

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SCHOOL DISTRICT OF MARINETTE**

and

**MARINETTE EDUCATION ASSOCIATION**

Case 56  
No. 62379  
MA-12260

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**Appearances:**

**James A. Morrison, S.C.**, 2042 Maple Avenue, P.O. box 406, Marinette, WI 54143-0406, appearing on behalf of Marinette School District.

**Stephen Pieroni**, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708-8003, appearing on behalf of Marinette Education Association.

**ARBITRATION AWARD**

Under the terms of their 2001-2003 contract, the Marinette School District and the Marinette Education Association jointly requested that the Wisconsin Employment Relations Commission assign me to serve as arbitrator to resolve a discharge grievance. Hearing was held in Marinette, Wisconsin on September 30, 2003. A stenographic transcript of the hearing was prepared. The parties filed post-hearing written argument -- the last of which was received January 29, 2004.

**ISSUE**

The parties agreed to the following statement of the issue:

Whether the School District of Marinette had just cause for the termination of JN from her employment as a teacher in the Marinette School District and, if not, what the appropriate remedy would be?

## DISCUSSION

On November 21, 2002, the District administration advised the Association that it would be recommending to the District Board of Education that JN be terminated. Following seven evenings of hearing, the District Board issued an Order which terminated JN's employment effective April 9, 2003. The Board's Order included formal Findings of Fact that JN had engaged in at least: (1) five forms of "physical abuse of students"; (2) six forms of "verbal abuse of students"; (3) three forms of "psychological/emotional abuse of students"; and (4) two forms of inappropriate "disciplinary action against students."

I begin with a consideration of the Association's "due process" contentions that the District lacked just cause to terminate JN because it: (1) relied on allegations that had previously been resolved in JN's favor or determined to warrant only a comment about "serious deterioration in job performance"; and (2) failed to give JN timely notice of other allegations.

The Association's first due process argument is that in a May 2002 letter, the District in effect advised JN that it would not be imposing any discipline in response to the allegations that had been made prior to the receipt of the formal complaint from JC's parents. In such circumstances, the Association argues that the District violated the just cause concept against double jeopardy by subsequently basing JN's termination upon some of these same allegations. I find this argument persuasive. The District correctly argues that, prior to the filing of the formal complaint against JN by JC's parents, resolution of a harassment complaint filed against JN by co-worker MKP had been the focal point of the District's efforts/investigation and was the primary subject of the May 2002 District letter upon which the Association relies. However, credible testimony by JN's accusers persuades me that District supervisors had received some allegations of abuse prior to the JC parent complaint and had taken no action against JN beyond noting a "serious deterioration in her job performance" in the May 2002 letter. Thus, as to the allegations which had been reported to the District prior to the JC parent complaint, I conclude the District cannot now rely thereon to support termination after having determined that a "serious deterioration" comment sufficed.

The Association's second due process argument is that allegations of misconduct first raised at the Board hearing should be dismissed because the lack of notice deprived JN of a meaningful opportunity to respond. I do not find this argument persuasive. As argued by the District, JN's recollection of all events was precise and the gaps between Board hearings gave the Association ample opportunity to investigate all allegations and respond. Thus, JN suffered no deprivation of due process as to these allegations. However, as again persuasively argued by the Association, to the extent these allegations are premised on evidence that the District possessed prior to May 2002 and took no action, said evidence, as noted in the preceding paragraph, is outside the scope of what I will consider when determining whether there was just cause to terminate JN.

Given the foregoing, the next step in my analysis is identifying those allegations upon which the Board made Findings that supported JN's termination which cannot now be considered because they had been reported to or observed by the District prior to the JC parent complaint and determined to warrant only a "serious deterioration" comment.

From the credible testimony of the accusing witnesses and from Principal Hayes' notes, I conclude that the following allegations (using the numbering and language found in the Board's Findings) were reported to or observed by the District and thus cannot now be considered as support for JN's termination:

1. (a) Placing JC's head under a chair and putting her feet on his back to hold him down.
  - (b) Sat on B, SH and JC.
  - (c) Pulled the hair of JI.
  - (e) Slammed SH into a chair.
- 2 (a) Stating in the presence of students that they disgust her.
  - (b) Made demeaning comments about SH in her presence.
  - (c) Constantly repeated derogatory comments about students (e.g., big fat liars) in the presence of students.
  - (f) Threatening to recommend returning a student to Bellin Hospital.
- 3 (c) Allowing K. to become very upset and distraught by allowing him to speak with his mother's boy friend after having been told not to allow such contact.
- 4 (a) Denied snacks to children in her room as a disciplinary measure.
  - (b) Denied lunches to children in her room (e.g. FK and JC) as a disciplinary measure.

I now turn to consideration of the remaining allegations.

As to these allegations, the Association raises a threshold argument regarding the level of proof needed to establish that the events in question occurred. Because JN (1) is an eleven year teacher with a good work record who (2) had to defend against allegations as to events that allegedly occurred many months earlier and because (3) some of the allegations

constitute child abuse, the Association argues that a “clear and convincing” standard is appropriate. I do not find this argument persuasive. The parties’ contract does not express differing standards of proof for different types of conduct or employees and, as indicated earlier herein, I am persuaded that the passage of time did not negatively impact JN’s ability to defend herself. In such circumstances, I conclude that it is the contractual intent of the parties that I do no more or less than to weigh all of the evidence presented and then make a determination as to whether the events in question occurred. I have done so.

**Allegation 1(c) - Pulled the hair of JC.**

From the credible testimony of JC, I conclude that JN did grab JC’s hair to keep him from moving away from her. This constitutes significant misconduct by JN.

**Allegation 1(d) - Pinched the nose and stepped on the feet of K.**

The evidence presented is not sufficient for me to conclude that JN did more than hold K’s nose in response to K’s pinching her nose. Thus, I reject this allegation as being a valid basis for discipline.

**Allegation 2 (d) - Constantly repeated obscenities and profanities used by a student in the presence of the student and other students.**

JN admits this allegation. The Association argues that this conduct does not warrant discipline because JN had not received notice that this practice was not an acceptable educational technique. I reject this Association argument. While the evidence establishes that JN repeated the obscenities and profanities back to the student who has used them as part of an effort to provide the student with alternative words by which to express anger, the evidence also establishes that JN used this “technique” for extended periods of time and in front of other students. Thus, even assuming the dubious premise that a single repetition only to the student in question could be viewed as an acceptable technique, extended repetition in front of other students cannot.

**Allegation 2 (e) - Yelling at students inappropriately.**

From the credible testimony of JC, I conclude that JN did yell at students from time to time. There is insufficient evidence to establish that such yelling was inappropriate in the context of any student behavior that was occurring.

**Allegation 3 (a) - Intentionally provoking JC into misbehaving and then punishing him.**

From the credible testimony of JC, I conclude that JN did on occasion provoke JC and then punish him. This constitutes significant misconduct by JN.

**Allegation 3 (b) - Deliberately upsetting JC by unnecessarily exposing him to books showing human body parts.**

The evidence presented is not sufficient to persuade me that JN “deliberately” upset JC through use of books showing human body parts.

As is evident from the foregoing, I found the testimony of JC to be the critical credible evidence of JN’s misconduct. When considering his credibility, I gave full consideration to his admitted propensity to lie on occasion and to the possibility that his testimony was influenced by his parents and their pending lawsuit. However, particularly because JC admitted to certain misconduct of his own (such as use of profanity) and did not recall or support all of the alleged misconduct that involved his interactions with JN, I found his testimony as to the misconduct discussed above to be credible.

In summary, of the allegations upon which I have concluded the discharge can appropriately be based, I have found that the record evidence substantiates the allegations of holding JC by the hair, provoking JC, and using obscenities. By the slimmest of margins, based in large part on JN’s length of service and prior good record, I conclude that this serious misconduct does not establish just cause for JN’s discharge. However, given the severity of the misconduct, JN’s reinstatement is without back pay. Should JN engage in any such misconduct again, her immediate discharge will be contractually appropriate.

Dated at Madison, Wisconsin, this 23rd day of August, 2004.

Peter G. Davis /s/

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Peter G. Davis, Arbitrator