BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEYAUWEGA-FREMONT EDUCATION ASSOCIATION/WEAC

and

WEYAUWEGA-FREMONT SCHOOL DISTRICT

Case 28
No. 61301
MA-11884

Appearances:

Attorney Teresa M. Elguézabal, and **Attorney Rebecca Ferber Osbourn,** Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Weyauwega-Fremont Education Association/ WEAC.

Davis & Kuelthau, S.C., by **Attorney Robert J. Simandl** and **Attorney Lisa L. Kritske,** 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Weyauwega-Fremont School District.

ARBITRATION AWARD

The Weyauwega-Fremont School District (hereinafter District) and the Education Association of the School District of Weyauwega-Fremont (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. The parties executed an Agreement to arbitrate the dispute between the parties dated May 29, 2002. A request to initiate grievance arbitration was filed with the Wisconsin Employment Relations Commission by the Association on June 6, 2002. Commissioner Paul A. Hahn was appointed to act as Arbitrator on June 13, 2002. Hearing in the matter took place on the following days in 2002: October 23; October 24; November 25; November 26; November 27; December 12. The hearing took place in a District facility in Weyauwega, 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 March 25, 2003. The parties were given the opportunity and filed reply briefs. Reply briefs were received by the Arbitrator on May 1, 2003. The record closed on May 1, 2003.

ISSUE

The parties stipulated to the following issue:

Whether the District violated Article 4.19.3 of the collective bargaining agreement and the Wisconsin Statutes by non-renewing James Emrich's teaching contract (for other than just cause)? If so, what is the appropriate remedy? (Tr. 7)

RELEVANT CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS CLAUSE

The operation of the school system and the determination and direction of the teaching force, including the right to plan, direct, and control school activities, to schedule classes and assign work loads; to determine teaching methods and subjects to be taught; to maintain the effectiveness of the school system in accordance with school board policy; to determine teacher complement; to create, revise, and eliminate positions; to establish and require observance rules and regulations; to select and terminate teachers' contracts for just cause; and to discipline, reprimand, and suspend, without pay, and discharge contracted teachers for just cause are the functions and rights of the BOARD, and shall be limited by terms of this Agreement and Wisconsin Statutes.

. . .

ARTICLE IV – CONDITIONS OF EMPLOYMENT

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4.19.3 Non-Renewal Policy:

Any supervisory decision involving non-renewal of a teacher's contract shall be made only after at least two (2) non-renewal conferences between the teacher and the supervisor. Such conferences shall be at least ten (10) days apart. Before recommendation of non-renewal is made to the BOARD there shall be an additional conference between the teacher, the supervisor and the district administrator. Any recommendation of non-renewal of teacher's contract shall be made to the BOARD at an executive session. Thereafter, the teacher shall have all the rights of a hearing and appeal as provided by statute.

Teachers shall not be non-renewed except in accordance with the following:

1. The teacher shall be given notice of his misconduct or incompetence and the possible consequences of continued incompetence or further misconduct.
2. The teacher's past service in the district must be taken into account in the assessment of penalties.
3. Progressive discipline is accepted and is to be applied where appropriate.
4. Rules, policies, regulations, and orders shall be applied even-handedly among all teachers.
5. The recommendation for such action to include a statement of reason(s) reasonably related to employment.

Non-renewals pursuant to this section shall be subject to the grievance procedure. Teachers with less than three (3) years of teaching experience in the district may be non-renewed without consideration of subsections 1 through 5 of this section.

. . .

SEXUAL HARASSMENT POLICY – 411.1

Sexual Harassment, a particular type of harassment to which either sex can be subjected, is illegal. It includes unwelcome sexual advances, unwelcome and physical contact of a sexual nature and/or unwelcome verbal or physical conduct of a sexual nature. Unwelcome verbal or physical conduct of a sexual nature includes but is not limited to:

- The deliberate, repeated display of offensive sexually graphic materials which are not necessary for business or instructional purpose;
- Requests, demands, or subtle pressure for sexual favors in exchange for continued employment, advancement, grades or status and
- Sexually oriented verbal "kidding" or abuse creating an intimidating or hostile or offensive working or educational environment or has the purpose or effect of substantially interfering with that individual's work performance.

It is the effect and characteristics of the behavior, not the intent, which constitutes sexual harassment.

**PROVISION FROM SCHOOL DISTRICT
OF WEYAUWEGA-FREMONT FACULTY/STAFF HANDBOOK**

Hall passes (MS, HS). Giving a student permission to leave a class places the liability of accountability and supervision in the hands of the teacher issuing the hall pass. Only in the case of an emergency, a health reason, or for sending disobedient students to the office, should a student be permitted to leave without a hall pass. Passes to the lavatory are to be restricted, with a common sense rule applying. Study hall is considered a class.

STATEMENT OF THE CASE

This grievance arbitration involves the Weyauwega-Fremont School District and the Education Association of the School District of Weyauwega-Fremont. (Jt. 1) The Association alleges that the District violated the collective bargaining agreement by non renewing the Grievant from his teaching position pursuant to Article II, Management Rights, and Article IV, Conditions of Employment, of the parties' collective bargaining agreement. The parties' collective bargaining agreement was expired and in a contract hiatus; therefore the parties entered into an agreement to arbitrate the dispute dated May 29, 2002. (A. 40)

The Grievant was employed by the District on August 21, 1985 to teach biology. On April 30, 1986, the Grievant received a written reprimand from then principal James Erdman following a complaint in reference to an inappropriate statement made to a student about the topic of human reproduction which was being studied in the Grievant's class. (D. 16) The Grievant responded to the reprimand on May 5, 1986, characterizing his statement as a frivolous utterance, indicating that his remark was taken by the student as a joke and was not intended to hurt the student's feelings or cause any harm. (A. 36)

On September 5, 1991, following consultations with District Administrators regarding revision of the curriculum for the biology class, the expectations for the Grievant and the biology course for the 1991-1992 school year were summarized in a memorandum to the Grievant. (D. 35) There was no mention in this memorandum of any problems related to Grievant's responsibility for creating a hostile learning environment in his classroom, which ultimately became the subject of the investigation that led to Grievant's non-renewal at the end of the 2001-2002 school year.

In September of the 2000-2001 school year, District High School Principal Gerry Pardun, received a student complaint regarding Grievant's policy allowing students to leave his classroom to use the bathroom. One aspect of Grievant's classroom policy regarding bathroom use was that students could leave for a medical reason. For female students, a medical reason

could be their menstrual period, and female students were required to tell the Grievant if their medical reason was their menstrual period. Following a conference with Principal Pardun, Grievant's direct supervisor, the Grievant received a verbal warning (recorded) concerning his bathroom policy. The Principal determined the policy constituted inappropriate, sexually based discrimination and an impermissible inquiry. Pardun advised the Grievant that any further violations of District policy would result in additional discipline up to and including discharge. (D. 13)

Later in the Fall of 2000, the Grievant was accused by two female students in his biology class, of an inappropriate sexual comment and sexual hostility based on the Grievant starring at one of the student's breasts instead of her face during a discussion. These allegations led to a meeting between Grievant, an Association representative and Principal Pardun on December 22, 2000. During the course of that meeting, the Grievant admitted that he told a female student that she should think about putting as much effort into biology as she does with her boyfriend, or words to that affect. Grievant stated that he was unaware that he was looking at the student's breasts instead of her face. The meeting was summarized in a memorandum from Pardun to the Grievant dated January 19, 2001. Pardun advised the Grievant of the District's harassment policy, the anti-retaliation clause of the District policy and suggested whether it would be beneficial for Grievant to receive counseling or training in sexual harassment issues. The memorandum advised the Grievant that any violations of these District's policies would result in additional discipline up to and including discharge. The memorandum did not state there was any violation of a District policy. (D. 17) The Grievant filed a grievance objecting to the sexual harassment memo (D. 17) authored by Principal Pardun and Sexual Harassment Coordinator Tina Valenti. On February 14, 2001, Pardun responded to the grievance and stated: "The purpose of the Memo (D. 17) was to summarize the sexual harassment investigation and bring closure to the matter, pursuant to District policy. The Memo was not intended as discipline." (A. 19)

On February 20, 2001, Principal Pardun received several complaints from students concerning Grievant's conduct in the classroom. Pardun advised the Grievant of these complaints in a memorandum to him of February 22, 2001. The complaints related to sexual harassment and violation of the sexual harassment policy of the District. The complaints involved starring at the chests and the behinds of female students, inconsistent and/or retaliatory grading of students and requiring the disclosure of medical information prior to allowing students to utilize the washroom. The memorandum requested a meeting with Grievant and an Association representative on February 22 or February 23. Pardun indicated that the matter would be investigated thoroughly and promptly. (D. 27)

On March 28, 2001, following discussions with the Grievant regarding his interaction with students and conduct in the classroom and an investigation by Tina Valenti, Director of Pupil Services, Principal Pardun issued a memorandum to the Grievant stating that students will be given a pass to use the restroom when requested and that the Grievant would make no

mention of student medical, psychological and personal information, that degrading comments about students will not be used, that inappropriate looks at students will not be tolerated and reminding Grievant that professional behavior is mandatory and must be followed. (D. 15) The memorandum further advised Grievant that complaints lodged against Grievant regarding his conduct involving female students, including comments about them and sexually directed looks at them create an uncomfortable environment for the students. The memorandum stated that regular and routine classroom observations will be made to verify Grievant's conduct and offered Grievant any assistance in meeting these requirements. (D. 15) The March 28, 2001, memorandum did not state that it was discipline but that the enumerated requirements had to be met . On March 28, 2001, Grievant also received from Pardun a memorandum regarding the teaching methodology to be used in Grievant's biology classes. (D. 14) This memorandum closely paralleled the memorandum which Grievant was involved in developing in 1991 regarding his teaching methods for his biology class. (D. 35) This March 2001 memorandum did not indicate that it was discipline and made no reference to the allegations against the Grievant set forth in the March 28, 2001 memorandum to Grievant discussed as District 15.

The Grievant received no further discipline or corrective action from the District for the 2000-2001 school year and his teaching contract was renewed for the 2001-2002 school year.

There were no further allegations against the Grievant until January 2002. On January 4, 2002, a female student, who was taking biology from the Grievant, alleged that the Grievant made a statement to the effect that the female student was no longer a virgin. The Grievant denied that he made this statement and also denied that he apologized to the student as she also alleged. There were no witnesses to this alleged exchange even though the student indicated that the Grievant was with another student when he made the statement. Although there had not been any allegations against the Grievant prior to this incident during the 2001-2002 school year, Grievant's principal, Pardun, had advised him earlier in the school year that the students and their parents, who had made allegations against the Grievant the previous school year (2000-2001), were stirring up trouble again and talking to school board members even though the students were no longer in Grievant's classroom.

The incident with the female student and the virginity remark initiated an investigation by Tina Valenti, Director of Pupil Services, Principal Pardun and School District Administrator, Carol Conway-Gerhardt. This investigation led to interviews with approximately 40 students and parents of students and developed allegations during the 2001-2002 school year but primarily developed additional allegations alleged to have occurred during the 2000-2001 school year. These allegations included sexual innuendos and inappropriate sexual comments in and out of the classroom and unrelated to the topic then being taught in the biology class, starring at girls' breasts and butts and at the breasts of parents during the course of parent-teacher conferences, inappropriate comments about girlfriends and boyfriends, references to different stages of a girl's development, in particular

as to girls' breasts, permitting pervasive sexual banter in the classroom including inappropriate writings on the classroom calendar and blackboard and retaliation against students by failing students who had complained against the Grievant. 1/

1/ These allegations and others resulted in the notice of non-renewal. (Jt. 4)

These allegations and the subsequent investigation by the District resulted in a finding by the District that Grievant had violated District policies, had engaged in sexual harassment and had allowed and encouraged a hostile learning environment in Grievant's biology classes. On February 21, 2002, the District commenced the State of Wisconsin statutory Teacher non-renewal process, resulting in a notice of non-renewal, a hearing before the District's Board of Education and its decision to non-renew the Grievant by letter to the Grievant on April 19, 2002. (D. 22, 21, 4 and 5) The Association's grievance and the parties' agreement to arbitrate followed. Hearing was held by the Arbitrator on October 23, October 24, November 25, November 26, November 27 and December 12 of 2002.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the Grievant's non-renewal would not have occurred except for Grievant's alleged statement to one of Grievant's students, OW, on January 4, 2002, to the effect that OW had lost her virginity. The Association argues that absent this allegation, the District would never have reopened the investigation into the Grievant's conduct in the previous school year (2000-2001). The Association submits that absent a finding by the Arbitrator that the allegation by OW is true and credible, the non-renewal or discharge of the Grievant under the collective bargaining agreement cannot stand.

The Association devotes a significant portion of its post hearing briefs in an effort to destroy the credibility of OW and takes the position that the testimony of OW, District and Association witnesses proves that OW is not credible. The Association argues that faced with the absence of any witness to the interaction between the Grievant and OW, when the statement was allegedly made, and given Grievant's adamant denial, the statement to OW did not and could not have happened. The Association posits that OW was used by a small group of students from the previous school year, who did not do well in the Grievant's class, and who made numerous complaints, about which the District did nothing, to continue the assault on the Grievant in the 2001-2002 school year. Essentially, the Association argues that OW was used to invigorate and re-instate an investigation into the allegations of 2000 and 2001 since there were no other real allegations regarding Grievant's conduct in the 2001-2002 school year.

The Association takes the position that even if the proven conduct alleged during the 2000-2001 school by the Grievant occurred it would not warrant non-renewal. The Association avers that the complaints by a certain small group of students who were doing poorly in Grievant's class, do not establish credible allegations of sexual harassment or the creation of a hostile learning environment.

The Association argues that new allegations made by these same students when they were no longer in Grievant's class during the 2001-2002 school year lack credibility based on the testimony of the students themselves and testimony of students who were also in Grievant's 2000-2001 class who testified on behalf of the Grievant that there was no sexual harassment and no hostile learning environment in the Grievant's biology classes either in 2000-2001 or 2001-2002.

The Association notes that the Grievant admitted to certain comments during the 2000-2001 school year, some of which were not unwelcome by the students, and that the bathroom policy was not sexual harassment, but the Grievant's good faith attempt to follow the faculty handbook guidelines on issuing hall passes to students during class. The Association argues that any actual sexual comments in the classroom were not so pervasive or severe as to alter the conditions of the students' education or their ability to learn.

The Association submits that just cause was not proven by the District and the District's procedural mishandlings of the Grievant's case preclude a just cause finding. The Association argues that the District does not have clean hands in that School Board President Steven Loehrke, whose son would not be eligible to be valedictorian because of a less than perfect score in Grievant's biology class, welcomed the opportunity to have the unfounded sexual allegations against the Grievant upheld. Loehrke, the Association submits, was intimately involved in the investigation of the Grievant and encouraged parents and students to come to him directly with their complaints. The Association takes the position that the District in its investigation ignored the fact that the students complaining were a handful in comparison to the total number of students that the Grievant taught, many of whom testified in favor of the Grievant and many of whom were not called by the District even though they had spoken with the District Administrator during the course of the investigation in 2001-2002 about the events that occurred in 2000-2001.

The Association takes the position that the District did not conduct a reasonable and fair investigation and that the investigation into sexual harassment was conducted by three administration individuals who had no experience in conducting such an investigation and were biased by not fairly presenting the testimony and evidence that could have been gleaned from students who did well in Grievant's class. As shown by the testimony presented by the Association those students thought that Grievant taught an excellent class and that there was not any hostile learning environment or sexual harassment. The Association also argues that the District's punishment of the Grievant for his bathroom policy by non-renewing him was double jeopardy because he had been punished for his policy in the Fall of 2000.

The Association points out that the Grievant was not afforded progressive discipline. The only discipline received by the Grievant was an oral reprimand (recorded) that was received by the Grievant in the fall of 2000 regarding the bathroom policy. Except for this reprimand the Grievant's record was unblemished for the 2000-2001 school year. Even in April 2001 when the District found that the Grievant had violated the District's sexual harassment policy no discipline was imposed or training of any kind required. The Association submits to the Arbitrator that the only discipline actually issued to the Grievant prior to his non-renewal was the verbal warning. The Association points out that despite the District's contention that the Grievant had created a hostile classroom environment in violation of the sexual harassment policy, the District allowed the Grievant to continue teaching until the end of the 2001-2002 school year; no students, except for OW, were removed from his class and there was no District supervision or observation of the Grievant's classroom from the time that the complaints were first raised in the fall of 2000 until the week before Grievant's non-renewal hearing. The Association argues that the District's conduct in allowing the Grievant to stay in the classroom best demonstrates that this was an appropriate case for progressive discipline far short of non-renewal.

The Association in concluding its argument attacks the District's position by making a disparate treatment argument in that a teacher in 1994, who was clearly guilty of sexual misconduct involving the touching of a student, was only suspended without pay for the first semester of the 1993-1994 school year. It was only when the Wisconsin Department of Public Instruction lifted the teacher's teaching license that the District terminated that teacher. In effect, it was the Department of Public Instruction that terminated the teacher and not the District. This, the Association argues, is disparate treatment in that for a more serious proven offense, a previous teacher was only suspended, where for much less proven and serious offenses the Grievant was non-renewed. The Association argues that the reason Grievant's action resulted in his non-renewal was because of the goal of School Board President Steven Loehrke to terminate the Grievant for the grades received by his son, a student in Grievant's classroom.

For the aforementioned reasons, the Association argues that just cause for non-renewal pursuant to the collective bargaining agreement was not proven and that the Grievant should be reinstated with full back pay and benefits.

District

The District commences its post hearing brief and argument by setting out the investigation of the allegations against the Grievant conducted by high school principal Gerry Pardun, the Grievant's immediate supervisor, and the investigation by Tina Valenti, Director of Pupil Services, who at that time also was the sexual harassment officer. The District

submits that this investigation considered the events starting in the fall of 2000, with Grievant's inappropriate bathroom policy, through the January 2002 complaint of OW. In August of 2001 District Administrator Carol Conway-Gerhardt became the sexual harassment officer and was responsible for handling any sexual complaints and investigations.

It is the position of the District that when confronted with his bathroom policy Grievant initially denied that he had such a policy requiring girls to reveal their menstrual period, but after Mr. Pardun conducted a further investigation and consulted with Union representative Gabrilska, the Grievant admitted to the inappropriate inquiry in his bathroom policy. Contrary to the Grievant's statement that it had been his policy and no one had complained about it for years, the District argues that previous high school Principal Sarah Anderson testified that she had admonished the Grievant in 1999 that his bathroom policy for female students and their menstrual periods was inappropriate and that it should be discontinued.

The District argues that it conducted a thorough investigation into the complaints of December 2000 from students regarding inappropriate looks and comments, the complaints of February 2001 regarding allegations of inappropriate looks and continued inappropriate bathroom inquiries and retaliatory grading. The District also investigated the complaint of January 2002 by student OW that the Grievant made a sexual comment to her alleging that she had lost her virginity. These investigations, by Principal Pardun and Tina Valenti were found by these District Administrators to have created a hostile learning environment and that the Grievant had retaliated against students who filed sexual harassment complaints by giving them zeros for alleged cheating on exams. The District also argues that OW is a credible witness and the virginity statement in fact happened. The District further argues that as a result of Ms. Valenti's investigation of allegations against the Grievant, it was substantiated that the Grievant made unacceptable remarks to female students to the effect that they should put as much effort into their biology as they do their boyfriends. Valenti further confirmed that Grievant frequently brought up the subject of sex in class whether it related to the topic or not, that Grievant inappropriately looked at girls' breasts and butts and that Grievant made inappropriate remarks to female students in a sexual context and that the Grievant retaliated against students for filing sexual harassment complaints. Ms. Valenti found that the Grievant had violated the District's sexual harassment policy and had created a sexually hostile classroom environment.

The District states that former District Administrator Carol Conway-Gerhardt was responsible for deciding whether to recommend to the District Board of Education the non-renewal of the Grievant in 2002. The District argues that Ms. Conway-Gerhardt followed all the statutorily required non-renewal standards under the collective bargaining agreement, that she based her recommended non-renewal of the Grievant on her own detailed investigation as well as on the investigation by Principal Pardun and Director of Pupil Services Valenti. The District submits that the District has a strict policy against sexual harassment and that Administrator Conway-Gerhardt had a number of years of experience in administering

employee standards of conduct policies and sexual harassment policies. The District takes the position that the letter of non-renewal containing 14 findings in which the Grievant violated District policies and employee standards of conduct amply provided the basis of the non-renewal letter.

In its post hearing brief the District details the circumstances and supporting facts that it argues proves that Grievant violated District policies by creating a sexually hostile classroom environment. 2/

2/ These will be discussed in the Discussion section of this Award.

The District avers that it may discharge the Grievant for creating a sexually hostile classroom environment even if such misconduct is not specifically referenced in the collective bargaining agreement or District policies. The District cites applicable arbitration case law that although the collective bargaining agreement or District policies do not contain an exhaustive list of what circumstances create a sexually hostile classroom environment, arbitrators have ruled that there are serious offenses which constitute just cause for disciplinary action even if the misconduct is not specifically mentioned in the collective bargaining agreement or the employer's employment policies. Citing Federal case law, the District takes the position that the Grievant's comments and actions resulted in a hostile classroom environment which was detrimental to his students' ability to learn. 3/ These comments, actions and the creation of hostile classroom environment warranted the just cause termination of Grievant's teaching contract with the School District. The District notes that the Grievant's hearing testimony calls into question his credibility and that in fact the Grievant is not credible.

3/ In its reply brief, the District presents and discusses further case law, studies and guidelines defining school based sexual harassment and the effect on students.

The District argues that the Grievant was disciplined and treated the same as another employee who sexually harassed students. The District submits that in deciding what discipline was appropriate for the Grievant's conduct, the District reviewed how other employees, who were disciplined for sexual misconduct, were treated. In such review, the District found that there was only one (1) other incident of teacher sexual misconduct which took place in 1994. In that case, the teacher was discharged from employment. Therefore, the District argues it followed such precedent when it non-renewed the teaching contract of Grievant.

Lastly, the District argues that there is no evidence to support the Association's theory that the District, led by Board member Loehrke, had any vendetta against the Grievant.

In conclusion the District argues that Grievant's teaching contract was non-renewed because he created and maintained a sexual hostile learning environment and for failing, despite District warnings and counseling, to meet the requirements of his position as a professional educator and for his failure to adhere to the policies and procedures of the District which were undisputedly on notice to him. The District requests that the Arbitrator confirm the decision of the District and deny the grievance, thereby affirming the District's decision to non-renew the Grievant's employment for just cause.

DISCUSSION

This is a discharge case. Grievant was terminated from his employment with the District when his teaching contract with the District was non-renewed for the 2002-2003 school year. (Jt. 4 & 5) The termination is subject to a just cause provision in the parties' collective bargaining agreement. (Jt. 1) Despite a contract hiatus, the parties agreed to arbitration to determine if the termination was for just cause. (A. 40) There were 14 points or reasons given in the notice of non-renewal for the termination of Grievant's employment. (Jt. 4) Taken together, the Grievant was terminated for violation of the District's policy against sexual harassment and for creating a hostile learning environment in his classroom.

The District's policies against harassment and sexual harassment were introduced into the record. These included the main statement against sexual harassment (Jt. 7), standards of conduct (Jt. 6), a separate policy against harassment (D. 38) and the teachers handbook (D. 41). The Grievant was obligated to abide by these policies when he signed his individual teaching contract. (Jt. 2) There is no serious contention by the Grievant or the Association that Grievant was unaware of these policies or was not obligated to follow them. The main reason the District submits that the policies were violated is that Grievant engaged in and allowed, in and out of his classroom, sexually oriented verbal kidding and abuse that created an intimidating and hostile learning environment which interfered with the learning process for some students in his classroom. (Jt. 7 & 4) There is no accusation that there was any sexual touching or that Grievant engaged in or permitted the deliberate and repeated display of offensive sexually graphic materials or that Grievant sought sexual favors from students to enhance their grades. (Jt. 4 & 5) There is an allegation in Joint Exhibit 4 regarding questionable grading practices concerning students following their complaints of sexual harassment; the specific word retaliation (also a violation of District policies) is not used.

Grievant was first employed by the District in 1986. Grievant was employed to teach biology. During his first year of employment, Grievant received a written reprimand from the High School principal. The Grievant made an inappropriate remark to a male student

regarding the topic of reproduction then being studied in Grievant's class. The comment was of a sexual nature. (D. 16 & A. 36) The District argues that this started a pattern of sexual innuendoes and inappropriate sexual remarks by the Grievant. In 1991, the Grievant and representatives of the District's administration worked on revising the curriculum and classroom conduct for the Grievant's biology course. The revisions to the curriculum arose from parental complaints about the curriculum changes in the previous year (1989-1990). (Tr.1096-1098) The resulting memorandum was limited to Grievant's curriculum and teaching methodology; there were no references to any problems or allegations of sexual harassment. (A. 35) The next allegation of sexual harassment or impropriety occurred in the Fall of 2000. Therefore, from 1986 until 2000 there were no allegations against the Grievant for sexual harassment. I do not find that this establishes a pattern of conduct connected to the reasons for Grievant's termination at the end of the 2002 school year. And for that reason I will not consider the 1986 reprimand, and it will have no effect on my consideration of just cause. Arbitrators seldom go back 14 years to consider a discipline where it has not been part of a pattern of conduct.

Grievant admits that he has a different style of teaching and does not teach biology in the traditional way. (Tr. 1095) However that does not appear to have anything to do with the reasons for his termination which are stated in the notice of non-renewal. (Jt. 4) As I will discuss in more detail, Grievant's teaching style of an open classroom, where students were encouraged to be open and honest with Grievant and he with them, while not being a "bad" teaching style may have led to conditions that encouraged or allowed the sexual banter that was present in Grievant's classroom, especially when considering that a biology course lends itself to "sexually related" discussions and matters. There is also ample evidence in the record that Grievant's class was "hard" and a "lot of work". However, it is not my intent or jurisdiction under the parties' labor agreement to judge Grievant's teaching style except as it may have impacted on the reasons for Grievant's termination.

The burden of proof and persuasion in this discharge case falls on the District. Given the reasons for the termination, sexual harassment and creation by sexual harassment of a hostile learning environment, I find that the burden rises to a level of clear and convincing. Both parties have cited Carroll Daugherty's seven tests for just cause in a discipline case. 4/ I regard those tests as a guideline from one arbitrator which I choose to acknowledge but not follow to the letter. I also find, and again with little challenge from the Association, that the District followed the contractual and statutory requirements for non-renewal. There is, however, substantial disagreement whether the District carried out a due process investigation before determining to terminate Grievant's employment though the non-renewal process.

4/ ENTERPRISE WIRE CO., 46 LA 359, DAUGHERTY, (1966).

At the outset, I do not find that the District's investigation or lack thereof is a determining factor in my decision. The District's investigation into claims of sexual harassment starting in the Fall of 2000 was conducted over the next two years. It was conducted by School District Administrator Conway-Gerhardt, High School Principal Pardun and Director of Pupil Services Valenti, who was also the Sexual Harassment Officer. None of these individuals, by their own testimony, were experienced investigators of sexual harassment claims. Pardun testified that he had no previous training in investigating sexual harassment and Grievant's case was his first investigation. (Tr. 310 & 311) Valenti testified that she had attended one workshop on sexual harassment and this was also her first investigation. (Tr. 588) While Conway-Gerhardt had in her administrative experience worked at establishing sexual harassment policies, there is no evidence of experience in actual investigations. (Tr. 37)

This does not mean that the District totally failed in their due process investigation. But the procedure followed by the District's investigators was problematic. Valenti refused to share the names of complaining students when she met with Grievant and his Association representatives in December of 2000 and March of 2001. (A. 39 & Tr. 589 & 1288) It is difficult for someone in Grievant's position to respond to complaints that are not specific and are not tied to the person complaining. Valenti also felt the law merely required that the students perceived sexual harassment when, as pointed out in the District's post hearing brief, those perceptions must be reasonable. Valenti, as did Conway-Gerhardt, did conduct extensive interviews and testified that some male students she interviewed did not feel Grievant's classroom conduct was inappropriate. (Tr. 575) Conway-Gerhardt interviewed fifty people including forty students, several parents and staff when she took over the investigation in the Spring of 2002. (Tr. 140) Given that the number of students who testified on behalf of the District was far less than forty, I am reasonably left to wonder what the other students had to say. Pardun's involvement in the actual investigation over the two year period was limited after the first complaint about Grievant's bathroom policy and the initial investigation after the female student's complaint in January of 2002 about Grievant's reference to her virginity. While Pardun signed most of the documents, Valenti and Conway-Gerhardt did most of the investigation and after the complaint by the student in January of 2002, Pardun was removed from that investigation. (Tr. 314) It is also apparent from the testimony that feed back to the Grievant, the Association, students and their parents was less than perfect.

But while I have expressed some of the negative aspects of the District's investigation, the District did attempt to verify the complaints against the Grievant, did apprise him of the complaints, even if in some cases only in general terms, and did offer him meetings with the investigators, his supervisor and with the presence and assistance of his Association representatives. Therefore, I find that while not perfect and with significant discrepancies, some of which were caused by a lack of knowledge of the law, the District's investigation met the due process requirements normally required in a discipline case under a collective bargaining agreement. What this case and my decision must center on is did the alleged incidents happen, and if so to what degree, and does that degree warrant termination of the Grievant?

I believe in analyzing the specific instances of alleged sexual harassment leading to the charge of a hostile learning environment that there are two truths that are self evident. One is that by the time students reach their sophomore or junior year of high school they are not naïve about sexual matters. And, secondly, students, regardless of the course, do not have the same abilities to learn. Sexual banter among some students, not all, occurs. And Grievant's teaching style was going to be easier for some students to learn under than others. I say this not to excuse proven sexual harassment, but I cannot ignore the reality of the culture and teaching methods in a public high school.

BATHROOM POLICY: Teachers at the District were required to have rules to manage their classrooms and enforce the rules and policies of the District. Grievant had a policy regarding his students leaving the classroom which was strict but was in line with the intended policy of the District, that use of the bathroom during class time was not encouraged. (D. 41) Grievant allowed students to use the bathroom for medical reasons which for female students included their menstrual period. Grievant had this policy for several years with limited complaints from students and administration. A previous high school principal, Anderson, testified that sometime during her tenure (1996-2000) one or more students complained to her that to go to the bathroom they had to tell Grievant it was their menstrual period. Anderson testified that she told Grievant that in her judgment this was not a good policy. She issued no discipline. (Tr. 1382) Other than this one instance, Grievant was never admonished about his policy until the Fall of 2000.

In September of 2000, Principal Pardun and Grievant discussed Grievant's bathroom policy. In a recorded oral reprimand, Pardun directed the Grievant to not ask female students if their medical reason was their menstrual period. (D. 25) Grievant did not deny that it was his policy and testified that he ended it after the warning and oral reprimand from Pardun. (Tr. 1106)

In February, 2001, Valenti sent Grievant a memorandum saying that she was about to investigate further sexual complaints against the Grievant, one of which included his bathroom policy. (D. 27) However, in the follow up memorandum of April 4 of 2001, wherein Valenti summarized her findings, no mention is made of the bathroom policy. (D. 18) This lack of further mention of the bathroom policy is supported by the testimony of a number of students and teachers who testified that Grievant changed his policy after the oral warning from Pardun. Pardun also testified that after February of 2001, he heard no further complaints about the bathroom policy after his memorandum to Grievant on March 28 of 2001. (D. 15 and Tr. 325 & 326) OW, the only female student who testified who attended Grievant's class in the 2001-2002 school year, testified that she never experienced Grievant asking about her menstrual period as a reason to use the bathroom. (Tr. 386)

Principal Pardun and the District found this policy of the Grievant to be sexual harassment; I disagree. I find that Grievant's policy was an attempt to abide by the requirements placed on him by the District to enforce a policy of limited access to the

bathroom by students during class time. Not all discrimination is unlawful; boys do not get to use the girls' bathroom. While the policy may have reflected poor judgment, I do not believe it rises to the level of unprofessional conduct by Grievant to the degree of unlawful sexual discrimination and harassment. The District's oral warning and later corrective action were an adequate and appropriate response; the more disturbing aspect is that the District apparently had to advise Grievant again about the policy in March of 2001. I also note that one girl testified that she was "okay" with the policy and felt it gave girls a break as some teachers did not give hall passes to the bathroom for any reason. (Tr. 956) The allegation that Grievant's classroom seating chart had dates by the girls' names indicating their menstrual period is inconclusive; the only chart introduced into evidence had dates by the names of boys and girls and seems to support Grievant's testimony that the dates noted were for tardies. (A. 29)

OW: Grievant was awarded a contract for the 2001-2002 school year with no conditions despite the happenings of the previous school year. It was the alleged statement by Grievant to OW on January 4, 2002 that started the investigation that led to Grievant's dismissal. OW was in Grievant's biology class during the 2001-2002 school year. On January 4th, at the end of the school day in a very busy hallway outside Grievant's classroom, OW testified that she heard the Grievant talking to a student about the biology reproduction unit and heard Grievant say ". . . if you ever have any problems with reproduction unit (9) you can ask [OW]". OW testified that hearing her name she turned to Grievant who said to her, ". . . because I'm sure you've already lost your virginity." (Tr.350-352)

OW met with Pardun on January 7th and with the use of school year books tried to identify the student with whom Grievant was talking and who could have verified that the event and Grievant's statement happened. Failing in that attempt, OW then testified that she approached Grievant on January 8th and received an apology from him for making the comment. Grievant denies that the incident on January 4 and the apology on January 8 ever happened. (Tr. 1070-1072) What I am faced with is the classic she said/he said situation. Do the allegations of sexual harassment in 2000-2001 which I will discuss herein make it more likely that Grievant would have made the statement than not? There are other factors to consider regarding the creditability of OW.

Grievant testified that in the Fall of 2001 Pardun warned Grievant that the same students and parents who had complained in the previous school year were "stirring things up" again and talking to the School Board President. (Tr. 1078) Shortly after making her allegation, OW wanted the investigation dropped; she was satisfied with the apology from Grievant and told Pardun. (Tr. 372) OW also testified that she was friends with several of the girls who had filed complaints against the Grievant in the preceding school year. (Tr. 390-391) And while OW may have received a higher grade on an exam than she should have following Grievant's alleged apology, her own testimony refutes the District's suggestion that this was a payoff for asking that the investigation be dropped. OW testified that she doubted Grievant would give her a higher grade as a thank you for dropping the investigation. (Tr. 379)

Lastly, several teachers who knew OW well testified that OW's integrity was questionable and that she would tell white lies (Tr. 801) and that she would tend to exaggerate and be dramatic. (Tr. 1063) Richard Altendorf, a former counselor at the high school who retired in June of 2001, testified that he knew OW well and that she exaggerates to the point that she ends up believing it. (Tr. 878) OW also testified that she was told by District Administrator Conway-Gerhardt that the most Grievant would be disciplined was a day off, a statement confirmed by one of William's teachers. (Tr. 393 & 847 & 848)

This allegation is the catalyst of the District's investigation of the sexual harassment complaints against Grievant, most of them occurring in the 2000-2001 school year. It cautions me to be doubly careful in considering those allegations because if the District believed OW, given the record testimony about her truthfulness, even Pardun told Association representatives that he had serious reservations about her story (Tr. 293 & 297 & 298), how careful was the investigation of the other allegations. I find that OW was not a creditable witness and that her story, totally uncorroborated by direct evidence, is not likely to be true.

WRITINGS: Students in Grievant's 2000-2001 class wrote on the blackboard "Grievant is a Gynecologist;" wrote on a classroom calendar "Grievant got laid" and drew what to some, but not all, students appeared to be a penis on the blackboard. JM (Tr. 422 & 433), AF (Tr. 427), SE, who drew the penis and wrote the "laid" comment on the calendar (Tr. 643), BH (Tr. 523), JF (Tr. 612 & 619), KK (Tr. 955 & 969) and MD (Tr. 931 & 933). Grievant acknowledges the calendar incident and that he erased the reference to him in the gynecologist remark and left the word gynecologist on the blackboard because it had been misspelled and he challenged the students to spell it correctly. Grievant claims he never saw the penis drawn on the blackboard; MD testified that Grievant directed a student to erase it. (Tr. 1144 & 1152 & 931) How long these writings remained in place varies from Grievant ordering its immediate erasure to months depending on who testified; a long time from the testimony of students called by the District to a short time from the testimony of students called by the Association. Clearly students felt that it was okay to make these writings without fear of retribution. No student was disciplined. No student testified that this inhibited their learning. What these facts support is that Grievant's teaching and classroom style allowed these things to happen and the effect on the classroom and whether it was sexual harassment or created a hostile environment must be determined by the totality of the circumstances and proven facts. These actions were by students not the Grievant. His unprofessional conduct, if any, is that students thought they could do these things without resulting consequences.

SPECIFIC SEXUAL COMMENTS: One of the alleged specific comments by Grievant was to a former District student, JS. JS testified that Grievant asked her if she had ever experienced an orgasm. This occurred in 1999 when JS and a friend were walking by Grievant's room. JS never had Grievant as a teacher. (Tr. 449) It strikes me as a little incredulous that Grievant would make such a statement out of the blue to a student he probably didn't know that well.

Further, before the Board hearing considering Grievant's non-renewal, JS submitted an affidavit stating that Grievant made the statement to her friend. (Tr. 454) Grievant denies ever making such a statement and the friend who could have verified that the statement was made never testified. (Tr. 1140) In another allegation, LW testified that on one occasion when she approached Grievant's desk to ask him a question she bent over and Grievant said "orgasm". (Tr. 678) LW testified there were no other students within six feet to hear the statement and no other witness testified that he or she heard the statement to LW. Grievant denied that he made the statement. (Tr. 1140) This is another case of she said/he said. There is no corroborating proof the statement was made. As with other of the allegations, I will consider it in the context of whether it is or is not likely Grievant would have made the statement.

One of the general complaints that I will discuss later is that there was constant reference by Grievant to the female anatomy, particularly breasts. An alleged specific instance was testified to by JB, a male student, who stated that Grievant pointed out to the class student BB as an example of a girl who developed her breasts faster than other girls. (Tr. 697) BB, called by the Association, testified that it never happened. (Tr. 887) I find it difficult to believe that a specific comment like that would not have been heard by more students who could have supported the allegation, but none testified. Certainly if the remark had been made it would be unprofessional regardless of the class and subject. Corroborated specific remarks carry more weight than general remarks about the discussion of the size of various students' breasts.

MT and AF, students of Grievant, testified that in discussing a forthcoming Christmas concert in December of 2000 Grievant happened upon the conversation and said "Santa has a big dick." Actually MT testified that Grievant said "Santa has a big –. . ." (Tr. 466 & 714) Grievant denies that he ever made the statement and in a meeting with Principal Pardun on December 22, 2000 that was not one of the allegations of sexual harassment against him. (Tr. 1113) The record also reveals that JB was present talking with AF when MT joined them and the alleged remark was made, but JB never testified that Grievant made the remark and was never asked the question; there is no indication that JB had left the presence of AF and MT before Grievant was to have made the statement.

Another remark that MT and AF testified that Grievant made was when they were doing additional work at a computer and were having trouble "booting" the computer. Grievant was alleged to have said "you first have to put the dick--disk in." Both students believed it was not a mistake but was intended as a sexual type of joke. (Tr. 469 & 716) Grievant testified that what he said was "dicks" and not "dick." (Tr.1241) Grievant testified that it was a misstatement. Arguably, the words are close enough in pronunciation that it could have been a mistake. This incident, though argued in the District's brief, was not one of the fourteen allegations of unprofessional conduct that led to Grievant's dismissal. (Jt. 4)

JF and BH testified that the Grievant had in class referred to SE's breasts as "nice tubas". (Tr. 525, 526 & 605) SE was a reluctant witness for the District. She initially tried to plead fifth amendment rights. (Tr. 639) SE had an open and kidding relationship with the Grievant. The alleged statement occurred when SE asked to leave the class for a pep rally. Grievant testified that he knew that SE was not in the pep band and asked her what instrument she played; she said the trumpet. Grievant said you should play a bigger instrument, a tuba. (Tr. 1202 & 1203) JF and BH testified that the statement was "you have big tubas." SE's testimony ran from a "nice tuba," which she did not take as a reference to her breasts, to later testimony that Grievant had said "nice tubas." (Tr. 641) This later testimony was more consistent with what she said at the Board's non-renewal hearing, though SE also testified that she didn't make anything of Grievant's statement until the District's attorneys made her testify and go into depth about it. (Tr. 642) Grievant also denied that at the Board hearing he had said of SE "nice tubas"; no evidence, a transcript or witness, disputed Grievant's denial. (Tr. 1203).

BOY FRIEND COMMENTS: Three female students, AF (Tr. 471), MT (Tr. 709) and LW (Tr. 681) testified that during the course of the school year (2000-2001) when they spoke to Grievant about having trouble with their biology studies, Grievant told them to the effect that they should spend as much time with their studies as they do their boy friends. All attached a sexual connotation to the remark. Grievant testified that when confronted by Pardun at the December 22, 2000 meeting with the complaint about the boy friend comment he assumed it was MT who had come to him in November concerned about how she could get a better grade. Grievant testified that he told MT that if she spent more time doing biology as you do with your boyfriend it (her grade) will get better. (Tr. 1111) Grievant went on to testify that there is a great deal of writing in his class and the students are required to be able to use what they learn. MT's effort seemed rushed and thrown together like it was done in haste. MT's boyfriend was in the same class and they spent a lot of time together. (Tr. 1112) There was no testimony from Grievant or the Association about the other two instances testified to by AF and LW. At the high school level I believe one can take reasonable notice that girl friends and boy friends sometimes spend almost every minute together that they can. I also believe it is reasonable to assume that some "couples" can be together a great deal and get their school work done and others cannot. While the three students may have perceived the comment to have a sexual connotation or be a sexual innuendo, I do not agree that their perception is reasonable. It is clear from the students' own testimony that there was no specific sexual comment made, and I credit Grievant's testimony that all he intended was that they had to give some priority to their school work. MT also testified that Grievant also thought she was spending too much time with FFA, a remark clearly having nothing to do with a boy friend issue. (Tr. 710)

CREATIVITY POINTS: Part of Grievant's course of instruction were oral reports made by students to the rest of the class on a topic related to the subject of study at that time in the various units of the biology course. Grievant wanted to make the reports visually and audibly interesting to the class so that the students would listen. (Tr. 1133 & 1134) Female students

JM (Tr. 427 & 428), LW (Tr. 686) and BH (Tr. 526) testified that students consistently would make sexually oriented remarks during their oral reports in order to get creativity points to enhance their grade for the report. JM testified that after making such a remark in her oral report she saw the check mark on Grievant's grading sheet awarding her a creativity point. (Tr 428) Grievant denies that he gave creativity points to students who used sexual oriented remarks during their oral reports. Grievant testified that at the beginning of the year he advised students that if they had any question about the appropriateness of something they wanted to use in their report, they should check with him first. (Tr. 1136) Grievant testified that on one occasion he remembered one student tried to get into his sex life with his wife and he told the student that it wasn't appropriate and to move on. (Tr. 1136) This incident was verified by a female student, KK, who testified that when a student named TK tried to make a comment about Grievant and his wife in an oral report she was reprimanded by the Grievant. KK's testimony tended to refute the testimony that students were allowed or did put sexual remarks in their oral reports. (Tr. 954) Another specific instance of a possible sexual remark in an oral report was testified to by JB who said a student referred to prostitution, which might have occurred during the unit on sexual diseases. (Tr. 700) JF testified that a student made a comment about Grievant's penis in an oral report and was never disciplined or admonished. (Tr. 620) SE testified that she thought it was okay to put sexual things in the oral reports but could not remember any specific instance when she did it. (Tr. 646 & 647) JF testified that a student made a comment about Grievant's penis in an oral report and was never disciplined. (Tr. 620)

RETALIATION: Two female students, AF and JF, were during the 2000-2001 school year accused of cheating by the Grievant and received zeroes for grades: AF twice and JF once. Both students denied that they had been cheating and claimed that the cheating accusation by Grievant came within a short period of time after they had complained to Pardun and Valenti about what was going on in Grievant's classroom. (Tr. 476 & 622). Both students and the Grievant remembered the incidents and testified extensively about them, Grievant's explanation of the incidents and why he accused these students of cheating is taken as a denial of any retaliation against the students for their complaints against him. Grievant testified that because of the complaints made against him in December of 2000, he was mindful of the policy against retaliation when he accused JF and AF in January of 2001 of cheating. (Tr. 1118) Grievant further testified that the cheating incidents were investigated by Pardun who never ordered that the grades be changed. (Tr. 1122 - 1126)

Pardun's testimony on these cheating incidents was inconclusive; he just did not remember well enough what he had or had not done after investigating these incidents. I note that on February 22, 2001 Grievant received a memorandum from Pardun listing as one complaint against the Grievant that he engaged in retaliatory grading. (D 27) However, in a March 28, 2001 memorandum to Grievant concluding Pardun's and Valenti's investigation into this and other complaints, there was no mention of the cheating incidents or retaliatory or inconsistent grading. (D. 15) There was no further accusation against Grievant in the 2000-2001 or 2001-2002 school years against the Grievant for retaliatory grading. The fact that Principal Pardun and Sexual Harassment Officer Valenti never made a finding after the students made the complaints can only lead to a logical conclusion that they did not believe it

happened. I find also that the testimony of District Administrator Conway–Gerhardt on this matter was perfunctory and conclusitory and not based on her own personal analysis of the facts. (Tr. 45 & 46) She never testified that she relied on the investigation of Pardun and Valenti who never in their numerous memos to the Grievant found that he had retaliated against JF and AF.

ALLEGATIONS FROM 2001-2002 SCHOOL YEAR: The primary allegation from this school year related to the OW incident which I have discussed above. There were not the pervasive allegations made during this school year as in the previous year. Other than OW, the allegations were specific and made by male students and were remembered by the Grievant.

One allegation involved a remark made to student SS by Grievant when SS dropped a test tube of material just after Grievant had warned the class to be careful. Grievant said "God dam it, SS." Grievant does not deny the remark and admits he was upset. (Tr. 1142 & 1143) SS testified that he had been to a bible study the night before and believed that Grievant was damming him to hell. (Tr. 661) TA, who witnessed the incident, testified that there was no use of the word "hell" or any reference to it by Grievant. (Tr. 671) I regard the remark as unprofessional but do not find that it is reasonable to conclude that Grievant meant the remark to dam SS to hell.

Another allegation relates to Grievant remarking about the "hickies" on one of his female students. To Grievant, the student entered the classroom flaunting her "hickies" and Grievant testified that he told her that it was nothing to be proud of and pointing out to her the adverse reaction on the class. (Tr. 1148) It is apparent, as with other situations, that Grievant used this occasion as a learning opportunity and, although he may have been correct in what he said to the student, it probably was not in the best judgment. I do not find that it was sexual harassment and the female student never testified, so I am unable to at least consider her perception, reasonable or not.

Another allegation relates to Grievant's use of a ruler in such a manner that LG testified that the Grievant was demonstrating masturbation. (Tr. 667) OW also testified to the same effect. (Tr. 387) JG, however, testified that it was his recollection that OW was not in the class. (Tr. 668 - 669) Grievant testified, in some detail, that he was demonstrating with the use of a ruler an aspect of protein synthesis and did slide his hand back and forth on a ruler held horizontally to indicate the messenger RNA which is in the shape of a ruler. (Tr. 1146 & 1147) Grievant testified that he had no idea that the students took it as being a gesture of masturbation. (Tr. 1148) I credit Grievant's testimony; it is not surprising to me that a few students would read masturbation into what Grievant was demonstrating.

In another incident, LG, testified that he called his friend TB a "pussy" and Grievant asked him if the knew what the word meant and LG just laughed. (Tr. 667-668) Grievant does not deny this incident and yet again tried to use it as a learning experience by asking LG if he

knew what it meant because students often use words they don't understand and calling someone a pussy is a derogatory comment. (Tr. 1149 - 1150) The pussy statement and the following discussion occurred after class. I am not sure that this incident would be considered sexual harassment or lead to a hostile environment. It may however support the notion that sexual bantering was allowed in Grievant's classroom and perhaps in this case only admonishing the student not to use the term to one of his friends would have been the more appropriate response.

There was testimony by LG and TB that sexual comments were made by Grievant during class that were at times unrelated to the topic being studied. These were general statements. OW, on the other hand, testified that she liked the class, was doing well and that Grievant never stared at girl's breasts. Absent the specific "virginity" remark to OW and those incidents discussed above regarding the 2001-2002 school year, there is little evidence of sexual harassment or a hostile learning environment present in the 2001-2002 school year. Grievant was not specifically disciplined for any of the aforementioned incidents.

THE 2000-2001 GENERAL ALLEGATIONS: As noted earlier, District Administration re-visited this school year after the complaint of OW. The investigation was primarily in the hands of District Administrator Conway-Gerhardt who assumed the role of Sexual Harassment Coordinator prior to the start of the 2001-2002 school year. Two students who had made complaints in the 2000-2001 school year against the Grievant testified that they made complaints in the 2001-2002 school year because they (MT and AF) believed that nothing had been done to Grievant. (Tr. 732 - 733) They did not have any first hand knowledge of what was occurring in the 2001-2002 school year because, having completed biology, they were no longer in Grievant's classes.

Other than the involvement of male students in the allegations discussed above, the general allegations leading to a finding of sexual harassment by Grievant in 2000-2001 were made by six female students: MT, JM, AF, MK, BH and JF. Their allegations as to what went on in the classroom as they testified included the following: Grievant stared at girls' breasts and butts; Grievant would scan girls' bodies; Grievant allowed and engaged in sexual remarks and innuendoes, including remarks having nothing to do with the topic being studied; Grievant would compare the breast size of different girls; Grievant would stare at girls' chests when they would approach his desk for assistance; Grievant allowed sexual oriented kidding. The testimony varied that these happenings occurred once or twice a week to constantly every class period and throughout the school year.

The Mother of MT and the Mother and Father of AF also testified that during parent/teacher conferences after the first quarter of the school year (Fall of 2000) the Grievant constantly looked at the breasts of the Mother. Only Mrs. F talked with Pardun about this incident, and Pardun said he would look into it. Mrs. F testified that Pardun did not get back

to her until much later. (Tr. 497 - 498) I note here that in the December 2000 disciplinary meeting held by Pardun with Grievant and his representative, the uncontradicted testimony at hearing was that Pardun never brought up the incidents alleged to have occurred during the parent/teacher conferences. I also note that MT, AF and BH were receiving a D grade from the Grievant.

As so often happens in these cases, if there is one group of students who testify against a teacher there is another group testifying for the teacher who deny that the alleged incidents ever happened. Female students MD, MK, KK, BB and male student BG testified that the aforementioned incidents never happened. (They made no comment on the parents' testimony). Two of these students, MD and KK, testified that they were in the same 7th hour class period as BH, JM and JF. These students, who were A and B grade students, testified that it was a comfortable classroom environment no different than any other class they had; Grievant did not stare at girls' breasts and butts; girls could not and did not receive good grades by flaunting their "stuff" or by wearing provocative clothing; Grievant never said anything inappropriate and there were no sexual comments in the class; what sexual kidding that occurred was no different than in any other class and students were not disciplined for it in Grievant's or the other classes either; Grievant would tell students to stop if the kidding got out of hand.

Grievant in general testified that he denied these allegations and testified that in one of the investigatory meetings with Pardun and Valenti told them that if the perception of girls was that he was staring at their breasts and butts he would try to do what he could to avoid this perception. Grievant also complained to Valenti and Pardun as to how a teacher could defend himself against this type of allegation.

THE LOEHRKE ALLEGATION: The Association alleges that District School Board President Steven Loehrke plotted to get rid of the Grievant because the Grievant gave his son a B grade in biology which would prevent his son from having any opportunity to be his class valedictorian. Loehrke testified that it would not be possible for his son to be valedictorian because he was taking too many courses where the highest grade was a 4.0 being averaged with courses where the highest grade was 5.0. (Tr. 909 & 910) Grievant testified that Loehrke was unhappy with the B grade and expressed his displeasure in a parent/teacher conference in the 2000-2001 school year when his son took biology. (Tr. 1151 - 1152) Another teacher, Colleen Boelter, testified that in a parent/teacher conference, Loehrke was upset with the grades his son Lincoln had received in Grievant's class and stated that maybe someday he would sit in judgment of the Grievant. (Tr. 1011 & 1012) Loehrke denied both of these allegations on the record. The record testimony and the fact that Loehrke sat with District counsel through the entire hearing do not convince me that Loehrke was out to get Grievant because of his son's grade situation.

GENERAL FINDINGS: I find that progressive discipline was not applied to the Grievant under any norm accepted in arbitration case law. Grievant only received one oral warning (recorded) in September of 2000, dealing primarily with his bathroom policy. One finding of

sexual harassment in early 2001 was changed in a later document from the District after an Association grievance. Following the grievance the memorandum to Grievant specifically stated that sexual harassment had not been found and the memo was not discipline. Two other documents that same year (2001), in March and April, while finding sexual harassment did not discipline Grievant but only advised him to take corrective action. As District Administrator Conway-Gerhardt testified, she did not find it necessary in either school year to remove Grievant from the classroom or suspend him or give Grievant any document clearly designated as a written reprimand. Nor was Grievant ever ordered to take some kind of training or consultation to cure his perceived sexual harassment problems. I agree with the District that it is not necessary to follow progressive discipline in every case dependent on the seriousness of the event. But the absence of progressive discipline increases the burden on this and any employer to convince the arbitrator to uphold a discharge.

The District dismissed the Grievant because of unprofessional conduct and for creating a hostile learning environment due to sexual harassment. The cases cited to me while dealing with a hostile environment do so in the context of the workplace and not a high school classroom situation. I believe the test under which I have decided this case closely follows the test set forth by the United States Supreme Court, the Seventh Circuit Court of Appeals and the Wisconsin Supreme court.

> **A condition sufficiently severe and pervasive to alter a student's classroom learning conditions to the extent that these conditions create a hostile educational environment.** 5/

5/ BASKERVILLE V. CULLIGAN INT'L CO., 50 F.3RD 428 (7TH CIR. 1995); KANNENBERG V. LIRC, 213 W.2D 373, 388 (1997); HARRIS V. FORKLIST SYS., INC., 510 U.S. 170 (1993).

These Courts have held that the cumulative effects of all incidents must be considered. Frequency and relevancy and severity particularly are to be considered. The Courts look to whether the conduct was humiliating or merely offensive and, in the case of the work place, whether the banter was occasionally vulgar and tinged with sexual innuendo or whether it crossed the line from vulgar to harassment. I believe that the courts would lower the standard and find the "line" crossed more quickly with high school aged students. The main issue in determining whether there was a hostile educational environment as alleged by the District depends in significant measure on the creditability of the witnesses.

As I have noted before, aside from the specific happenings testified to, there was almost an equal number of students who testified that there was a sexually charged hostile environment in Grievant's classroom and an equal number of students who testified that there was not. Affecting creditability of the District's case are several things. Some of what Conway-Gerhardt testified to that she learned during her investigation was not supported by the testimony of the students who were there. For example, she testified that students told her that Grievant discussed the size of his penis; JF testified only that a student put a penis remark in his oral report, not that Grievant discussed it. She interviewed 40 students, 10 parents and 2 teachers. And while the District hardly needed to call all these witnesses if they supported their case, the District's case would have been enhanced by further corroboration to some of the specific incidents. The absence of parental complaints other than the MT's and AF, I find startling if the conditions of sexual innuendoes, sexual bantering and grades on oral reports enhanced by sex comments were true. That parents expressed such outrage was never alluded to by Pardun, Valenti or Conway-Gerhardt. I do not believe parents today are reluctant to go to school administration and their school board to express their concerns. I do not accept that parents of these students did not do it for fear of retribution by Grievant toward their children. The District's retaliation policy afforded protection and not even the District found clear retaliation as one of the reasons for non-renewal. (Jt. 4)

It is possible that after sixteen teaching years of no complaints that Grievant would suddenly allow and engage in sexual harassment but it adds to the District's burden. I do not find the 1991 memo about classroom conduct and method of teaching to have anything to do with a warning about sexual harassment. Grievant worked on that memo with his superiors and creditably testified that there only had been complaints about his grading and curriculum. The similar memo in March of 2001 from Pardun was written without consultation with the Grievant and without Pardun ever evaluating Grievant or visiting his classroom; in fact, Pardun never viewed Grievant in a classroom setting until a week before Grievant's School Board non-renewal hearing. The reason this 2001 memorandum (D. 14) was sent by Pardun, as it had nothing to do directly with the student sexual harassment allegations, is a mystery. I can only surmise that Pardun sent it as some kind of subtle warning to Grievant that he should tighten down his classroom and that he was under attack. Progressive discipline, with involvement of the Association, might have been more effective. There is also no significant proof of any connectivity between the alleged sexual harassment and the D grades and the inability to learn.

On the issue of creditability, I find that there are creditability issues with the testimony for and against the Grievant. To decide this case I do not need to find conclusively that one group of witnesses was more creditable than the other. Reviewing this extensive record and testimony as a whole, I find that there is enough doubt regarding the alleged incidents, specific and general, that the District has not met its burden of proof to support a discharge.

The Association raises a disparate treatment argument. The District argues that a former teacher was fired by the District in 1994 for sexual remarks and sexual touching of a student. (D. 31 & 42) However, as these exhibits make clear in that case, despite more serious

conduct by that teacher, his initial discipline was suspension for the Fall semester of the 1994-1995 school year. The remark in the District's reply brief that the District only suspended pending State action is not supported by the record. That teacher was only discharged when the State of Wisconsin department of Public Instruction pulled his teaching license. In reality, the Department caused the firing of the teacher not the district. While the Association's argument has merit, I did not give it significant weight in making my decision and award. The facts as to the conduct are dissimilar and the individuals involved in the decision making are not the same.

Given the record as a whole I do not believe a discharge is warranted. I find troublesome that the District had to go back to the 2000-2001 school year and resurrect what I believe some in the administration of the District found to be a botched investigation into the allegations against the Grievant. I think it was reasonable for Grievant to assume that absent discipline and with his teaching contract being renewed for the 2001-2002 school year he started that school year with a clean slate. I believe this is supported by the uncontradicted testimony of Association representative Lois Gensen-Sanders that the first time the Grievant and the Association were aware of some of the 14 reasons for non-renewal on the Notice of Non-Renewal was when Grievant received the document. (Tr. 1324 & 1325)

The record evidence, hearsay testimony coupled with creditability issues make this a difficult case for the District to prove and the Association to defend. I do not believe that the District has proven just cause for the discharge of the Grievant; it has not convinced me that it has proven by clear and convincing evidence that there was just cause to warrant discharge.

However, I believe Grievant warrants discipline. The reason for this is my finding in several of the specific allegations that Grievant did not act professionally. It is not for me to make a decision on how Grievant teaches biology. Grievant testified that his teaching style and program is different, and he acknowledged that it has caused some problems with students and parents. Having an open and free-wheeling classroom may be an enlightened teaching style, but it does not and should not make students feel so comfortable that they know that no discipline will be suffered if they draw a penis on the blackboard. I give credence to enough of the testimony that a good deal of sexual banter went on between students and between students and Grievant. I do not accept that such banter went on in every classroom at the high school. It also seems apparent that there was less control in the classroom than there should have been and this could relate to the two exhibits in 1991 and 2001 that dealt with classroom standards. While Grievant may not have created a hostile learning environment to satisfy discharge, the classroom environment for which Grievant is responsible, was an environment that should have been corrected.

Therefore I believe and so find that the District could have imposed corrective discipline less than discharge and more than a warning letter and such reasonable discipline as a strong warning to the Grievant, is reflected in my remedy in this award.

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

AWARD

The District violated Article 4.19.3 of the collective bargaining agreement by non-renewing Grievant's teaching contract for other than just cause.

REMEDY

The Grievant's termination (non-renewal) will be modified to a thirty (30) teaching day suspension without pay. Grievant will be reinstated to his previous teaching position with the District effective with the commencement of the 2003-2004 school year, issued the appropriate teacher contract and receive backpay and benefits (lost as a result of Grievant's non-renewal of his teaching contract for the 2002-2003 school year), with the exception of the thirty (30) day suspension without pay.

JURISDICTION

The parties stipulated that I retain jurisdiction to resolve any disagreements on my remedy.

Dated at Madison, Wisconsin, this 30th day of May, 2003.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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