BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RHINELANDER SCHOOL DISTRICT

and

RHINELANDER EDUCATION ASSOCIATION

Case 57
No. 61379
MA-11910

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServ – Central, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Rhinelander Education Association.

Eckert, Kost & Vocke, by **Attorney Michael L. Eckert,** 1285 Lincoln Street, P.O. Box 1247, Rhinelander, Wisconsin 54501-1247, appearing on behalf of the Rhinelander School District.

ARBITRATION AWARD

The School District of Rhinelander, hereinafter District, and Rhinelander Education Association, hereinafter Association, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate arbitration was filed with the Commission on July 2, 2002. Commissioner Paul A. Hahn was appointed to act as arbitrator on July 9, 2002. Hearing took place on September 18, 2002 at the Cedric A. Vig outdoor classroom in Rhinelander, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post hearing briefs. Post hearing briefs were received by the Arbitrator on November 8, 2002 (District) and November 12, 2002 (Association). Reply briefs were received by the Arbitrator on November 27, 2002. The record was closed on November 27, 2002.

ISSUE

The parties stipulate to the following issue:

> Is the 30 day suspension and unpaid leave for Mark Mani a reasonable discipline under the Collective Bargaining Agreement for his actions on May 1st and particularly with regards to the Section related to just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article XIII
Nonrenewal/Discipline

A. Standard for Discipline: No teacher shall be discharged, reprimanded, suspended, or disciplined except for just cause. Any such action shall be subject to the grievance procedure set forth herein.

. . .

C. Burden of Proof: With the just cause standard, the District shall have to carry the burden of proof.

STATEMENT OF THE CASE

This arbitration involves the School District of Rhinelander and the Rhinelander Education Association. (Jt. 1) The Association alleges that the District violated the just cause provision of the collective bargaining agreement by awarding the Grievant a 30-day suspension without pay for his actions on May 1, 2002 when he took a group of seventh and eighth grade students to the Cedric A. Vig outdoor classroom as a field trip reward for these students for their efforts in an anti-smoking campaign at the District. (Jt. 2 and 3) The suspension was grieved by the Association on June 6, 2002. (Jt. 5)

The District operates a K-12 school district in Rhinelander, Wisconsin. The Grievant is a licensed school teacher employed by the District at the District's Junior High School. The Grievant's primary teaching responsibilities at the Junior High School included teaching seventh and eighth grade health classes. In school year 2001-2002, the District received an anti-smoking grant, and the Grievant was directed to coordinate a "Teens vs. Tobacco" program. Seventh and eighth grade peer leaders were trained to counsel sixth grade students and urge these students against the use of tobacco. The Grievant personally selected the approximate 25 students involved in this program and developed their curriculum and trained them. The anti-tobacco program was conducted over a ten week period. At the completion of the anti-tobacco effort and as a reward to the students for their efforts, Grievant planned a "reward" day or field trip at the Cedric A. Vig outdoor center, commonly referred to as CAVOC. CAVOC consists of approximately 160 acres of forested land some distance from the main school district grounds and is owned by the District as a result of a gift to the District. CAVOC is administered by the District's School Forestry Advisory Committee which authorizes as approved activities of this land, on which there is a small pond, hiking, sight-seeing, nature study, bird-watching and skiing. (Jt. 9)

The Grievant, approximately one month before the field trip to CAVOC, completed a field trip form to present to his supervisor, the Principal of the Junior High School, which provided a minimal description of the activities that would occur on the field trip and also provided that there would be three chaperones in attendance; the field trip was approved by Principal Wall on April 4, 2002. (Jt. 6) Although the CAVOC property includes a small pond, no one contemplated that the students would be entering the water as part of this field trip and no indication as such was made in the communication from the Grievant to parents regarding the purpose of the field trip and what the students should bring with them. (Jt. 7)

On May 1, 2002, approximately 25 students were bused to CAVOC. The bus driver who was contemplated to be one of the chaperones left with the bus as soon as the driver dropped off the students. As the day developed, the other chaperone was only there approximately two hours and another member of the School District faculty was present only to purchase pizza for the students for lunch. During the course of the day, certain students, with the permission of the Grievant, and some students without permission or knowledge of Grievant, jumped off a small pier into the pond, some in their undergarments and some with their clothes on. On May 1, 2002, there were no signs prohibiting swimming and there were no lifesaving devices at the water or any kind of railing around a 20-foot pier that goes out into the pond. Four students were also allowed to leave the property and walk approximately one-quarter of a mile to one of the student's homes to procure dry clothes and towels. This was done with permission and knowledge of the Grievant. No student that entered the water suffered any known ill effects from entering the water which was later determined by the District to be approximately 50 degrees farenheight when measured several days after May 1, 2002.

The Grievant did not report the "water incident" to Principal Wall as he did not believe it was a negative activity. The Principal, from a message on his home phone answering machine, was told that several students on this field trip had been "skinny dipping". On May 3, 2002, the principal spoke with the Grievant who denied that any students on the field trip had been skinny dipping. The Principal recalls the conversation as the Grievant denying that any student on the field trip had been in the water. The Grievant was requested not to speak to any of the students that had been on the field trip while the Principal conducted his investigation, however, the Grievant immediately after the initial meeting with Principal Wall spoke with three students who assured him that no one had been skinny dipping during the course of the field trip. At a second meeting with Principal Wall and other representatives of the District, as well as Association representatives, the Grievant, from Wall's recollection, admitted that students had been in the water. Grievant's recollection is that he had never denied that students were in the water and simply felt it was not that big a deal; the students had merely jumped in and immediately came out of the water and no harm had occurred to any of the students.

On June 5, 2002, a meeting was held by the Board of Education of the District to act on a request by the administration for the termination of the Grievant. The result of that hearing

was that the Board ordered that Grievant be placed on thirty days of unpaid leave (suspension) and that a "severe" letter of reprimand be placed in the Grievant's file. The Board's action was confirmed in a letter to the Grievant from School District Superintendent James M. Chillstrom on June 12, 2002. (Jt. Exs. 3 & 2)

A grievance was filed by the Association on behalf of the Grievant on June 6, 2002 alleging a violation of Article XIII, Paragraph A of the collective bargaining agreement between the parties. (Jt. 5) The parties processed the suspension of the Grievant through the contractual grievance procedure but were unable to reach a resolution and agreed to waive a Board hearing and proceed directly to arbitration. (Jt. 5) No issue was raised as to the arbitrability of the grievance. Hearing in the matter was held by the arbitrator on September 18, 2002.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the administration of the District put its total trust in the grievant to do what a "responsible person" would do on May 1, 2002 on the field trip to CAVOC. The Association argues that Grievant's record with the District demonstrates that Grievant is concerned about his students and has a good relationship with them and that he observes required practices and building policies of the District. The Association submits that the District's policy regarding use of school facilities encourages the widest possible use of school property for activities of the school within legal limitations and that nothing that the Grievant did on May 1, 2002 violated any use of school facilities. As it relates to the uncontemplated jumping into the lake at CAVOC, the Association argues that the Grievant used good judgment in recognizing that this was a reward day for these students and it would have been inappropriate to discipline them for this activity from which no student got sick or was harmed. The Association notes that the District had not been concerned about the lake or students swimming or jumping into the lake prior to this incident; it had placed a pier twenty feet into the water without a railing and had never posted "no swimming" signs anywhere on the property.

The Association argues that there are no rules regarding the use of CAVOC that prohibit swimming in the pond on the property and that the approved activities listed for CAVOC clearly have been expanded upon over the years of use of the property as substantiated by the record. The Association points out that the administration of the District has never talked to teachers or done an inservice regarding what activities are or are not proper on the CAVOC property. The Association takes the position that the jumping in the lake on May 1, 2002 was not anticipated or planned or plotted by the students. The jumping into the lake was not done covertly and was merely a spur of the moment activity based on the fact that

despite it being May 1, it was a warm day and that it was not unusual for a few of the students to go swimming on May 1. The Association notes that the students responsibly determined whether there were any hazards at the end of the pier from which they jumped into the water and found none.

The Association argues that the punishment received by the Grievant is totally unreasonable. The Association submits that the actions or decisions of the Grievant on May 1, 2002, were not that egregious to result in a $6,000 fine of the Grievant.

In its reply brief and responding to the District's post hearing brief, citing the District's position on errors of judgment by the Grievant, the Association again notes that the experience at CAVOC was that many activities other than hiking, sight seeing, nature study, bird watching and skiing took place on school field trips. The Association argues that there were no well-established rules that prevented the Grievant from allowing students to jump off the dock into the pond and that applicable arbitration case law requires that the Grievant be advised of the rules, and where there are no rules, the exercise of reasonable discretion does not prove just cause for discipline.

In responding to the District's argument that the Grievant failed to cooperate in the investigation, the Association takes the position that it is unfounded that Grievant refused to cooperate. The Association submits that the first conversation Grievant had with Principal Wall was casual and that the Principal did not indicate that he was investigating anything that could lead to discipline. The Association, in response to another position by the District, states that the chaperone policy was not a school policy but an administrative rule and therefore could be changed by the principal to allow fewer chaperones than were in attendance on the May 1st field trip.

The Association restates its main argument that the punishment received by the Grievant does not "fit the crime." The Association submits that any "errors in judgment" resulted in no harm to any student and should not result in a $6,000 fine against the Grievant. Such a penalty is punitive and not aimed at correction which should be the primary purpose of disciplinary actions.

In conclusion, the Grievant and Association request that the Arbitrator sustain the grievance and grant the Grievant back his pay.

District

The District, in its post hearing brief, states its position based on several errors in judgment made by the Grievant on May 1, 2002. The District argues that these errors establish reasonable finding of just cause and reasonable discipline toward the Grievant. The District takes the position that the mere fact that the educational purposes appropriate for CAVOC did not prohibit swimming or jumping in the lake does not mean that such activity

was permitted. The District notes that nowhere on the field trip request form to Principal Wall did the Grievant list that the students would be jumping into the water at CAVOC, and it is clear from the record testimony that the Principal would not have approved the water activity if that activity had been listed on the agenda for the day.

Secondly, the District takes the position that the Grievant on the field trip request approval form stated that he would have three chaperones during the day at CAVOC. In fact, the District submits, the seventh grade counselor Karl Ader was onsite only for a couple of hours, the bus driver would not qualify as a chaperone except when driving the bus and the grant writer for the grant, Tubbs, was only onsite for a few minutes to help arrange for the pizza lunch. Therefore it is clear, submits the District, that the Grievant took it upon himself to chaperone twenty-three students and did not evidence responsible adult supervision.

The District next argues that just cause exists because the Grievant erred in his judgment in allowing his students to swim unsupervised in inappropriate attire and in conditions that jeopardized their health and safety. The District argues that when approached by a student requesting to be able to go into the water, the Grievant defended his approval by stating that the student is an excellent swimmer. However, as established by the District in the record, the student did not wear a swim suit but rather wore shorts and a tank top and swam while the Grievant remained at the lodge totally unable to see the lake where the student swam. Other students then followed this student into the water and were completely unsupervised and unchaperoned. The District posits that the conditions at the lake on May 1, 2002 were not favorable for entering the lake even though there was no ice on the lake that day. The District on May 11, 2002, measured the water temperature of the lake and found that it was between 40 and 49 degrees fahrenheit, that water clarity is a problem as witnessed by all parties to the arbitration and the Arbitrator at the arbitration hearing, and that there is no way to judge the depth of the water at the end of the 20-foot pier in the lake. The depth of the water when measured by the District on May 11, was well in excess of six feet, significantly above the head of the average seventh or eighth grade student.

The District submits that the Grievant's next error in judgment was allowing four students to leave the CAVOC property unsupervised and walk a quarter of a mile to the home of one of the students for dry clothes and a towel. The Grievant did not know what the students were doing after they left the school property. It is clear, the District argues, that under school policy students must be under adult supervision at all times, and if they leave school grounds, they must have permission from the office and no such permission was granted by the office; Grievant had no authority to allow the students to leave CAVOC unsupervised.

Lastly, the District argues that just cause exists because the Grievant failed to cooperate in the investigation of the incident and actively interfered with the investigation. The District points out that the allegation regarding "skinny dipping" came from a concerned parent and that the school principal did not learn about the events of May 1 from the Grievant, but rather

from a message on his home answering machine. When the principal attempted to talk to the Grievant on May 3, 2002, he was unable to find the Grievant because the Grievant was improperly using flex time. The principal had never mutually agreed to the use of flex time by the Grievant as required by School District policy. The District argues that the Grievant's uncooperative behavior did not end with the abuse of flex time procedure because when confronted with the allegation regarding skinny dipping, the Grievant stated that no students entered the water. Following the conversation with School Principal Wall, who told the Grievant he would be launching an investigation and the Grievant should not have any conversations about the incident with the students involved, the Grievant immediately thereafter had conversations with three students, actively interfering with the Principal's investigation. The District takes the position that in a subsequent meeting, when the Grievant finally accepted the veracity of the allegations about the events of May 1, 2002, he refused to accept the gravity of the allegations and said that he did not regard what had happened with the students jumping into the lake as a big deal. The District argues that the Grievant's statement and attitude demonstrate that Grievant did not accept the seriousness of what transpired at CAVOC on May 1, 2002.

In its reply brief responding to the disparate treatment argument of the Association regarding a snow mobile incident at Fort Wilderness in January of 2002, the District points out that the entire seventh grade staff was on hand for the field trip; and therefore there was ample supervision while at CAVOC the Grievant was alone with 23 students. Further, the District leaned about the roll over or the tipping over of snow mobiles pulling students on a frozen lake in Fort Wilderness from the teacher involved and not from a parent leaving a message on the answering machine. The District submits that it did trust the Grievant as noted in the evaluations of the Grievant, but that is not the issue on May 1, 2002. The issue is whether the Grievant lived up to the District's trust on that date; the District argues he did not.

Further responding to the Association's reply brief, the District submits that there was no life saving equipment at the water's edge and that the lack of safety equipment is all the more reason that the Grievant should have refused permission for his students to swim. At the least, Grievant should have been physically present in a supervisory capacity. The mere fact that some students at their homes on a lake near Rhinelander are allowed to swim on May 1, is not relevant because what a student is permitted to do under a parent's supervision is not relevant on a school field trip.

Lastly, the District notes that the Grievant was not forced to pay a $6,000 fine as argued by the Association. In fact, the Grievant did no work for the School District during that period of suspension and the $6,000 figure is money that the Grievant did not earn because it was unpaid leave as opposed to money that he had earned and was later forced to pay out-of-pocket to the School District.

The District concludes its argument by stating that the investigation of the events of May 1, 2002, demonstrate that there was sufficient just cause under the collective bargaining agreement to support the School Board's chosen sanction of a thirty-day suspension and unpaid leave against the Grievant.

DISCUSSION

This case involves the thirty day unpaid suspension of the Grievant. The Association brought this matter to arbitration alleging that contrary to the requirements of the labor agreement, the suspension was without just cause and too "harsh". The District alleges that the Grievant was guilty of poor judgment on the May 1st field trip and was not honest about what happened and tried to inhibit the District's investigation. Most of the facts in this matter, recounted above, are not in dispute and will not be stated again except as necessary.

The District's post hearing brief provides a useful format to analyze the record in this case. The first issue is whether the Grievant violated school policy in not providing an adequate number of chaperones for the outing. Whether the school policy is clear and whether it is an administrative policy that Principal Wall could alter, as he testified, what is clear is that Grievant committed to having three chaperones, including himself, on the trip. (Jt.6) The record establishes that for the majority of the time at CAVOC the Grievant was the only chaperone on the premises. At the least, the Grievant is guilty of failing to provide the number of chaperones to which he committed to his supervisor; it is hard to argue that the Grievant exercised good judgment in trying to chaperone twenty-five students by himself.

Two issues are essentially tied together: whether the Grievant exercised poor judgment in allowing students to use the property in a manner contrary to school policy by allowing them to jump into the lake and allowing the students to enter the water unsupervised and without proper attire. It is clear from the record that CAVOC property has been used for purposes other than stated in the policy that covers usage of this land. (Jt.9) High and low ropes courses are not listed in the policy, and it is doubtful that any policy could cover all the activities that teachers and students could develop over the course of time and their imagination. The point is whether swimming is such an activity; I find that it was not on May 1, 2002. I do not accept the Association's argument that because it was not prohibited it was permissible. Nor do I find a need to determine whether the District was at least responsible because it did not have signs prohibiting swimming or have safety devices present. Nor do I find much strength to the Association's argument that given that students in the "north" are tough and jumping into a cold lake is no big deal and nothing happened that the District took a minor event and made it a major one.

I find the Grievant exercised poor judgment on that day because he let the students jump in the lake without supervision. It matters not that the students took some precautions to check the depth of the water and that there was always more than one student present. When Grievant gave permission to one student, he knew at that point there would not be adult supervision, let alone a trained adult, and logic should have suggested to him that if one student went in the water more would follow. What Grievant also forgot was that the water activity was unplanned and probably was not contemplated by the parents of these students based on his letter to them prior to the trip. (Jt.7) That nothing happened to any of the students could have just been pure luck.

The next issue related to poor judgment by Grievant is his allowing four students to leave the CAVOC property to go to a student's home to retrieve clothes and towels. I find that Grievant did exercise poor judgment in this regard. The potential liability to the District if something had happened while these students were off school grounds could have been significant. Parents expect their children, once they are at school, to be under the school's control the entire time as does the administration.

It is evident from Grievant's testimony that a basis for many of his actions on May 1st was his trust of these students. The Grievant trusted the students to do the right thing and his trust was evidently rewarded as no harm came to any of the students. However, trust of the students, as the Administration trusted Grievant, cannot excuse errors in judgment. The Administration and the parents of the students put their trust in teachers each day and expect the teacher to act reasonably and prudently. And it is evident from Grievant's evaluations that he has honored that trust. On May 1, I find that Grievant unfortunately let trust override appropriate decisions.

The last issue raised by the District are the allegations surrounding Principal Wall's investigation which started because of a message on his answering machine stating that student's on the field trip went "skinny dipping". It is Grievant's interaction with Wall, at this point that, based on the record testimony, led to the discipline of the Grievant. Wall testified that when he met with Grievant on May 3rd, the Grievant denied that any of the students were in the water. Grievant testified that all he heard from Wall was that students went skinny dipping. Somewhere in that conversation, which was not witnessed by anyone else, Wall believed that Grievant denied that anyone was in the water. I do not choose to find that either party to the conversation testified more creditably than the other. I find it entirely believable that in denying that students were skinny dipping or being shocked at this accusation what Grievant said or did not say could have been taken by Wall as a denial that anyone was in the water. I can also understand that if Wall believed Grievant lied this would understandably affect his recommendation for discipline to the District's administration. In another meeting with Wall and other District representatives and with Association representation, Grievant admitted that students went in the water, and, by that time, the investigation showed that no student went skinny dipping. I find that Grievant did not intentionally interfere with Wall's investigation when he spoke with three students immediately after the first meeting with Wall and was told by Wall not to speak with any students. Grievant should not have but was understandably upset because if students had skinny dipped they in affect would have betrayed his trust by lying to him. When told again by Wall shortly thereafter not to speak to students, Grievant complied.

I do not regard the allegation that Grievant misused flex time on May 3rd, when Wall wanted to speak to him about the alleged skinny dipping, to be conclusive enough from the record to consider that as part of my decision. Grievant evidently had flex time but did not

have a mutual agreement with the principal on that day to use it to skip the first class hour. But it appears the practice may have allowed mutual agreement to be given in advance and not necessary for the specific time it was used.

I find that the record in this matter satisfies the obligation on the District to prove just cause under the parties' labor agreement. The preponderance of the evidence establishes that Grievant exercised poor judgment and violated school policies by not having three chaperones on the field trip, by allowing students to enter the water unsupervised and by allowing students to leave school property unsupervised. Having found just cause the issue then becomes appropriate discipline if any. The Association argues that a thirty day suspension resulting in a loss of $6,000 of salary is simply too harsh and unjustified for what Grievant did or did not do on May 1, 2002. There are two accepted principles in labor relations which must be considered in determining the proper amount of discipline. One is whether the aim of the discipline is corrective and whether progressive discipline is required given the circumstances. Also to be considered is Grievant's work record and any disparate treatment argument.

In this case the Association makes a disparate treatment argument. It is based on a field trip in January of 2002 for the entire seventh grade. During the course of the day, students were pulled on an inner tube behind a snowmobile on a lake. On a couple of occasions, the snowmobile tipped throwing the students off; they were not wearing helmets. The teacher in charge reported the incident at the end of the day to Principal Wall. Evidently no investigation was done or discipline levied. The District argues that there were significant differences because all the seventh grade teachers were present as chaperones and Wall was told immediately of the incident by the teacher that the snowmobiles tipped. The District in its post hearing brief makes clear that had Grievant told Wall immediately about the water incident things might have been different, implying, I think it is reasonable to assume, less discipline. But Grievant never thought to tell Wall because Grievant did not regard that anything wrong had happened. Supervisors seldom like to be surprised, particularly in this case by a parent. And, of course, from the District's perspective, this 'surprise' was compounded by Grievant's alleged denial that the students went into the water. It is appropriate to make a disparate treatment argument and one can argue that the level of risk to students between the two activities is approximately the same. I have considered this argument in Grievant's defense but not given it significant weight because of the differences between the two events.

There was no progressive discipline in this case. The Grievant has never been disciplined before and has an exemplary work record. (Assoc. 1) In a collective bargaining relationship, a thirty-day suspension is usually the last step in progressive discipline before discharge. In fact, discharge of the Grievant was recommended by District Administration and modified by the School Board to the suspension. The issue then becomes one of whether this discipline was punitive or corrective. Normally with a first offense or incident, arbitrators look to see if the discipline puts the employee on notice that he must correct his behavior. I find nothing in the record testimony to suggest that Grievant hasn't learned his lesson and knows he has been put on notice; Grievant probably would have helped his cause by being a little more contrite.

Given the record as a whole I find that this amount of discipline was more punitive than corrective and that a more modest level of discipline would accomplish the District's legitimate goal of putting the employee on notice to correct his behavior in the future. I note that this was a one time incident on a field trip and not a problem with Grievant's regular class room duties or instruction; it is doubtful that it will happen again. I do not overrule an employer's discipline lightly once I have found just cause, but, in this case, I believe the amount of discipline is unnecessarily excessive, and therefore arbitrary. I therefore will modify the discipline to a five-day suspension without pay. The disciplinary letter as modified by my decision will remain in Grievant's personnel file.

Based on the record as a whole, I issue the following

AWARD

The thirty (30) day suspension and unpaid leave for the Grievant is not a reasonable discipline under the Collective Bargaining Agreement for his actions of May 1st and particularly with regards to the section related to just cause. The suspension will be reduced to five days of unpaid leave and the District will award twenty-five (25) days back pay or salary to the Grievant within thirty calendar days of the date of this decision.

Dated at Madison, Wisconsin, this 11th day of December, 2002.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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