BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

SCHOOL DISTRICT OF GRANTSBURG

Case 18
No. 60822
MA-11735

(Kathryn Daniels Grievance)

Appearances:

Mr. Tim A. Schultz, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, WI 54868, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorneys Kathryn J. Prenn and Christopher R. Bloom,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

Northwest United Educators, hereinafter the Union, with the concurrence of the School District of Grantsburg, hereinafter the District, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as Arbitrator to hear and decide the instant dispute involving the termination of Kathryn Daniels, hereinafter the Grievant, and in accordance with the grievance and arbitration procedure contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On April 2, 2002, a hearing was held in Grantsburg, Wisconsin. The hearing was not transcribed. On June 19, 2002, the record was closed having received the last of the parties' briefs.

ISSUES

The parties stipulated to the following issues:

1. Did the District have just cause to terminate the Grievant?

2. If not, what is the appropriate remedy?

PERTINENT AGREEMENT PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

Except as expressly modified by other provisions of the contract, the School Board possesses the sole right to operate the School District and all management rights reposed in it. These rights include, but are not limited to, the following:

. . .

C. To suspend, demote, discharge and take other disciplinary action against employees;

. . .

ARTICLE X – DISCIPLINE

A. The parties recognize the authority of the Employer to initiate disciplinary action against employees for just cause.

B. Employees who have completed their probationary period shall be entitled to appeal any disciplinary action taken against them through the grievance procedure.

C. If any disciplinary action is taken against an employee, both the employee and the Union will receive copies of this disciplinary action.

. . .

BACKGROUND

The District operates a public school system in Grantsburg, Wisconsin, which includes elementary, middle and high schools. At all times, the Superintendent has been Joni Burgin. The Grievant was a Teacher's Aide and was employed by the District from October 6, 1997, to the time of her termination on January 14, 2002. During the course of her employment, the Grievant worked with cognitively disabled students, sometimes referred to as special education students, in a middle school classroom taught by teacher Kathy Bowers. In addition, the Grievant's duties included work as a bus crossing guard on the school premises and as a supervisor of students at noon recess.

The following is a framework of events which were relied upon by the District for its termination of the Grievant. This framework includes documents supplied by both the District and the Union. Some of the facts contained within these documents are in dispute. The names of students within the documents have been modified to protect their identification. The disputed facts are addressed in the Positions of the Parties and in the Discussion below.

May 20, 1999.

On May 20, 1999, Middle School Principal Paul Tatting and Elementary School Principal Clayton Jorgensen wrote a memorandum to the Grievant regarding "Responsibilities and Consequences" for an event which occurred on May 17, 1999:

. . .

> On Monday, May 17th, Paul Tatting and Clayton Jorgensen met with Kathy Daniels. The reason for the meeting was to ask Kathy why she did not inform anyone when she was not picking up MH. BH, the mother, had called and was worried if something had happened to Kathy. Mr. Jorgensen had tried to contact Kathy because she had not showed up for her early childhood job, but could not locate her. Finally, the mother agreed to take M to the picnic. Kathy did not meet the group at the park.
>
> Kathy said she did not call anyone because she had been up all night helping her sister who had a baby. She was so tired she just overslept. She apologized. Mr. Tatting reminded Kathy that not calling and letting people know she wouldn't be able to pick up M had happened a few times before. M's mother, B, had called Kathy Bowers, M's teacher, and Mr. Tatting voicing her frustration. Kathy explained she had a back problem and could not get to the phone.
>
> M's education is very important. If she does not get a ride to school, or if Kathy is not able to work with her in the home, M's education suffers. In the future the following must occur.
>
> 1. If Kathy is not able to pick up M, she will phone, preferably B, but otherwise Kathy Bowers, Mr. Jorgensen, Cindi Throngard, or Mr. Tatting.
> 2. The school District will work to find someone who can sub for Kathy when she is unable to work with M.
> 3. If Kathy does not call and let us know she cannot pick up or work with M, disciplinary action will be taken.

4. The School District is extending Kathy's employment status to probationary one more year because this year's position was different than last year.

cc: Joni Burgin

March 7, 2001.

On March 7, 2001, Middle School Principal Mark Dorhout wrote a memorandum to the Grievant regarding "Notice of Deficiencies" for events on and leading up to February 21 and 22, 2001:

. . .

1. There have been occasions on which your bus duty was not completed satisfactorily. February 21 and February 22, 2001, were examples. You also continue to be tardy for work. Further, there has been at least one occasion on which you were not adequately prepared to perform the safety functions of your position, but were standing on your corner anyway. On that occasion, you just parked your car and walked to the corner. This situation presented a hazard for both you and the traffic as you had neither the safety vest nor the stop sign that are required to perform the job safely. This was in direct violation of the District's requirements that you use these safety devices when performing your job.

2. Absences. Both Mr. Tatting and Mr. Jorgensen have previously advised you that your dependability was not at an acceptable level. In a support staff evaluation signed on May 28, 1999, Mr. Jorgensen stated that he expected you to "plan ahead better. If she is going to be late, or not able to come to work, she must let people know in advance." This area of you job performance remains a concern.

Your attendance record for the 2000-01 school year is as follows:

Sick leave:	21.5 days used, plus six days without paid leave
Personal leave:	Both personal days have been used
Emergency leave:	One day used
Unpaid leave:	Eight days

You have missed a total of 38.5 days out of approximately 125, or approximately one of every 3.5 days. This level of attendance is unacceptable.

Expectations to address these deficiencies are as follows:

a. You are expected to be on time for work. Your day begins at 7:45 a.m. and ends at 3:45 p.m. This includes a one-half hour unpaid lunch and two paid 15-minute breaks. Preparation time during the day should be used for preparation of lessons as assigned by Mrs. Bowers.

b. You are expected to pick up your safety gear in the office at 7:50 a.m. You should be out to your corner by 7:55 a.m. with the appropriate gear (vest and stop sign) during the winter and five minutes earlier when the weather gets nicer (more bike and student traffic).

c. You are expected to pick up your safety materials at 3:15 p.m. for the afternoon bus duty. Your duty is to maintain traffic patterns and allow no cars to be in the middle school loop while the buses are present. You will start this duty at 3:20 p.m. and end when traffic is minimal (approximately 3:35 pm). You are then expected to bring safety materials back to the office and continue with your job until 3:45 p.m.

d. If for some reason you will be late, you must contact me by 7:00 a.m. or at the earliest possible time so that a substitute can be found to perform your duty. This is imperative for safety reasons.

e. Your attendance must improve. Unpaid leave will be granted only for bona fide emergencies and illness. Furthermore, as indicated above, I expect that if you are gone due to an emergency or illness, you will inform me at the earliest possible time.

Your improvement in these areas of deficiency is critical for safety reasons and for the CDS program to function so as to best meet the needs of the students. This memo shall place you on notice that unless there is significant and substantial improvement in your overall job performance, including but not limited to the areas of deficiencies stated in this memo, you will be subject to disciplinary action up to and including dismissal. It is important that you take the steps necessary to correct these deficiencies so as to insure your continued employment.

If you have any questions or concerns following your review of the information contained in this memo, please do not hesitate to discuss them with me.

c. Joni Burgin, Superintendent Burgin
Personnel File
Tim Schultz

. . .

March 22, 2001.

On March 22, 2001, Middle School Principal Mark Dorhout wrote a memorandum to the Grievant regarding "Notice of Deficiencies" for events on and leading up to March 20, 2001:

. . .

There continues to be problems with your job performance. You received a letter indicating deficiencies in this performance on March 7, 2001 (only 16 days ago). Since you have received that letter you have not improved three areas. These include:

1. Your bus duty was not completed satisfactorily. On March 20, 2001 you again did not adhere to the safety requirements of the district. In a previous letter (March 7, 2001) I stated: "… you were not adequately prepared to perform the safety functions of your position, but were standing on your corner anyway. On that occasion, you just parked your car and walked to the corner. This situation presented a hazard for both you and the traffic as you had neither the safety vest nor the stop sign that are required to perform the job safely. This was in direct violation of the District's requirements that you use these safety devices when performing your job."

On March 20, 2001 you did the exact same thing. I cannot tolerate this due to safety concerns for both you and our students.

2. You also continue to be tardy for work. On this same occasion, you left the school grounds at 3:35 p.m. I the March 7 letter I stated that:
"You are expected to be on time for work. Your day begins at 7:45 a.m. and ends at 3:45p.m. This includes a one-half hour unpaid lunch and two paid 15-minute breaks. Preparation time during the day should be used for preparation of lessons as assigned by Mrs. Bowers."

Furthermore, in this same letter I stated:
"You are expected to pick up your safety materials at 3:15 p.m. for the afternoon bus duty. You duty is to maintain traffic patterns and allow no cars to be in the middle school loop while the buses are present. You will start this duty at 3:20 p.m. and end when traffic is minimal (approximately 3:35pm). You are then expected to bring safety materials back to the office and continue with your job until 3:45 p.m."

You left at 3:35pm from your bus duty location where you had just parked your car. This cannot continue.

3. You did not inform me that you were going to be absent due to illness.
Again in the March 7 letter I stated : "Your attendance must improve. Unpaid leave will be granted only for bona fide emergencies and illness. Furthermore, as indicated above, I expect that if you are gone due to an emergency or illness, you will inform me at the earliest possible time."

You did not make an attempt to contact me until Mrs. Williamson called you (per my request) and asked you to call me.

In our conversation on the phone (9:30a.m. on 3-21-2001) you acknowledged to me that you knew that you were supposed to contact me. You also understood that you did not do your bus duty as you were supposed to and that you need to use the stop sign and vest because of safety concerns. You also understood that you were to return to the middle school and continue your job until 3:45p.m. and not leave at 3:35p.m.

Your improvement in these areas of deficiencies is critical for safety reasons and for the CDS program to function so as to best meet the needs of the students. This memo shall place you on notice that unless there is significant and substantial improvement in your overall job performance, including but not limited to the areas of deficiencies stated in this memo, you will be subject to disciplinary action up to and including dismissal. It is important that you take the steps necessary to correct these deficiencies so as to ensure your continued employment.

If you have any questions or concerns following your review of the information contained in this memo, please do not hesitate to discuss them with me.

c. Joni Burgin, Superintendent Burgin
Personnel File
Tim Schultz

. . .

July 10, 2001.

On July 10, 2001, Middle School Principal Mark Dorhout wrote a memorandum to the Grievant regarding "Written Reprimand" for events on and leading up to May 2, 2001:

. . .

In a memo to you dated March 7, 2001, you were put on notice regarding job performance deficiencies and expectations regarding those areas of concern. In

that memo, you were advised that you are expected to be to work on time and that if, for some reason, you will be late, you are to contact me.

A second memo spelling out deficiencies was issued to you on March 22, 2001. In that memo, it was noted that you had, once again, failed to contact me regarding your absence from work.

Despite those two earlier efforts to address these concerns with you, on Wednesday May 2, 2001, you failed to report to work until 8:25a.m., 40 minutes after you are expected to start work. In addition to reporting late, you failed to call me as you are expected to do if you are going to be absent. As a result of your failure to call, your bus duty was not completed. This put students in jeopardy as safety was compromised when you were not available for the bus duty, and I had no knowledge of your absence.

I asked you about this absence at approximately 9:00 a.m. You said that the power was knocked out from the previous night's storms. These storms came through at about 8:30pm on May 1. I explained that you need to develop a backup system for making sure that you get to work on time. You said that your boyfriend was going to call in to me, but he did not do so. It is your responsibility to notify me of your tardiness. In addition you may want to consider purchasing a clock with a battery backup.

As a result of your tardiness for work, as well as your failure to contact me regarding your absence, this memo shall serve as a formal written reprimand. As I explained to you in my previous memos, unless there is significant and substantial improvement in your overall job performance, you will be subject to further disciplinary action up to and including dismissal. It is clear that my earlier informal efforts to work with you in resolving these issues have not been successful. It is up to you to take the steps necessary to improve your overall job performance so as to ensure your continued employment.

If you have any questions or concerns following your review of the information contained in this memo, please do not hesitate to discuss them with me.

c. Joni Burgin, Superintendent
Personnel File
Tim Schultz

. . .

October 9, 2001.

On October 9, 2001, Middle School Principal Brandon Robinson wrote a memorandum to the Grievant regarding "Notice of Suspension" for events on and leading up to September 27 and 28, 2001:

. . .

> In a memorandum dated July 10, 2001, you were formally reprimanded for failing to report to work on time and for failing to call Principal Dorhout as you had previously been directed to do in the event of an absence. The reprimand followed earlier communications to you regarding job performance deficiencies and expectations, including the expectation that you are to be to work on time and that if, for some reason you will be late, you are expected to contact the Principal.
>
> Despite these earlier actions, you failed to report to work on Thursday, September 27, and Friday, September 28, and did not notify me of either absence. On Thursday, this resulted in no one being on bus duty in the morning because we did not know you were absent. This resulted in a potentially hazardous situation for our students.
>
> I met with you on Thursday, October 4, 2001, to discuss issues relating to this matter. During our conference, you stated that you had provided a personal leave request form to Carleen Williamson. In checking with Ms. Williamson, however, Ms. Williamson stated that she did not receive a personal request form from you. Nor did she receive a phone call from you regarding your absences. In addition, Renee Wienzerl also did not receive a personal leave request or phone call from you. With respect to your having lined up Yvonne Lindus to sub for you on Thursday, I believe that is questionable as Ms. Lindus was employed elsewhere on that date.
>
> Based on my investigation, I have concluded that you failed not only to contact me as you had been previously directed regarding your absences on Thursday and Friday, but that you also were not truthful when you stated that you had provided a personal leave request form to Ms. Williamson. Essentially, you were absent without leave (AWOL) on both dates and your absence created a potentially hazardous situation for our students Thursday morning. As a result, I am, hereby, suspending you for two days without pay on October 11 and October 12, 2001.
>
> This represents a final opportunity for you to correct your job performance regarding these matters. If there is a recurrence, I will have no alternative except to recommend that your employment be terminated.

If you have any questions or concerns following your review of the information contained in this memo, please do not hesitate to contact me.

c. Joni Burgin, Superintendent
Personnel File
Tim Schultz

. . .

November 30, 2001.

On the morning of November 30, 2001, the Grievant's car slid into a ditch about one mile from her home near Hertel, Wisconsin, and while she was commuting to the District. The Grievant's home is located approximately 35 miles from the District. After sliding into the ditch, the Grievant walked home and made some telephone calls. The Grievant's vehicle was later pulled out of the ditch, which caused a radiator hose to break and which made a further delay. The car was eventually operable, but not until later that afternoon. The Grievant did not work at the District on that day.

The parties are in dispute over whether the Grievant failed to keep the District informed of her inability to report to work that day.

December 7, 2001.

On December 7, 2001, the Grievant was supervising three cognitively disabled students on the playground over by the picnic table at noon recess. At the request of one of her three students, the Grievant sat on the picnic table and began playing with a hand held electronic game. While the Grievant was playing the game, one of the Grievant's other students went to another part of the playground and was reprimanded by teacher Scott Nelson.

On December 19, 2001, Scott Nelson submitted a written statement to Principal Robinson and with regard to the events which occurred on December 7, 2001:

. . .

Re: Kathy (Katy) Daniels

- Katy is an aide to CDS students. This student population requires routine and consistency. Katy's job attendance does not meet this part of the job description.

- On or about December 7, 2001, Katy was playing a hand held electronic game during playground supervision. A CDS student in her care had to be reprimanded by another playground chaperone, as she was unaware of the situation.

. . .

The parties dispute whether the Grievant was not performing her supervisory duties on the playground and while playing with the hand held electronic game.

December 12, 2001.

On December 12, 2001, the Grievant wrote a letter to Principal Robinson:

. . .

> You were in a meeting so I am writing this note to tell you that I am sorry for not getting ahold of you yesterday. But I was either sleeping or getting sick. I didn't think of you all day. I am only here today because I get yelled at for being sick, and there are not subs ever available. I am not promising that I won't throw up today but I'll get by and as long as I am here right! (Emphasis in original.) I also want to let you know I've been thinking of leaving GMS. [Grantsburg Middle School]. My job isn't as rewarding anymore. The staff I work with isn't as supportive or feel like a team any more. I enjoy the kids and I'll miss them very much but I don't feel I am really doing anything any more. I feel a person should like to come to work. I used to love coming to work and I felt I was teaching or helping the students in a way. It was very rewarding.
>
> I also didn't feel guilty about taking a day off if I wasn't feeling great.

. . .

Later on December 12, 2001, the Grievant was working individually with a cognitively disabled student at a table in the school library. Robinson went to the library so as to speak to the Grievant about the above letter to Robinson.

The parties are in dispute over whether the Grievant was sleeping at the table in the library when Robinson found her. The District also asserts that the Grievant was not performing her supervisory duties.

December 13, 2001.

On December 13, 2001, the Grievant was again at a table in the school library and was working with the same cognitively disabled student as the day before. The parties are in dispute over whether the Grievant was sleeping. The District again asserts that the Grievant was not performing her supervisory duties.

December 14, 2001.

On December 14, 2001, the District had its annual Christmas Coffee open house. The purpose of this event was for parents and alumni to come and visit the school's special education program. The parties are in agreement that the Grievant was sleeping. However, the Union asserts that this was unintentional, there were extenuating circumstances, and there were other factors to consider which is further detailed in the Union's position below.

January 3, 2002.

On January 3, 2002, Middle School Principal Robinson and Special Education Director Tom Hellmers met with the Grievant and discussed the sequence of events since October 9, 2001. Robinson drafted the following notes in preparation for this meeting:

. . .

> Meeting with Katie
> Attended by Tom Hellmers,
>
> High liability of Special Education Students
> Not Meeting Some Expectations
>
> Attendance- November 30th- Car in the ditch- Katie called and said that she would try to be in. She did not make it to work for the day and did not call back later to inform us of this.
>
> Inattentiveness- December 7th- Playing an electronic game during lunch recess supervision. The other students had to be supervised by the other staff members, one being disciplined that is from the CDS program.
>
> Sleeping- December 12th- I observed you sleeping in the library with M [special education student]. I was going to talk to you regarding your letter that you gave me. You were sleeping when I found you and I said that I would meet with you later.

Sleeping- December 13th- Observed by Kathy Bowers sleeping in the library with M [the same special education student] when she was supposed to be tutoring him.

Sleeping- December 14th- Observed sleeping during the Christmas Open House on the couch from 11:45-12:15. The CDS staff observed this incident.

This does not seem to be working. You are not meeting out expectations.

You have two choices:

1. Submit your letter of resignation by the end of the work day tomorrow.
2. My recommendation to the Superintendent and School Board that you be terminated for just cause.

Do you have any questions?

. . .

January 8, 2002, and events thereafter.

On January 8, 2002, Robinson wrote the following letter to the Grievant:

. . .

This letter is to advise you that a hearing has been scheduled for 7:30 p.m. Monday, January 14, 2002, before the Board of Education to consider the Administration's recommendation that your employment with the School District of Grantsburg be terminated.

A review of your employment history with the District reveals the following concerns/actions regarding your job performance:

1. May 20, 1999: You were counseled by Mr. Tatting and Mr. Jorgensen regarding your failure to inform anyone when you are not going to pick up a student. You were advised that this instance was not the first time that you had failed to call regarding your absence for the day. At that time, you were also advised that disciplinary action would be taken if you, in the future, failed to call the District when you were going to be absent.

2. March 7, 2001: On that date, you were issued a Notice of Deficiencies regarding job performance concerns. The deficiencies included your being tardy to work, your failure to be timely prepared to perform safety functions, and your failure to timely contact the District Office on days that you were absent.

3. March 22, 2001: You were again issued a Notice of Deficiencies. Areas of concern included your failure to be timely prepared to perform the safety functions of your position, your being tardy to work and your failure to contact then-Principal Dorhout in the event of an absence as you had been directed to do.

4. July 10, 2001: You were issued a written reprimand for your failure to report to work on time. In addition to reporting late, you also failed to contact then-Principal Dorhout as you had been directed to do if you were going to be absent. As a result of your failure to call, your bus duty was not completed. That fact puts students in jeopardy as safety was compromised when you were not available for the bus duty, and the District had no knowledge of your absence.

5. October 9, 2001: On October 9, 2001, you were issued a two-day suspension without pay for failing to report not work on two separate occasions and failing to notify Principal Robinson as you had been directed. On one of the two days, your failure to notify the District of your absence again resulted in no one being on bus duty in the morning thereby creating a potentially hazardous situation for the students. During the District's investigation of that situation, it also became apparent that you were not truthful when you stated that you had provided a personal leave request form to Ms. Williamson. You were also advised that the two-day suspension provided your final opportunity for you to correct your job performance regarding these matters and that is there were a recurrence, the Administration would recommend that your employment be terminated.

As I discussed with you on January 3, 2002, you were again absent on November 30, 2001. On that date, you called in and said you would try to be in, but you never did make it to work for that day and did not call back later to inform me of that fact. On December 7, 2001, you were observed playing an electronic game during the time that you should have been supervising the lunch recess. On December 12, 2001, I observed you sleeping in the library. You were also observed sleeping in the library on December 13, 2001. On both of these occasions, at the time you were sleeping, you had supervisory responsibilities with respect to students. On December 14, 2001, you were observed sleeping during the Christmas Open House from 11:45 until 12:15. Your sleeping on the job meant that you were not supervising students as you were employed to do during those times.

For these reasons, the Administration has no alternative except to seek termination of your employment. You are officially placed on suspension with pay pending the outcome of the hearing.

The January 14, 2002, hearing will be in closed session unless you request that the hearing be open to the public. During the hearing, you have the right to be represented and to present evidence and testimony on your behalf.

Sincerely,

Brandon Robinson /s/
Brandon Robinson

Cc: Joni Burgin, Superintendent
Personnel File
Tim Schultz

. . .

On January 14, 2002, the School Board met and discussed District's recommendation for termination of the Grievant. The Grievant was represented at the hearing by Executive Director Tim Schultz. Following the hearing, the Board voted to terminate the Grievant's employment with the District.

On January 15, 2002, a grievance was filed asserting that the District did not have just cause to terminate the Grievant. The grievance was advanced to arbitration.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The District

The District had just cause to terminate the Grievant.

The Grievant's pattern of conduct started with her informal 1999 evaluation and continued through her formal written reprimand and subsequent suspension. The District responded and used appropriate progressive discipline. The Grievant's record of discipline supports discharge as the appropriate form of discipline.

October 9, 2001.

The Grievant claims that she filed a leave request on September 27 and 28, 2001. However, the District has no record of this. Further, this explanation cannot be given

credence because her explanation was not offered at the time that the incident was being investigated and the suspension was imposed. Moreover, the Union never grieved the suspension and, thus, the Grievant accepted the discipline.

November 30, 2001.

The Grievant's conduct culminated in a series of incidents which showed a disregard for her duties. The incident on November 30, 2001, is of the same nature of the Grievant's past discipline for neglecting her duties and not notifying the District of her absence. In addition, the Grievant's credibility is in question. The Grievant testified that she did not speak with Robinson that morning. However, Robinson testified that she did.

December 7, 2001.

Again, and on December 7, 2001, the Grievant showed a lack of regard for her responsibility in supervising the safety of her students. School policy prohibits students from bringing hand held electronic games to school, a rule which is enforced by the staff. Because the Grievant was not aware of the situation, one of her students needed to be reprimanded by another playground supervisor. Her conduct resulted in improper supervision and is a gross disregard for the safety of her children. The Grievant's lack of attention to her duties, and the significance of her duties, again resulted in children not being properly supervised.

The Grievant testified that all three of her assigned students were at or near the picnic table while she was playing the game. However, Scott Nelson testified that one of the three had a confrontation by the baseball backstop. Further, and according to the testimony of both Tom Hellmers and Principal Robinson, this claim by the Grievant did not come up during their meeting with the Grievant on January 3, 2002, or during the hearing before the Board on January 14, 2002. Therefore, the Grievant's testimony is not credible.

December 12 and 13, 2001.

The Grievant committed similar violations on December 12, 2001, and on December 13, 2001, when she was observed sleeping. The Grievant**'s** conduct jeopardized the safety of her students by neglecting her main responsibility to supervise her students.

The Union asserts that the Grievant was merely "resting her eyes." However, Principal Robinson observed that the Grievant was sleeping with her head down for an amount of time. This is a reasonable conclusion that she was asleep, citing MARATHON COUNTY, WERC, MA-11085 (BOHRER, 1/01). The issue in MARATHON COUNTY was the perception of an employee during a break. In this case, the Grievant was sleeping while she was supposed to be supervising a single special needs student. The Grievant's actions constitutes gross misconduct and neglect of duties and was a gross disregard of her responsibilities.

Further, the Grievant testified that she saw Robinson walk in the door at the time. However, this testimony is not credible given the assumption that the Grievant cannot see when her eyes are shut and given that Robinson said "Hi" to the Grievant's student and cleared his throat before the Grievant moved.

December 14, 2001.

On December 14, 2001, and during the school's "Christmas Coffee," the Grievant was in the classroom with her eyes closed, her head back, and on the couch sleeping for between ten and twenty minutes. This occurred next to the table where teacher Bowers was meeting with a parent and during a time when teacher aides were assigned to cleanup and serve any remaining parents. The Grievant again showed a disregard for her duties.

Other arguments.

The Grievant's failure to notify the District of her absences, sleeping during her supervising duties and neglecting the supervision of her students all relate to her prior discipline. This involved a similar neglect of duties and failure to properly notify the District of her absences. The Grievant's acts show a clear pattern of gross disregard of responsibilities with increasing severity over the course of the Grievant's employment. The District attempted to address the instances both informally and formally, but the Grievant's neglect worsened.

In KOCH REFINING CO., 86 LA 1211 (MILLER, 1986), the arbitrator acknowledged the safety implications of sleeping on the job and concluded that sleeping on the job, exiting before the end of a shift and using unauthorized leave were sufficient for discharge when coupled with progressive discipline due to conduct demonstrating a lack of responsibility. Likewise, the Grievant has on many instances jeopardized the safety of a child that she is supervising. This distinguishes the Grievant's behavior from any other type of neglect of duties and responsibilities. Such conduct cannot be tolerated on a job site, much less in a school district responsible for safely providing education. This is especially true for a special education aide, such as the Grievant, where a neglect of duties has serious safety implications.

The District's discipline of the Grievant was imposed in gradually increasing levels. Similar to the situation in KOCH, the Grievant was first counseled informally, and then counseled again for her lack of responsibility in leaving work early and for not properly notifying the District with respect to absences. Her conduct jeopardized the safety of her students in that her supervisory duties were not being performed. After these deficiencies persisted, the Grievant was given written reprimands concerning the same conduct. Her suspension followed another violation of a similar nature. Thus, the District followed progressive discipline.

In short, the District warned the Grievant of the consequences of her conduct on several occasions over the course of three years. The District's efforts to correct the Grievant's behavior failed. The Grievant chose to disregard the District's attempts for corrected behavior and her behavior has increasingly worsened. Therefore, there was just cause for the District to terminate the Grievant's employment.

Additional credibility issues.

There are additional reasons why Grievant's testimony is not credible. First, she was the only witness to testify on her own behalf for most of the incidents.

Second, the Grievant's testimony is inconsistent with others' testimony. For example, the Grievant said that she left early on occasion after bus duty because she was unable to take breaks during the day. However, witnesses Bowers, Linscheid and Samantha Nelson testified that breaks can be taken during the day and that an employee cannot leave early for not taking a break. Moreover, and as evidenced in Principal Dorhout's memo dated March 22, 2001, the Grievant was directly informed that she was required to return to the classroom following bus duty and that she was not allowed to leave early.

Third, and with regard to the incident on May 2, 2001, the Grievant testified that the District did not discuss that situation with her prior to her receiving the July 10, 2001, written reprimand. However, the written reprimand itself states that Robinson had previously discussed the matter with the Grievant.

Fourth, the Grievant continued to leave early and without permission as evidenced by the Grievant's 2001-2002 personal log book. The Grievant offered no testimony rebutting this evidence.

Fifth, the Grievant made unfounded allegations against other District staff. These were that the District's Occupational Therapist "closed her eyes" and slept, and that teacher Bowers would leave work early. The Grievant offered no independent evidence on this and could not pinpoint dates. Apparently, the Grievant's testimony is her rationalization for the severity of her conduct. However, her testimony is neither verifiable nor credible and, as such, is self-serving.

The Union

The District did not have just cause to terminate the Grievant.

The Union admits that the District documented a pattern of concerns regarding the Grievant prior to the incident which occurred on September 27 and 28, 2001. However, the

Grievant has already been disciplined for those previous transgressions. Therefore, the Grievant's discharge must be based on those allegations in the District's January 8, 2002, letter that have occurred since her last disciplinary action on October 9, 2001.

October 9, 2001.

The Grievant did not contest her suspension on October 9, 2001, and it is not part of the issue being grieved. However, the incident which led to that suspension is a part of the Grievant's recent employment history, and it was the only disciplinary act where the writer of a District exhibit was present at the hearing to testify about its contents. In addition, the manner in which this suspension was handled exemplifies the District's poor handling of the recent events that led to the Grievant's discharge.

The Grievant's suspension was for failure to report to work and for failing to notify the District of her absence on September 27 and 28, 2001. However, this allegation distorts the truth. Both the Grievant and her fiancé Mike LaPointe testified that the Grievant had requested leave at least a month in advance so that the Grievant could accompany LaPointe to Minneapolis for LaPointe's surgery. When the Grievant turned in a family leave form for the two days, it was returned with written instructions from secretary Carleen Williamson to file a personal leave form instead. Robinson confirmed this and testified that the Grievant had originally sought family leave. However, and when the Grievant went to make a copy of the blank personal leave form, the form was photocopied on both sides due to someone having changed the copy machine's settings. The Grievant filled out one side of the form and placed it in full view of the secretary on her desk and when she was talking on the telephone. The Grievant received the form back signed by Principal Robinson and she took the signed form home to show to LaPointe. LaPointe testified that he saw the signed form. Yet, the District claims that it never received the form and that it did know the Grievant would be absent.

In addition, the Grievant testified that it was not unusual for documents to get lost after being placed on Williamson's desk. In the past, the Grievant has had to redo her time-sheets because they were lost and after having placed them upon Williamson's desk. Moreover, the Grievant notified teacher Bowers well in advance that she would be absent and the Grievant secured a substitute for each day. For some unknown reason, the substitute on September 27 did not show up until September 28, 2001.

November 30, 2001.

The Grievant could not find anyone to pull her car out of the ditch until after lunch. Union witness Jason Colsrude testified that when he pulled the car from the ditch at 1:30 p.m., the radiator hose broke making the car inoperable. The Grievant then called her brother to fix the hose, but her brother had to wait until after his work ended at 2:00 p.m. and then he had to

drive 15 miles to get the part. Since it was not until after 3:30 p.m. that the car was ready to drive, and since the Grievant's work day ends at 3:45 p.m. and she knew a substitute was working for her, it was reasonable for the Grievant not to go to work that day. Further, both the Grievant and LaPointe testified that the Grievant called into the school office three separate times that day. The evidence shows that the Grievant made every effort to get to work that day and that she kept the District posted of her status throughout the day.

Robinson's testimony indicates his confusion regarding the timing of the Grievant's calls to the office. Robinson testified that the Grievant called and said that she would try to be in before noon, but that a part was broken and that her brother would fix it. However, the hose didn't break until around 1:30 p.m. and the Grievant's brother didn't finish work until after 2:00 p.m. Therefore, the call that Robinson refers to must have taken place between 1:30 p.m. and 2:00 p.m.

The Grievant's absence on November 30, 2001, was for a legitimate and understandable reason. The Grievant is most likely not the only District employee to be absent due to a similar accident and there is no record of discipline of other employees in like situations.

The Grievant did fail to come to work on November 30, 2001. Prior District documentation showed a concern about the Grievant failing to call in when late or absent. However, and in the instance of November 30, 2001, the Grievant secured a substitute and reported in three separate times between 7:30 a.m. and 2:30 p.m. that day. The Grievant made an effort to get to work that day and she did not willfully drive into the ditch or willfully damage her car when it was pulled out. Therefore, there was no "just cause" for termination under any definition of the term for the Grievant's actions on November 30, 2001. The Grievant's absence was not a willful disregard of the District's interests, but was due to circumstances beyond her control and she followed the prescribed procedure of securing a substitute and reporting her absence. The District's allegation that her actions were a continuation of a pattern of absenteeism and failure to notify the District is not only inaccurate, but also unreasonable when taking into account all relevant circumstances.

In addition, the District failed to conduct a sufficient investigation prior to it imposing discipline in that it did not ask the Grievant for her side of the story before it terminated her employment. The record shows that the Grievant was not questioned about her absence on November 30, 2001, until January 3, 2002. Moreover, Robinson's notes of what he intended to discuss with the Grievant on January 3, 2002, shows that he had already made up his mind that the Grievant would either resign or be terminated and prior to asking for the Grievant's side of the story.

December 7, 2001.

The Union disputes the District's assertion that the Grievant was not paying attention to her duties on December 7, 2001. The Grievant testified that she was responsible for three

students at lunch recess that day, but that they were allowed and were encouraged to play with other students. In addition, other adults shared responsibility for supervision. When one of the Grievant's students got into trouble by the swings, the Grievant took all three to the nearby picnic table. While there, a student asked the Grievant to play with that student's hand held electronic game. The Grievant then played the game with another of her students for about three minutes. A third student was playing tag nearby. The playground was in full view and the Grievant was interacting with her students. The first student then went to another part of the playground, but still within the Grievant's view. That student is allowed some freedom on the playground.

The student that went to the other part of the playground then, and according to District witness Scott Nelson, became disrespectful with Nelson and Nelson noticed that the Grievant was playing the electronic game. Nelson's testimony indicates that this incident was of a short duration and that it occurred at 12:40 p.m. and at the end of his ten minute rotating recess duty.

Contrary to the District's assertion, there is no proof that the Grievant was not paying attention to her students when the she was playing the game. The Grievant knew where each student was. Further, her testimony indicates that she had been around the playground and that she had not merely stationed herself at the table for recess. Moreover, since the District waited until January 3, 2002, to first discuss the incident with the Grievant, then the District must not have viewed the incident as a very serious infraction at the time of the incident.

The District argued that the Grievant violated a written rule in the student handbook which prohibits students from possessing electronic games. This, however, is an argument first advanced at the arbitration hearing and it is based upon new evidence. The Grievant testified that this handbook had not been handed out to her, that it had not been handed out to her students, and that she was not aware of this policy. It could not have been considered by the Board as a reason for discharge. Furthermore, it was not unusual for students and staff in Bowers classroom not to receive the handbook.

The District failed to consider the relevant circumstances. The Grievant did more than supervise, she interacted with the students at a location in full view of the students and she testified that she was aware of her student's locations. It is normal for the Grievant's students to go to another part of the playground as they are encouraged to act with the other students. The fact that the student got in trouble for disrespecting a teacher was not the result of the Grievant playing the game as it also might have occurred five feet from the Grievant. The Grievant's handling of the situation was defensible and the District's penalty was grossly harsh and unjust.

December 12, 2001.

The Grievant testified that she became sick on Monday, December 10, 2001, and that she was told by teacher Bowers to go home. The evidence shows that both Bowers and

Principal Robinson knew that the Grievant was still sick the next day on December 11, 2001, as her absence was not questioned. On the evening of December 11, 2001, the Grievant's fiancé's son became sick and she spent much of the next three nights caring for that child on top of her own illness. The Grievant probably should not have gone to work that week. However, and according to the Grievant, she went to work because of the prior criticism she had received regarding her attendance.

The Grievant's letter to Principal Robinson dated December 12, 2001, shows the Grievant's state of health and mind at the time of the "sleeping" allegations. The letter states "I am only here today because I get yelled at for being sick, and there are not subs ever available. I am not promising that I won't throw up today but I'll get by as long as I am here right!" (Emphasis in original.) According to Robinson, he went to the library on December 12 to discuss this note. Robinson testified that when he got to the library, he found the Grievant asleep and that the Grievant did not awake until Robinson said something to the student that the Grievant was supervising. The Grievant disputes being asleep, testifying that she was fully aware of Robinson coming down the hall and entering the library, but that she was resting her eyes.

The above incident raises a number of questions with the way that the District handled the situation. The Grievant's letter to Robinson shows that Robinson knew she was sick. However, Robinson did not ask the Grievant how she was or show any concern about her health. He only wanted to talk about the note. In addition, Robinson did not find the incident serious enough to discuss it until he met with the Grievant on January 3, 2002.

December 13, 2001.

Bowers testified that she "observed" the Grievant sleeping at a library table that day when the Grievant was supposed to be supervising a student. Yet, rather than wake the Grievant, Bowers then went to the classroom to get others to "observe." According to District witness Kayleen Dahl-Branstead, Bowers came to the classroom and said, "Come look at this." Bowers testified that she observed the Grievant sleeping for five minutes. Bowers also testified about the level of supervision needed by the student the Grievant was supervising. But instead of waking the Grievant, Bowers allowed the Grievant to sleep for five minutes so that Bowers could make a spectacle of the Grievant.

The Grievant's letter to Robinson dated December 12, 2001, as well as the Grievant's testimony, tell how the Grievant had been outcast by the others in the classroom. In the letter, the Grievant states "the staff I work with isn't supportive or feel like a team anymore." The Grievant testified that other adults in her classroom would quit talking when she was around. Therefore, it is not surprising that Bowers would act in an uncaring manner toward the Grievant and that Bowers would not hesitate to document minor incidents such as this, even several weeks later as evidenced in Bowers' documentation dated January 10, 2002.

The Grievant testified that she did not fall asleep on December 13, 2001. She could not have been sound asleep as District witness LouAnn Linscheid testified that the Grievant heard the group in the hall and looked up. However, even if the Grievant did doze off, it is understandable considering her illness and lack of sleep. Further, the Grievant testified that the student was done with a test and was copying his name, address and phone number.

December 14, 2001.

The Grievant testified that she sat on the couch along the wall and near the corner of the room for about ten minutes and after she had finished helping with cleanup. There were two children near the couch on the floor playing video games and five adults were sitting at the table and talking: one alumni parent and four District employees. Other students were working on a puzzle in the kitchen area. The Grievant testified that she was very tired, but that she did not sit on the couch for the express purpose of sleeping. She sat away from the other adults because they never included her in their conversations. At about 11:45 a.m., she leaned her head back and dozed off, but her coffee cup in her hand fell to the floor, startling her. The Grievant jumped up, picked up the cup, and went outside for some air where she drove around the block for about 10 or 15 minutes. Since the Grievant's duty-free lunch break is scheduled from 11:30 a.m. to 12:00 noon, all of the above occurred during the Grievant's lunch break.

Each District witness had a different variation of this incident. According to Bowers' documentation dated January 10, 2002, the Grievant was asleep between 11:45 a.m. and 12:15 p.m. This is the version that Principal Robinson referenced in the District's letter to the Grievant dated January 8, 2002. However, and at the arbitration hearing, Bowers testified that the Grievant was sleeping for 15 to 20 minutes. According to Samantha Nelson, the Grievant was sleeping "maybe five minutes." According to Kayleen Dahl-Branstead, the Grievant was sleeping "a few minutes."

Although the employees who worked with the Grievant probably knew that the Grievant was sick that week, nobody bothered to wake the Grievant, ask her if she was okay, or if she needed a break. Samantha Nelson testified that Nelson is allowed to take 10 minutes if she has "had enough or is stressed out." Obviously, the Grievant had had enough to fall asleep with other adults and students present. The Grievant's colleagues should have shown some compassion rather than to simply report the Grievant to the District's Administration.

Another new allegation made by the District at the arbitration hearing was that the Grievant, prior to December 12-14, 2001, had a problem in sleeping on the job. The District has not hesitated in documenting its concerns with the Grievant in the past. However, not one of the documents in evidence alleges that the Grievant had been previously asleep on the job. Similarly, the Grievant had not been previously warned. The only documentation of this concern occurred on three consecutive days during a week in which the Grievant was sick and was up nights caring for a sick child.

The District has held the Grievant to a higher standard than other employees and the District was watching for the next opportunity to discharge the Grievant.

Other arguments.

Consideration should be given to the Grievant's lack of sophistication regarding her union rights. The Grievant repeatedly testified that she did not understand her right to representation or her right to respond and file a grievance throughout the disciplinary process. The Grievant's naive attempt to respond to accusations is evidenced by her hand written notes on the March 22, 2001, Notice of Deficiencies: "I haven't been late for a long time." "I just thought since there is no time for my 15 min. break I didn't see why it would matter why I left after my bus duty since there isn't anything to do after 3:35-3:45." The Grievant testified that she made these notes in utter frustration when presented with another document by her principal.

Further, the Grievant testified that she was always called to the principal's office one day before it was to take place where she met one or more administrators alone. The Grievant was never advised that she could or should have a representative with her. The Union shoulders some of the blame, but the District's administration should not take advantage of an employee who doesn't understand their rights. It was not until the end of the Grievant's meeting with Robinson on January 3, 2002, that the Grievant was first advised she might seek representation. As a result, the Grievant's record is severely one-sided, distorted, and without contradiction.

The Grievant's record following the October 9, 2001, suspension does not warrant the ultimate discipline of discharge. The Grievant's alleged deficiencies were identified in previous District documents as not being on time for work, not being prepared to work, failing to call when going to be absent and improving attendance. However, the District's reasons for discharge were not a continuation of these deficiencies. The Grievant has given valid reasons for her actions and her reasons are legitimate. In addition, the District did not fully investigate prior to recommending termination and it has produced additional rationale following her termination.

During the arbitration hearing, the Union objected to Robinson's testimony recounting the Grievant's response to him on January 3, 2002, that she should get some days off with pay. This comment, made by an employee who has just been informed that she will be terminated, is irrelevant to the issue here.

The Grievant's record of employment had improved. Bowers confirmed this in her testimony. Further, evidence shows that the Grievant had been absent or late less often, and was calling in as directed when absent. The District, however, discharged the Grievant based upon three unrelated allegations in her discharge letter.

The District's handling of the three "sleeping" incidents is very distressing. The Grievant had never been notified or disciplined for sleeping on the job until the week that she was ill and caring for a sick child at night. The Grievant denied falling asleep on December 12 and 13, 2001. Perhaps she dozed off considering her ill health and lack of sleep. However, there was no willful disregard of the District's interests. Her colleagues and principal seemed more concerned over documenting her, making a mockery of her and disciplining her than they were about why she was so tired.

This "sleeping" incident is a one-time isolated instance and does not constitute just cause for termination. There is virtually no connection between this allegation and the deficiency concerns listed in the Grievant's employment history. The Grievant went to work despite her illness and lack of sleep so as not to get in trouble for being absent. In the end, she couldn't win for trying.

The District's reasons for termination were pretextual. The Grievant was discharged for three allegations that had little connection with prior warnings. Her conduct is defensible in each of the allegations. There is no evidence of a willful disregard. It is doubtful that any three of the allegations, or all three taken together, would result in discharge to any other District employee. The District did not conduct a sufficient investigation. Several written accounts from District witnesses were written after Robinson's decision to recommend termination and were done to support his allegations. One can only conclude from this that the District's stated justification for discharge was mere pretext.

There are other arbitration awards with more serious infractions than those committed by the Grievant and with less serious penalties. In addition, arbitrators have the right to impose lesser penalties, or no penalty at all. See, LAC DU FLAMBEAU SCHOOL DISTRICT, WERC, MA-11218 (GALLAGHER, 4/01) (Discharge was not upheld because the prior discipline was unrelated to the final incident, where there was a lack of a sufficient investigation, and where the investigating employer did not obtain the grievant's version of the final incident.)

As a remedy, the Union requests that the Grievant be restored to her prior position and that she receive any lost wages or benefits as a result of the District's termination. Further, the Union seeks to expunge the January 8 and 15, 2002, letters from the Grievant's personnel file.

The District's Reply

Although the Grievant claims that she was unaware of the District's policy prohibiting electronic games, she must be presumed to have knowledge. Further, the Grievant's responsibilities included the supervision of special education students. By playing the game on December 7, 2001, she was not performing her supervisory duties. It is fundamental that the Grievant cannot supervise children while playing a hand held electronic game. The result was that one of the Grievant's students had to be reprimanded by another teacher.

The Grievant's primary duty when she is acting as a special education aide is to supervise children. The Union's assertion, that the closing of the Grievant's eyes or dozing off is not a willful disregard of the District's interests, misses the point. It is physically impossible for the Grievant to supervise while she is sleeping or while her eyes are closed.

The District need not enact a rule regarding sleeping on the job. The prohibition against sleeping on the job is so fundamental that the District has the right to expect that the Grievant know not to do it, citing SAWYER COUNTY, WERC, MA-7729 (JONES, 11/93). The Grievant knew or should have known that there can be no sleeping on the job. This is a matter of common sense and is especially true with special education students who often require more supervision than other children.

As previously stated, the Grievant's failure to supervise students, whether it is sleeping on the job, playing a video game or failing to call the District to inform someone of her absence, all constitute a direct neglect of the Grievant's responsibilities. Similarly, the Grievant's failure to notify the District of her absence, her failure to attend work on time and her high level of absences, also constitute a direct neglect of the Grievant's responsibilities. On many instances, the Grievant's failure to perform duties resulted in duties not being performed at all, such as bus duty supervision. Further, these violations continued throughout the Grievant's entire tenure with the District. The District responded with progressive discipline.

As a result, the Union cannot claim that the Grievant's sleeping constituted a one-time, isolated instance. Moreover, the Grievant's excuses for sleeping and for not calling in to notify the District of her absence by no means lessens the impact of her behavior. The District requires that employees be awake on the job and that it be adequately notified with a reason for the absences. These duties need to be performed and children need to be supervised. If employees do not show up for work or sleep during work, then their safety is placed in jeopardy. The Grievant's conduct exhibited a pattern of placing the safety of the students in jeopardy.

By asserting that the District did not conduct a full investigation because it did not obtain the Grievant's response until after Christmas vacation, the Union presumes that the Grievant would have been able to provide an explanation for her actions. The bottom line is that the Grievant could not provide an explanation either before or after the Christmas holiday. The Grievant's actions simply are unexplainable and unjustifiable.

The District conducted a full investigation and gave the Grievant an opportunity to explain her actions. When she could not do this sufficiently, the Grievant was informed of the recommendation for termination.

The District disputes the assertion that Principal Robinson's January 3, 2001, notes are evidence that he prejudged the discharge decision. Robinson's outline assisted him in

providing the Grievant an opportunity to provided an explanation. The presence of an outline does not reflect prejudgment especially after Robinson had obtained information from all of the objective witnesses involved.

The Union's Reply

The issue is whether the District had just cause to terminate the Grievant for the reasons stated in the District's letter dated January 8, 2002. The first reason was because the Grievant was absent on November 30, 2001, and because she did not call later that day to inform Principal Robinson. The second reason was because the Grievant was observed playing an electronic game on December 7, 2001, when she should have been supervising. The third reason was because the Grievant was observed sleeping on December 12, 13 and 14, 2001, meaning that she was not supervising students as she was employed to do during those times.

The District cites a record of past discipline. However, and according to the Grievant, she did not challenge previous deficiency notices, reprimands and a suspension because she didn't understand she had the right to do so, and because she was not informed of this right. Nevertheless, this stands unchallenged. The Union recognizes that arbitrators often consider an employee's record in determining the appropriateness of discipline. Moreover, to discipline the Grievant for these prior actions would constitute double jeopardy. The Grievant's discharge must be based on the reasons given by the District at the time of her discharge.

Discharge was not appropriate given the innocuous nature of the alleged transgressions and extenuating circumstances. With regard to the incidents which occurred on November 30, 2001, and on December 7, 2001, the Grievant did nothing wrong. She did not violate any policies, nor did she intentionally shirk any duties. She was acting in a reasonable manner.

With regard to the sleeping accusations, the Grievant should not have even been at work that week due to illness and lack of sleep. She succumbed to prior accusations of excessive absenteeism by making a supreme effort to be at work.

October 9, 2001.

The Union disputes the District's claim that the Grievant did not notify anyone on September 27 and 28, 2001. Both the Grievant and LaPointe testified that the absence had been planned since the beginning of the school year. Moreover, the Grievant discussed her absence with teacher Bowers and arranged for substitutes. She initially submitted a written request for Family Medical Leave, but was denied because her fiancé did not qualify under the definition of family. She then submitted a form for personal leave and received a signed copy granting her request.

Although the District claims that neither Ms. Williamson or Renee Wienzerl received a personal request, it relies on hearsay evidence to support this contention. Williamson and Wienzerl were not called as witnesses, even though both work in the Grantsburg Middle School across the parking lot from the arbitration hearing site. By not calling either witness at the arbitration hearing, the District forfeits its right to make this claim. The Grievant's testimony that she submitted a request form stands uncontested.

November 30, 2001.

The District continues to confuse the facts surrounding the Grievant's absence on November 30, 2001. It does not appear that the District is contesting the legitimacy of this absence. An employee who slides in a ditch on a wintry morning in a remote area and then sustains damage when the vehicle is pulled out, could be excused for being absent. The District's accusations appear to concern allegations that the Grievant failed to notify the District during the day of her status. Contrary to the District's claim, the Grievant called in more than once that morning. Independent testimony by the Grievant and LaPointe agreed that she called once after walking home after the car went into the ditch, once later that morning to inform the District that someone could pull her car out after lunch and once around 2:00 p.m. that afternoon after the radiator hose broke.

The District claims that the Grievant called teacher Bowers and informed her that the Grievant would be in by noon when she is out of the ditch. According to the District, Bowers then notified Principal Robinson and Robinson did not hear from the Grievant for the rest of the day. However, Bower's handwritten notes stated that it was Bowers who told the Grievant that she would tell Robinson that the Grievant "would try to be in by 10." These notes also indicate a second call from the Grievant and state that around 9:40 a.m. she "was told by [Special Education Aide Samantha Nelson] that Mr. Robinson had talked to [the Grievant] and would be in by 10." Robinson testified that the office had heard from the Grievant later in the morning, before noon. Robinson also erroneously stated that the Grievant said that she would try to be in before noon, but a part was broken on the vehicle.

Colsrude testified that he pulled the car out of the ditch around 1:30 p.m. Colsrude remembered that time because he is not allowed to use the truck that pulled the Grievant out from noon until 1:00 p.m. each day. It was not until after the car was pulled out that the hose broke. If Robinson knew about the broken part, then the Grievant had to have called after 1:30 p.m. that afternoon. That call could not have been made in the morning.

The District's claim that the Grievant only called in once is not supported by the evidence. Evidence and testimony from the District's own witnesses, viewed as a whole, support that given by the Grievant, LaPointe, and Colsrude. The Grievant's actions did not warrant any type of discipline, let alone discharge by the District.

December 7, 2001.

The District's contention that the Grievant violated a policy is irrelevant to her discharge. Further, it was not listed as a reason for discharge in the District's letter of January 8, 2002, and it was not mentioned during the School Board hearing. Therefore, the Board did not consider it when it decided to discharge the Grievant. It was not until the arbitration hearing that this argument was advanced.

The Grievant admits playing the game for about three minutes with one of her students. However, she testified that she is unaware of any policy and there is no proof that she ever received one. In addition, the Grievant played the game with an unobstructed view of the playground. Although one of the three students under her direct supervision went to another part of the playground, that student was still within the Grievant's view.

The District's position, that the reprimand by another playground supervisor was due to the Grievant not being aware of the situation, is a remarkable nexus. Both the Grievant and District witness Scott Nelson testified that the Grievant's students were allowed and were encouraged to interact with other students. In other words, the Grievant's students did not have to be by the Grievant's side at all times. There is no evidence, and it makes no sense, that the reprimand was a direct result of the Grievant playing an electronic game for three minutes with another student. The reprimand could have occurred if the Grievant were not playing the game. This is a prime example of the District's amplification of a relatively innocent occurrence in order to support a discharge.

According to the District, Scott Nelson reported the Grievant's behavior that day to Principal Robinson. However, Robinson did not address the situation until the January 8, 2002, meeting. This shows that the incident was not that important of a matter to warrant any discipline, particularly discharge. Indeed, playing a game and other interactions with students should be considered a part of the Grievant's duties.

December 12, 13 and 14, 2001.

The Union is not in a position to assert unequivocally that the Grievant did not dose off on any of the three days. The Grievant has given her opinion in her testimony, and admits dosing for a moment on December 14 before dropping her cup. The cup dropping is significant in that it would be nearly impossible to hold a cup for a prolonged period of time, and dropping the cup caused the Grievant to awaken, indicating that she fell asleep for a very short period of time.

Nevertheless, the Grievant was not willfully sleeping on the job. Further, if she was asleep, it was for short durations and there were extenuating circumstances which make her drowsiness understandable and reasonable. It is significant that throughout all of the past

documentation of the Grievant, there is no other mention of concern about her falling asleep on the job or not being alert. Although Robinson witnessed the Grievant asleep on December 12, and he was informed immediately about her sleeping on December 13 and 14, he did not address the situation until January 3, 2002. It was not important enough to warrant immediate attention. This isolated bout resulting from illness and sleep deprivation does not warrant any more than a letter of concern or warning from the District.

Other arguments.

The District asserts that the Grievant has displayed a pattern of disregard of her duties over the entire course of her employment with the District, that it has increased in severity, and that the Grievant's neglect has worsened. The Union concedes that the Grievant had been accused in prior notices and reprimands of failing to contact the District regarding her absences or being late, of excessive absenteeism, of being late for bus duty, of not being ready to fulfill her responsibilities in a safe manner**,** and of leaving work early after the completion of bus duties. Continuation of this type of behavior might warrant eventual discharge. However, being absent due to the Grievant's car sliding in the ditch and then calling in three times throughout the day to inform the District of her status, playing a hand held electronic game with a student during recess and dosing off perhaps three times in a three-day span during a week of illness and sleep deprivation does not constitute a worsening of the Grievant's behavior. If anything, the Grievant was taking extra precautions to correct the earlier-stated deficiencies as seen in the Grievant's letter to Robinson dated December 12, 2001. Further, the Grievant's work habits had improved this year and, as teacher Bowers testified, she started the school year focused.

The District cites authority for the proposition that discharge should be set aside only when the penalty is excessive, unreasonable or management has abused its discretion. The Union responds that for the reasons stated above the District's discharge of the Grievant was both excessive and unreasonable.

DISCUSSION

The stipulated issues before me are whether the District had just cause to terminate the Grievant and, if it did not, what would be the appropriate remedy.

Both parties have provided me with extensive written arguments. These included various descriptions of the doctrine of "just cause." I am most comfortable with one of the descriptions cited by the Union:

> As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied

> analytical framework has been developed over the years through the common law of labor arbitration. That analytical framework consists of two basic elements: the first is whether the employer proved the employe's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protections, and disparate treatment.

S & M ROTOGRAVURE SERVICE, INC., WERC, A-5720 (JONES, 6/99).

Arbitrator Jones' reasoning seems to me to be straight forward and it encompasses the arguments advanced by the parties. In addition, there is no definition of "just cause" in the parties' Agreement. Therefore, I adopt his approach in my analysis of this case.

Whether or not the District has proven the facts regarding the Grievant's misconduct is largely in dispute.

November 30, 2001.

In dispute on this date is whether the Grievant failed to keep the District informed of her inability to report to work.

The District's January 8, 2002, document states that the Grievant informed Principal Brandon Robinson that she would "try to be in" to work that day, but that she never did and that she failed to call back later and inform Robinson. The Union asserts that the Grievant called into the school office three times that day: once soon after sliding into the ditch, once later that morning to inform the District that someone could pull her car out after lunch and once around 2:00 p.m. after the car's radiator hose broke. The Union concludes that every effort was made by the Grievant to get to work that day and that the Grievant kept the District adequately informed.

There is no dispute that on November 30, 2001, between 7:30 and 7:50 a.m., just prior school starting, that the Grievant called and spoke to teacher Kathy Bowers. Bowers testified that the Grievant had called for Robinson, but since he was not yet in, the Grievant was put in contact with Bowers. Bowers' notes of this telephone conversation, dated January 10, 2002, state that when Bowers initially "asked [Grievant] when she would be in – she said she didn't know." Bowers testified that she then told the Grievant to try and make it in by 10:00 a.m. to which the Grievant said she would try. Bowers also told the Grievant that she would inform Robinson that the Grievant would be in by 10:00 a.m.

The Grievant's testimony regarding her conversation with Bowers is very similar and is consistent with Bowers' account up to this point, but adds that Bowers voiced emotion during the conversation. According to the Grievant, and after the Grievant said that she would get there as soon as she could, Bowers got mad and told the Grievant to be in by 10:00 a.m.

Robinson testified that when he arrived for work that day, Bowers informed him of the conversation she had with the Grievant and that Bowers told the Grievant to try and be in around 10:00 a.m.

The parties' account of what happened next then begins to diverge.

Robinson testified that the Grievant called him sometime before noon and spoke to him on the telephone in his office. According to Robinson, the Grievant said that she would try to be in before noon, that her car had a broken part, and that her brother was trying to get the part for the car. Robinson did not hear from the Grievant again that day. According to Robinson, no one else heard from the Grievant after that.

The Grievant testified that she called the District following her conversation with Bowers and sometime between 10:00 and 10:30 a.m. According to the Grievant, she spoke with secretary Carleen Williamson. The Grievant further testified that she called at that time because Bowers expected her to call at 10:00 a.m. The Grievant told Williamson that it would be at least not until noon because the person helping the Grievant couldn't help until then.

Next, the Grievant testified that Jason Colsrude pulled her car out sometime between 1:00 and 1:30 p.m., but that upon getting it out of the ditch a hose on her car broke. The Grievant then called her brother for help getting the hose part. According to the Grievant, she then called the District. The Grievant's testimony did not provide details as to the content of this conversation other than she told someone that the car was getting fixed. On direct examination, the Grievant testified that she spoke to Robinson on this occasion. On cross examination, the Grievant said that she did not recall ever talking directly to Robinson that day. At 2:00 p.m., the Grievant's brother arrived with the part and the car was fixed sometime between 3:00 and 3:30 p.m. According to the Grievant, she decided not to go to work because she had a substitute secured and by the time that she drove to the District, the work day would have been over.

When determining this issue of credibility, it is helpful to review the Grievant's motivations for making calls to the District and her position of employment. Although the Grievant's first conversation was with Bowers, she initially attempted to contact Robinson. The Grievant's motivation to call Robinson is reasonable considering Robinson's reminder in his suspension letter that she is expected "to be to work on time and that if, for some reason you will be late, you are expected to contact the Principal." This reminder had followed a specific instruction by Principal Dorhout in his written reprimand of the Grievant dated July 10, 2001, that when reporting late to work, the Grievant is "to call [Dorhout] as you are

expected to do if you are going to be absent." Unquestionably, the Grievant was expected to call the Principal when reporting late or for an absence and to comply with Robinson's instructions given the ramifications in his suspension letter: "This represents a final opportunity for you to correct your job performance regarding these matters. If there is a recurrence, [Robinson] will have no alternative except to recommend that [the Grievant's] employment be terminated." When the Grievant couldn't reach Robinson the first thing that morning, it was also a reasonable alternative for the Grievant to ask for Bowers since Bowers is the main teacher in the room where the Grievant reports for work daily.

The Grievant is an aide and is assigned students in the classroom headed by Bowers. According to the Grievant, Bowers got "mad" during their conversation and told the Grievant to try and make it in by 10:00 a.m. Because of Bowers' position relative to the Grievant, I find that Bowers' statement was a frustrated directive from a person with some form of authority. I also find that Bowers had reason to be frustrated because, and according to Bowers, a new IAP program had started that week and it was important for the Grievant to be there. The importance of the Grievant's presence that day was not contested by the Grievant. This frustrated directive included Bowers saying that she would advise Principal Robinson of their conversation. In a sense, then, Bowers was "reporting on" the Grievant.

Given this backdrop, it seems highly irregular and unbelievable that the Grievant chose to speak to Williamson, a secretary, and not with Robinson or Bowers. The Grievant knew or should have known, based upon her conversation with Bowers, that Robinson expected her to try to be at work by 10:00 a.m. The Grievant also knew, or reasonably should have known, the importance of communicating with Robinson regarding absences due to her suspension. Therefore, it is not credible to me that the Grievant, and under these circumstances, would call and speak to a secretary.

I find that the Grievant's second call to the District was with Principal Robinson. This is consistent with Robinson's testimony that he spoke directly with the Grievant. Furthermore, and although Williamson did not testify, Robinson testified that he checked with the office secretaries who told him that the Grievant had not otherwise called in. The Grievant appeared hesitant, if not inconsistent, at the hearing as to her conclusion that she did not speak directly with Robinson. This is opposed to Robinson whose testimony was more definite that he did speak directly to the Grievant that day. Therefore, I credit Robinson's testimony that he spoke to the Grievant.

I do agree, however, with the Union that Robinson is confused over the timing of his telephone conversation with the Grievant. Robinson testified that during his conversation with the Grievant, the Grievant said her brother was trying to get a car part. The problem with this testimony is that it was not known by the Grievant that a part was needed until later that day. Colsrude testified that he was unable to pull out the car with his truck until sometime between 1:00 and 1:30 p.m. and that he knew of the time because his employment situation only allowed the use of the truck after 1:00 p.m. According to Colsrude, a hose ripped as he pulled

out the car and another hose part was needed for the car to operate. I found Colsrude's testimony credible. Thus, and I agree with the Union, if Robinson knew about the Grievant needing a car part, then his conversation with the Grievant must have occurred after Colsrude pulled the car out and before the Grievant's brother arrived with the part. According to the Grievant, her brother didn't arrive with the car hose until 2:00 p.m.

Notwithstanding the dispute over the timing of the Grievant's two calls, I credit Robinson's testimony regarding the content of his conversation with the Grievant. The Grievant informed Robinson that she was still trying to come to work. In my opinion, when the Grievant did not call the District back, the Grievant left the District hanging. It was incumbent upon the Grievant to call again so as to let Robinson know of the final outcome of whether she would be there.

The evidence is that the Middle School day ended at 3:45 p.m. Since the Grievant's conversation with Robinson occurred sometime after the period of 1:00 to 1:30 p.m., but before 2:00 p.m., then there were approximately two hours left before the end of the work day. It was entirely reasonable for the District to expect another call from the Grievant considering that she said that she was still trying to come to work. Although the car was not fixed until sometime between 3:00 and 3:30 p.m., the Grievant provided no explanation for why she did not call during the interim and to update the District. The evidence was that the Grievant was near a phone for most of that day and that nothing prevented her from calling the District back and updating it after speaking to Robinson.

The Union asserts that the Grievant's fiancé, LaPointe, independently testified that the Grievant called three times that day. However, and contrary to the Union's assertions, LaPointe testified about two phone calls, and not three. Moreover, LaPointe's testimony did not provide with whom the Grievant spoke to the second time. Therefore, I do not find LaPointe's testimony determinative in this issue of credibility.

With regard to the Union's argument that the Grievant is most likely not the only District employee to be absent due to a similar accident, this argument is based upon conjecture. There was no evidence of disparate treatment regarding other employees. Therefore, the argument does not have merit.

With regard to the Union's argument that the Grievant's absence on this date was due to circumstances beyond her control, I disagree. Although the Grievant may not have had control over sliding into the ditch that morning, she had the ability to call the District back again that afternoon and following her conversation with Principal Robinson.

The Grievant failed to call the District back after she spoke with Robinson and after she told Robinson that she would try and be in on November 30, 2001. Therefore, the District has proven that the Grievant failed to keep it informed of her inability to report to work that day.

December 7, 2001.

In dispute on this date is whether the Grievant was not performing her supervisory duties on the playground and while playing with a hand held electronic game.

The District asserts that when the Grievant was playing the game, she was not aware of the situation resulting in one of her students being reprimanded by another playground supervisor, teacher Scott Nelson. In addition, school policy prohibits students from using such games, a rule that is enforced by the staff. Therefore, she was neglecting her supervisory duties. The Union asserts that neither the Grievant nor any of her students was ever given the handbook containing the rule prohibiting the use of such games and that she was unaware of this rule. Further, the Union asserts that the Grievant was still paying attention to the children on the playground, that she was simultaneously interacting with students, that playground duty is shared with other adults, that the reprimanded student in another part of the playground was still within the Grievant's view**,** and that her distance away from the reprimanded child was not the cause of the trouble. Therefore, the Union denies any misconduct.

With respect to the rule, the Grievant testified that she never saw the handbook containing the rule. On cross examination, Robinson testified that although he distributed the handbooks to students and parents, that he did not distribute them to "the CDS Room." The Grievant testified that Bowers kept them in a stack in her classroom and did not distribute them. Bowers did not refute this. In addition, there was no testimony from other aides in Bowers' room that they had ever received the handbook. In short, the evidence on this was insufficient. Therefore, I find that the District did not prove that the Grievant knew or should have known about a rule prohibiting the use of hand held electronic games.

With respect to the allegation that the Grievant was not properly supervising, teacher Scott Nelson testified that, in addition to himself, there were two other adults, including the Grievant, supervising 145 to 150 middle school children that day. According to Nelson, this supervisory duty was a shared responsibility with the other adults on the playground. Nelson testified that he typically performs his duty by walking around the playground so as to be visible and so that his back is not turned toward the children. According to Nelson, he had never before seen someone supervise the playground while sitting at the picnic table. In addition, teacher's aide LouAnn Linscheid testified that she has supervised the playground at recess, although not on the day in question. According to Linscheid, she performs her duty by walking and scanning the children with her eyes. When asked her opinion, Linscheid testified that she did not think adequate supervision could be done while sitting at the picnic table.

I am persuaded that the proper standard for the supervision of a large number of middle school children, with only a few adults, is by walking about the area with one's eyes on the children. I find this standard compelling and reasonable given the number and the age of these children. The Grievant may have been sitting in such a way as to be facing the children and she may have been interacting to some degree with the child with whom she was playing the

game. However, she was stationary and her attention was divided. She was not acting in uniformity with the standard of care necessary for this type of supervision and under these circumstances.

I agree with the Union that the Grievant playing a hand held electronic game did not cause the child that was reprimanded to get into trouble. However, the likelihood of that happening could have been reduced if the Grievant had complied with the proper standard for supervising this many middle school children by being more mobile and if the Grievant had not divided her attention between viewing the game in her hand and viewing the children on the playground. Therefore, the District has proven that the Grievant was not performing her supervisory duties on the playground while playing with a hand held electronic game on December 7, 2001.

December 12, 2001.

In dispute is whether the Grievant was sleeping on this date. The District also asserts that the Grievant was not performing her supervisory duties.

Principal Robinson testified that upon entering the library, he observed the Grievant with her head down upon the table and motionless. According to Robinson, he stood at the table and observed the Grievant for a period of 30 to 60 seconds. Robinson then cleared his throat and said "Hi" to the Grievant's student, whereupon the Grievant stirred.

The Grievant testified that she was sitting with student M in the library at a table and that M was going to look for a book. According to the Grievant, and at the point when she first saw Robinson coming toward the library, she concluded that Robinson was coming discuss her letter written to him earlier that day. The Grievant testified that she then closed her eyes to rest them while he walked toward her. In addition, and according to the Grievant, by the time that Robinson came into the library, her head was up. The Grievant denied that her head was upon the table, but that perhaps her elbow and arm were upon the table with her head in the palm of her hand of that arm. Further, the Grievant disputes that she was sleeping and testified that she was aware of M. On cross examination, the Grievant testified that she was present for Robinson's testimony and for his account of what happened that day. However, she denied his observations and said that she did not know why Robinson would testify that way.

Regarding this issue of credibility, it is helpful to examine the record and the Grievant's reasons for her actions while in the library. The Grievant testified that she went home sick on Monday, December 10, 2001, but that she notified Robinson and secured his permission to go home before doing so. She further testified that on Tuesday, December 11, 2001, she was at home sick. There was no testimony from the Grievant on whether or not she reported her absence to Robinson on December 11, 2001. However, the Grievant's letter to Robinson states: "I am sorry for not getting a hold of you yesterday. But I was either sleeping or getting sick."

I interpret the above written statement by the Grievant that she is "sorry for not getting a hold of you yesterday," as an admission that the Grievant failed to report her absence to Robinson on December 11, 2001. Further, knowing that she may have violated the terms of her suspension, I do not find it credible that the Grievant would "rest her eyes" when she first saw Robinson enter the library and then wait for him to come up to her table. It is unreasonable to believe that someone like the Grievant, and with her job potentially on the line for failing to report an absence, would present herself in a manner which might be construed as sleeping in front of the person who has the power to recommend her termination. In addition, the Grievant's testimony that by the time Robinson came into the library her head was up, infers that her head was down beforehand. Therefore, I find her testimony regarding this incident to be unreliable and I credit the testimony of Robinson over that of the Grievant.

I agree with the District that the test for determining whether someone is asleep is not whether that person is clinically sleeping, but whether it was reasonable for the observing person to make this conclusion based upon the perceived conduct of the person in question. MARATHON COUNTY, WERC, MA-11085 (BOHRER, 1/01). In this case, I find that it was reasonable for Robinson to conclude that the Grievant was sleeping when he observed her motionless for 30 to 60 seconds while standing at the Grievant's table and then seeing her stir when clearing his throat and greeting student M. Therefore, I find that the District has proven that the Grievant was found sleeping at the library table and while working with a student on December 12, 2001.

With regard to the Grievant's supervisory duties, the Grievant was assigned a cognitively disabled student in a one-to-one ratio. This ratio, by itself, indicates the importance of maintaining a state of alertness. Further, there were numerous witnesses that testified about the importance of having a constant awareness of students who are mentally impaired. I have already found that the Grievant was sleeping. Therefore, I also find that when the Grievant sleeping on this date, she was not performing her duties of supervising a cognitively disabled student.

December 13, 2001.

The dispute on this date is similar to that depute the day before: whether the Grievant was sleeping and whether the Grievant was not performing her supervisory duties.

Teacher Bowers testified that she observed the Grievant sitting at a library table with the Grievant's head down upon the table and across from the Grievant's student, M. According to Bowers, she then went and asked other staff to come and observe the Grievant with Bowers, which they did. Bowers estimates that the Grievant was in this same position for a total of about five minutes. Substitute teacher's aide Kayleen Dahl-Branstead testified that upon being summoned by Bowers, she saw the Grievant sitting at the library table with her arms crossed and upon the table, head down upon her arms. According to Dahl-Branstead, the Grievant's head did not move during the time that she observed the Grievant. Teacher aide

LouAnn Linscheid testified that she saw the Grievant with her head down on the table and with her head upon her arms. According to Linscheid, student M was sitting at the table with his book open and was looking around the library.

The Grievant testified that she was with student M and that she had gone over his weekly reader. According to the Grievant, M had finished his task early. M was then copying over his name and address for the Grievant while she waited. According to the Grievant, it takes a long time for M to copy his name and address. The Grievant testified that she did not fall asleep. Rather, she was in the same position that she was the day before: sitting up with her elbow and arm upon the table and with her head in the palm of her hand of that arm. According to the Grievant, maybe her eyes were closed and she was resting them while waiting for M to finish.

I find that the Grievant was sleeping on December 13, 2001, based upon others' observations of the Grievant's posture. Dahl-Branstead testified that the Grievant's arms were crossed and upon the table, her head down upon her arms, and that her head did not move. Although it is unclear how long Dahl-Branstead observed, her testimony is in accord with Bower's testimony that the Grievant maintained her same position. Moreover, Bowers testified that the Grievant maintained the same position for five minutes and that the Grievant's head was down upon the library table. Linscheid testified that the Grievant's posture was with her head down on the table and with her head upon her arms. In my opinion, this evidence outweighs the Grievant's claim she was sitting up with her arm and elbow propping up her head. In addition, it was reasonable for the District to conclude that a person is sleeping when a person is sitting at a table with arms crossed and upon the table, head down upon the arms. MARATHON CO., SUPRA. Therefore, I find that the District has proven that the Grievant was sleeping on this date.

With regard to the Grievant's supervisory duties, I have already found that the Grievant was sleeping on December 13, 2001. Therefore, I also find that while she was sleeping, the Grievant was not performing her duties of supervising a cognitively disabled student on December 13, 2001.

December 14, 2001.

The Union admits that on this date, the Grievant was sleeping while sitting on a couch in the classroom and during the Christmas Coffee. Further, this occurred with other adults and students present. Hence, there is no dispute that the District has proven the alleged misconduct. There are, however, some differences in the details of the misconduct. Therefore, I will take up those details.

I agree with the Union that there were different accounts for the length of time that the Grievant slept. Kathy Bower's notes state: "11:45 – 12:15 Katie slept on the couch." Bowers testified that she watched the clock in the classroom and that the Grievant slept for 15 to 20

minutes during this time period. Kayleen Dahl-Branstead testified that she was not sure how long she observed the Grievant sleeping, but that it was for a few minutes. On direct examination, Candace Olson testified that she saw the Grievant sleeping for more than a few minutes; maybe more, maybe less than 10 minutes. On cross examination, Olson said that she did not recall the amount of time, but that the Grievant was sleeping for 10 minutes. On redirect, Olson testified that when she first saw the Grievant sleeping, that the Grievant was already asleep. LouAnn Linscheid testified that she first saw the Grievant already asleep and that she could not say for how long the Grievant was sleeping. Samantha Nelson testified that she was not sure, but that she saw the Grievant sleeping maybe 5 minutes. Finally, the Grievant testified on direct examination that she dosed maybe 2 minutes. On cross examination, the Grievant testified that she was sleeping for 3 minutes.

With regard to the length of time that the Grievant was sleeping, Bowers was the only witness that based her observations on an objective criteria: a clock. In addition, Bowers' demeanor when testifying about the duration of the Grievant's sleeping was forthright. The other witnesses either did not testify that they based their conclusion on a time piece, or they were unsure of the amount of time that the Grievant slept. For example, although Olson seemed confident in her observation of the Grievant, she began her observation after the Grievant was already sleeping. With regard to the Grievant's account, it is my experience that people generally lose track of time when they sleep and that their conclusions on the amount of time that they have been sleeping, without more independent evidence of time, are unreliable. Further, the Grievant has an interest at stake and is more likely to minimize the amount of time that she slept.

I find that Bowers' testimony is the most credible regarding the length of time that the Grievant was sleeping. Bowers testified that she observed the Grievant sleeping for 15 to 20 minutes. Giving the benefit of any doubt to the smaller total amount of time that Bowers observed, I find that the Grievant was asleep for 15 minutes during the period of 11:45 a.m. to 12:15 p.m. on December 14, 2001.

With regard to the Grievant's supervisory duties, the Grievant testified that she sat on the couch near two children playing Nintendo on the television because: "I felt I should be near the kids." Since the Grievant chose to be with children during her scheduled break time, I find that the Grievant was not on break for purposes of supervising children. In addition, and during the time that the Grievant slept, I find that she was not consciously "with the kids" and that supervision of children requires consciousness. Therefore, I also find that the Grievant was not performing her supervisory duties for the period when she slept on December 14, 2001.

To summarize so far, I find that the District has proven the following misconduct: the Grievant failed to keep the District informed of her inability to report to work on November 30, 2001; the Grievant was not performing her supervisory duties on the playground while playing with a hand held electronic game on December 7, 2001; the Grievant was sleeping and was not performing her supervisory duties on December 12, 2001; the

Grievant was sleeping and was not performing her supervisory duties on December 13, 2001; and the Grievant was sleeping and was not performing her supervisory duties on December 14, 2001. My analysis now turns to whether the District has established that the Grievant's discharge was justified under all the relevant facts and circumstances.

The District's investigation.

The District asserts that it conducted a fair investigation. The Union disagrees and asserts three main arguments. First, it asserts that the District prejudged the Grievant as evidenced by Robinson's notes when he first asked the Grievant her side of the story. Second, it asserts that the District's reasons for termination were pretext as evidenced by the length of time that it waited before first confronting the Grievant with her alleged misconduct. Third, it asserts that the Grievant did not understand her right to respond and file a grievance throughout the disciplinary process and that the District took unfair advantage of her naivete.

Robinson testified that he is the Grievant's immediate supervisor for purposes of evaluations or discipline. On January 3, 2002, Robinson met with the Grievant and spoke with her regarding her alleged misconduct. This was the first time that the District confronted the Grievant regarding the events on November 30, 2001, December 7, 2001 and December 12 through 14, 2001. Robinson's notes dated January 3, 2002, were drafted prior to when he met with the Grievant on that same day. In addition to Robinson and the Grievant, Tom Hellmers, Director of Special Education/Pupil Services and School Psychologist, also attended this meeting.

I agree with the Union that Robinson's notes are conclusory. At the bottom of this document and following short statements of what occurred on each date, it states: "This does not seem to be working. You are not meeting our expectations. You have 2 choices: 1. Submit your letter of resignation by the end of the workday tomorrow. 2. My recommendation to the Superintendent and School Board that you be terminated for just cause. Do you have any questions?" The Grievant testified that it was apparent to her during the meeting that Robinson's mind had already been made up. According to the Grievant, Robinson was following his notes during the meeting: when she replied to each incident, he went right on to the next item.

However, Robinson testified that his mind wasn't made up and that if there had been an acceptable excuse for some of the events, then he would not have gone to the bottom of the page. He further testified that he explained each incident to the Grievant and that the Grievant responded in turn. Because Robinson did not find the Grievant's responses to these incidents to be acceptable, Robinson went to the bottom of the page. Hellmers testified that during the meeting, Robinson gave the Grievant an opportunity to tell her side and respond to each incident. Further, and according to Hellmers, Robinson never cut off the Grievant's responses. Hellmers testified that his own mind was not made up at the beginning of the meeting and that Robinson did not say or do anything which would lead Hellmers to believe

that Robinson had prejudged the Grievant. Moreover, and according to Hellmers, the course of the conversation between Robinson and the Grievant included questions, answers and follow-up. The Grievant did not appear to Hellmers to be frightened and there was banter between Robinson and the Grievant.

In my opinion, the fact that Robinson kept his nose in his notes and went from top to bottom does not, by itself, indicate a predetermined bias against the Grievant. Hellmers testified that Robinson gave the Grievant an opportunity to tell her side of the story, that Robinson never cut off the Grievant's response, that the course of the conversation between Robinson and the Grievant included questions, answers and follow-up, that the Grievant did not appear frightened and there was banter between the two, and that Robinson did not say or do anything that would indicate a bias or prejudgment. This type of interaction is not indicative of a person that already has their mind made up. Therefore, I do not find that Robinson prejudged the Grievant prior to questioning her about her conduct on January 3, 2002.

With regard to Robinson delaying his meeting with the Grievant until January 3, 2002, Scott Nelson testified that the Christmas vacation break started on December 21, 2001. Although there was no evidence regarding when this break ended, it has been my experience with school districts that this typically occurs immediately following January 1st of the new year. Hence, the District's Christmas break probably went from December 21, 2001, to January 2, 2002. Robinson testified that the reason he waited to discuss the incidents with the Grievant until January 3, 2002, was because he wanted to research things and double check. Further, Robinson testified that since witness Candace Olson was only available on certain days and times, that he had to wait to speak to her. In addition, and according to Robinson, he decided that it was better to meet and discuss the incidents with the Grievant right after the break instead of right before the break.

Robinson's reasons for delay, and his decision to wait to speak to the Grievant following the December 14 incident until January 3, 2002, were reasonable. There were only five school days remaining between the Christmas Coffee incident and the beginning of the school Christmas break. It is uncontested that Robinson was still investigating and that he had not yet made contact with witness Olson through no fault of his own. Robinson spoke to the Grievant on the second school day after returning from break. Thus, and in my opinion, it was not suspect for Robinson to take six school days to complete his investigation and prior to questioning the Grievant. Further, I do not find it troublesome that a principal would wait until after a Christmas break before discussing an employee's possible termination with that employee.

The Union's assertions that the Grievant did not understand her right to respond and file a grievance throughout the disciplinary process and that the District took unfair advantage of the Grievant because of her naivete does not have merit. First, and with regard to the disciplinary process leading up to and including the suspension on October 9, 2001, the evidence is that both the Grievant and the Union received copies of the District's

documentation dated March 7, 2001, March 22, 2001, July 10, 2001 and October 9, 2001, and relative to the Grievant's misconduct. Since the Union was on notice of potential adverse action taken by the District against the Grievant, it can not be said that the District took unfair advantage during this period.

Second, and with regard to the District's investigation leading up to January 3, 2002, it is generally accepted that where an employee fails to request or waives union representation, there is no violation of the contract or of that employee's Weingarten rights. See, Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 247 (1997). The Grievant did not request representation at her meeting with Robinson and Hellmers on January 3, 2002. Further, there is no evidence that the Grievant did not understand what she was discussing with Robinson on that date or that she was otherwise unable to effectively communicate. Although the Union may be correct that the Grievant lacked a certain level of sophistication regarding her right of representation, this is not a basis to conclude, under these circumstances, that the District's investigatory meeting on January 3, 2002, was unfair. Therefore, I am not persuaded by the Union's argument in this regard.

Disparate treatment.

There was insufficient evidence in the record regarding the manner in which the District dealt with employees with problems of misconduct similar to the Grievant. Therefore, I do not find evidence of disparate treatment which would affect my decision.

Progressive discipline.

One of the cited principles of progressive discipline by the District and in its brief is that discipline should be imposed in "gradually increasing levels." St. Antoine, The Common Law of the Workplace, Section 6.7(2), p. 172 (1998). This principle is based upon the concept that "[w]ith progressively increasing penalties, employees have an opportunity to conform their performance and conduct to the employer's reasonable expectations." St. Antoine, SUPRA, at p. 173. Furthermore, this principle and underlying concept are closely related to the principle that employees need to know what is expected of them and that "[i]t is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable." ID., Section 6.5(3), at p. 166.

In this case, the Grievant was repeatedly warned and disciplined for almost three years for being tardy, for being excessively absent and for failure to call the District and to inform it of her absences. This is evidenced in the District's documentation. On May 20, 1999, the Grievant was written up for her failure to call the District and inform it that she would not be able to perform one of her duties. She was told in the future where she is unable to perform, that she must call one of a group of specific people, including the Principal, and that if she did not, "disciplinary action will be taken." On March 7, 2001, the Grievant was written up for

her failure to complete bus duty, for excessive tardiness, for failure to follow safety procedures and for excessive absenteeism. She was given specifics on how not to repeat this misconduct. Further, she told that if these deficiencies were not corrected that "you will be subject to disciplinary action up to and including dismissal." On March 22, 2001, the Grievant was written up for failure to complete bus duty, for continued tardiness and for failure to call the Principal and inform him of her absence. She was told that unless her conduct improved, that "you will be subject to disciplinary action up to and including dismissal." On July 10, 2001, the Grievant received a "Written Reprimand" for being tardy and for failure to call the Principal and inform him of her absence. She was told that unless her conduct improved, that "you will be subject to further disciplinary action up to and including dismissal." On October 9, 2001, the Grievant was written up and suspended for two days without pay for being absent and for failure to call the Principal and inform him of her absence. She was told that this was "a final opportunity" and that if her misconduct recurred, that "I will have no alternative except to recommend that your employment be terminated."

It is clear to me that as of October 9, 2001, the principles of progressive discipline had been accomplished. The Grievant knew what was expected of her: if you are going to be absent, call the Principal. She was given an opportunity to conform her performance and a gradual increase in the level of discipline resulted when she failed to meet the District's expectations. The question then becomes whether the nature of the Grievant's post suspension misconduct following October 9, 2001, is sufficiently related to the Grievant's prior misconduct such that the next level of discipline, i.e., discharge, is consistent with and does not offend the above principles and concepts of progressive discipline.

The District argues that the Grievant's collective acts of failure to inform the District of her inability to work on November 30, 2001, her failure to supervise on December 7, 2001, and her sleeping and failure to supervise on December 12, 13 and 14, 2001, is similar to the Grievant's pre-suspension misconduct. The District makes various characterizations that the pre-suspension and post-suspension types of misconduct are tied together because of a disregard of duties, a neglect of duties, a lack of attention to duties, a lack of regard for responsibilities, a neglect of responsibilities or a disregard of responsibilities. I find such characterizations to be nebulous and they are not consistent with the above notions of progressive discipline. Such characterizations do not adequately inform an employee about the specifics in conduct which an employer should reasonably expect. I reject any inference by the District that the Grievant was repeatedly warned and disciplined about a general neglect of her duties. Therefore, the District's argument in this regard does not have merit.

That is not to say that the Grievant's misconduct on November 30, 2001, is unrelated to her prior misconduct. The prior misconduct included that the Grievant repeatedly failed to call and inform the Principal of her absence. The misconduct on November 30, 2001, was that the Grievant failed to inform Principal Robinson of her inability to report to work. As I have already noted in my above discussion relative to this incident, the Grievant left the District hanging. In my opinion, failing to call Robinson back so as to let the District know whether or

not she would be at work parallels her failure to inform the Principal of an absence. Therefore, the nature of the Grievant's conduct on November 30, 2001, is sufficiently related to the Grievant's prior misconduct.

With regard to the act of sleeping, I do not find that this is related to the act of failing to inform an employer about an absence or the act of failing to inform an employer regarding the ability to come to work.

However, I agree with the District that it need not enact a rule which requires its employees to perform their duties and not sleep on the job. As pointed out by the District, the concept of not sleeping on the job is so basic and fundamental that the District has the right to expect that its employees both know the concept and comply with it. SAWYER COUNTY, WERC, MA-7729 (JONES, 11/93). Therefore, it seems to me, sleeping while at work is a justifiable reason for the District to discipline the Grievant in some form.

Moreover, although there was testimony that the Grievant had been seen sleeping at work prior to December 12, 2001, there was no evidence that the District knew of this behavior and that it failed to act. Therefore, any argument that the District failed to previously warn or discipline the Grievant for sleeping does not have merit.

I have already found that the District has proven that the Grievant was sleeping on December 12, 13 and 14, 2001. This misconduct occurred on three consecutive days and following two days of illness where the Grievant stayed at home. I understand why someone like the Grievant might return to work regardless of her current illness and inclination to fall asleep. I do not condone such behavior, especially where that person's duties include one-on-one supervision of a cognitively disabled student, but I understand the logic given that the Grievant was under pressure for her prior absenteeism. The Grievant's letter to Robinson bears this out where, and from her perspective, she was being "yelled at for being sick." However, it is illogical for the Grievant to return to work, three days in a row, and in this condition. Once maybe, but not three times.

The Grievant's misconduct regarding sleeping was egregious. She failed to either seek assistance from others or she failed to seek out a more appropriate place, such as a teacher's lounge, where she might rest. Although the Grievant may have felt personally isolated from her coworkers, this is an insufficient reason for her conduct given the nature of her responsibilities supervising special education students. Significantly, it was unreasonable for the Grievant to repeat this behavior for three consecutive days and her misconduct was compounded because of the recurring instances. I am not persuaded that the Grievant's illness that week was a mitigating factor and should affect my decision under these circumstances.

I find that the District's decision to consider the misconduct which occurred on November 30, 2001, along with the misconduct involving the three sleeping incidents on December 12, 13 and 14, does not run afoul of the principles of progressive discipline. The Grievant knew what was expected of her on October 9, 2001, she knew this was her final

opportunity to correct her behavior, yet she failed to comply on November 30, 2001. Given the egregiousness of the misconduct that occurred on December 12, 13 and 14, 2001, and that the District had a right to expect that the Grievant would not sleep on the job and while supervising special education children, the District was justified in considering this misconduct together with that on November 30, 2001**,** in its decision. Therefore, and under all of the relevant facts and circumstances, the District had just cause to terminate the Grievant.

AWARD

Based upon the foregoing and the record as a whole, it is the decision and award of the undersigned Arbitrator that the District had just cause to terminate the Grievant. Therefore, the grievance is denied.

Dated at Eau Claire, Wisconsin this 1st day of October, 2002.

Stephen G. Bohrer /s/

Stephen G. Bohrer, Arbitrator

SGB/ans
6440.doc