

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FOND DU LAC SCHOOL DISTRICT

and

FOND DU LAC EDUCATION ASSOCIATION

Case 61
No. 62026
MA-12130

(K__ M__ termination grievance)

Appearances:

Davis & Kuelthau, S.C., by **Attorney Mark F. Vetter** and **Attorney Daniel J. Chanen**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-3101, appearing on behalf of the District.

Ms. Lucy T. Brown, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708-8003 and **Mr. Armin Blaufuss**, Executive Director, WinnebagoLand UniServ Unit-South, P.O. Box 1195, Fond du Lac, WI 54936-1195, appearing on behalf of the Association and Grievant.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance. By agreement of the parties, the dispute was arbitrated pursuant to the grievance procedure provisions contained in their July 1, 2000 - June 30, 2001, agreement (Agreement).

Pursuant to notice, the grievance dispute was heard at the District's Administration Office on February 20 and 21, and March 6, 2003. The proceedings were transcribed. Submissions of initial and reply briefs were completed on May 13, 2003, marking the close of the hearing.

ISSUES

At the hearing the parties authorized the Arbitrator to decide the following issues:

1. Did the District have just cause pursuant to Art. VIII. Sec. A. when it dismissed K__ M__ from employment effective at the end of the day on November 27, 2002?
2. If not, what is the appropriate remedy?

PERTINENT AGREEMENT PROVISIONS

ARTICLE VIII - PERSONNEL POLICIES

A. Teacher Contracts

5. No teacher shall be dismissed or suspended without just cause.

BACKGROUND

The District is a K-12 public school district serving Fond du Lac, Wisconsin. The Association and District have been parties to a series of collective bargaining agreements covering the District's non-supervisory professional educators.

Prior to her discharge, the Grievant, K__ M__, had been employed by the District since 1990 as a teacher of severely cognitively disabled (CDS) students. Grievant worked with students ages 12-21 at the District's Woodworth School until being assigned, beginning in 1992-93, to work with elementary school students at Waters Elementary. She remained at Waters until she applied for and was granted a transfer to work in the CDS classroom at the High School beginning at the start of the 2001-02 school year, where she continued until the October 28, 2002 incident occurred that led to her termination. At the High School, Grievant's 2002-03 class consisted of seven students in the most profoundly disabled of the school's three categories of severely cognitively disabled students. As of October 28, 2002, Grievant was assisted by three paraprofessional Instructional Assistants, L__ K__, Barbara Floyd and Tara Pilak. L__ K__ had substituted for one of Grievant's Instructional Assistants during the spring of 2002, and when that employee left the District in mid-September of 2002, L__ K__ was assigned to replace her, at Grievant's request. Grievant's class shares its classroom with another class of CDS students taught by CDS Teacher Valerie Lenz. The District's seven evaluations of Grievant's work during her twelve-plus-year tenure (including one evaluation performed in June 2002) were all quite positive, with no significant problem areas noted, and no reference to any problems regarding mistreatment of students.

Grievant was disciplined on two occasions prior to her discharge. She was issued a verbal warning on January 26, 2001, for spitting at a student. Grievant did not grieve that warning, but she did include a response to it, explaining that, while alone with five students, she ultimately spit back at the student to stop the student who was persistently following her and repeatedly spitting in her face despite her unsuccessful efforts to stop the student from doing so in other ways. On May 23, 2001, Grievant was also issued a suspension without pay from March 15 - April 3, 2001, and a reassignment to a reading program for the balance of the year with her return to the reading program and to the classroom in 2002-03 variously conditioned on mental health professionals' clearances. That suspension was issued for conduct including "engaging in inappropriate and unacceptable acts involving students including . . . forcefully pulling students by their ears to get them to comply with your directions . . . forcefully pulling students by their hair at the base of their heads to get them to comply with your directions . . . [and] forcefully squeezing the back of a student's neck and leaving a red mark to get the student to comply with your directions. . . ." Grievant did not grieve that suspension, but she did attach to it her own and the Association's responses to it. Those responses, among other things, asserted that Grievant's decision not to challenge the suspension was for personal reasons and was not an acknowledgement that there were any bases for the District's accusations; that the Department of Social Services had investigated and found no basis for any action against Grievant in the matters; that the District's investigation was biased and unfair in various ways; that the District had failed to provide the Grievant with adequate assistance to provide the services Grievant was expected to provide to her students; and that the misconduct alleged was an accumulation of contentions about which the Grievant had never before been criticized or put on notice by the District.

On October 28, 2002, Grievant was suspended with pay pending a District investigation of the cause of an injury sustained by a student in Grievant's class on that day. The injured CDS student is referred to in this Award as "Student." By letter dated November 15, 2002, Acting Superintendent James Gryzwa wrote Grievant as follows:

The purpose of this letter is to advise you of the results of our investigation into injuries received by one of your students. Based upon that investigation, the District has concluded that you are the person who inflicted the injuries upon the student in question.

The investigation has established that on Monday, October 28, 2002, you intentionally and deliberately imbedded your fingernails into the neck of one of your students to get him to comply with your directive that he rise up off of the floor. Your fingernails left marks on the student's neck, some of which bled. When you were informed of the student's injuries by one of the instructional assistants, you did not report the injuries to anyone. Your conduct was unacceptable and will not be condoned. Your actions on October 28 have violated several Board of Education Policies, including but not limited to the following: Policy 1.4, 7.28, 10.1, 10.6, 10.610, 10.72 and 10.76. [text of the referenced Board policies is omitted].

During the 2000-2001 school year, you were twice disciplined for the mistreatment of students. For the first occurrence, you received a verbal warning. Later you received a two-week suspension without pay and a temporary reassignment because of additional multiple acts of student mistreatment, including acts similar in nature to your October 28 misconduct. One of the students you mistreated in 2000-01 is the same student you mistreated on October 28, 2002.

Your acts of misconduct on October 28, 2002, separately and in combination with your past acts of misconduct, constitute just cause for your immediate termination from employment with the District. Accordingly, on Tuesday, November 26, 2002 at 5:00 p.m., a hearing before the Board of Education will take place at which time I will recommend that the Board immediately discharge you from employment. . . .

If you wish to challenge the outcome of that hearing, you may do so under the Grievance procedure set forth in Article VII of the Master Agreement between the Board of Education and the Fond du Lac Education Association.

Finally, between now and the November 26, hearing, you will be suspended without pay for three days pursuant to Article VIII(A)10 of the Master Agreement. At all other times, you will remain on paid suspension pending the outcome of the November 26 hearing.

. . .

Following issuance of that letter, the District, Association and Grievant agreed to waive the Board hearing and process the matter at Step 3 (i.e., the Superintendent's level) of the grievance procedure. It was also agreed that if the Superintendent decided at the conclusion of the Step 3 grievance hearing to terminate Grievant's employment with the District, Grievant's employment would be considered terminated at the end of the day on November 27, 2002, and that Grievant could then proceed to binding arbitration.

The parties met on November 27, 2002, to conduct the Step 3 grievance hearing. The hearing was not completed that day and it was subsequently agreed that the Association could submit a written statement of the position of the Association and Grievant relative to the recommended termination. That Association statement, submitted by letter dated December 13, 2002, from Association UniServ Executive Director Armin Blaufuss, read, in pertinent part, as follows:

Effective at the end of the workday on Wednesday, November 27, 2002 the Fond du Lac School District terminated K__ M__. At issue is whether the

District had just cause pursuant to Article VIII of the Master Agreement to terminate K__ M__'s employment. On behalf of the Fond du Lac Education [Association] I assert the District did not have just cause.

The allegation that led to the District decision to terminate K__ M__'s employment was made by one of K__ M__'s instructional assistants. This assistant alleged that she saw K__ M__'s fingers in a pinching configuration before K__ assisted in lifting a CDS student from the floor at or near noon on October 28, 2002 in the CDS classroom at Fond du Lac High School.

From the Association perspective the following particulars, among others, must lead to the conclusion that K__ M__ did not do that which she is alleged to have done.

1. The assistant while stating that K__ M__'s hand was in a pinching configuration did not actually see a pinch.
2. At the time of the alleged pinch the assistant did not express any concern and further, did not look to see if there was any injury or marks.
3. Another teacher was also helping to get the CDS student up. She did not notice the pinching configuration nor did [she] notice anything unusual at the time of the alleged pinch.
4. While the assistant has asserted the alleged pinch occurred at or near noon, marks were not noticed on the CDS student's neck until at or near 2:30 p.m. The marks were first noticed by the same assistant who alleges she saw K__ M__'s hand in a pinching configuration at or near noon.
5. Mary Fran Merwin, Fond du Lac High School Principal saw the marks on the CDS student's neck between 2:35 p.m. and 2:45 p.m. on October 28, 2002. She described the marks as "fresh".

Based on the foregoing the District cannot meet its burden to prove that K__ M__ did what she is accused of doing. As such, the District does not have just cause to terminate K__ M__'s employment.

As remedy the District must

1. Immediately reinstate K__ M__;
2. Make K__ M__ whole for all lost wages and benefits;

3. Remove from K__ M__ 's personnel file and any other administrative files any reference to the incident that allegedly occurred on October 28, 2002;
4. Provide a teaching environment that is not hostile to K__ M__ 's continued employment with the District.

By letter to Blaufuss dated January 13, 2003, Gryzwa issued his Step 3 answer, which read, in pertinent part, as follows:

I have reviewed and considered your December 13, 2002 letter and the specific statements contained therein. After reviewing that information, it remains my belief that on October 28, 2002, Ms. M__ engaged in the inappropriate conduct summarized in my November 15, 2002 letter. Therefore, this letter will confirm that Ms. M__ 's employment with the District is terminated effective at the end of the day on November 27, 2002. If Ms. M__ disagrees with this decision, her recourse is to proceed to binding arbitration as set forth in Steps 5 and 6 of the Grievance Procedure in the Master Agreement.

The matter was then advanced to arbitration as noted above. At the arbitration hearing, the District presented testimony by its former Director of Personnel and Employee Relations, James Freeman, High School Principal Merwin, CDS Instructional Assistant L__ K__, CDS Teacher Valerie Lenz, Assistant High School Principal John Wiltzius, and Acting Superintendent Gryzwa, and rested. The Association presented testimony by the father of Student, Grievant, District Physical Therapist Linda Martinson, CDS Instructional Assistant Barbara Floyd (by telephone), Dr. Charles Wessels, M.D. (by telephone), and Association Representative Blaufuss, and rested. The District then presented further testimony by Merwin, concluding the evidentiary hearing.

Additional factual background is set forth in the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The District

The District has proven by clear and convincing evidence that the Grievant intentionally embedded her fingernails in the back of Student's neck when she induced him to get up off the floor. The record establishes: that Grievant has a pattern of using inappropriate and physically aggressive prompts with students when she is frustrated; that she has continued to use inappropriate physical prompts, e.g., the hair tug, even after she was specifically warned not to use the technique of tugging at the hair at the base of a student's neck; that the wounds on Student's neck looked exactly like fingernail marks were curved upwards toward Student's

hairline; that Student's body position and Grievant's hand position, during the October 28, 2002 incident of lifting Student off the floor, were consistent with the wounds found on the back of Student's neck; and that there was no other incident on the day in question which would have created the embedded fingernail marks on Student's neck.

The District reasonably credited L__ K__'s description of Grievant's hand position during Grievant's efforts to get Student to get up off the floor. L__ K__'s description of Grievant's hand position when attempting to get Student off the floor was consistent with the wounds on Student's neck. Lenz corroborated the details of L__ K__'s testimony about the incident. Grievant's version of the incident has materially changed over time, and it is inconsistent with Lenz' and L__ K__'s in various respects. In contrast, L__ K__'s version has remained consistent over time. There was no other incident during the day in question that could have inflicted the distinctive fingernail shaped wounds on the back of Student's neck. Grievant's conduct as described by L__ K__ is consistent with her prior inappropriate treatment of students. She was frustrated when she could not get Student to get up from the floor on October 28, 2002, and she has reacted inappropriately on prior occasions when she was frustrated with students not complying with her directions.

The Association has not presented evidence which undermines L__ K__'s credibility. Unlike the Grievant, who has an obvious interest in the outcome of the case, L__ K__ can and should be presumed credible where, as here, there is no showing that she had a motive to fabricate her story. On the contrary, L__ K__ and Grievant had a positive working relationship. The evidence concerning friction between Grievant and the Instructional Assistants in the CDS classroom is largely attributable to Grievant's relationship with Instructional Assistants other than L__ K__. L__ K__ was supportive of the Grievant in the October 16, 2002, meeting with supervisors to address on-going concerns Grievant had about communication and respect within her classroom. It is undisputed that Grievant requested that L__ K__ be assigned to Grievant's classroom when a former Instructional Assistant left her position. Indeed, L__ K__ testified that she thought of Grievant as a friend.

For those reasons, the Arbitrator should conclude that the District had just cause to terminate the Grievant as it did, and the grievance should be denied in all respects.

The Association

The District has failed to meet its burden to prove that Grievant intentionally dug her fingernails into Student's neck sometime shortly after noon on October 28, 2002. Other than the fact of wounds, the District's only evidence is the testimony of L__ K__, the Instructional Assistant who cared for and was responsible for Student throughout the day of October 28. The District claims L__ K__ should be believed, and not Grievant, because L__ K__ has no reason to lie, and Grievant has every reason to lie because she is the accused. The reasoning is very flawed. First, it assumes guilt on the part of Grievant; but if she was not guilty, she is

not lying. Second, the District's reasoning fails to recognize the fact that if Grievant did not cause the injury, the next most likely person to have caused the injury is L__ K__ because she was with Student all day. This does not mean L__ K__ necessarily caused Student's injury (perhaps Student did it to himself), but L__ K__ has a motive to throw blame on another. L__ K__ is not an uninvolved bystander.

Even L__ K__ agrees that she did not see Grievant pinch Student or do anything else inappropriate. Her later-embellished description of how Student jerked when Grievant placed a hand under his head is self-serving and contrary to the testimony of the other two witnesses, Lenz and Grievant. This circumstantial and unreliable testimony cannot establish proof that Grievant dug her fingernails into Student. The other evidence cited by the District — the location of the marks — does not support the District's case because such horizontal marks would not be made by the right hand of a person standing to the right of the head of a student lying down.

There is substantial evidence that Grievant was not the person who injured Student. Not only do the marks on Student's neck not correspond to a feasible position for Grievant's had during the lift, but the marks had characteristics that do not support the District's theory that the injury was inflicted two hours or more before it was first seen. In addition, the fact that the marks were not seen by any person for those two hours, despite Student having his head down on the table renders it highly questionable that the injury was inflicted at the time Grievant helped get Student up off the floor shortly after noon.

Finally, the "motive" that the District attempts to establish is nonexistent. The District says Grievant was frustrated because Student would not get up, and thus dug her nails into him to get him up. This scenario does not make sense for a number of reasons. Lenz had just come over to give assistance, both Lenz and L__ K__ were able to watch Grievant's actions, and Student was already complying with their directions in that his head was up before Grievant put her hands under his neck. Grievant was confronted with Student lying on the floor several times a day; there was no indication that this time was different than all the times before. Yet, the District alleges that Grievant's frustration got the better of her this time. The only way the District can "find" an answer to this inconsistency is to allege that Grievant's two prior disciplines demonstrate that she did and will mistreat students when frustrated. However, the past disciplines cannot and do not tend to show that Grievant engaged in the alleged October 28, 2002, misconduct at issue in this case. Especially so where, as here, District objections prevented the Association from submitting evidence that would have proven that she did not commit the misconduct for which she had previously been disciplined.

For the foregoing reasons, the Association requests that the grievance be granted and that the Arbitrator order the District to restore Grievant to her prior position with all lost pay, benefits and seniority restored.

DISCUSSION

The central question in this case is whether the District has proven Grievant guilty of intentionally and deliberately imbedding her fingernails into the neck of Student on October 28, 2002.

The Arbitrator agrees with the parties that it is appropriate to require the District to prove Grievant's guilt in that regard by clear and convincing evidence. The injury to Student was referred to and investigated by the Fond du Lac County Department of Social Services regarding possible physical abuse of a child. While that Department issued a February 11, 2003, determination that did not find that any abuse, as defined by the Wisconsin Children's Code, the misconduct of which Grievant is accused is clearly such as would make the clear and convincing evidence standard applicable here.

In the Arbitrator's opinion, the District has failed to meet that standard. At most the evidence shows that Grievant is one of several people, including Student himself, whose fingernails could have created the marks.

The various descriptions of the blood in Student's wounds and the alignment of the wounds in relation to where Grievant was standing when Student was assisted in getting up from the floor do not make it impossible for Grievant to have caused the wounds. No witness described the color of the blood as bright red. A dark red shimmering appearance, even in somewhat rounded shapes, would not be ruled out by the passage of time between shortly after noon and 2:15 p.m. While Grievant's position standing somewhat to the right of Student's head could have made it awkward for her to have caused the marks described in the record, that potential awkwardness does not altogether rule out the possibility that Grievant caused the wounds, either.

Nevertheless, upon consideration of the record as a whole, the Arbitrator concludes that the evidence does not clearly and convincingly prove that it was Grievant that caused the wounds. The Arbitrator's principal reasons for reaching that conclusion are as follows.

The physical nature of the injury persuasively indicates it was caused by a forceful contact between someone's fingernails and Student's neck area. Those fingernails could have been Student's. The marks are consistent with Student reaching over his head and digging his own nails into his neck. The evidence indicates that Student's behaviors sometimes include unpredictable conduct that threatens or causes harm to himself or others. Student's chronological age in October of 2002 was approximately 15, and his functioning or cognitive age was between one and two years. Student is physically imposing, standing about 6 feet tall and weighing approximately 320 pounds. Clearly, he is strong enough to have caused the wounds himself. He is nonverbal and not toilet trained, but he is able to move about without assistance. He has pinched and hit others at school. He has a tendency to lie on the floor and to refuse to get up when asked to do so, and he sometimes rolls around when he is on the floor, as well. Regarding Student's fingernails, Student's father testified as follows:

BY MS. BROWN:

Q Has [Student] ever hurt himself with his fingernails?

A He's probably bleeding right now. He scratches himself all the time. With this — this disorder that he has, it sometimes causes blemishes and different things and he's scratching all the time.

Q Do you know the condition of [Student]'s fingernails on October 28th, 2002?

A No. They probably were long. I'm the only one that cuts them.

Q Do you know —

A He doesn't let anybody else cut them.

Q Sorry. Do you know when — did you cut [Student]'s fingernails after October 28th, 2002 or shortly thereafter?

A Yes, shortly after, I did.

Q Were they long when you cut them?

A They grow like weeds. Yeah. I mean, three or four days and he's got to get them cut.

(Tr. 293)

In addition, the District's case depends heavily on the credibility and reliability of L__ K__'s testimony about the position of Grievant's hand at the time Grievant assisted in getting Student to get up off the floor.

The Arbitrator finds L__ K__'s credibility to be suspect. It is undisputed that Grievant specifically requested that L__ K__ be assigned to replace her Instructional Assistant who left the District in mid-September of 2002. L__ K__ testified that she and the Grievant were friends who had a good working relationship and that she had never had any disagreements or confrontations or problems of any kind with Grievant prior to October 28, 2002. (Tr. 125) However, that testimony seems quite at odds with L__ K__'s later testimony that when she discovered the marks on Student's neck, she chose not to follow what she says she knew was the standard procedure of showing the marks to Grievant because L__ K__ was afraid that Grievant would yell at her because (L__ K__ believed) Grievant had caused the marks. (Tr. 135) It also seems at odds with the statement L__ K__ testified that she made to Don Kohlman in connection with the marks on Student's neck to the effect of, "[Student]'s bleeding. Why do they keep letting her do this to these children?" (Tr. 135, 167)

Furthermore, the record as a whole establishes to the Arbitrator's satisfaction that despite efforts by Grievant to take charge of the Instructional Assistants and have them participate in the classroom activities as Grievant directed them, both L__ K__ and Pilak frequently continued to perform tasks as they chose rather than as directed by Grievant, and to not listen or pay attention when spoken to by Grievant; that Grievant attempted to talk with her Instructional Assistants, including L__ K__, to resolve some of the issues that were negatively affecting their relationship during the fall of 2002; and that when those efforts failed, Grievant sought the assistance of the administration. Thus, at a meeting on October 16, 2002, the Instructional Assistants, including L__ K__, were told by Merwin and/or Wiltzius that Grievant was the teacher and that the Instructional Assistants should follow her directions and that if issues arising in the classroom involving students should be taken up with Grievant and not the administration or students' parents. In the same meeting, Grievant was told that she needed to become a better leader so that the Instructional Assistants would follow her directions and would not need to complain to the administration about issues arising in the classroom. About a week later, when Merwin asked Grievant and her Instructional Assistants how things were going, the Instructional Assistants asserted that the situation between them and Grievant had improved. Grievant asserted that problems with the Instructional Assistants had not improved significantly following the October 16 meeting. Grievant specifically disagreed with L__ K__ and Pilak as regards whether there was still a lot of whispering going on behind others' backs and a lot of private conversations going on in the bathroom. (Tr. 462) Then, in the week prior to Monday, October 28, 2002, Grievant had occasion to verbally scold L__ K__ and Pilak for failing to follow her directions. (Tr. 465-66 and 481-82)

The Arbitrator also finds L__ K__'s reliability to accurately recall the physical circumstances on the date in question to be suspect. In that regard, L__ K__ testified that Student's hair was long, almost to his shoulders (Tr. 130) and that Student's hair covered the majority of his neck preventing L__ K__ from seeing the wounds when he had his head down on the table and she was standing next to him on the afternoon of October 28. (Tr. 154) Lenz, who routinely washes Student's hair, testified that Student's hair length was fairly short and not down to his shoulders. (Tr. 202-03) The photograph and witness drawings of Student's head and neck with Student's head bent forward (as it would have been on the table over which L__ K__ had been standing) all show the wounds lower on Student's neck than the ends of his hair and not covered by his hair.

The Arbitrator also finds it improbable that L__ K__ did not specifically look for a possible resultant injury within minutes of the time Grievant and Lenz assisted Student in getting up off the floor. If L__ K__ had in fact seen what she claims to have seen as regards the position of Grievant's right hand and fingers and the swinging of Student's head to his right at the time Grievant's right hand came into contact with his neck, and if she truly believed that Grievant was repeatedly harming children, one would expect that she would have taken the opportunities she had to promptly check to see whether Grievant's action had left any marks on Student's neck.

The Arbitrator also finds it improbable that Student's head swung as L__ K__ testified it did as he was getting up with Lenz' and Grievant's assistance. (Tr. 132) In her testimony about what she observed during the effort to get Student up off the floor, Lenz mentioned no such head movement, but rather described Student's getting up as "just one move." (Tr. 189) Lenz was facing Student and lifting him by his hands while her feet were in contact with his as a fulcrum.

The Arbitrator also finds it improbable that if the injury had occurred between noon and 12:30 p.m. that it would not have been noticed by L__ K__ or some other adult in the room prior to 2:15 p.m. L__ K__ was with Student for all but about 5 minutes of that time period. (Tr. 133) During some of a pumpkin carving activity, Student was seated with his head down resting on his arms on the table. (Tr. 152-53) L__ K__ was standing beside Student and Kohlman was standing with L__ K__ during the pumpkin carving, as well. However, no one called attention to any injury on Student's neck before L__ K__ did so around 2:15 p.m.

The District's case also depends heavily on the validity of its contention that the Grievant inflicted the injury because she became frustrated with the difficulties she was having in getting Student to get up off the floor. However, the Arbitrator finds it improbable that the circumstances leading to Grievant's touching Student's neck were such as would have resulted in the Grievant inflicting the injury because of frustration. Getting Student up from the floor was a task that Grievant performed daily. By the time L__ K__ claims that Grievant positioned her right hand in a pinching fashion, Lenz was directly involved in assisting Grievant to get Student up, and both Lenz and L__ K__ were in a position to observe at least generally what Grievant was doing. Those circumstances made it improbable that Grievant was sufficiently frustrated to resort to digging her fingernails into Student's neck to cause him to get up. Those circumstances also made it improbable that Grievant would engage in such an action because of the high risk of detection and possible adverse employment consequences.

In the context of the foregoing, the balance of the record evidence relied upon by the District also does not clearly and convincingly establish that Grievant caused Student's wounds. While all of the District's contentions have been considered in reaching that conclusion, three in particular are discussed below.

First, it is true that Grievant's October 31, 2002, drawing of the injury showing the curved injuries opening downward is inconsistent with those drawn by Merwin on October 28 and by L__ K__ on October 29, both of which showed the curved injuries opening upward toward the top of Student's head. Grievant's drawing is also inconsistent with Grievant's November 20, 2002 letter (Exh. 18) to Gryzwa in which she describes her initial reaction to seeing the wounds in her classroom as prompting her to comment to L__ K__ — before Grievant was aware of any accusation that Grievant had caused the marks — that Student "could have done it himself." For those reasons, among others, the Arbitrator does not find Grievant's drawing to be an accurate depiction of the wounds. Rather, the Arbitrator

concludes that the injuries did, in fact, open upward. However, because the drawing was not made as proximate in time to Grievant's viewing of the wounds as Merwin and L__ K__'s were, the Grievant's inaccurate drawing is not a sufficient basis on which to conclude that Grievant was deliberately falsifying her drawing to free herself from blame for causing the marks.

Second, it is also true that Grievant reacted to learning that L__ K__ had taken Student out of the classroom and had shown his wounds to Kohlman, by angrily criticizing L__ K__ for having done so and by directing her return with Student to Grievant's classroom. However, that reaction is just as persuasively explained as a rebuke for and correction of L__ K__'s disregard for a recent supervisory directives to take up issues arising in the classroom with Grievant, as it is an indication of guilty knowledge on Grievant's part.

Third and finally, it is also true that shortly after Grievant learned that she was being accused of injuring Student, Grievant told Lenz that Grievant had not been attempting earlier that day to use the hair tug prompt that Grievant had previously described and demonstrated for Lenz as a means she sometimes used for getting Student up off the floor. While that statement could reflect guilty knowledge on Grievant's part, it could also have simply been an innocent effort to identify any possible basis on which the District could mistakenly conclude that Grievant had caused Student's injury. In any event, the hair tug prompt Grievant had demonstrated to Lenz was a prompt, not a painful hair pull, such that it was materially different than digging fingernails into Student's flesh hard enough to leave marks with blood in them.

There remains the District's additional basis for the discharge, that Grievant "failed to report the injuries to anyone" when she was informed by L__ K__ of Student's injury. In that regard, the record shows that Grievant had no meaningful opportunity to report the injuries to the administration prior to the time that administration members were viewing the injuries for themselves. Grievant learned of the injuries from a brief hallway interaction with L__ K__, after which Grievant directed L__ K__ to return to Grievant's classroom with Student. Very shortly thereafter, Merwin and Wiltzius — in response to Kohlman's report of the injury to Wiltzius — arrived in Grievant's classroom and began to examine Student for themselves. In those circumstances, the record does not persuasively establish a wrongful failure on Grievant's part to report the injury.

Because the District has not sustained its burden of proving that Grievant was guilty of the misconduct charged in the District's suspension and termination letters, it follows that the District did not have just cause to discharge Grievant and that the discharge violated the Agreement.

Remedy

The Arbitrator has accordingly ordered conventional relief in the forms of reinstatement, back-pay and employment record expungement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The District did not have just cause pursuant to Art. VIII. Sec. A. when it dismissed K__ M__ from employment effective at the end of the day on November 27, 2002.

2. Unless the Association and the District agree otherwise, the appropriate remedy for the violation of Art. VIII. noted in 1, above, is that the District shall immediately:

a. offer K__ M__ reinstatement as a CDS Teacher at the Fond du Lac High School, with full restoration of her seniority and of other rights and privileges.

b. make K__ M__ whole, without interest, for the loss of wages and benefits she experienced by reason of the District's suspension and subsequent termination of her employment effective at the end of the workday on November 27, 2002, (with a set-off for interim earnings that Grievant would not have received had she not been suspended and terminated).

c. remove from K__ M__ 's employment record all references to the subject suspension and termination.

3. The Arbitrator retains jurisdiction for a period of 60 calendar days (and for such extension or extensions of that period as the Arbitrator may hereafter order) to resolve, at the request of the Association or District, any disputes that may arise between them regarding the meaning and application of the remedy ordered in 2., above.

Dated at Shorewood, Wisconsin, this 18th day of July, 2003.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator