

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA SCHOOL DISTRICT

and

KENOSHA EDUCATION ASSOCIATION

Case 169

No. 61202

MA-11847

(Tim Somers Grievance)

Appearances:

Mr. Clifford B. Buelow, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the Employer.

Mr. Robert Baxter, Executive Director, Kenosha Education Association, 5610 55th Street, Kenosha, Wisconsin 53144-2295, appearing on behalf of the Association.

ARBITRATION AWARD

The Kenosha School District, hereinafter referred to as the Employer, and the Kenosha Education Association, hereinafter referred to as the Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the discipline of an employee. Hearing in the matter was held in Kenosha, Wisconsin on August 21, 2002. A stenographic transcript of the proceedings was prepared and received by the Arbitrator by September 25, 2002. Post hearing written arguments and reply briefs were received by the Arbitrator by November 13, 2002. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties were unable to agree upon the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

“Did the Employer have just cause to issue a written reprimand to the grievant on October 18th, 2001?”

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

XVI. TEACHER EVALUATION

H. No teacher will be disciplined without just cause. Removal from Appendix C assignments shall be subject to the just cause standard.

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BACKGROUND

Amongst the various functions of the Employer it operates Grewenow Elementary School whereat it employs Timothy Somers, hereinafter referred to as the grievant, as a fourth grade elementary teacher. The Employer has employed the grievant since 1974. He has never been disciplined. During his employment he has received good to excellent evaluations commending him for his communications skills. During the 2001-2 school year he was the Association's Building Representative. The Employer also employs two (2) other fourth grade teachers at Grewenow, Ruth Copeland and Virginia Thompson.

For seventeen (17) years J.D. Fountain was principle of Grewenow. Fountain retired on June 30, 2001. Just prior to his retirement Fountain had a conversation with the grievant. During the conversation Fountain and the grievant reminisced about their years at Grewenow. Fountain was aware that Copeland and the grievant had scheduled fourth grade class field trips that excluded Thompson's fourth grade class. Two (2) of the trips (to the State Capitol and Old World Wisconsin) dealt with an area of study all the fourth grade classes had in common, Wisconsin History. Fountain told the grievant he wanted all fourth grade teachers to work together the next school year. Fountain later told Thompson he had talked to the grievant and that he had told the grievant he hoped all the fourth grade teachers could work together the next school year.

On July 1, 2001 Susan Valeri became the principle of Grewenow. Valeri had worked for the Employer as a teacher and had been a member of the Association. On May 17, 2000 she became interim principal at the Employer's Columbus Elementary School and performed that duty until she became principal at Grewenow. During the transition of principals Fountain informed Valeri of the problem with the fourth grade teachers, informed her all other grade levels planned joint field trips and told her getting the forth grade teachers to work collaboratively should be a priority for her.

Shortly after Valeri assumed her duties as principal the grievant stopped in at Grewenow and introduced himself. On July 26, 2001 the grievant again went to Grewenow and had another conversation with Valeri. During this second conversation the grievant asked Valeri to approve a field trip for his and Copeland's fourth grade classes. Valeri questioned why Thompson's class was not included. The grievant replied he did not respect Thompson and did not want to work with her. Valeri informed the grievant she would approve the field trip, informed the grievant she wanted all fourth grade classes to go on field trips together, and, informed the grievant she would not approve future field trips unless they were collaboratively planned. Valeri said this five (5) times and the grievant responded five times he had no interest in going on field trips with Thompson.

Shortly after the 2001-02 school year began Thompson asked Copeland how much money Copeland and the grievant would be asking from parents for field trips. Copeland would not give her an answer. Thompson reported the matter to Valeri who then scheduled a meeting with all three (3) forth grade teachers. At this meeting both Copeland and the grievant commenced criticizing Thompson's work performance. Valeri stopped them and told them their comments were counterproductive. She informed all three teachers she wanted them to work collaboratively on field trips and the ordering of supplies. Valeri stated joint field trips were best for the students and was more economical. Valeri also informed the three teachers she did not want to tell parents the fourth grade teachers did not get along with each other. Valeri concluded that while she did not expect them to like each other she expected them to collaborate on field trips. At this point the grievant stood up and paced around the room. Valeri believed he looked agitated. The grievant requested to talk to Valeri in private. Valeri requested that it wait until the meeting was over but the grievant insisted he talk to Valeri immediately. Valeri and the grievant then went to a conference room.

Upon entering the conference room the grievant pulled a slip of paper out and referred to it as he spoke to Valeri. The grievant informed Valeri that if she chose to breach the confidentiality of their conversation she would jeopardize or impair her credibility in the building and in the district. The grievant also informed her that if she insisted on joint field trips with Thompson he would cancel his field trips and that she would have to deal with the angry parents. If the matter got to the Superintendent or the School Board she would have to explain it. The grievant told Valeri that if she continued to interfere he would file a grievance for harassment and that Copeland may also file a grievance. The grievant also informed Valeri that it would seem

rather odd that during her first month at Grewenow she'd had a grievance filed against her in the same way a grievance had been filed against her at Columbus. The Grievant also stated that if there were any repercussions against him in his day-to-day treatment or in his evaluations he would file a grievance and/or a federal suit. Valeri requested the paper the grievant had referred to but he refused to give it to her stating if he gave it to her she could sue him (Tr. p. 86). It was introduced at the hearing as Union Exhibit # 5., and states the following:

1. Confidentiality-Credibility
 - a. Bldg.
 - b. District.
2. Cancel Field Trips
 - a. 39 Hostile/Angry
 - b. A few from room 206
 - c. School Board
 - d. Superintendent
3. Further Interference
 - a. Grievance
 - b. Ruth
 - c. 1st Month's 2 griev.
4. Repercussions
 - a. Day-to-day
 - b. Evaluation
 - c. Position
 - d. Grievance
 - e. Federal Suit

At the conclusion of their meeting Valeri and the grievant returned to the meeting with Thompson and Copeland. Valeri informed the three (3) teachers she had some new information to consider and ended the meeting. Thereafter she wrote up the following notes:

Fourth Grade Conference Summary

Thursday, September 6, 2001
2:50 p.m.

I called a conference for the three fourth grade teachers (Tim Somers, Virginia Thompson, Ruth Copeland) to discuss collaboration on field trips. I asked for this conference because Virginia Thompson came to me on Tuesday very upset that the other two teachers were not going to work with her on field trips or anything else. Dave Fountain did tell me that the three teachers were having a problem working together. During the summer Tim Somers came to me with a field trip request form for only two classes, we talked about adding the third class at that time. He told me he did not respect Virginia Thompson and that he did not want to work with her. I asked him at that time to reconsider for the next field trip.

The four of us sat down in my office and I started the conversation by asking the teachers if they had anything to say before I gave my thoughts and wishes on the subject of working as a team and including Virginia Thompson in on plans for future field trips. Tim Somers and Ruth Copeland both had negative comments about Mrs. Thompsom; they claim that she didn't show up at meetings last year and that she doesn't work as hard as they do. Ruth Copeland told Virginia that she approached her in a negative manner on Tuesday when she was asked about how much money she was collecting for the field trips for the year. I asked them to stop at that point because we weren't being productive. I told them that I wanted Virginia Thompson included in the field trips because of the cost savings of going at the same time. I also said that parents would be calling if one class wasn't going and the other two were. I asked them what my response to these parents should be. I said it was unacceptable to tell them the three teachers didn't get along. I told them that they didn't have to plan together or like each other, I just wanted some collaboration on field trips and possibly the ordering of any fourth grade materials. At that time Tim Somers stood up and said he needed to speak with me alone. He asked again and seemed agitated. I excused myself from the other two teachers and followed Tim into the conference room across the hall. Tim closed the door behind us, took out a list and told me that if I ever breached the confidence of the meeting we were currently having that he would ruin my reputation at Grewenow and in the district. He continued by telling me that if I insist that he go on field trips with Virginia Thompson that he would cancel all of the field trips he had planned and refer all of the angry parents to me. He said that he refuses to work with Virginia Thompson, that I don't know how bad she is. He told me that if I push it he will file a grievance against me for harassment. He continued reading off a list and told me that if there were any repercussions toward him for this conversation that he would sue me for ? and file a grievance against me. He said if this conversation or decision not to work with Virginia Thompson affected his evaluations in any way that he would sue me and file a grievance. When he was done I asked him if I could keep his notes for reference and he said no because then I could sue him. We then returned to the meeting with the other two teachers and told them I had to make some decisions

before we could continue the meeting. Virginia Thompson insisted that if we were talking about her that she be informed, I told her that it wasn't about her, it was about me and that I wasn't comfortable making any decisions at that time, I needed time to think. She insisted again and I told her that I didn't want to react to information I was given that I needed time to think. The teachers left. Tim Somers thanked me for my discretion.

The meeting ended at 3:13 p.m.

On September 11, 2001 Valeri issued the following memo:

TO: Virginia Thompson, Tim Somers, Ruth Copeland
FROM: Susan Valeri
RE: Field Trips
DATE: 9/11/2001

For the benefit of the fourth grade students at Grewenow I have decide that the fourth grade teachers (Virginia Thompson, Tim Somers, Ruth Copeland) will collaborate on all fourth grade field trips. You will also collaborate on the ordering of curriculum materials and supplies for fourth grade. If you have any questions please feel free to see me.

On September 13, 2001 Valeri sent the following memo to the grievant:

TO: Tim Somers
FROM: Susan Valeri
RE: Field Trips
DATE: 9/13/2001

On Thursday, September 13th, you informed me that you were not asking for any money from students for field trips because you were canceling those field trips. When I asked you why you were canceling the trips, you replied that it was because of the conversation we had on September 6, 2001, regarding the inclusion of Ms. Thompson and her class on these trips.

I was very concerned about your response, since this decision was not discussed nor decided upon by the fourth grade team. It also runs counter to my memo to you dated September 11th, where I informed you that I wanted all of the fourth grade teachers (Tim Somers, Virginia Thompson, Ruth Copeland) to collaborate on all field trips.

Since our 4th grade parents and students are expecting to take these trips together as a class and some of the field trips are related to the fourth grade curriculum, I am directing you to maintain your schedule of field trips and to include the classes of Ms. Thompson and Ms. Copeland.

Please contact me if you have any questions about this issue or my expectations of you. Thank you.

On October 18, 2001 the grievant was issued the following letter of reprimand:

October 18, 2001

Mr. Tim Somers
Grewenow Elementary School

Dear Mr. Somers:

This letter is to inform you that you are being issued a letter of reprimand. This disciplinary action is based on your conduct in a meeting with Principal Susan Valeri where you made threatening, harassing and insubordinate remarks to her. As a result of this meeting, Ms. Valeri filed a formal harassment complaint with the Office of Personnel.

As history, you were asked by your former principal last year to work with the other 4th grade teachers in a collaborative style, especially as it related to planning and field trips. You refused. Twice during this past summer, you met with Ms. Valeri and stated your opposition to working with all of the 4th grade teachers on field trips. At the request of the teacher who was being excluded from the field trips, Ms. Valeri scheduled a meeting with all of the 4th grade teachers at the start of this school year to discuss the matter. During this meeting, you asked to speak with Ms. Valeri in private and, by your own admission, you threatened to file grievances and lawsuits if Ms. Valeri discussed the dialogue exchanged in this private meeting (i.e. your opposition to collaboration with all 4th grade teachers and the consequences to Ms. Valeri should she direct it). Also, by your own admission, you indicated to Ms. Valeri that if she made you plan field trips with the teacher in question, you'd cancel all of your field trips and direct all of the

angry parent calls to Ms. Valeri. Finally, although you deny it, you threatened to ruin Ms. Valeri's reputation both at Grewenow and in the District if she made you plan field trips with all 4th grade teachers at Grewenow.

While it is within your rights to file grievances and lawsuits if you feel that you have not been treated fairly as an employee, there is no protection under the law for threatening your superior with angry parent calls and ruining their reputation if they don't acquiesce to the way that you'd have the school led.

It is hoped that this letter of reprimand will allow you to reflect on your duties as a teacher in this District and the importance of exercising sound and careful judgment as you work with your colleagues and building principal. You are warned that in the event of further disregard for your duties as a teacher, you will be subject to further discipline, up to and including discharge. Also, since a formal harassment charge has been filed, you are warned that you may not retaliate against Ms. Valeri in any way for filing a charge against you.

You are reminded that the District's Employee Assistance Program (652-7000) is available to you to assist you with any personal problems that you may have that may be impacting your ability to carry out your work duties.

Your teaching position is included in the Kenosha Education Association (KEA) Bargaining Unit covered by a collective bargaining agreement between the District and the KEA. If you believe this action was not based on just cause, you may appeal this decision through that agreement's grievance procedure.

Sincerely,

Blane McCann /s/
Dr. Blane McCann, Ph.D.
Executive Director of K-8 Instruction

Jason R. Olson /s/
Mr. Jason R. Olson
Director of Personnel

Thereafter the instant grievance was filed and processed to arbitration in accord with the parties' grievance procedure.

EMPLOYER'S POSITION

The Employer contends the essential facts in the instant matter are not in dispute. During the 2000-01 school year Copeland and the grievant took their classes on field trips without Thompson's fourth grade class. Fountain told the grievant he hoped the fourth grade teachers

could work together in the 2001-02 school year. Fountain told Valeri about the lack of collaboration between fourth grade teachers. The grievant was impressed with Valeri when he first met her. In their second meeting Valeri informed the grievant she would not approve future class trips unless all fourth grade classes went together, she told him this five times and five times he said he would not do so.

The Employer argues that when the grievant learned Valeri had scheduled a meeting of all fourth grade teachers to discuss collaboration of field trips, the grievant developed a plan to thwart this. He wrote a list of possible responses to coerce Valeri into changing her mind. Copeland and the grievant began the September 6th, 2001 meeting with an attack on Thompson. When Valeri put a stop to this and informed them she wanted the fourth grade teachers to collaborate, the grievant asked for a private meeting. The grievant told Valeri to keep their conversation confidential or he would ruin her reputation. He further threatened several actions if she did not change her mind.

The Employer argues the only dispute of note is whether the grievant told Valeri he would ruin her “credibility” or whether he would ruin her “reputation”. In addition, the Employer asserts the grievant has attempted to downplay the significance of the threats he made to Valeri.

The Employer avers it is not unusual for a grievant to tell a different story than that alleged by his superiors. The Employer points out that arbitrators generally presume the supervisor to be more credible as the accused employee has an incentive for not telling the truth whereas the supervisor, who has nothing to gain or lose, is presumed to be telling the more credible version. The Employer concludes Valeri’s version of variations in the testimony is more credible than the grievant’s because his testimony was self-serving, unbelievable and nothing more than an attempt to avert disciplinary action.

The Employer also contends its actions were neither arbitrary or capricious. The Employer points out it was undisputed that it has retained the inherent management right to direct matters of curriculum, including field trips. The Employer notes the grievant did not grieve Valeri’s memo to work collaboratively on field trips. The Employer argues the grievant’s actions were a premeditated attempt by a seasoned veteran to bully a relatively new administrator. The Employer asserts these actions were unprofessional, totally devoid of any regard for the students and without regard for the obvious economies involved in joint field trips.

The Employer also urges the Arbitrator to follow the well-established arbitral principle that determining the penalty for employee misconduct is a function reserved to management and that an arbitrator should not substitute his or her discretion for that of management.

The Employer would have the undersigned deny the grievance.

ASSOCIATION'S POSITION

The Association contends the grievant was not insubordinate. The Association points out that when the grievant left the September 6th, 2001 meeting it was adjourned without making any decision on collaboration thus the system that allowed field trips to be planned by the teacher and not across grade level was still the practice. The Association also points out that after the September 11th, 2001 memo joint field trips were planned and conducted. Thus, the Association concludes, there was no insubordination and asserts the instant grievance should be sustained.

The Association also contends the grievant did not threaten/harass Valeri. The Association points out the grievant simply read his list to make it clear to Valeri he was very certain that he did not want to participate with Thompson. Further, that the grievant believed he was exercising his rights as an employee represented by the teacher's collective bargaining agreement and under public employee state law. The Association further points out the grievant did not raise his voice during his private meeting with Valeri. The Association concludes that the grievant did not threaten/harass Valeri and again asserts the instant grievance should be sustained.

The Association also points out the grievant has an impeccable record as a teacher in the Kenosha School District. The Association argues that as the grievant is a highly respected and valued teacher, in and out of the classroom, he does not deserve to have this blemish on his record. The Union further argues that given the grievant's record he had no need to threaten or harass anyone.

The Association would have the Arbitrator sustain the grievance and direct the Employer to cleanse the grievance personnel file.

EMPLOYER'S REPLY BRIEF

The Employer argues that the grievant's claim he wanted a confidential meeting because he wanted to discuss his reasons for not working with Thompson do not have the ring of truth. The Employer points out Copeland and the grievant began the meeting on September 6th, 2001 by lambasting Thompson in her presence. Thus, the Employer concludes, there was nothing regarding Thompson to keep confidential and there was no legitimate reason for a private meeting. The Employer also points out that if the primary substance of the grievant's conversation was an assertion of his contractual and statutory rights he should have made such assertions in the presence of Copeland and Thompson. The Employer avers the fact the grievant wanted to go private for such a noble cause proves the incredibility of any such motivation.

The Employer contends the real reason the grievant wanted to talk in private was because he did not want any witnesses so that Valeri was caught in a "he said, she said" credibility dispute. One between a young administrator and a veteran teacher who was the Association's building representative.

The Employer points out the grievant acknowledged during the hearing that there was nothing in the collective bargaining agreement which gives teachers any rights with regard to student field trips. The Employer argues that the grievant, an Association building representative, never bothered to find out what his rights were under the collective bargaining agreement. The Employer also points out that when the grievant was directed in writing to collaborate on field trips he did so but he did not file a grievance over the directive.

The Employer further argues that the grievant's threat of filing a grievance or federal suit, when he had no basis for it, demonstrates a threat of frivolous and vexatious litigation. The Employer concludes this threat was an attempt to intimidate Valeri into compliance with his wishes. The Employer also argues the grievant's assertion that it would not look good for Valeri if she had grievances filed against her early in her tenure at Grewenow, the same as at Columbus, is not a courageous assertion of legal rights but a blatant threat.

The Employer further contends the grievant's threat to cancel field trips violates the well established labor law of "work and grieve" when an employee believes the collective bargaining agreement has been violated. The Employer argues that as an Association building representative the grievant is held to a higher standard and is presumed to know this fundamental rule.

The Employer also argues the fact the grievant complied with Valeri's written directive does not erase his earlier conduct which standing alone is deserving of discipline. The Employer points out it took into consideration the grievant's work history when it determined to give the grievant a written reprimand rather than a suspension.

ASSOCIATION'S REPLY BRIEF

The Association points out the grievant complied with Valeri's September 11th, 2001 memo and thus there was no insubordination. The Association also argues the fact that the grievant had a prepared list does not demonstrate premeditation, but avers the prepared list lends credibility to the grievant that a breach of confidentiality would impair Valeri's credibility in the building and the District. The Association further argues that the fact the grievant had prepared a list does not demonstrate the grievant was attempting to coerce Valeri into changing her mind regarding forth grade teachers planning and attending field trips together.

The Association concludes the grievant complied with Valeri's directive. Further, that the grievant did not threaten or harass Valeri but informed her of what he believed his rights were under the collective bargaining agreement as well as Wisconsin Public Employee law. The Association also argues that as a twenty-eight (28) year employee, there is no evidence he is capable of behaving in the manner the Employer contends he did.

DISCUSSION

The pertinent facts herein are not in dispute. The grievant's supervisor requested that he collaborate with a fellow teacher when planning field trips. The grievant in no uncertain terms refused to do so. The undersigned finds this is clearly insubordination. The Association argument that the grievant complied with Valeri's September 11, 2001 memo directing the three (3) fourth grade teachers to collaborate on all fourth grade field trips does not negate the fact the grievant refused to comply with her oral request to do so on July 26th, 2001 when Valeri informed him no future field trips would be approved unless they were collaborated with all three (4) fourth grade teachers. Nor does his compliance negate the fact that when Valeri made the same request on September 6th, 2001, the grievant again refused to do so.

The record demonstrates that when the grievant arrived at the meeting on September 6th, 2001 he came prepared to refuse to comply with Valeri's request for collaboration. As the Employer has pointed out, the grievant is an Association building representative and therefore should be well aware of the pitfalls an employee faces when an employee pursues self-help remedies. If, as he has claimed, the grievant believed his contractual rights were being violated the appropriate action was to comply with a supervisor's directive and then grieve the matter. The grievant failed to do so and thus he must suffer the consequences of his insubordinate actions.

However, what the undersigned finds most troublesome is the grievant's threat to take punitive actions against the students in his charge by asserting he would cancel all his field trips if Valeri directed him to collaborate with Thompson. There is no dispute that field trips are an important aspect of the educational process. In effect the grievant asserted his professional independence was more important than the quality of education he threatened to withhold from the students. Such a threat, even if not acted upon by the grievant, cannot be ignored by the Employer. To compound this matter, the grievant's assertion he would direct any angry parent calls to Valeri, and, that this would probably come to the attention of the Superintendent and/or the members of the School Board, is, in the undersigned's opinion, an attempt to intimidate Valeri into backing down from her attempts to have the three (3) teachers collaborate on field trips. The undersigned finds the Employer was justified in determining to discipline the grievant when he threatened job actions and attempted to intimidate his supervisor.

During the processing of his grievance the grievant alleged Valeri was attempting to take him out as a way of establishing discipline in the building (Tr. p. 79). There is no evidence in the record to support such an allegation. The record does demonstrate Valeri twice gave the grievant a reasonable and legitimate directive; collaborate with all the fourth grade teachers when scheduling field trips. However, the grievant informed Valeri he would not comply with this directive and further informed Valeri he would cancel all his field trips if directed to work with Thompson. Thus, the undersigned finds the grievant was not only insubordinate, but threatened the supervisor with a work action if she continued her directive.

The record also demonstrates that, at the commencement of the private meeting between Valeri and the grievant, the grievant requested the matter be confidential. The undersigned sees no problem with a request at the commencement of the meeting that what the grievant said to Valeri remain between the two of them if the grievant had limited himself to just the request for confidentiality. However, the grievant then went a step too far. He informed Valeri that any breach of confidentiality would ruin her credibility in the building and the District. This, no matter what word games the grievant may have been playing, is a direct threat by the grievant that if Valeri took the matter further she would face consequences. Such a petulant comment by the grievant, in effect, opened their dialogue with a threat to the principal. This comment, in and of itself a veiled threat, would justify disciplinary action by the Employer.

The Association has pointed to the grievant's excellent work record in support of its position that the Employer did not have just cause to discipline the grievant. However, the Employer has acknowledged it took the grievant's work record into consideration when it tempered the discipline it meted out, limiting the discipline to a written reprimand. Having found the grievant was insubordinate and having found the grievant did threaten his supervisor, the undersigned concludes, based upon the above and foregoing, and the testimony, evidence and arguments presented, the Employer had just cause to issue a written reprimand to the grievant. The grievance is therefore denied.

AWARD

The Employer had just cause to issue a written reprimand to the grievant on October 18th, 2001.

Dated at Madison, Wisconsin, this 2nd day of December, 2002.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator