

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HURLEY EDUCATION ASSOCIATION

and

HURLEY SCHOOL DISTRICT

Case 47
No. 60928
MA-11758

Appearances:

Dean, O'Dea & Pope, P.C., by **Attorney Raymond J. O'Dea**, 204 North Harrison Street, Ironwood, Michigan 49938-1798, appearing on behalf of the Union.

Weld, Riley, Prens & Ricci, S.C., by **Attorney Tom Rusboldt**, 3624 Oak Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

The Hurley Education Association, hereinafter referred to as the Union, and the Hurley School District, hereinafter referred to as the District or the Employer, are parties to a collective bargaining agreement, hereinafter CBA, which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the District's decision not to renew the teaching contract of the Grievant in this matter, Nikki Pieczynski, hereinafter referred to as the Grievant. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Hurley, Wisconsin, on July 30, 31 and August 1, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by November 5, 2002, marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties were able to stipulate to the issue before the Arbitrator as follows:

Did the Employer have just cause when it non-renewed the Grievant's employment contract effective June 30, 2002? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7 – CONDITIONS OF CONTRACT

. . .

2. An established teacher (a teacher beyond the initial two (2) year probationary period) in the system may be placed on probation for a period not to exceed one year if a problem arises as to quality of instruction, professional ethics, or adherence to accepted school board policy. Under these circumstances, the Employer may withhold the increment increase during the period of probation. During the period of probation the teacher will be offered recommendations for improvement, guidance and assistance in making the necessary adjustment. At the end of the probationary period no teacher shall be non-renewed except for just cause.

3. An established teacher who has not reached retirement age shall not be disciplined or dismissed, suspended or discharged except for cause. The following might be considered as cause: (1) neglect of duty; (2) repeated violation of rules made by the Employer; (3) conviction of a felony or immorality; (4) evidence of physical or mental incapacity.

. . .

RELEVANT POLICY STATEMENTS

STAFF EVALUATION

. . .

The staff evaluation program shall aim at the early identification of specific areas in which the individual professional staff member needs help so that appropriate assistance may be provided or arranged for. A supervisor offering suggestions for improvement to a professional staff member shall not release

that professional staff member from the responsibility to improve. If a professional staff member after receiving a reasonable degree of assistance fails to perform his/her assigned responsibilities in a satisfactory manner, dismissal, or non-renewal procedures may be invoked. In such an instance, all relevant evaluation documents may be used in the proceedings.

. . .

BACKGROUND

The Grievant began her employment with the District in the Fall of 1988 as a special education teacher. At that time, she was finishing up the requirements for her special education certification through the University of Wisconsin at Stevens Point. Her supervisor was Nancy Chartier, the Director of Special Education and Pupil Services for the District.

During her first school year with the District, Ms. Chartier agreed to act as her "Cooperating Teacher" for the purposes of observing the Grievant's teaching on a regular basis and reporting those observations to the University. Ms. Chartier provided the University with four separate observation reports dated February 4, 1999, March 3, 1999, March 29, 1999 and April 5, 1999. (Jt. Ex. 2) Each observation report was favorable:

2/4/99: Nikki is extremely organized and lessons are well thought out. It is evident that she teaches with a purpose in carrying out set objectives.

The classroom is managed with the implementation of a structured behavioral program and various incentive charts.

Students respond openly and enthusiastically to the letter sounds.

Nikki is a very talented educator motivating children to learn.

3/3/99: The rapport that Nikki has established with the students that she works with is to be commended. Nikki implements various questioning techniques, and teaches for knowledge based learning. She demonstrates excellent behavioral management skills and provides an environment conducive to learning.

3/29/99: Very creative lesson! It has been a pleasure observing Nikki's teaching.

The lesson was very organized, well thought-out and promoted collaboration.

Nikki is an excellent teacher and posses [sic] a true knowledge of the education process.

4/5/99: Nikki continues to do an excellent job – she has built a very trusting relationship with the EEN students she works with.

The spelling unit was well developed and directions were presented clearly.

The students were observed using techniques taught in other areas of study.

The Grievant was not evaluated again until February 9, 2000. (Jt. Ex. 3) This evaluation contained some “concerns” and a recommendation for a third year of probation as well as a number of favorable observations:

Ms. Pieczynski demonstrates excellent control of her classroom.

She uses positive reinforcement to motivate her students.

She is very conscientious of her responsibilities as the case manager of the Elem. LD students.

Willingness to improve instructional skills through inservices is a concern.

Mrs. Pieczynski needs to develop strategies necessary for increasing the reading levels of learning disabled students.

Her knowledge of the LEP process continues to improve, and Mrs. Pieczynski has become more comfortable with it.

Mrs. Pieczynski is always dressed as a professional.

She was very flexible this year when the LD delivery of services was revamped from self-contained to a least [sic] restrict approach.

Mrs. Pieczynski is very open-minded and willing to accept new ideas.

Mrs. Pieczynski has an excellent rapport with students.

She demonstrates the skills necessary for working with various faculty members.

Mrs. Pieczynski works very collaboratively [sic] with the grade one, grade two and grade three regular education and Title 1 teachers in an inclusive setting.

Mrs. Pieczynski does an excellent job with organizational skills related to the (Illegible)

Mrs. Pieczynski is involved in student activities related to her area of instruction.

Mrs. Pieczynski is a very positive member of the Hurley K-12 team at the elementary level.

Mrs. Pieczynski has been required to change the delivery of service to a least restrictive approach. She has done an excellent job at the transition in meeting students needs. However, the concern for reading strategies and the foundation for reading development is an area of weakness that is imperative to rectification. [sic] It is on this basis that I am recommending a third year of probation.

Following the February, 2000 evaluation, the District prepared a remediation plan for the Grievant (page 5, Jt. Ex. 3) in an effort to address the concerns set forth in the evaluation. The remediation plan stated, *inter alia*:

. . .

This teacher's instruction could be improved in the following areas as noted in the Teacher Appraisal/Evaluation Report dated 2/9/00.

. . .

Mrs. Pieczynski will attend at the expense of the Hurley School District graduate level courses, workshops, and inservices related to reading strategies/fundamental reading skill development – three in any combination over the period of the 2000 – 2001 school year.

A re-evaluation of delivery of services will be completed at the conclusion of workshop, inservices or graduate level courses and throughout the 2000 – 2001 school year.

The Union grieved the extension of the Grievant's probationary period. The parties settled the grievance and, pursuant thereto, the third year of probation did not take effect.

The Grievant's next evaluation is dated December 18, 2000. (Jt. Ex. 5) This report, like the previous reports, was prepared by Ms. Chartier and rated the Grievant in numerous areas on a scale of 0 to 4, 0 being unsatisfactory, 1 meaning "some deficiencies evident," 2 being "satisfactory," 3 "exceptional" and 4 "clearly outstanding." There were 15 categories to be rated by this scale. On eight of them, the Grievant received a rating of 1, on six a rating of 2, and on one a rating of 4 for a total "summary score" of 24 points. This "summary score" placed her somewhat below satisfactory on the grading scale where a score of 30 was considered to be "satisfactory." Ms. Chartier noted the Grievant's principal strengths as "Nikki shows average skill in remediation of reading." Her comments on the Grievant's principal weaknesses and suggestions for improvement were:

Nikki demonstrates difficulty in getting along with peers. Improvement in peer communication is needed. Nikki lacks the ability to teach strategies needed for learning disabled students to be successful in the regular education setting. Improvement is also needed in the area of responsiveness to administrators suggestions and directions.

A third year probation, advancement on the salary schedule or lane change will be proposed to the District Administrator and Board of Education.

The record reflects that Ms. Chartier's entry regarding "advancement on the salary schedule or lane change" actually meant she would not recommend that the Grievant so advance. Her recommendation for "present and future job classification" was "Third year probation – Elementary LD Teacher." Although this evaluation was completed on December 18, 2000, it was not signed by Ms. Chartier until February 21, 2001.

As a result of the December, 2000 evaluation, Ms. Chartier fashioned a new remediation plan for the Grievant. This plan is dated February 19, 2001, and sets forth the Grievant's areas of deficiency as follows (Jt. Ex. 6):

- Broad knowledge for administering and interpreting the Woodcock Johnson Evaluation Tool

Explanation of deficiency: On three separate occasions during the IEP process you displayed the lack of knowledge for interpreting the Woodcock Johnson Evaluation for a student referred for learning disabilities. You also attended an initial IEP meeting without the needed sub-test for determination of a learning disability. As indicated in §300.532 (2)(c)(1)(ii) of the Federal Regulation evaluation procedures are to be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the test. The inability to determine the ceiling for scoring a students test results is a clear indication that you lack the given knowledge base need [sic] in interpreting evaluation scores needed in determining if a child is with a learning disability.

- Deficiency in developing and implementing reading strategies to be used by students with learning disabilities in the regular and special education setting

Explanation of deficiency: In October, I observed you working with four (4) grade two students in the small group setting in which you instructed one of the students to read aloud the directions to the work sheet. The student visibly struggled with the pronunciation of several of the key direction words. I observed you reread the written directions as you instructed the students to follow along with their fingers. The instructing of key strategies used for reading directions which should be carried over in the regular education setting were not demonstrated.

- Demonstrates inability to perform dual task-negligence in meeting IEP time frames

Explanation of deficiency: When assigned a new student or increase in contact times you have on several occasions sighed and remarked "I don't know how I can meet all these time frames." Your inability to manage your case load and student contact time often leaves students short in receiving the contact time as indicated in their IEP. On several occasions the contact time has been neglected. You have not made any attempt to ask for assistance to rectify the situation. When a peer mentor was assigned to you in November you questioned why you needed the peer mentor. On, [sic] Thursday, February 15, 2001 at 3:00 PM you left a phone message on my answering machine for permission to go skiing with the fourth grade class on the following school day Tuesday, February 20, 2001. This is a clear indication that the needs of your students are not a priority.

- Displays inability to work to a professional level with professional peers

Explanation of deficiency: In 1999 - 2000 you demonstrated difficulty in working with a fifth grade teacher who questioned the required contact time agreed upon in the IEP, in meeting the educational needs of a student in her classroom.

In 2000 - 2001 you have demonstrated the inability to work collaboratively with peers in the lower elementary level. You have demonstrated on several occasions the inability to work in a collaborative setting. This was clearly demonstrated when you did not communicate with the other members of the READS team at the Literacy Conference by taking your turn presenting the Language Circle display that the team brought to present. The READS Grant is a special education grant program implemented in the Hurley School District to reduce the number of referrals for learning disabilities. You should have been a key player in this demonstration.

It is on the above basis that I am recommending that you be placed on a (3) third year of probation for the 2001 – 2002 school year. During the probationary period I am recommending that you remain at your current salary step and credit increment as indicated in the Master Agreement. The above recommendation will be presented to the Hurley Board of Education on Wednesday, February 28, 2001 during closed session. You will be notified of the action taken by the Board of Education by letter from District Administrator, Michael Richie.

. . .

To remedy the above-described deficiencies Ms. Chartier ordered the following:

Peer Mentoring LD Teacher – Beginning March 2001 – May 2002

- To develop knowledge base needed for teaching reading and math strategies for students with learning disabilities
- To develop needed peer relation skills for working collaboratively in a school setting

Monthly meetings with the Pupil Service Director – Beginning March 2001 – February 2002

- To develop a knowledge base for the IEP Procedure
- To demonstrate the skills for interpreting the evaluation materials used to identify students with a learning disability
- To develop needed knowledge base of the qualifying criteria for students referred for a possible learning disability

Peer mentoring by the School Psychologist in the area of Student Evaluation

- You are to demonstrate the ability to administer the Woodcock Johnson Evaluation tool or designated evaluation tool in the presence of the School Psychologist
- You are to score the given test and interpret the results of the exam to the School Psychologist and/or the Director of Pupil Services
- You are to review your responsibilities as a teacher in the area of learning disabilities as stated in Wisconsin State Statutes and Federal Regulations.

On March 7, 2001, the Grievant was notified by the District Administrator, Michael Richie, that the Board of Education was considering the recommendation of the administration to place her on an additional year of probation for the 2001 – 2002 school year. On March 19, 2001, the Grievant was notified (Jt. Ex. 7) that a hearing on the matter had been scheduled for March 27, 2001, following an open session of the regular School Board meeting. Just prior to that meeting, on March 26th, a new remediation plan was developed for the Grievant by Ms. Chartier. This plan was presented to her on or about April 6, 2001, along with a letter advising her that the Board of Education had voted 4 to 1 on March 27th to place her on another year of probation. The Grievant acknowledged receipt of this notice but did not agree with it. (Jt. Ex. 9)

On June 18, 2001, just two and one-half months following the initiation of the new remediation plan and the implementation of the third year of probation, Ms. Chartier wrote a letter to the Board of Education (Jt. Ex. 10) stating as follows:

. . .

To the Hurley Board of Education:

I am making a formal request to alter the remediation plan that was developed for Mrs. Nikki Pieczynski in March 2001. I have been overseeing Mrs. Pieczynski's teaching methods over the past three months and in that time Nikki has demonstrated great improvement in refining her skills in implementing developmental strategies and collaboration with peers. Although the remediation plan is not completed Mrs. Pieczynski has confirmed that she is willing to work toward the completion of the set objectives. I am recommending that Mrs. Pieczynski be allowed to move on the salary schedule and receive the credit allowance as stated in the Master Agreement. I would also recommend that Nikki remain on probation until the last day of the first semester of the 2001 – 2002 school year. This would give adequate time to complete the remediation goals.

If I was [sic] to testify in the hearing scheduled for July 27, 2001 regarding this issue I would be testifying to the above information as true. It is because of Mrs. Pieczynski's dedication to self-improvement that I am making this recommendation. Please be prepared to take action regarding this request during the June 27, 2001 monthly Board meeting.

Respectfully,

Nancy Chartier
Director of Pupil Services

Cc: Mike Richie, District Administrator
Nikki Pieczynski, Learning Disability Teacher

The Board of Education voted 5 to 0 in support of Ms. Chartier's recommendation. Ms. Chartier left the Hurley School District's employ at the end of the 2000 – 2001 school year.

The Grievant returned to her teaching job in the Fall of 2001 with the knowledge that she was to serve one more semester of the extended probationary period. As the semester began, the school had a new principal, Donna Bessen; a new part-time (30%) Director of Special Education, Trisha Oeltjenbruns; and the school psychologist, with whom the Grievant had previously worked, Barbara Schuler, had terminated her employment with the District.

On September 25, 2001, Bessen observed the Grievant teaching a math lesson. On October 8th, Bessen sent the Grievant a note entitled "First Formative Evaluation" (Jt. Ex. 12), which outlined her observations as follows: 1/

. . .

On September 25, 2001, I had the opportunity to observe you teaching a math lesson with J., a fourth grade learning disabilities student.

I was unclear of the learning objectives because there was no introduction of what was going to be done with the student. The activities that followed included:

- working with fact families
- patterning
- a work sheet to prepare for a test
- flash cards for multiplication drill and practice

All of the activities that I observed were teacher directed.

After the lesson was over, there was no closure. The student was not given the opportunity to express what he had learned or worked on during the session. There was no indication of what learning would occur on the following day. Example: Tomorrow we will be learning about patterning.

You did use modeling with J. when you had him write the numbers just like you did. You also gave J. plenty of positive reinforcements when he responded with a correct answer.

When I looked over your lesson plans, the only thing that was written for math was: continue math. There were no specifics; no goals or objectives for the lesson you did.

In future observations, among the things I would like to see are an introduction to the lesson so the student knows why the lesson is being taught and some type of closure so the student knows what he/she will be learning the following day, and specific lesson plans that address the student's areas of instruction in the learning disabilities classroom.

Since you are a probationary teacher, I look forward to visiting your classroom on a regular basis.

. . .

The Grievant signed the above on September 9th acknowledging her review of the information contained therein and her right to attach a statement thereto. No such statement was attached.

1/ The identity of the child or children involved is being concealed.

Bessen again observed the Grievant on October 30th and 31st and provided the Grievant with a synopsis dated November 1st of her observations and complaints. (Jt. Ex. 13) This document was entitled "Second Formative Evaluation" and said:

. . .

On October 30 and 31, 2001, I had the opportunity to observe you working with six different learning disabled students. As I entered your room, one student was working in a math workbook and the other student was working on a beading activity.

You had to make a phone call regarding one student because you had forgotten that he was to be in your classroom. When I asked you about it you said that sometimes you go in and get him and sometimes the teacher sends him.

When B., a third grade student came in you told him to open his math book to page 76. You read the directions on the page to the student. You used appropriate questioning techniques with the student about what he was supposed to be doing. You told the student to work on the questions on the page. When the student finished, you asked him if he had checked his work.

You had two students working on different math activities and you were sitting directly across the table from the students. You were writing upside down when you were correcting the math and showing the students what they had done wrong. This was confusing to the students as well as to you because you stated that you lost track and were confused.

You gave your students positive reinforcement for all correct responses and for the effort they displayed.

While working with a student on a place value activity, you told the student to use the place value materials, but there were none on the table.

You took out a reading basal told [sic] the student that he was going to read a story. The student had a piece of paper and you told the student to do just one line at a time. You gave the student positive reinforcement and told him he did a very good job. The student asked to use a transparency like he had used before and you told the student that you had already gone through the colors two times and he didn't like the colors.

While working with a student on a spelling/writing activity, you had the student try and pick out words from a workbook page, which was too difficult for the student. This is a student who needs to have visual cues or sentence frames.

You worked with two third grade students for reading. Each student was completing a workbook page. You read the directions to each student and had them complete the pages. One student was working with compound words. After completing the workbook page, you had the student write a list of other compound words. You missed a teaching opportunity during that time because the student had words listed that were not compound words and you didn't address that. You just collected her list with no feedback about the words.

The other student was coloring a picture and you asked him to write a couple of sentences regarding the picture. After the student completed the activity, you corrected all the spelling mistakes the student made but never discussed that with the student. There was another teachable moment that was missed.

As we discussed earlier, in future observations, among the things I would like to see are an introduction to the lesson so the students know what is going to be taught (not just reading the directions to the student), sitting next to the student so that it is easier for the student to see the visual work, some type of closure so the student knows what he/she will be learning the following day, lesson plans that address the concept that will be taught, and communication with the classroom teachers so that they know and you know what concepts are being taught and the strategies that work with each student.

Since you are a probationary teacher, I look forward to visiting your class again in the very near future.

Before the Grievant responded to this “Formative Evaluation,” she received yet another note from Bessen dated November 12, 2001, referring to a conversation the two of them had had on November 5th. (Jt. Ex. 16) This note said:

. . .

On Monday, November 5, 2001 I met with you in your classroom and we discussed the issue of communication with the staff regarding students, progress, and programming.

The directive at that meeting was that you and I would sit down together with each individual elementary teacher that had a learning disabled student to discuss how we can improve communication, thereby improving the instruction that our student receive.

I was informed of the meeting that you had scheduled for today on Friday, November 9, 2001. I was unsure of what the meeting was about so I attended.

At the meeting you discussed communication problems and you felt that the form you handed out, “Daily Regular Education Progress Report” would be the best approach right now. You asked the regular education teachers to fill it out daily for their students.

After the meeting ended, I asked you if you thought this meeting had taken the place of the meeting that we discussed on November 5, 2001 and you said yes. I told you that we would still need to meet with teachers as I had directed you to do on the 5th.

You then told me you would not talk with me anymore without Chris Kelly being present.

Cc: Stu Waller, District Administrator
Patricia Oeltjenbruns, Special Education Director

The Grievant did not respond to this note in writing. She did sign the November 1st document on the following day, November 13th and, as before, acknowledged her review of the information with Bessen and her right to attach a statement to it. This time though, the Grievant did respond to Bessen’s observations. On November 14th she sent Bessen a memo (Jt. Ex. 15) stating as follows:

. . .

Re: Incorrect comments on evaluation received November 13, 2001

I am writing this in response to my most recent evaluation because some points were made in it that were incorrect.

- **Forgotten Student**
I did not forget B. He had been coming to my room independently prior to that day so I called to check on him.
- **Teaching Moment**
As per my lesson plans and the objective of the activity I did no [sic] want to discourage the child's train of thought and change the focus of the lesson. The child is one that has difficulty attending and I prepare lessons for him that focus on only concept at a time.
- **Colored Transparencies**
After I recapped with the student last year's attempts to use the transparencies I told him I'd be happy to get them out and try them again this year. I was taught in one of my methods classes that the different colors were used to make text stand out for children therefore making it easier to read. This is especially true of dyslexic children which this particular student is diagnosed as having.

CC: Stu Waller, District Administrator
Trish Oeltjenbruns, Special Education Director

On the very next day, November 15th, the Grievant received another note from Bessen relating back to her observations on October 30th and containing comments which had not been addressed in the "Formative Evaluation" covering her observations of October 30th and 31st. This note (Jt. Ex. 14) says:

. . .

On Tuesday, October 30, 2001 I observed you in your classroom with 3 students. At 1:30 p.m., after those students left your room, I remained in your classroom. I waited for you to return with the two students that were scheduled from 1:30 p.m. – 2:00 p.m. You did not return to your classroom so I looked at your lesson plan book and there was nothing indicated there for those two students so I proceeded to the fourth grade classroom where the students were enrolled.

Upon entering the classroom, you were standing in the back of the room while the classroom teacher and students were engaged in a discussion regarding the

newspaper. As I approached you, I questioned you about why you had not returned to your room with the two learning disabled students. You told me that you were now doing inclusion with these students instead of providing the direct instruction during that time slot. I thought that was a great idea and told you so. I asked how long you had been doing that and you told me that you had been doing it for a week.

I asked you what your participation in the activity of that day was and you did not know. I was concerned with that so I asked you if you and the classroom teacher had discussed this activity and your participation in it and you said no. Collaboration is the key to successful inclusion so I continued the discussion with you only to find out that the inclusion had only occurred one day previously instead of one week. The classroom teacher was unaware of any changes in the schedule moving from direct instruction to inclusion. As a matter of fact, when I discussed this with her, she informed me that she never really knew what was going to happen on any given day. Sometimes you were there with students, sometimes you were not, and sometimes the students were not even serviced during the time slot at all. There was no consistency in planning or communication.

This document was unsigned by Bessen and did not contain an area for the Grievant to sign acknowledging her receipt thereof or her right to attach a response.

The next memo from Bessen was dated November 16, 2001, and was directed to the Grievant, the District Administrator and Chris Kelly, the bargaining unit president (Jt. Ex. 17) and refers to a meeting held on November 14, 2001. It reads as follows:

As previously discussed on November 5, 200 [sic] the issue of communication with staff regarding students, progress, and programming came up again. The directive at that time was that we would set up a meeting with each individual elementary teacher that had a learning disabled student to work on communication issues.

As per the request on November 14, 2001 for a plan to help Ms. Pieczynski in the area of communication some suggestions I have include the following:

- Individual meetings with teachers that have learning disabled students and the elementary principal to communicate and coordinate the appropriate teaching strategies that work with each individual student so that there is consistency and carry over in the regular education classroom and the learning disabilities classroom. (i.e. learning disabilities teacher will share the specific strategies and techniques she uses with the students so that the student is successful in all academic areas)

- Working with teachers on any new forms that you devise and implement so they are all aware of the procedure for completing them
- A specific planning time with teachers to coordinate and collaborate instruction for learning disabled students (at your meeting on November 12, 2001 some teachers suggested that you meet with them at their team meetings)
- Ongoing communication of student progress or lack of progress with classroom teachers

In the area of teaching techniques some suggestions I have include the following:

- Learn and use the strategies that work with each individual student
- Teach the specific skill that you are working on to the student incorporating the learning style of the student as well as the strategy and then, if you need to, use a workbook or worksheet to practice or reinforce the skill;
- Explore multi-sensory instruction with each individual student
- Continue to develop you knowledge base for teaching reading and math strategies for students with learning disabilities

The record next contains a half page of typewritten notes prepared by Bessen which refer to a meeting which took place on November 29, 2001. (Jt. Ex. 17A) This document is unsigned and undated:

On Thursday, November 29, 2001, Nikki Pieczynski, Pat Hochstein, and I met after school to discuss Z. and M. During the meeting, Pat and Nikki discussed some strategies that work with the two students in the l/d setting and in the regular education setting. Pat had a few questions about the form that Nikki has asked the teachers to fill out. I had some concerns about the text book that Nikki has been using with Z. since it is not the same series that he is using in the regular education classroom and the skills are not sequential. Nikki will be checking into using the first grade edition of the Houghton Mifflin series that we currently use so that skills can be built in the special ed classroom that will help Z. perform in the regular education room.

As far as with M., Nikki said that she is taking it slow. She is not sure what M. is capable of yet. She will be working on facts through 18.

Pat and Nikki will be meeting on Friday mornings for planning time. Pat will share what her lesson plans are for the coming week so that Nikki will be able to plan activities and lessons that will go along with the classroom curriculum.

I asked Nikki about scheduling the meeting that she told the teachers she would have in one week to discuss the forms she had developed. She told me that she has to talk to Chris Kelly first. I am unsure as to why she needs to talk to Chris since she told the teachers on the night of the meeting that they would have a meeting in one week to discuss how the forms were working and if they had any questions. To my knowledge, Nikki has not approached any of the teachers to discuss the forms.

I also asked Nikki if she had sent a letter home to the parents regarding the new form that was being sent home (the form the classroom teachers have been asked to fill out) and she said no. She told me that she would have one going home on Friday, November 30th.

On January 8, 2002, the Grievant received formal notification from the District Administrator, Waller, that the Board of Education was considering “the Administration’s recommendation” that her contract not be renewed. The notice was dated January 7, 2002. It advised her that, pursuant to Wisconsin Statutes, she had the right to “file a request with the Board within five (5) days of your receipt of this notice for a conference with the Board relative to the subject of nonrenewal of your contract.”

On January 15, 2002, the Grievant sent a note to Bessen advising of her willingness to attend workshops or conferences which might aid her understanding and interpretation of the Woodcock Johnson III test. She asks for Bessen’s help in locating such workshops or conferences: “If you have any information on workshops pertaining to these areas, ideas, or suggestions please let me know.” This note referred to a conversation the two had had in the Grievant’s classroom on the previous day, January 14th.

On January 22, 2002, Bessen sent another lengthy memo to the Grievant referencing “Interpretation Results of the Woodcock Johnson III.” This memo was Bessen’s response to the above referenced meeting of January 14th. It read as follows:

I was in attendance at an IEP for a fourth grade student on Monday, January 14, 2002, along with the parent, Mr. G., Mrs. Czarnecki, and you.

It became rather apparent that you had difficulty interpreting the results of the testing instrument (Woodcock Johnson III) that you had administered. When questioned about if the student qualified for special education services by the results of the test, you were unable to answer the question. You openly stated that you were confused about the test results. You did not know why there were scores for both age equivalency and grade equivalency.

You also came to the meeting totally unprepared. You did not have any of the test results with you or any type of written report or formal observation. When I asked you about why you did not have a written report or formal observation, you stated that you no longer had to do that. You further stated that all you had to do was to answer the last six questions on the test print out report.

Back in October, when you asked me if you could have additional time for testing with the Woodcock Johnson III, I asked you if you were comfortable with administering and interpreting the new assessment. You stated to me that you felt very comfortable with the Woodcock Johnson III. You continued to state that you had taken Val Hellem's WJIII, gone through it, and felt that you were familiar with it. If you had told me at that time that you did not feel comfortable administering or interpreting the assessment, you could have received training on it.

In your correspondence to me dated January 15, 2002 you asked me if I had any information on workshops pertaining to the areas of administering and assessment of the Woodcock Johnson III. That type of information does not normally come across my desk. It would be up to you to take the initiative and then inform me as to the dates and location of training that you would be interested in attending.

I must advise you that your lack of knowledge in the interpretation of the Woodcock Johnson evaluation tool is another reason for the Administration's recommendation that your contract not be renewed. Your remediation plan of February 19, 2001 noted a deficiency in the administration and interpretation of the Woodcock Johnson evaluation tool. Apparently the deficiency has not been rectified.

...

The next day, January 23, 2002, Bessen prepared what she called the "Third Formative Evaluation." This document was received by the Grievant on January 28, 2002, and said:

On January 15, 2002, I had the opportunity to observe you teaching math with three students in your classroom. As I entered your room, a student was working on basic math skills of addition and another student was working on estimation and exact answers.

You did ask the second student what he had done the previous day and he said that he had learned about perimeter. The student had difficulty pronouncing the word but after questioning him, he did seem to know the concept. You read the

directions to the student on pages 172 and 173 and had the student begin working on the problems in the book. This student had difficulty rounding numbers to the nearest ten to understand if he should have an exact answer or if he could estimate. You verbally told the student the rule for rounding to the nearest ten but you did not work with the student on making sure that he understood the rule or doing any reteaching activities that would help the student to fully understand the concept of rounding so that he could successfully understand the lesson for the day.

The other student was using an appropriate technique of counting on. You told the student that if she could finish the next few problems in the book she could have some free time. The student had difficulty staying on task. You told the student that she could have seven minutes of free time and then you would do the flash cards with her.

A third student came into your room and you told her what had occurred the previous day in math. This student had to sit and wait for about five minutes while you finished up with your other two students. You then grabbed a packet of stapled Touch Math worksheets and told the student she would work on those. You asked the student to count by ones for you and she was able to do that up to the number 49. The student had difficulty knowing what number would come next. You continued by writing the numbers (by tens) at the bottom of the worksheet. You had the student complete a page writing the numbers in sequential order and then you circled the numbers with a zero in the second digit. After that, the student completed a dot-to-dot worksheet connecting the numbers. You told the student she could color the dot to dot. [sic] The student spent one third of her lesson time coloring. At the very end of the lesson, you did addition flash cards with the student. It was very apparent that this student is extremely deficient in the area of math.

During the observation you gave plenty of positive reinforcements to your students.

After the observation, I asked to see the teacher's manual for Touch Math so that I could see the lessons that were associated with the packet of handouts that you gave one of your students. You stated to me that you didn't have a manual. This concerned me because you did not teach a specific lesson to that student, you just gave the worksheets to her to complete. There needs to be a system of teaching sequential skills to students based upon their IEP goals and objectives.

As I looked over your lesson plans, you did not have any lesson plans developed for two of your students. Instead of having a lesson plan that addressed the area of instruction for the student who is extremely deficient in the area of math, this student spent one third of her instruction time coloring a picture. The IEP was not being followed for this student.

In your previous formative evaluations, I mentioned sitting next to your students so that it is easier for them to see the visual work. Due to your technique of using visual clues with students, it is imperative that your [sic] sit next to your students so that they are able to utilize this technique without confusion. This seems to continue to be a struggle for you. The area of closure with your students was also addressed in previous evaluations. You need to continue improvement in this area. Students need to know what they will be learning next – a new concept or reteaching of one that the student is struggling with. The development of appropriate lesson plans continues to be an area of deficiency.

. . .

The Board of Education held a private conference with the Grievant regarding the issue of her non-renewal on February 13, 2002, and immediately following that conference voted unanimously not to renew her contract. She was notified of this action by letter dated February 20, 2002, the receipt of which she acknowledged on February 27, 2002. This grievance followed.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union believes that the record fails to support any justification for the non-renewal of the Grievant. She is a competent teacher, interested in improving her teaching abilities and she should be reinstated with full back pay and benefits, including raises or increases which she may have enjoyed had she not been non-renewed.

The decision to non-renew the Grievant's contract was made in November, 2001, following three short classroom evaluations performed by the new principal, Donna Bessen. Consequently, the focus should be on that period from August, when Bessen began as the new principal, to November, when the decision to non-renew was made. But, even if one considers events which occurred prior to that time, the conclusion should still be that she is a well qualified and competent teacher.

The Union asserts that the Arbitrator may conduct a hearing *de novo* as to the factual allegations leading to the non-renewal of a teacher. This is a two-step process, the first step being to determine whether or not the factual allegations against the teacher have been proven and the second step to determine whether or not the charges, if proven, constitute just cause for discharge. In support thereof, the Union cites WEST SALEM V. FORTNEY, 108 WIS. 2D 167; 321 N.W.2D 225 (1982). The Union says that the factual allegations against the Grievant have not been proven and, even if they have been proven, they do not rise to the level of good cause for discharge or non-renewal.

The Union compares the licensure of the Grievant with that of her evaluator, Bessen. The Grievant holds a master's degree in teaching and a special state license in the areas of "learning disabled" and "emotional disturbance" as well as elementary education for kindergarten through 8th grade. The LD and ED licensure covers pre-kindergarten through 9th grade. She also continues to take seminars and additional graduate level courses to improve her teaching abilities. Bessen, on the other hand, is not licensed in LD or ED. Her only licensure is in elementary education with licensure as a principal coming in December, 2001, after the period of primary focus in this matter. The Union discounts Bessen's experience some 15 years ago with Gogebic-Ontonagon Headstart when she wrote IEP's for headstart children because she had never been certified in any special education area and because she was not a licensed teacher at the time. She did take a course in dyslexia at one time but had not taken any other courses in the LD/ED area. With reference to the Woodcock Johnson III test, Bessen has had no training or administration experience with this tool although she did work to some degree with its predecessors. The Union notes with interest that the District's Director of Special Education during the period of Bessen's evaluations, Trisha Oeltjenbruns, did not testify.

Bessen had no experience evaluating elementary teachers prior to the Fall of 2001 nor did she seek any particular advice on the subject prior to evaluating the Grievant. Despite the availability of Oeltjenbruns, Bessen never considered seeking the input of someone with an LD background in her evaluations of the Grievant.

The Union summarizes the reasons for non-renewal as expressed by the District as follows:

1. Failure to complete the prior remediation plan;
2. Failure to develop and implement teaching strategies and techniques;
3. Failure to communicate with colleagues;
4. Failure to prepare and comply with IEPs (this includes appropriate use of the Woodcock Johnson III test).

Although Bessen testified that an evaluator may not see things happening during an evaluation lasting as long as an hour, her evaluations only lasted 40 minutes, 52 minutes and 45 minutes respectively. Also, Bessen agreed that these types of evaluations are very subjective and that "stop by" observations are untrustworthy.

Bessen's first formative evaluation of September 30, 2001, resulted in concerns relating to the introduction and closure of the subject matter and to the Grievant's lesson plans. She testified, however, that the Grievant did introduce fact families and had appropriate student input. While Bessen was critical of moving to a quiz, she did not know if it related to previously introduced material. She confirmed that there was appropriate student interaction, an appropriate technique and that student response was okay. During this evaluation, a regular education teacher delivered a paper to the Grievant's classroom which the Grievant properly

introduced into the classroom setting. Bessen was also not critical of the Grievant's use of appropriate instruction technique and feedback on a quiz; her use of positive reinforcement; the way in which she sought student input; explanations provided by the Grievant; her consistent work with the lesson plan and appropriate instructions on reading; the Grievant's change in activities (noting Bessen's acknowledgement that LD student progress is not always consistent making planning sometimes difficult); and her use of modeling and positive reinforcement.

The subjective nature of these evaluations is highlighted, argues the Union, by Bessen's agreement that the Grievant introduced multiplication but suggested it could be done differently and that the use of flash cards was okay but could have been done by an aide. (The Grievant did not have an aide.) Bessen also agreed that the Grievant's techniques of reminding the students of prior lessons and her attempts to slow them down in their learning were appropriate. The Union concludes that Bessen did, in fact, agree with a number of techniques employed by the Grievant and that she, in substantial part, provided introduction and closure to her students.

As a result of Bessen's second formative evaluation, which took place on October 30, 2001, she had essentially the same concerns as before, i.e. introductions, closures and lesson plans, but she added another: the fact that the Grievant sat across from her student rather than next to him. The majority of actions taken by the Grievant during this evaluation, including introductions and closure, were appropriate and Bessen's testimony confirms this. Once again, the subjective nature of these evaluations is demonstrated by the record and the level of criticism is difficult to quantify.

The final formative evaluation performed by Bessen prior to her recommendation for non-renewal took place on October 31, 2001, and, according to Bessen, the Grievant once again performed many appropriate techniques.

Bessen was not aware of the prior remediation plan and did not discuss it with the outgoing administration. The Union notes that this points to a lack of communication on the part of the administration. Since this plan ran until the end of the 2002 school year, it was impossible for the Grievant to have completed it before Bessen made her recommendation for non-renewal in November, 2001. This weakens the strength of the allegation that the Grievant failed to complete it as used by the administration in support of her non-renewal. Bessen agrees that someone should have told her about it and that it would make sense to follow through on the plan in order to determine whether or not it worked. In any event, the issue is essentially moot since Val Hellem, another LD teacher and the peer mentor identified in the plan, did not believe the Grievant needed mentoring and was not inclined to play that role; the school psychologist, Schuler, the person charged in the plan with overseeing the Grievant's use of the Woodcock Johnson III test, did not agree that she needed such oversight and that her (Schuler's) observation of the administration of the test would invalidate the results and, finally, Ms. Chartier, the then Director of Special Education and the person who had put the plan together, determined the Grievant had made great progress toward the goals of the plan and was dedicated to self-improvement.

Although Bessen was in possession of letters from other LD, CD and ED professionals which were complimentary of the Grievant, she did not follow up with them or question the results of her evaluations.

On the issue of the Grievant's communication with regular education teachers, the Union argues that the Grievant did meet with four teachers pursuant to Bessen's desires. Although the meetings were not completed, Bessen could not say that the Grievant resisted them in any way. As for a meeting with the regular education teachers as a whole set up by the Grievant, Bessen agreed that such a meeting would promote communication although she was critical of it.

On the issue of the inappropriateness of the Grievant's lesson plans, one of the criticisms leveled by Bessen, the Union notes that during the hearing, Bessen agreed that the plans improved as time went along and that the plans for the days of her evaluations themselves, while they did not match the classroom activities, were okay and that she (Bessen) did not compare them with the individual IEPs.

Other teachers and parents presented letters and testimony in support of the Grievant's teaching prowess. This evidence, along with the foregoing, supports the conclusion that the Grievant is a competent and well-qualified teacher who has adequately responded to the allegations against her which resulted in her contract non-renewal and is worthy of reinstatement.

The District's Initial Brief

The District, of course, agrees that the issue here is whether it had just cause to non-renew the Grievant. It refers to Arbitrator Carroll R. Daugherty's seven questions enumerated in ENTERPRISE WIRE CO., 46 LA 359 (DAUGHTERY, 1996) as a basis for the definition of just cause but points out that the facts of any given matter may be such that the guidelines set forth by Daugherty may not be applicable with precision. Also, not all arbitrators have accepted the proposition that a "no" answer to any one of the seven questions proves the non-existence of just cause. It argues that not all arbitrators have felt bound to a "mechanical application" of the questions, and citing SCHOOL DISTRICT OF JANESVILLE, A/P M-91-294 (BARON, 8/27/92) and SAWYER COUNTY, WERC CASE 103, No. 48834, MA-7729 (JONES, 11/15/93) says "that a proper analysis of just cause can be conducted utilizing the basic standards of fairness." The District quotes Arbitrator McLaughlin (SCHOOL DISTRICT OF NEW RICHMOND, WERC CASE 35, No. 50773, MA-8376 (MCLAUGHLIN, 7/6/94);

. . . where the agreement does not specify the standards to be applied and where the parties have not otherwise stipulated to them, the just cause analysis must address two elements. The first is that the Employer demonstrate the misconduct of the employee and the second, assuming this showing is made, is that the Employer establish that the discipline imposed was contractually appropriate. . .(SAWYER COUNTY at page 7)

Arbitrator Shaw (SCHOOL DISTRICT OF SPRING VALLEY, WERC CASE 27, NO. 55951, MA-10126 (SHAW, 12/4/98) at page 18;

. . .in making that determination, it is necessary to determine whether the employee engaged in the improper conduct for which he/she has been disciplined and, if so, whether the level of discipline imposed is reasonably related to the employer's interest in discouraging or preventing such conduct.

and Arbitrator Hahn (CVTC, WERC CASE 192, NO. 59553, MA-11331 (HAHN, 9/10/01):

. . . just cause requires a due process for an employee and due process requires notice of the employee's deficiencies, an opportunity to correct those problems and progressive discipline if the faults are not corrected, which includes the warning in the progressive discipline procedure, that future failings will lead to more severe discipline including discharge.

The District says that there is no question that the Grievant had notice of her deficiencies and an opportunity to correct them. The new administration (Bessen, et. al) was willing to "ignore" the past and start anew with the beginning of the 2001-2002 school year. If the Grievant had made "any effort to reestablish the old remediation plan or to work closely with Ms. Bessen and the regular ed teachers. . . she would have saved her job." But instead of working with Bessen, the Grievant refused or failed to face up to her old deficiencies. As the complaints about her from parents and teachers piled up, the Grievant "sat mute" during evaluation discussions and "when Ms. Bessen attempted to rectify the communication problem with individual teacher meetings, Ms. Pieczynski held the group meeting emphasizing the need to improve communication from the regular ed teachers to her."

The District asserts that it is required to observe its own policies and procedures. (STATE EX REL. MEEKS V. GAGNON, 95 WIS. 2D 115 (1959)). Its policy on staff evaluation states:

The staff evaluation program shall aim at the early identification of specific areas in which the individual professional staff member needs help so that appropriate assistance may be provided or arranged for. A supervisor offering suggestions for improvement to a professional staff member shall not release that professional staff member from the responsibility to improve. If a professional staff member after receiving a reasonable degree of assistance fails to perform his/her assigned responsibilities in a satisfactory manner, dismissal, or non-renewal procedures may be invoked. In such an instance, all relevant evaluation documents may be used in the proceedings.

The District has the management right to judge employee performance through the evaluation process and, although those evaluations are subject to review, the standard of review is a narrow one and should not be disturbed unless it is apparent that the District was arbitrary, capricious or wholly without a basis in reason.

The District reminds the Arbitrator that documents unchallenged at the time of receipt are accepted on their face without relitigating the merits at a later time. (NEW LISBON SCHOOL DISTRICT, CASE 33, NO 52870, MA-9134 (CROWLEY, 5/9/97).

In closing, the District argues that its staff evaluation policy is not significantly different from Arbitrator Hahn's just cause standard. It aims to identify areas of deficiency in order to arrange for appropriate assistance; provides for identification of those problem areas to the staff member; and provides for an offer of assistance. In this case, the Grievant failed in her responsibility and the District proceeded to non-renewal pursuant to its rights and to its obligations to its students.

The Union's Reply

While the District continues to refer to the prior remediation plan in the negative, it fails to note that the Grievant made admirable progress towards its goals and was praised by her then-supervisor Nancy Chartier for that progress. Consequently, her probationary status was halved and she was restored to the proper salary schedule.

The District also ignores the fact that the remediation plan, if one was in effect at all at the beginning of the 2001 school year, could not have been completed. The peer mentor, Hellum, selected by Chartier did not believe that the Grievant needed such assistance. Even so, the Grievant sought her assistance in this regard. The monthly meetings required by the plan were never held because after the first meeting Chartier made her praising comments about the Grievant and recommended that she be reinstated. The last point raised in the plan relating to the Woodcock Johnson III testing is misleading because the school psychologist, Schuler, testified that one, she never doubted the Grievant's ability to administer the test and, two, that her (Schuler's) presence during the administration of the test (in order to monitor it) would invalidate the testing. Schuler's conclusion was that the administration obviously did not understand the nature of the Woodcock Johnson III.

The complaints Bessen testified were made to her by various regular education teachers about the Grievant "do not square with the letters that they presented" in this case. Only one complaint was noted from a parent, and the Union posits that one unhappy parent out of a total of twelve students (the Grievant's student load) is not surprising. Since the only testimony at the hearing regarding teacher/parent interaction with the Grievant was positive toward the Grievant, the Union suggests that this criticism has little or no merit. The evidence does not support the nature of the complaints leveled by Bessen against the Grievant.

Bessen did not believe that the Grievant was resisting the individual meetings she (Bessen) had suggested take place among the Grievant, Bessen and each regular education teacher to address the issue of communication and although the administration criticizes the Grievant's meeting with all of the regular ed teachers to address communication, this criticism is belied by their own testimony.

The conclusion that the administration's decision to non-renew the Grievant in November, 2001, is supported by the fact that they had no knowledge of the prior remediation plan and had not reviewed any previous evaluations. Hence, the decision was made based on the three evaluations done by Bessen in the Fall of 2001. The Union criticizes the administration for now claiming that its decision was based, at least in part, on events which occurred during the six week period following the initial decision in November.

Regarding the hearing before the School Board, the Union emphasizes that only Bessen and the Grievant testified at any length while Waller said that he did indicate that he supported the decision of Bessen. So, any suggestion that the School Board hearing delved into the issues of the case to any great extent is misleading.

In conclusion, the Union says that the District has failed to establish a just cause basis for the non-renewal of the Grievant and that the Grievant has shown that she made a concerted effort to meet Bessen's suggestions given the constraint of the LD setting. She changed her method of doing lesson plans in order to address Bessen's complaints. In short, she has shown that she is a dedicated, hardworking teacher undeserving of this process.

The District's Reply

The District reiterates Bessen's qualifications as a principal and teacher and says that the areas in which she evaluated the Grievant were not, for the most part, highly technical and she was qualified to evaluate the Grievant.

Regarding the Union's criticism of the fact that the District failed to call Oeltjenbruns as a witness and the fact that the Grievant touted the support of fellow *special education* teachers, the District reminds the Arbitrator that the Grievant's problems were between her and the *regular education* teachers and that in the Hurley School District, administrators evaluate staff, not staff.

In response to the Union's assertion that the decision to non-renew the Grievant's contract was based upon the three evaluations done by Bessen, the District says it was based on those plus "frequent informal observations, Ms. Pieczynski's response to the directive for individual meetings with the regular education teachers, teacher complaints, parent complaints, Nancy Chartier's evaluations, and Ms. Pieczynski's past record which included the reinstatement of her probation and a failure to pursue remediation plans offered her." It says that "the non-renewal recommendation is not the subject of this arbitration, the Board's

decision is” and argues that the Board, in making that decision, had the benefit of “all that went into the recommendation, another formative evaluation, the resultant summative evaluation, Ms. Pieczynski’s lack of preparation for the January, 2002, IEP meeting, the attendant lack of knowledge regarding the interpretation of the Woodcock Johnson III test results and Ms. Pieczynski’s testimony.

Although the Grievant did most things right during the formal evaluations, she “exhibited teaching deficiencies which, when considered in the context of other indicators, more than justify the Administration’s recommendation and Board’s decision to nonrenew” the Grievant. The first evaluation was shortened by 15 minutes due to the Grievant’s lack of planning for the day’s lesson. The other two evaluations also involved a lack of planning. This lack of planning resulted in late lesson starts and lack of clarity of the learning objectives in the first evaluation; a “forgotten student” and missing materials during the second evaluation; and a student relegated to coloring much of the time during the third evaluation. This lack of planning also contributed to the “disappearance” of the Grievant following the second evaluation.

Regarding the remediation plan developed by Chartier, the District maintains that it may not be viewed as a contract binding the parties to the end of the 2002 school year. This interpretation would give to the Grievant more protections than are given to teachers without a remediation plan.

The Grievant’s communication with other teachers did not improve following the evaluations nor did her lesson planning. The District argues that the lesson plans introduced at the hearing were completed after the classes and are, therefore, inappropriate.

DISCUSSION

At issue is whether the District had just cause to non-renew the Grievant’s teaching contract. Discharge places the Grievant’s job, seniority, contractual benefits and reputation at stake and constitutes the most extreme penalty available in the workplace. Hence, the burden is on the District to prove wrongdoing and justification for its actions by a preponderance of the evidence.

Few, if any, contracts contain a definition of “just cause” and the CBA here is no exception. There is no uniform definition of what constitutes just cause and so it becomes the job of the Arbitrator to define such parameters based upon the facts of the case. On the function of the Arbitrator in such cases, I agree with Arbitrator Harry Platt. He said:

It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires “sufficient cause” as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer’s right to discipline where its exercise is essential to the

objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. RILEY STOKER CORP., 7 LA 764, 767 (PLATT, 1947)

The District references Arbitrator Carroll R. Daugherty's well known seven questions as providing a potential definition for just cause but observes that Daugherty acknowledged that the facts in any given case may not be capable of application to the questions with precision. (The Union did not comment on the use of these questions nor did it put forth any particular suggestion as to the elements of just cause.) Daugherty's questions have been criticized as being too mechanistic. They are objective and require "yes" or "no" answers and Daugherty himself admitted that "The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines [sic] cannot be applied with slide-rule precision." GRIEF BROS. COOPERAGE CORP., 42 LA 555, 557 (DAUGHERTY, 1964). Absent contractual direction or a stipulation by the parties to apply Daugherty's seven questions, the undersigned is reluctant to imply them into the agreement of the parties.

I believe just cause requires a finding that the employee is guilty of the conduct in which he or she is alleged to have engaged and that the level of discipline imposed as a result of that conduct is reasonably related to the severity of the conduct. Just cause mandates not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative except to impose discipline. (See PLATT, *Arbitral Standards In Discipline Cases*, in The Law and Labor-Management Relations, 223, 234 (UNIV. OF MICH., 1950). Fully entrenched in this definition are the core concepts of due process and fair dealing.

The Grievant asserts that the Arbitrator may consider the factual elements of this case *de novo*. The CBA is silent on the issue of the standard of review and, in such cases, Arbitrators have discretion in the review of discharge/discipline cases to apply a *de novo* standard or the more restrictive abuse of discretion standard. See NICOLET HIGH SCHOOL DISTRICT V. NICOLET EDUCATION ASSOCIATION, 118 WIS. 2D 707, 715 (1984). Based on the above and on the authority afforded the Arbitrator under the terms of the CBA, the undersigned will review the non-renewal of the Grievant's contract *de novo*.

Even if one accepts the factual content of each of the three evaluations performed by Bessen in 2001 and 2002 as true and correct, which the Arbitrator does not, and discounts to a degree the Grievant's exception to many of them, which the Arbitrator does, the District's argument in support of the Grievant's non-renewal still must fail. It must fail for three specific

and distinct reasons. First, the nature and extent of the alleged deficiencies demonstrated by the Grievant, as reported by Bessen in her evaluations and other “notes,” while sufficient to invoke that portion of the District’s evaluation policy offering “appropriate assistance,” were insufficient to support the most severe disciplinary measure available – termination; second, the District failed to give the Grievant sufficient time and opportunity to remedy her alleged teaching deficiencies; and third, the District failed to afford the Grievant due process in the form of notice that her continued employment was in jeopardy until the decision to non-renew her contract had been made and it was too late for her to reverse the process.

The record is lengthy and contains page after page of evaluation notes and testimony by Principal Bessen regarding the Grievant’s difficulties communicating with regular education teachers; using what Bessen describes as inappropriate teaching techniques; complaints from other teachers and parents; lack of knowledge in the use of the Woodcock Johnson III testing tool; failure to participate in extra-curricular classes and other after-school activities; poor classroom planning and supervision and other assorted deficiencies, gleaned, for the most part, from three evaluations. If one were to review these writings in a vacuum, one would emerge with the conviction that the Grievant was one of the most inadequate teachers ever to occupy a classroom. But I do not view them in a vacuum. None of these evaluations lasted longer than an hour and the results of one of them, the one conducted in January, 2002, are suspect because, by that time, the recommendation to non-renew the Grievant had already been made and communicated to the Board by the administration upon Bessen’s recommendation. On the other side of the coin, the record is replete with evidence of mitigation and refutation of these allegations via the testimony of the Grievant and of Patricia Ann Entler, Barbara Schuler, and Lori Lund, three of the Grievant’s co-workers, and Patricia Strand, a parent of one of the Grievant’s students. In many cases, the Grievant firmly denies the allegations. The Arbitrator views both Bessen and the Grievant as essentially truthful witnesses and does not doubt that Bessen’s criticisms of the Grievant, while in some respects probably overstated, were made in good faith. The testimony of co-workers called to the stand by the Grievant may be expected to be favorable to the Grievant’s case. While mindful of that, the undersigned nonetheless finds them to be credible and sincere, likewise the testimony of Mrs. Strand. The difficulty with the District’s position lies in the course of action it chose to take upon the identification of the Grievant’s alleged difficulties. On balance, the Arbitrator is persuaded that the teaching deficiencies alleged to have been exhibited by the Grievant, while worthy of further evaluation and continued efforts by both parties to effect improvement, were insufficient to justify the most harsh discipline of termination. The Board's letter to the Grievant dated February 20, 2002, advising her that her contract would not be renewed fails to set forth the reasons for the Board's actions. Although the record does not specifically say so, the undersigned assumes the reasons are the same as those set forth in Waller's letter dated January 7, 2002, the Grievant's first notice that the Board was considering her non-renewal. Those reasons were:

...

1. You have failed to satisfactorily complete the remediation plan dated February 19, 2001.

2. You have failed to develop and implement teaching techniques and strategies for use with student with learning disabilities in the regular and special education setting.
3. You have failed to communicate and collaborate with colleagues regarding teaching techniques and strategies for use with learning disabilities.
4. You have failed to timely prepare individualized Educational plans and failed to comply with Individualized Educational Plan requirements.

. . .

As to number one, her failure to complete the remediation plan, she was given notice of her non-renewal three months before that plan was to have been completed. In any event, she had been essentially relieved of the duty to complete that plan by Chartier when, in June, 2001, she (Chartier) recommended to the Board that the Grievant be reinstated. At that time Chartier altered the remediation plan and acknowledged that "Although the remediation plan is not completed Mrs. Pieczynski has confirmed that she is willing to work toward the completion of the set objectives." The record reflects that she continued working toward those objectives during the first semester of 2001, albeit not to Bessen's complete satisfaction, and so met her responsibilities as set forth by the previous administration. Importantly, Bessen was unaware of that remediation plan during her first semester evaluations of 2001 and, therefore, unaware of Chartier's arrangement with the Grievant in this respect. Had she reviewed the Grievant's file, she may have been able to take advantage of the past efforts by the administration to work with the Grievant and may have perhaps have been able to build upon those efforts to the benefit of the Grievant and the District. As to numbers two and three, her failure to "develop and implement teaching strategies" and her failure to "communicate and collaborate with colleagues regarding teaching techniques and strategies," these two go hand in glove. The first is denied by the Grievant and supported only by Bessen's three rather brief observations, one of which was conducted after the non-renewal recommendation had been made. The second is denied by the Grievant and belied by the testimony of witnesses called by the Grievant. The record simply does not support the ultimate conclusion that the Grievant refused or failed to communicate with colleagues. Some colleagues may have had communication issues with her but certainly not to the extent that termination was justified. Regarding the fourth reason, that the Grievant failed to timely prepare Individualized Educational Plans and failed to comply with IEP requirements, the record is obscure on this point. Giving the District the benefit of the doubt by concluding that number four his merit, it is still not sufficient reason to extract the highest disciplinary price an employee can pay.

The District places some emphasis on the fact that the prior administration had identified the same problems with the Grievant and had reached the same conclusion, i.e., to non-renew her contract. The record supports the conclusion that the prior administration worked with the Grievant to improve her teaching skills but hardly supports the proposition

that it concluded she be terminated. The prior administration evaluated her performance and identified certain areas which it felt could be improved. The prior administration formulated a remediation plan for her to follow, extended her probationary period and froze her on the wage scale. Soon thereafter, the person responsible for her evaluation and remediation plan, the Director of Special Education, Nancy Chartier, advised the Board that the Grievant was doing so well that she should be returned to the proper wage scale position and her extended probationary period should be halved. The Board agreed. Thus, when the Grievant returned for the 2001 – 2002 school year, she began with what the District itself describes as a “fresh start” and had reason to believe that her job situation was secure. Indeed, Bessen testified that she was unaware of any prior remediation plan and supposedly began her evaluation process anew in September, 2001. By no later than December of that year (and the record strongly suggests that it was probably as early as November), she had concluded that this teacher was not “cutting it” and recommended non-renewal. Her Administrator, Waller, also new to his position, supported her decision. The Arbitrator takes particular note of the fact that Bessen, while consulting with other members of the professional staff during her evaluation process, failed to engage the participation and expertise of the Director of Special Education, Oeltjenbruns, in the process. She was not even consulted about potential remediation strategies once Bessen decided the Grievant wasn’t “cutting it.” When Waller was advised by Bessen of the Grievant's shortcomings and the fact that she wasn't “cutting it,” he too failed to seek the advice of the Director of Special Education. The Grievant admits that she is not a perfect teacher and that she has room for improvement but she only had, at best, about two months to correct all of the deficiencies, real or imagined, identified by Bessen. The undersigned finds that this limited period of time was insufficient to adequately evaluate and identify potential problem areas, let alone correct them. It also contravenes the District’s Staff Evaluation Policy because it fails to provide a “reasonable degree of assistance” to a teacher in need of improvement.

Finally, just cause requires that the Grievant be placed on notice that the path down which he or she is walking leads to discipline, especially if that discipline means the loss of his or her job, and notice of what steps he or she must take to halt the process. Bessen and Waller acknowledge that they knew non-renewal was the end-game at least as early as November 12th. The Grievant did not receive initial notification that the Board was considering the non-renewal of her contract until January 7, 2002. Immediately following the statutory conference held on February 13th pursuant to the Grievant’s request, the Board voted to non-renew her contract. She was advised of this action by letter dated February 20th. She was given no opportunity to remedy the situation following notice that her job was in jeopardy. The Arbitrator finds it unconscionable that Bessen did not advise the Grievant long before January 7, 2002, that her job was at risk and of the steps she must take to avoid such a drastic consequence. This clandestine approach does not appeal to reasonable and fair-minded persons and does not embrace standards of justice and fair dealing. Her failure to so advise the Grievant frustrated the very core principals of just cause: due process and fair dealing. By the time the Grievant was advised that her job was in jeopardy, it was too late.

In light of the above, it is my

AWARD

1. The Employer did not have just cause when it non-renewed the Grievant's employment contract effective June 30, 2002.

2. The Employer shall reinstate the Grievant's employment contract effective June 30, 2002, and is directed to make the Grievant whole for all benefits and wages lost because of the non-renewal pursuant to the terms of the Teacher's Master Agreement except:

a) All wages the Grievant earned in the interim that she would not have earned except for her non-renewal.

b) Any benefits she may have received from unemployment compensation.

3. The Arbitrator will retain jurisdiction over the application of the remedy herein for a period of at least sixty (60) days to address any remedy issues which the parties are unable to resolve.

Dated at Wausau, Wisconsin, this 21st day of January, 2003.

Steve Morrison /s/

Steve Morrison, Arbitrator