retired Washington teacher who expressed her sadness and regrets that the Washington mural had been painted over. That teacher later supplied Harrington with newspaper articles describing the creation of the mural.

On July 30, 2000, Harrington spoke with Association President Jeff Hetfeld in the hallway of the High School. At that time, Harrington told Hetfeld that the mural at Washington Elementary had been painted over without authorization by the Grievants and that the District was considering three options regarding the District's response to the situation: having the overpaint removed from the mural by the Grievants; having the overpaint removed by the District and billing the Grievants for the cost of the removal; and having the overpaint removed by the District and docking the paychecks of the Grievants for the cost of the removal. Hetfeld replied that he could not believe that the Grievants would do something like that without permission and recommended that Harrington talk to the Grievants about the matter before taking any action. Hetfeld also expressed his belief that the Agreement would prohibit the District from docking the Grievants' pay because their pay was for the 190 days of work that they had already completed.

Without any communications with the Grievants, the District issued letters dated August 2, 2000, to the Grievants at their home addresses from District Director of Administrative Services Gregory L. Kautza. Kautza's letters read as follows:

Dear Washington Teachers:

I received a letter last week that was addressed to the superintendent, school board president and myself. The letter stated that the historical mural in the Washington library had been painted over. After checking with my paint crew to see why they had done such a thing, I was informed that they did not paint over the mural. Through conversations with Garth Swanson and the summer staff it was determined that you four ladies painted over the mural.

I understand there was a survey done last year to determine the staff's feelings about the mural. I further understand that the survey results were such that Garth made a decision that the mural was to stay. [Emphasis in original.] With Garth on vacation this week it is hard to determine whether or not he informed all staff that the mural was to stay, but it was general knowledge in the building. Garth, however, did tell the district paint crew, who are the people authorized to paint the building, to leave the mural when they painted the rest of the library last year. The proper channel for requests for painting is through Bryan Plautz or me. Neither of us recall any requests to have the mural covered.

After conversation with Garth and Frank Harrington it has been decided that the mural needs to be restored. I acquired a product from Mautz paint called "Goof Off." This product removes latex paint, but not oil based paint. I experimented with this product and with a great deal of effort with rags and brushes, the latex you applied can be removed.

Frank and I talked about two options: 1) You could remove the latex yourself, or 2) we will have it removed and equally bill the four of you for the process. We would like the four of you to get together and determine how you want to handle the restoration of the mural and inform us ASAP. In either case it needs to be done before the beginning of the school year — consequently we need to know your decision no later than Wednesday, August 9th.

Kautza's letter shows copies were sent to District Superintendent Frank Harrington, School Board President Joe Fink and Swanson. Kautza testified that Pike told him that the mural had been painted over by the four Grievants.

The Grievants each learned of the contents of those letters on August 3. They discussed the letter and authorized Grievant Schroeder to call Kautza and inform him that they had chosen to remove the paint from the mural themselves and that they would begin doing so. When Schroeder called Kautza on August 4, he was not available, so she left a message to those effects on his voice mail.

From August 3 until August 15, 2000, non-Grievant Wegner and the four Grievants (including Marquis), worked on removal of the latex paint using "Goof Off." The label on the "Goof Off" can states that "[v]apor is harmful and eye irritant." It also cautions that "... dizziness, headaches, nausea or eye watering" can result from its use and that "[i]ntentional inhalation can be fatal." Despite those warnings and advice from paint store personnel that the product is intended only for small scale spot removals in well-ventilated areas, the Grievants and Wegner used 29 quarts of the product and the Grievants worked a combined 126.25 hours. (Wegner worked an additional 26 hours, but no claim has been advanced on her behalf in this case.) The Grievants testified that they did their paint removal at night to avoid daytime heat and humidity. They set up fans to reduce the effect of the product fumes, and they found that they needed to wear multiple layers of rubber gloves to avoid contacting the product with their hands while performing the paint removal. Despite those precautions, Grievant Schroeder experienced headaches and chemical burns on her face and leg. After a small amount of the product splattered off a wall and into her eye, Schroeder also experienced a temporary problem with kaleidoscopic vision for which she sought and received medical attention.

Kautza visited the Library on various days to see how the Grievants were progressing, but he never encountered the Grievants because they did their paint removal work only at night. On one occasion, Swanson told Marquis that he wanted to help the Grievants with the paint removal, but Marquis told him "[n]o the stuff will kill you," referring to "Goof Off" and the fragile state of Swanson's health. The District took no other steps to determine whether or assure that the Grievants were performing the paint removal work in safe and healthy manner.

By August 15, the Grievants had successfully removed the paint covering all but one of several segments of the mural. The Grievants stopped their paint removal efforts at that point following an Association Executive Committee meeting during which Hetfeld learned for the

first time what the Grievants were doing and called on them to cease their paint removal efforts because use of the "Goof Off" product threatened their health and safety. The next day, Hetfeld contacted Harrington and told him that he had asked the Grievants to stop work on the project because their use of the "Goof Off" was hazardous to their health.

Following that contact from Hetfeld the Superintendent conducted an investigation into the matter resulting in his issuance of a letter report dated September 19, 2000, which set forth the following:

FACTUAL INFORMATION:

In the fall of 1983, an "Artist in Residence" was contracted to work with students and staff at the Washington elementary School. This effort resulted in a mural being painted on portions of the walls in the Library area of that building. This event was publicized in the local press.

In the spring of 1999 (likely May) a "vote" or "survey" was directed to be taken by the custodian regarding whether the mural should remain as it was or be painted over. It appears from the testimony that not all staff members were surveyed. The principal (Garth Swanson) recalls the vote being such that he made a determination that the mural would not be painted over. The principal further recalls making a statement to that effect at a staff meeting in May of 1999. Members of the staff who gave testimony do not recall such a statement being made.

During the summer of 1999 all of the Library walls were painted except those portions with mural depictions. The painting of the walls was authorized and directed by the administration.

In the spring of 2000 primary grade level members of the Washington elementary staff were involved in preparing for a new program (Student Achievement Guarantee in Education - SAGE) to evolve in the fall of the 2000-2001 school year. The focus of this program is to reduce class sizes at the primary levels. Several of the staff determined that certain areas of the building needed to be "spruced-up" related to the SAGE initiative. The discussions with the Principal regarding the "spruce-up" did not include the murals.

During the summer, apparently in concert with the "spruce-up" effort by some of the teaching staff, Vicky Van Straten, Lynn Schroeder, and Jessica Pelka did paint over the mural portions of the Library wall. It was determined that Ardis Marquis, who had previously been identified as another staff member who painted over the murals, actually did not do any painting related to the murals. Additionally, two custodians (Bob Pike and Mark Voight) had only incidental

involvement related to the paint-over. Their actions included obtaining some additional painting material and/or moving cardboard for the teachers. They had no involvement in the actual painting.

ANALYSIS:

It is at this point that a primary question evolves. That question is: "Did anyone who did the painting receive affirmative authority or permission from the building principal or any other administrator to actually paint-over the murals?" With the testimony I received, no staff member stated that they had received permission to paint over the murals. The general testimony from staff members justifying why they felt they had the authority or did not need the permission for the paint-over was 1) because they believed they had been able to do other renovations in the past without request/permission; 2) because they had not been told that they could not paint-over the murals; and, 3) because their intentions were not malicious, rather were to assist in the spruce-up of the building. With the aforementioned, they appeared to believe that it would be permissible to do the painting covering the murals.

The teachers involved in the paint-over received a letter, dated August 2, 2000, from Greg Kautza (Director of Administrative Services) which gave them two options regarding the removal of the latex paint used to cover the mural. One option was to remove the paint themselves; the other option was to have the district remove the paint and be billed for the work.

In the August 2nd letter, Mr. Kautza also stated that he had contacted a Mautz paint dealer to determine if there was any product which would remove latex paint. He was told, and he referenced in his August 2nd letter, that a product by the name of "Goof Off" would work with great effort. One of the teachers also contacted the Mautz dealer and was told that this product was not designed for other than small scale spot removal.

At the close of the August 2nd letter, the teachers were asked to get together, determine their choice of options, and "inform us (Kautza or Harrington) ASAP". Lynn Schroeder, on behalf of the other teachers involved, left a voice mail on Greg Kautza's telephone stating that they were choosing option one (removing the paint themselves). There was no other first-hand discussion between these parties until after the removal process had been started. After leaving the voice mail message they did begin the process of removing the paint using the "Goof Off" product.

After many hours of work in removing the latex paint from one of the wall panels (this work being done by Vicky Van Straten, Lynn Schroeder, Jessica Pelka, Ardis Marquis, and Carol Wegner) the removal work was stopped due to

a concern regarding the potentially harmful nature of the "Goof Off" product being used in large quantities. Each of the individuals has contacted a physician to determine if any negative medical impact could be determined. The issue related to any medical concerns will be addressed to the individuals impacted in a separate document.

CONCLUSIONS

As Superintendent, it is my belief, based on the testimony and information which I have received, that none of the individuals involved in the paint-over of the mural had received "affirmative permission" to involve themselves in this project. An undertaking of this magnitude should have warranted, at a minimum, a collective discussion with the building Principal to review such a consideration and request specific permission to do a paint-over of the mural segments on the library wall. Some of the individuals had spoken with the Principal about cleaning up a trophy case, removing some coat racks, and painting a closet. In these cases the considerations/requests were affirmed by the Principal. **In the future, staff members must receive affirmative permission to involve themselves in similar such activities and are herein directed to do so.** [Emphasis in original.]

I have also noted a greater than desirable degree of what I refer to as "free flowing action" - meaning there is at least an appearance of an atmosphere in the building which allows individuals to believe they can "do" almost anything without discussion and/or permission from the Principal. **The Principal needs to establish boundaries and criteria within which decisions can be made relative to the operation of the building and is herein directed to do so.** [Emphasis in original.] Such boundaries/criteria must be communicated to the members of the staff so that there is no misunderstanding as to the useful parameters for "free flowing action" versus those actions which require prior approval.

Whatever disciplinary matters that may be considered relative to the mural paint-over incident will be handled on a personal and individual basis.

Copies of this report are to be distributed to the members of the Washington elementary School staff and those individuals attending the September 7, 2000 hearing.

On September 15, 2000, shortly before the issuance of the Superintendent's report, above, the grievance giving rise to this arbitration was filed by the Association. The grievance read, in pertinent part, as follows:

Statement of Grievance:

The rights of Bargaining Unit Members Vicky Van Straten, Jessica Pelka, Ardis Marquis, [and] Lynn Schroeder were violated by the District when the Director of Administrative Services, Greg Kautza, gave these teachers an order, contained in his letter of, August 2, 2000, requiring the removal of paint from walls in the Library of Washington Elementary School. We consider such order to be:

1. outside the scope of any duty for which the district contracted with the teacher
2. a possible violation of the safe workplace statute, 101.11, and
3. a demand to collect monies, without consent of the employees, for their work time or reimbursement.

Further the Association asserts that Mr. Kautza's letter of August 2, 2000, and related actions by the District, constitute discipline without just cause. It is clear that Mr. Kautza failed to conduct a thorough investigation into facts of the situation prior to taking disciplinary action against the teachers. Mr. Kautza also violated the provisions of the Master Agreement when he failed to copy the letter of August 2, 2000, to the [Association].

Additionally, the District failed to pay the teachers for their time and materials involved, as a result of Mr. Kautza's letter of August 2, 2000, in removing latex paint from the mural at Washington Elementary.

Relevant Contract Provisions:

Article 3.0 - Board Function - Sections 3.1 and 3.2

Article 30.0 Teacher Discipline -- Sections 30.1, 30.3, 30.5, 30.6

Appendix B -- 2000-2001 Salary Schedule and Appendix D - Teacher Contract

And any other relevant Article or Section which may be found to apply.

Remedy Requested:

1. Pay the teachers for the cleaning of the mural at Washington Elementary School at an hourly rate based upon each teacher's per diem for the 2000-2001 school year.

2. Reimburse the teachers involved for any expenses incurred in carrying out the District's orders contained in, or related to, Mr. Kautza's letter of August 2, 2000.
3. Cease and desist any pending disciplinary action against the teachers involved.
4. Rescind any disciplinary action, if any, taken against the teachers involved.
5. Remove all materials related to any action taken against the teachers from any and all files.

After the grievance was denied at the Principal step, it was appealed to the Superintendent. In his letter denying the grievance, the Superintendent concluded that Grievants Pelka, Schroeder and Van Straten painted over the mural without having solicited or received permission to do so from their building principal; that it was "appropriate and common to other similar situations where property has been defaced or destroyed . . . [to give] the individuals . . . the choice of fixing the damage or paying for its repair. I believe this is referred to as restitution." He further concluded that "[a]s of this date no formal disciplinary action has taken place, none of the three teachers are in jeopardy of losing their positions, and there have been no violations of the contract."

The grievance was then appealed to the Board of Education step. The Board response read, in pertinent part, as follows:

This letter shall constitute the response of the School Board to the grievance filed by the Merrill Education Association over the mural painting dispute. Since the Association indicated that several items in its grievance have been resolved, this response shall only address the portion of the grievance relating to the letter sent by Mr. Greg Kautza and the request by the Association that additional compensation be paid to those teachers who worked to remove paint from the mural.

The School Board has determined that the teachers working at the Washington Elementary School were volunteers and not employees of the School District at the time. The School Board has also determined that the actions of the teachers in painting over the mural without obtaining any affirmative permission or even discussing such action with the Administration was not a duly authorized work activity. As a result, the School Board has determined that the actions taken by Mr. Kautza were reasonable and appropriate under the circumstances as these same steps would have been taken with any other individual committing a

similar act on school property. The School Board, therefore, does not authorize any payment of compensation to the teachers involved as requested by the Association.

In order to resolve this matter, the School Board has directed the following steps to be taken by Administration:

The Administration is to restore the remaining portion of the mural as part of the upcoming, annual summer maintenance work.

The Administration is to reaffirm to the Board of Education that there is no disciplinary action reflected of this issue in personnel files of the teachers involved.

If you should have any questions regarding this, please contact Mr. Frank Harrington directly.

The dispute was ultimately submitted for arbitration as noted above. At the hearing, the Association presented testimony by the four Grievants and rested. The District presented testimony by Kautza and rested. The Association presented rebuttal testimony by Harrington and Hetfeld.

POSITIONS OF THE PARTIES

The Association

The Grievants were employees of the District for purposes of this case. The District treated them as employees by providing them access to the building, equipment and materials, and assistance as well as by giving them permission to "spruce up" the school in preparation for the upcoming school year. The Grievants painted over the mural in good faith, without malice, and within the practice and latitude set forth by their principal, Garth Swanson.

The District did not have just cause to issue the letter of August 2, 2000, demanding that the teachers pay for removal of the paint over the mural or remove that paint themselves. The District knowingly put the Grievants in an unsafe situation while providing no training or protections. The District also disciplined the Grievants without talking to them and without otherwise conducting a fair and impartial investigation before reaching its conclusions.

Although the Grievants acted in good faith, the District did not. The Grievants made improvements for no other reason than to benefit the students and the District. In return, the District seeks to deny that the Grievants were employees and treats them like vandals, presumably in an effort to shield itself from the consequences of its serious error in judgment in ordering the teachers to work without pay using a toxic substance.

The August 2 letter placed the Grievants under considerable time pressure to complete the mural restoration. They believed that they were being disciplined when they removed the paint. Only later did the District inform them it had not intended the August 2 letter to constitute discipline. In the circumstances, now that the "dust has settled" and the Grievants have been informed of their rights by the Association, they have every right to pursue compensation as they have in this arbitration.

By way of remedy, the District should be required to pay the teachers for the materials they used in removing the paint and for the time they spent doing so at an hourly rate based on their regular teaching salary. The District should be required to pay the Grievants at that higher rate, in part, because the District acted without regard to the Grievants' health and safety and without offering the Grievants an opportunity to explain their conduct before being ordered to remove the paint. The District should also be required to make sure that the Grievants' files are free of any documents or references to the painting over of the mural and should be ordered not to take any disciplinary action against the Grievants.

The fact that the District has not taken any disciplinary action beyond the letter of August 2 does not mean there is no dispute as to whether the District had the right to impose the action demanded by the District of the Grievants in that letter. That dispute still exists and is before the Arbitrator. CITING, CITY OF RICHLAND CENTER (POLICE), WERC MA-8539 (SHAW, 4/24/95).

The District

The Grievants, acting as non-employee volunteers, spontaneously decided on their own to paint over the mural. They did not receive explicit or implicit District authorization to do so. Their conduct equates to defacement of District property.

The District responded as it does with all individuals who deface District property. It asked the Grievants to cure the problem themselves or to pay to have the District cure the problem. That District response is dictated by common sense and was clearly reasonable, CITING, NICOLET AREA TECHNICAL COLLEGE, WERC MA-10428 (GRECO, 5/12/99), and the Grievants chose to remove the paint themselves.

Now the Grievants request compensation for curing the defacement that they caused. However, just as private citizens would not receive compensation for curing a problem that they have caused, the Grievants should not receive compensation for removing the paint over the mural.

A variety of additional considerations lend support to the District's position. One of the options stated in the August 2 letter was that the District could bill the Grievants for the cost of District restoration of the mural; however, neither that option nor the letter as a whole

contains any threat of or reference to docking the Grievants' pay for those costs. The August 2 letter did not inform the Grievants that the two options it listed were the only two options available. Neither in Schroeder's voice mail message agreeing to remove the paint nor in any other way did Grievants ask whether they would be paid for doing so or ask to meet with Kautza or Harrington to discuss pay or other possible options. The Grievants also did not fill out the form customarily used by teachers to get paid under Article 25 for work performed during the summer, and they did not obtain any employment contract to perform the paint removal work. Although Kautza's letter indicated that "Goof Off" could be used to remove latex paint, he did not recommend or require the Grievants to use this product. The District denies that its conduct illustrated a lack of concern for the Grievants and asserts that that issue is irrelevant when determining whether the Grievants should be compensated for curing the defacement of District property that their conduct created.

For those reasons, the Union's requests for arbitral remedies should be denied in all respects.

DISCUSSION

Central to the resolution of the ISSUES framed above is the question of whether the District's August 20, 2000 letter violated the Agreement.

If that letter impacted solely a matter between the District and non-employee community volunteers, then neither the Agreement nor its grievance and arbitration procedure would apply to the dispute under Agreement Secs. 14.1 and 14.3, Step V. The Arbitrator finds, however, that the Grievants' involvement in the Washington School mural paint-over was as District employees in the Association bargaining unit, not as non-employee community volunteers.

The Grievants' various efforts at sprucing up the building during the summer of 2000, whether paid or unpaid, were extensions of their work as teachers rather than projects independent of their employment relationship with the District. Those spruce-up efforts were intended to enhance the working environment for the Grievants as employees as well as to improve the educational environment for students and their parents. Those efforts were akin to other work commonly performed by bargaining unit teachers on a voluntary basis, some of which is specially compensated and some of which is performed without special compensation over and above the employees' annual salary. See, Agreement 18.4, Article 25, and Extra Duty Pay Schedule.

Kautza's August 2 letter, itself, shows that he understood that he was dealing with the Grievants as bargaining unit teachers. The salutation of the letter alone establishes that, to wit, "Dear Washington Teachers." The letter also refers to the Grievants' relationship to the District as employees by its references to "a survey . . . to determine the staff's feelings about the mural" and to the "general knowledge in the building" regarding the future of the mural. While Kautza was not a supervisor with authority over the Grievants, his letter refers to his

having conferred with the Superintendent regarding the Grievants' options outlined in the letter, conveying that the letter was being issued under the Superintendent's supervisory authority.

The issuance of the August 2 letter to the Grievants was, therefore, an action taken by the District with respect to the Grievants as Association bargaining unit employees and subject to challenge through the Agreement grievance procedure.

Whether viewed as discipline or some other form of exercise of the District's management rights under the Agreement, the August 2 letter violated the Agreement because it was arbitrary and capricious both procedurally and substantively. The management rights reserved to the Board of Education in Art. 3 are subject to the implied obligation that those rights may not be exercised in a manner that is arbitrary, capricious or in bad faith. See, e.g., BARRON COUNTY, WERC MA-10165 (JONES, 8/19/98) at 7; CITY OF RACINE, WERC MA-10580 (CROWLEY, 12/29/99) at 6; VERNON COUNTY, WERC MA-7210 (SCHIAVONI, 9/16/92) at 4; KEWAUNEE ENGINEERING CORP., WERC A-4762 (GRATZ, 12/3/91) at 10; and MUSKEGO-NORWAY SCHOOL DISTRICT, WERC MA-7065 (GRATZ, 8/13/92) at 13.

The August 2 letter — as the Grievants reasonably understood it — required them to choose between exposing themselves to being billed by the District for unspecified and unknown costs of mural restoration by the District and exposing themselves to the hazards of removing the paint themselves along with the associated costs of materials and expenditure of their time. It further required them to select an option and act quickly by calling for them to choose and communicate their choice of option "ASAP," and in no event later than August 9, and by requiring that the work on the project be completed "before the beginning of the school year" which would have been less than three weeks later on April 21.

Procedurally, the letter was arbitrary and capricious because it was issued without any communication with the Grievants. While the District's election to issue the August 2 letter without giving the Grievants an opportunity to explain their conduct was apparently influenced by a felt need to return the mural to its original condition before the beginning of the following school year, that election prevented the District from asking the Grievants whether they had in fact "painted over the mural," and it caused the District to erroneously determine that Grievant Marquis had done so when in fact she had not. As a further result, the District determined the alternative penalties to be imposed on the Grievants without asking the Grievants why they had painted over the mural. Giving the Grievants an opportunity to explain their conduct would not have fully exonerated Van Straten, Schroeder and Pelka from fault in the circumstances, because none of them had asked for or received express authorization to paint over the mural and they should have known that Swanson wanted the mural to remain uncovered when all but the mural was painted over during the summer of 1999 following the completion of Pike's survey. However, hearing from the Grievants before issuance of the August 2 letter would have revealed, as found in the Superintendent's perceptive investigation report, that the mural was painted over "apparently in concert with the 'spruce-up' effort on-going at Washington and that the Grievants "appeared to be believe that it would be permissible to do the painting covering the murals" at least in part because "there is at least an appearance of an atmosphere

in the building which allows individuals to believe they can 'do' almost anything without discussion and/or permission from the Principal." While those factors would not have fully exonerated the Grievants for painting over the mural without permission, they are nonetheless significant mitigating factors as regards the penalty, if any, that could properly be imposed on Van Straten, Schroeder and Pelka for the paint-over.

Substantively, the letter was arbitrary and capricious because it imposed a penalty on Marquis for painting over the mural when, in fact, she did not do so. It was also arbitrary and capricious because it applied the restore-or-pay-for-restoration approach which the Superintendent characterized in his grievance response as "common to other similar situations where property was defaced or destroyed." In the Arbitrator's opinion, it was arbitrary and capricious to treat the Grievants' actions as defacing or destroying property. The arbitration record confirms that the three Grievants who painted over the mural did so in concert with on-going efforts to spruce up and improve the building and not with any intention to harm or detract from its appearance or functionality. The Grievants' decision to paint over the mural was made on the spur of the moment, rather than as a result of some long-planned deliberate effort to defy management's authority or to undercut the preferences of other staff members who favored retention of the mural. The paint-over in this case is more aptly characterized as making a mistake regarding the extent to which they were authorized to spruce-up the building, rather than as defacing or destroying District property. For those reasons, the Arbitrator finds unpersuasive the District's assertion that it was "reasonable" for the District to apply to the Grievants its common response "where property was defaced or destroyed."

In the absence of an Agreement provision or published work rule putting employees on fair notice that they are subject to being billed for the cost of mistakes that they make as employees and choose not to fix on their own time and at their own expense, it is neither common sense nor reasonable for the District to impose those choices on the Grievants in response to their conduct in this case.

The Grievants' conduct in this case is clearly distinguishable from the spray painting of a the Spanish word, "OMELAS" in 12-inch high letters on the back of two large bookcases comprising one wall of the grievant's office in the NICOLET AREA TECHNICAL COLLEGE award cited by the District. In that case, Arbitrator Amedeo Greco found that the grievant's "gross misconduct when she defaced school property" was "inexplicable," prompting him to rule consistent with the Faculty Association's claim "that the College 'could have ordered her to buy new bookcases.'" ID. at 8. Unlike the grievant in that case, the Grievants' conduct in this case was not inexplicable. They acted — albeit without requisite permission — for purposes of improving the appearance and functionality of the school library.

The August 2 letter was also arbitrary and capricious because one of the two alternatives from which it required the Grievants to choose was inherently dangerous to their health and safety. That option was stated in the letter as, "[y]ou could remove the latex yourself." It followed a paragraph in which Kautza states, "I acquired a product from Mautz paint called 'Goof Off.' This product removes latex paint, but not oil based paint. I experimented with this product and with a great deal of effort with rags and brushes, the latex you applied can be removed." The letter thereby identified one and only one product,

identified where the Grievants could obtain that product, and identified how the Grievants could use the product to remove the latex. It thereby effectively authorized the Grievants to use that product and that method without offering any qualifications or references to the need for any protective clothing, equipment or methods. The letter thereby exposed the Grievants to a serious threat to their health and safety.

For those reasons, the Arbitrator concludes that the District's rights under the Agreement did not entitle the District either to require the Grievants to restore the mural themselves, or to require the Grievants in the alternative to be billed for the cost of District restoration of the mural. The District's issuance of the August 2 letter to the Grievants therefore violated the Agreement.

There remain the questions of whether the District is obligated in the circumstances to pay the Grievants for the time and materials they spent in removing paint from the mural, and if so, at what hourly rate.

The Grievants were effectively compelled to perform the paint removal task without compensation in order to avoid being billed an unspecified and unknown amount for District restoration of the mural. The Arbitrator has concluded that the District had no right under the Agreement either to require the Grievants to remove the paint or to bill them for that removal. In these circumstances, it is conventional and appropriate that the District be required to compensate the Grievants for the work the District improperly compelled them to perform.

The Grievants did not volunteer to remove the paint. Rather, they were compelled to do so by the August 2 letter or, alternatively, to be billed for the unspecified and unknown cost of the restoration. The letter did not invite the Grievants to confer with Kautza or other administrators about what should be done. The letter did not ask the Grievants if they had alternative solutions to propose. It effectively directed them to choose one of the two alternatives and to do so ASAP and in no event later than Wednesday, August 9. That is what the Grievants reasonably understood the letter was requiring of them; that is what the Superintendent's October 16 report describes the August 2 letter as requiring of the Grievants; and that is what the Arbitrator finds the August 2 letter required of them.

The fact that the Grievants complied promptly and without question or qualification to a District directive that has been found above to have violated the Agreement does not make it inappropriate that the District be ordered to pay the Grievants for the time and materials involved. It is true that the Grievants could have conferred with the Association before responding or could have refused to comply on health and safety grounds after learning from the paint store that "Goof Off" was suitable only for small spot removals, or could have put the District on notice that they reserved the right to later seek compensation through the grievance procedure for removing the paint. However, in the circumstances of this case, the Grievants' failure to do any of those things is not a persuasive basis on which to deny the Association's request for an order that the District pay for the Grievants' paint removal time and materials.

The Arbitrator, therefore, concludes that, by way of remedy for issuance of its August 2 letter in violation of the Agreement, it is appropriate that the District be required to pay the Grievants for their paint removal time and materials.

The Arbitrator finds that the rate at which the Grievants shall be paid is the first year level \$15.50 per hour "Summer school pay schedule" rate that Sec. 25.2 makes applicable to "professional staff members assigned to teach summer school . . . beginning in the summer of the year 2000," rather than the higher hourly rates based on their annual teaching salary requested by the Association. The paint removal work performed by the Grievants, while arduous and dangerous and effectively compelled by the District, is at least somewhat similar to the cleaning up of a laboratory which Hetfeld testified that he had previously performed at the Summer School rate. The Association identified no instances in which similar work was compensated at the sort of rates the Association is requesting for the Grievants in this case. The arbitral relief available in a case of this kind is make-whole relief intended to be compensatory in nature, rather than punitive. Accordingly, the Association's assertion that the higher salary-based rate be imposed as a punitive measure to discourage future such violations by the District is not a persuasive basis on which to impose the higher rates.

The materials costs incurred by the Grievants were identified at the hearing and not disputed by the District. Those costs have therefore been ordered reimbursed by the District to the Grievants.

The Association has also requested that the Arbitrator order the District to take no disciplinary action against the Grievants regarding the paint-over and to remove all documents or references to the painting over of the mural from the Grievants' personnel files. In that regard, the District correctly points out that, in its January 15, 2001 grievance response, the Board of Education unconditionally directed the Administration to assure "that there is no disciplinary action [concerning] this issue in personnel files of the teachers involved" in an effort to "resolve this matter." The District has also unequivocally stated in its reply brief (at p.4) that "[t]he District has openly addressed the issue of discipline and concluded that no discipline is warranted."

It is, therefore, clear from the record and the positions taken by the parties in this case that the District has enforceably agreed that no disciplinary action has been taken and that no future disciplinary action will be taken against the Grievants as regards the painting over of the Washington School mural. A remedial order to that effect would therefore be redundant and unnecessary.

However, because it has been disputed whether the August 2 letter was disciplinary in nature, it is not clear that the Board's directive above has assured that the August 2 letter has been removed from the Grievants' personnel files. The Arbitrator has, therefore, ordered that the August 2 letter be removed from the Grievant's personnel files along with any other documents or references concerning the painting over of the Washington School mural.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES above that:

1. The District did violate the Agreement by refusing to pay the Grievants (Vicky Van Straten, Jessica Pelka, Lynn Schroeder and Ardis Marquis) for the time and materials involved in their removal of paint covering the mural at Washington Elementary School during August of 2000.

2. As the remedy for the violation noted in 1, above, the District shall promptly:

a. pay the Grievants at the \$15.50 level of the Agreement Summer School pay schedule rate, without interest, and subject to customary payroll deductions, for the following amounts of time worked by them on paint removal during August of 2000:

Ardis Marquis — 30.5 hours
Lynn Schroeder — 37.0 hours
Jessica Pelka — 26.25 hours
Vicky Van Straten — 16.25 hours;

b. reimburse the Grievants, without interest, in a total amount of \$381.18, divided among the Grievants in a manner to be specified by the Association, for materials used during the Grievants' paint removal during August of 2000; and

c. remove from the Grievants' personnel files the District's August 2, 2000 letter and any other documents or references concerning the painting over of the Washington School mural.

3. The Arbitrator reserves jurisdiction for a period of 30 days following the date of issuance of this Award, to resolve, at the request of either party, disputes as to the meaning and application of the remedy ordered in 2, above.

Dated at Shorewood, Wisconsin, this 14th day of March, 2002.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator