

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GRANTSBURG SCHOOL DISTRICT

and

NORTHWEST UNITED EDUCATORS

Case 23
No. 63685
MA-12673

Appearances:

Christopher R. Bloom, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of the Grantsburg School District.

Melissa Thiel-Collar, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, appearing on behalf of Northwest United Educators.

ARBITRATION AWARD

Grantsburg School District, hereinafter referred to as the District, and Northwest United Educators, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the suspension without pay of an employee. Hearing on the matter was held in Grantsburg, Wisconsin on December 1, 2004. A stenographic transcript of the proceedings was prepared and received by the Arbitrator by December 16, 2004. Post-hearing written arguments and reply briefs were received by the Arbitrator by February 18, 2005. Full consideration has been given to the testimony, evidence and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties were unable to agree upon the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

“Did the District violate the collective bargaining agreement when, on March 22, 2004, it placed the Grievant on unpaid leave effective March 9, 2004?”

“If yes, what is the appropriate remedy?”

PERTINENT CONTRACTUAL PROVISIONS

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Article II – Board Rights

The Board shall have the right to discipline, terminate, or deny professional advantage to any employees covered by this agreement for just cause. Without limiting the rights of NUE, and subject to the laws and constitution of Wisconsin and the United States, it is expressly recognized that the Board’s operational and managerial responsibilities includes the following:

. . .

- G. The right to enforce the rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this agreement.

- H. The right to direct and manage the working forces in the system, including the right to hire, suspend, discharge, discipline, or transfer employees.

. . .

GRANTSBURG SCHOOL DISTRICT FACULTY HANDBOOK

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Principle I: Ethical Conduct Toward Students

The professional educator accepts personal responsibility for teaching students character qualities that will help them evaluate the consequences of and accept the responsibility for their actions and choices. We strongly affirm parents as the primary moral educators of their children. Nevertheless, we believe all educators are obligated to help foster civic virtues such as integrity, diligence, responsibility, cooperation, loyalty, fidelity and respect - for the law, for human life, for others, and for self.

The professional educator, in accepting their position of public trust, measures success not only by the progress of each student toward the realization of his or her personal potential, but also as a citizen of the greater community of the republic.

...

4. The professional educator makes a constructive effort to protect the student from conditions detrimental to learning, health, and safety.

...

BACKGROUND

The pertinent facts are not in dispute in this matter. Mr. Mark Peterson, hereinafter referred to as the Grievant, has been employed by the District as a Speech and Language Pathologist for over twenty-five (25) years serving students in grades 4-12. Prior to the instant matter the Grievant had a clean disciplinary record, was regarded as a good teacher and had received overwhelmingly satisfactory performance evaluations. On February 10, 2004 a guardian for a former student came to the District and requested to talk with the student's former teacher, Kathy Bowers. The guardian informed Bowers that sexual contact had occurred between his son and the grievant while the son had been a student attending the District. The student had graduated from the District in May of 2001 at the age of twenty-one (21). The guardian alleged that his son had been spending the night at the Grievant's house, going to movies and on shopping trips with the Grievant. The guardian also alleged that sexual contact had occurred between the Grievant and his son beginning when his son was seventeen (17) and still a student. Bowers informed District Administrator Joni Burgin of the matter. Burgin contacted the Department of Social Services, who began an investigation into the matter. Burgin also contacted the Sheriff's Department and the District Attorney. Burgin was informed that criminal charges were pending. Burgin next contacted the District's legal counsel and then requested the Grievant meet with her.

At the hearing Burgin testified that the Grievant informed her during a forty-five (45) minute meeting on February 11, 2004 that he had participated in sex with the former student on January 30, 2004. Burgin also testified the Grievant also informed her that the former student and he had a prior consensual sexual relationship. At the conclusion of the meeting the District Administrator placed the Grievant on administrative leave with pay pending the outcome of charges in the investigation. On March 8, 2004 the Grievant was charged with Second Degree Sexual Assault alleging the Grievant had sexual intercourse with the former student on January 30, 2004, that the former student suffers a mental deficiency that renders the former student temporarily or permanently incapable of appraising the person's conduct, and, that the Grievant knew of the former student's condition.

On March 12, 2004 the District Administrator was provided a copy of the criminal charge filed against the grievant. On March 17, 2004 a local newspaper published an article concerning the charge, identifying the Grievant and the fact the Grievant worked for the District. On March 23, 2004 the Grievant was notified by the District he was being placed on unpaid leave without pay, effective March 9, 2004, pending an investigation into the criminal charges filed against the Grievant. The Grievant was also informed the unpaid suspension would last until resolution of the criminal charges and the District's investigation. During the unpaid leave the District would continue to pay for the Grievant's insurances.

The instant grievance was filed on March 26, 2004 and processed to arbitration in accord with the parties' grievance procedure. The Grievant was found not guilty at the criminal trial on September 29, 2004.

DISTRICT'S POSITION

The District contends it was informed one of its teachers had a sexual relationship with one of its students. The District argues it was unaware of this relationship until the student's guardian informed the student's former teacher and the District Administrator. The District avers the Grievant admitted the relationship and admitted the relationship had progressed to involve sexual contact. The District points out these facts were confirmed by the Grievant during his testimony at the criminal trial. The District contends that given the criminal charges, as well as the information provided by the former student's guardian and the Grievant, that the District had information which provided for a level of disciplinary action to be taken. The District asserts the alleged conduct, conduct that was partially admitted to by the Grievant, could jeopardize student safety. The District argues to further complicate matters the District was practically prevented from obtaining more information due to the criminal process.

The District contends the Union assertion that the District could have spoken to the former student or to the Grievant is mere speculation, speculation contrary to the Grievant's criminal attorney's advice and the Grievant's constitutional rights. The District acknowledges it may have been able to obtain more information than contained in the Sheriff's interviews, but argues the information was not contrary to what the District had been provided already by the Grievant. The District argues that it could not conduct a complete investigation without interfering with the criminal process.

The District also argues that because the parties' have not defined "just cause" it consists of two elements, misconduct of the employee and contractually appropriate discipline. The District also argues that the penalty imposed by an employer should not be set aside unless the action was arbitrary, capricious, discriminatory or excessively severe in terms of all relevant circumstances. The District avers that a penalty should be set aside only when it has been shown the employer abused its discretion in some way. In effect, the District must have acted in a reasonable manner. The District argues that arbitrators have generally held that imposed discipline must be reasonable, not excessive, arbitrary or capricious and a showing that the conduct occurred.

The District asserts there can be no dispute what conduct occurred at the time the District made its decision to place the Grievant on unpaid leave. The District contends the question before the Arbitrator is whether placing the Grievant on an unpaid leave pending resolution of criminal charges and a full and complete investigation is reasonable under the circumstances. The District concludes that its actions were reasonable.

The District argues applying the above standard entails an analysis of fairness. The District asserts fairness in the context of just cause includes the concept of due process. The District contends an unpaid leave of absence or suspension is not a deprivation of due process when fringe benefits are maintained, when the leave of absence is subject to a subsequent investigation and hearing for the employee to present their case, and when a potential remedy includes full back pay and reinstatement. In support of its position the District points to GILBERT V. HOMAR, 520 U.S. 924 (1997). Therein the Court held taxpayers do not have to bear the burden of paying an employee whose services are not useful due to the employee being charged with a felony. The Court also held the Constitution does not require the Employer to bear the added expense of hiring a replacement while still paying the employee. The District concludes that based upon due process concerns, an unpaid leave of absence for an employee charged with a felony is appropriate.

The District argues based upon known facts the Grievant's services were no longer useful to the District at a minimum. At worst, the Grievant's services were a danger and potential liability to the District and students. At best, the District did not have all the information to complete its investigation. The District avers it did not make a final decision concerning the Grievant on March 23, 2004, merely deciding it would await the results of the criminal matter and its own investigation to render a final decision. The District contends the taxpayers should not be required to bear the full burden of paying the Grievant while the charges are pending.

The District also argues that given the fact the Grievant may receive back pay the District questions whether the unpaid suspension is even a disciplinary action. However, the District stresses the unpaid suspension, at a minimum, is appropriate when an employee has been charged with a felony of such a serious nature as sexual assault toward a student.

The District further argues this is not a situation created by the District and the instant matter is not a mere performance issue. The District avers the Grievant had been warned of the importance of ethical conduct toward students. The District also argues even the Grievant, given his twenty-five (25) years as a special education teacher, would acknowledge the severity of such alleged conduct, especially toward students who are deemed to be deserving of a higher level of protection and education. The District points out the allegations were of conduct that endangers students and subjects students to potential predatory behavior from a figure that otherwise must be trusted. The District avers the allegations entail a severe breach of trust, one that would have severe ramifications for other students. The District concludes it was placed in a position where it was required to take measures to protect students.

The District also contends this is not a situation where the normal steps of progressive discipline were appropriate. The District also contends termination of employment was not appropriate because the District did not have complete information and the District was prevented from conducting a full and complete investigation due to the on-going criminal process. Given the above the District concludes there was just cause for a temporary unpaid leave of absence. The District also concludes the Grievant must bear a portion of the financial burden for conduct towards a student that resulted in criminal felony charges.

UNION'S POSITION

The Union contends the District has the burden to establish just cause for its decision to suspend the Grievant indefinitely. The Union argues that even under the lowest standards of proof it is evident the District lacked just cause to strip the Grievant of his pay status and to place him in such a situation indefinitely. The Union acknowledges that the Grievant informed the District Administrator when they met on February 11, 2004 that he was under a criminal investigation for sexual contact with the former student. However, the Union stresses that despite the District Administrator's knowledge the guardian was alleging the sexual relationship had commenced while the former student was still attending the Grantsburg School District, the District Administrator did not ask the Grievant whether this allegation was in fact true. The Union also argues that nothing the Grievant stated during the meeting on February 11, 2004 would lead to a conclusion that the Grievant had a sexual relationship with the former student while the student was a student in the Grantsburg School District.

The Union stresses that between February 11, 2004 and March 23, 2004 neither Burgin nor any other District official conducted an investigation into the allegations being raised by the guardian or being investigated by the Sheriff's Department. The District did not talk directly to the former student nor was the Grievant given an opportunity to respond to any of the allegations. The Union also points out the District did not attempt to meet with any individuals who may have information regarding the allegations. The Union points out the District did not attempt to get a copy of the Sheriff's Department's investigation or attempt to obtain any information from the Sheriff's Department or the District Attorney regarding the substance of the investigation. The Union also points out that no complaints by other parents were received by the District nor did any parents request to have their children removed from the Grievant's instruction.

The Union points out the Grievant was charged with one count of sexual contact that was alleged to have occurred on January 30, 2004, almost three (3) years after the former student graduated from the District. The Union points out that the Grievant was not charged with having sexual contact while the former student was a student in the District nor did the Department of Social Services charge the Grievant with having sexual contact with the former student when he was a student in the District.

The Union also points out that neither the Grievant nor the Union was informed that the Grantsburg School Board would be considering the Grievant's employment status at the March 23, 2004 School Board meeting. The Union argues neither the Union nor the Grievant

were allowed to address the School Board on this issue. The Union stresses that the Grievant was not informed of the duration of his suspension and stresses that even though the Grievant was found not guilty on September 30, 2004 he remains on indefinite unpaid suspension.

The Union argues that the District's actions violate the time honored principles of labor law and the common notion that an accused is innocent until proven guilty. The Union also argues the District's reliance on GILBERT v. HOMAR is misplaced because the Grievant herein is, unlike GILBERT v. HOMAR, protected by a just cause provision of a collective bargaining agreement. The Union also argues that if the District wanted to rely on as a defense the filing of the criminal charge, once that charge was disposed of by a finding of not guilty, it was required to abide by the resolution of that charge and it has not done so.

The Union also contends the District failed to conduct a fair and objective investigation prior to placing the Grievant on indefinite suspension and the filing of the single criminal charge was insufficient to establish just cause. The Union argues the District cannot circumvent the just cause standard by alluding to a parade of unsupported accusations. The Union asserts that the District's indefinite unpaid suspension is discipline and argues discipline is corrective action intended to penalize an employee for misconduct and for the purpose of correcting that conduct. The Union, pointing to Burgin's testimony that Burgin believed the Grievant violated several policies of the District, including the District's Teacher Code of Ethics and the District's sexual harassment policy, argues the District disciplined the Grievant for being charged with a criminal offense and to protect the District's educational system from the adverse effects of a public accusation and arrest for a serious crime of this nature. The Union contends the District's actions are subject to the parties' just cause provisions.

The Union further stresses that Burgin acknowledged that the Grievant was never provided with what conditions need to be met in order for him to return to work nor has the Grievant been informed as to the duration of the suspension. The Union argues that the Grievant has been placed in a state of unpaid limbo. The Union also contends that the District's contention that the Grievant has not been disciplined and that the District will address this deprivation at the conclusion of the criminal matter is an unsustainable contention. The Union argues the basic notion of just cause does not permit the District to act as judge and jury, impose a penalty, and then make a decision at a later date as to whether the penalty is proper. The Union concludes that the District has in effect taken the position of guilty until proven innocent.

The Union avers GILBERT v. HOMAR does not apply to the instant matter. Therein the matter involved a constitutional question, the employee was not protected by a just cause provision, and does not involve the application of a collective bargaining agreement. The Union argues the just cause provision provides the Grievant with due process rights irrespective of the Grievant's constitutional rights. The Union concludes to hold otherwise would render the just cause standard meaningless.

The Union also argues that GILBERT v. HOMAR requires a prompt post-deprivation hearing. Such a hearing would limit the employee's lost income. The Union stresses in

GILBERT V. HOMAR only a total of twenty-eight (28) days lapsed before a final disposition on discipline was made by the employer. The Union points out at least eleven (11) months have lapsed herein and no final disposition had been made. The Union avers this is not a prompt time frame.

The Union also stresses that unlike GILBERT V. HOMAR there is no objective corroboration leading to the District's actions. The Union argues given the District's failure to conduct any modicum of an investigation makes GILBERT V. HOMAR inapplicable.

The Union also contends that at a minimum when the Grievant was found not guilty the District was required to place the grievant in a paid administrative status or was required to return him to work with back pay. The Union stresses the Grievant was found not guilty by a jury and still remains on indefinite unpaid suspension, despite the District's assertions that the suspension was due to the filing of a criminal charge. The Union points out the District argued it was awaiting the result of the criminal trial to determine what to do about the Grievant. The criminal trial concluded on September 30, 2004 and the Union asserts the District can not have it both ways, suspend the Grievant because of the criminal charge, and, disregard the disposition of that charge and keep the Grievant on indefinite unpaid suspension.

The Union also contends the District lacked just cause to suspend the Grievant without pay. The Union points out the District did not conduct any investigation. The Union argues the District acknowledged this when it informed the Grievant it was placing him on suspension without pay pending an investigation into the criminal charges filed against him. The Union also argues the actions the District took between February 11, 2004 and March 22, 2004 fall far short of any notion of due process under just cause. The Union contends no reasonable effort was made by the District to conduct a fair investigation. The Union argues industrial due process require the District to investigate the matter as fully as possible prior to making a disciplinary decision.

The Union also argues the filing of a criminal charge does not constitute just cause to place the Grievant on indefinite unpaid suspension. The Union asserts any penalty must fit the crime. Factors to be analyzed are the seriousness of the offense, the magnitude of the harm caused, frequency of the offense and the impact on other employees. The Union stresses that the only event that occurred between February 11, 2004 and March 22, 2004 was the filing of a single criminal count alleging sexual contact between the Grievant and a former student. The Union avers this in and of itself does not constitute just cause for indefinitely suspending the Grievant without pay.

The Union does not dispute that teachers occupy a position of high visibility and are often held accountable to greater standards than other public employees. The Union also acknowledges that some out of school conduct may affect classroom fitness. However, the Union argues the District contention that because the criminal charge has a direct link to the Grievant, the District has cause to indefinitely suspend the Grievant assumes too much. The Union avers this contention assumes the Grievant engaged in the alleged conduct or it alleges

the Grievant “groomed” the former student while the student was enrolled in the District. The Union argues there is no evidence to support this contention and there was no such evidence when the District took action. The Union points out Burgin acknowledged the Grievant never told her that he had contact with the former student when he was a student. The Union also stresses the Grievant had not been charged for having sexual contact with a student nor is there any evidence the Grievant will be charged for such an offense.

The Union also points out there is evidence that the Grievant had sexual contact while the former student was a student nor is there any evidence that the Grievant had any sexual contact with a student. The Union also points out there has been no showing by the District that the criminal charges filed against the Grievant negatively affected the Grievant’s ability to perform his duties. The Union asserts mere speculation that the criminal charge may adversely affect the Grievant’s ability to work with students, parents or fellow teachers is not enough carry the District’s burden, especially given our jurisprudence fundamental concept that the Grievant was presumed innocent. The Union also argues one newspaper article cannot establish a public outcry justifying the District’s actions. The Union also points out the article was published on March 31, 2004, after the District took its action.

The Union also argues the District has not demonstrated that the only way the District could protect its educational system was through an unpaid suspension. The Union asserts the District must be able to demonstrate keeping the Grievant on the job would have an adverse impact. The Union does not suggest the Grievant should have been kept in the classroom pending resolution of the criminal matter. Rather, absent an investigation, and absent providing the Grievant with an opportunity to rebut all allegations, the Union contends the Grievant should have been placed in paid leave status.

The Union would have the Arbitrator sustain the grievance and direct the District to return the Grievant to paid administrative leave and to make him whole for all lost wages.

DISTRICT’S REPLY BRIEF

In its reply brief the District argues the Union’s assertions that the Grievant should have been allowed to continue teaching or allowed to continue the paid administrative leave pending resolution of the criminal charges are not reasonable. The District argues the Union argument fails to recognize the matter received substantial publicity in the major newspaper for the region. The District also argues that the Union argument fails to recognize that in a small community news spreads via word of mouth. The District contends the fact of the matter is that the matter was well known, received publicity and parents would have complained had the Grievant been allowed to continue teaching.

The District also argues that the Union attempt to characterize the Grievant’s unpaid leave of absence as indefinite fails to recognize that leave of absence was merely deferential to the rights of the Grievant, his representation, and the victim in the criminal process. The District contends this deferential should not be held against the District.

The District also argues that if the Grievant would have been willing to participate in a full investigation he would have attended the arbitration hearing. However, the District argues the Grievant did provide information to the District and in so doing admitted to the conduct alleged to in the criminal charges.

The District also argues that it offers GILBERT V. HOMAR in support of a finding that an unpaid leave of absence is not a deprivation of due process. The District argues that coupled with its investigation and the Grievant's admissions, the District provided more due process than was necessary under GILBERT V. HOMAR.

The District does not dispute it did not have all the facts necessary to make a decision. The District argues it was prevented from doing so. The District merely asserts that it had sufficient facts to support some level of discipline which was contingent upon a full investigation and which entailed the Grievant not teaching. The District concludes given the Grievant's admission of this conduct, coupled with the victim's allegations, and the criminal charges there was just cause for some level of discipline.

The District again asserts the question for the Arbitrator was whether the discipline was arbitrary, capricious or unreasonable. The District contends the discipline was reasonable because it was temporary, contingent upon a further investigation, and the financial aspect was shared between the Grievant and the District. The District argues it struck the proper balance between the Grievant's burden and the taxpayer's burden while the criminal matter was resolved. The District concludes that just cause existed and the grievance should be denied.

UNION'S REPLY BRIEF

The Union asserts the District's contention that the Grievant admitted to having sexual contact with the former student while he was a student is not supported by the record. The Union argues a sexual relationship did not occur while the former student was a student. What the Grievant did acknowledge was that sexual contact occurred three years after the former student graduated, on January 30, 2004.

The Union also stresses the Grievant was not charged with having sexual contact with the former student when the former student was a student.

The Union also argues that before the Arbitrator can determine whether the imposed discipline was arbitrary, capricious or discriminatory, the Arbitrator must determine whether the process the District used to impose discipline was fair and objective. The Union argues just cause requires some notion of industrial due process.

DISCUSSION

There are certain basic facts in the instant matter that are not in dispute. There is no dispute that the Grievant had sexual contact with a former student on January 30, 2004. The

Grievant admitted to this during his meeting with Burgin. There is also no dispute that on January 30, 2004 the former student was twenty-three (23) years old. There is also no dispute that the Grievant was properly placed on paid administrative leaving pending the filing of criminal charges and the District's investigation. The record also demonstrates that the former student's guardian alleged a sexual relationship commenced prior to the former student's graduation.

A single criminal charge was filed against the Grievant alleging he had sexual contact with a person who suffers from a mental deficiency that renders that person temporarily or permanently incapable of appraising the person's conduct. The criminal charge does not allege any sexual contact occurred while the former student was a minor or while the former student was enrolled in the District. The criminal charge states the Grievant acknowledged he had sexual contact with the twenty-three (23) year old and that the Grievant had had sexual contact with the twenty-three (23) year old in the past.

A newspaper article was introduced by the District. However, this article, published on March 17, 2004, was very limited. The article identified the Grievant, the charge filed against the Grievant, and that the Grievant was on administrative leave. A second newspaper article, published on March 31, 2004, was introduced at the hearing by the District that identified the Grievant, the charge leveled against the Grievant, the fact the Grievant worked for the District, the fact the sexual contact was with a twenty-three year old individual, and, that on March 22, 2004 the fact the District had placed the Grievant on unpaid administrative leave. The Arbitrator notes here, as the Union has pointed out, one newspaper article does not constitute a public outcry or demonstrate substantial publicity. Nor is there any evidence that any parent, teacher, co-worker, or member of the public contacted the District about this matter. While Grantsburg is a small community and news may spread via word of mouth, had the District maintained the Grievant on paid leave taxpayers may have taken notice. However, even in Grantsburg, people understand your innocent until proven guilty. In this matter we will never know because the District choose to act before the public could respond.

The District has argued that it was prevented from investigating the instant matter due to the criminal investigation. The Arbitrator finds no merit in this argument. There is no evidence the District attempted to contact the Grievant, the twenty-three (23) year old former student, or the former student's guardian, to obtain additional information. There is no evidence the Burnett County Sheriff's Department or the District Attorney informed the District it was interfering with a criminal investigation. In effect the District choose to wait until the criminal process was complete before taking any further action.

The criminal process was complete on September 30, 2004 when the Grievant was found not guilty of the charge filed against him. Although the District alleged at the hearing that additional charges may be filed against the Grievant, such an allegation is mere speculation. There is nothing in the record to demonstrate why the District had not commenced and completed its investigation in this matter prior to the hearing in this matter on December 1, 2004.

In support of its contention that it was reasonable to suspend the grievant without pay the District has relied on GILBERT V. HOMAR. The Court therein allowed the employer to impose an unpaid suspension because criminal charges had been filed against the employee. However, in GILBERT V. HOMAR, after charges against the employee, a police officer at a university, were dismissed, the employee received full back pay. The charge was filed on August 26, 1992. The criminal charge was dismissed on September 1, 1992. The employee met with the employer on September 18, 1992. The employer rendered its disciplinary decision on September 23, 1992. The Court, taking into account the promptness of the employer's actions, concluded the employee's constitutional rights were not violated. The Court balanced a brief pay loss with the public's concern of having a drug felon on a university police force. While the employee was subsequently demoted to a groundskeeper for having made certain admissions to the police concerning the purchase of marijuana, the employee received full back pay at his previous rate of pay as a police officer.

Herein we have no promptness. The Grievant was charged on March 8, 2004 and was found not guilty on September 30, 2004. As of December 1, 2004 the District still had not completed its investigation. Given the Grievant works a school calendar, seven (7) months is not a brief pay loss. Further, given the not guilty verdict, the Grievant is not guilty of having sexual contact with a person who is mentally deficient. Given the above, the Arbitrator finds it was unreasonable for the District to continue the Grievant's unpaid leave of absence and it is unreasonable for the District not to make the Grievant whole for all lost wages.

The Arbitrator notes here that an allegation of sexual contact between a teacher and a student is a serious allegation. However, as the Union pointed out, although Burgin met with the Grievant for over forty-five (45) minutes, Burgin never asked the Grievant if the sexual relationship had started when the twenty-three (23) year old former student was still enrolled at the District. Thus, while the Grievant acknowledged he had a sexual relation with the former student on January 30, 2004 and acknowledged he had prior consensual sexual relations with the former student, Burgin never asked when the relationship started. Thus, contrary to the assertions of the District, the only admission by the Grievant was that he had a consensual sexual relation with a former student. There is nothing in the record that would indicate that Burgin even informed the Grievant of the guardian's allegation.

The Arbitrator notes here that two published articles, while identifying the Grievant, does not identify the twenty-three (23) year old and does not state that the twenty-three (23) year old was a former student of the Grievant and had attended Grantsburg School District. The District, citing GILBERT V. HOMAR, noted the Court stating:

“If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him...” Id. At 932.

The Arbitrator finds the District has a burden to demonstrate that the Grievant's services were no longer useful. While the Arbitrator acknowledged that an allegation of sexual contact

between a teacher and student is a serious allegation, the Grievant was not criminally charged with sexual contact with a student as the District claimed in its brief. The Grievant was charged with having sexual contact with a twenty-three (23) year old that was alleged to be mentally deficient. The criminal charge, in and of itself, does not demonstrate that the Grievant was a danger to students. The criminal charge raises an issue concerning sexual contact between adults and whether one (1) of the adults is mentally capable of entering into such a relationship. Thus the Arbitrator concludes that the District has failed to demonstrate that the filing of the criminal charge rendered the Grievant's services no longer useful. While the District was aware that the guardian had alleged the sexual relationship between the Grievant and the former student had commenced when the former student was still enrolled in the District, and while there was testimony on this matter at the Court proceedings, this was not a criminal allegation raised in the Court proceedings.

The Arbitrator also notes that *GILBERT V. HOMAR* dealt with the question of whether a public employer violated the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee. Herein, the question is not whether the Grievant's constitutional rights were violated but whether the collective bargaining agreement's just cause provision has been violated. The District has argued that because the suspension was not permanent and a criminal charge was filed against the Grievant a lesser standard of arbitrary, capricious or reasonableness should be applied. The Arbitrator finds no merit in this argument. The collective bargaining agreement provides the District can discipline employees for just cause. Herein the Grievant was suspended without pay. Such an action is clearly disciplinary and subject to the just cause provision of the collective bargaining agreement. In effect the District is arguing some suspensions are subject to the just cause provision and some suspensions are not. Such a conclusion would add to the collective bargaining agreement and the Arbitrator does not have the authority to add to the collective bargaining agreement.

The Arbitrator finds nothing improper in the District's placing the Grievant in a paid leave of absence when it became aware of the allegations filed by the Guardian and prior to concluding its investigation. Such an action is reasonable given the District's responsibility to protect its students given the fact the allegation raised the question as to whether there was sexual contact between a teacher and student. However, the filing of the criminal complaint, as noted above, raised an issue concerning the conduct of the Grievant and an adult who was alleged to be mentally deficient. The criminal complaint did not raise an issue concerning the Grievant's actions with a student. The criminal complaint did not raise an issue concerning when the relationship between the former student and the Grievant began. Reasonably, the District could have attempted to complete its investigation into the allegation raised by the guardian. If the grievant, the Union or the county officers processing the criminal matter thwarted the District in its attempt to investigate the matter the District would have a defense for its actions. Mere speculation that it would be thwarted in its investigation is insufficient to render the District's actions reasonable. Reasonably, the District could have continued the paid suspension until the criminal matter was resolved. However, because the criminal complaint was limited to the actions between two adults, the Arbitrator finds it was

unreasonable for the District to discipline the Grievant by placing him on unpaid leave prior to completing its investigation into the guardian's allegations.

Therefore, based upon the above and forgoing, and the arguments, evidence and testimony presented, the Arbitrator concludes the District violated the collective bargaining agreement when it placed the Grievant on unpaid leave. The District is directed to make the Grievant whole for all lost wages.

AWARD

The District violated the collective bargaining agreement when, on March 22, 2004, it placed the Grievant on unpaid leave effective March 9, 2004. The District is directed to make the Grievant whole for all lost wages.

Dated at Madison, Wisconsin, this 13th day of April, 2005.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

