

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FALL RIVER EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF FALL RIVER

Case 14
No. 63851
MA-12729

(Steven Sauer Non-Renewal)

Appearances:

Lucy T. Brown, Legal Counsel, Wisconsin Education Association Council, on behalf of the Fall River Education Association.

Lathrop & Clark, Attorneys at Law, by **Shana R. Lewis**, on behalf of the School District of Fall River.

ARBITRATION AWARD

The School District of Fall River, hereinafter the District, and the Fall River Education Association, hereinafter the Association, jointly requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the parties could select an arbitrator to hear and decide the instant dispute. The undersigned, David E. Shaw, was selected to arbitrate in the dispute. Hearing was held before the undersigned on November 4 and November 6, 2004 in Fall River, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by February 22, 2005.

Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties agreed there are no procedural issues, but could not agree on a statement of the substantive issues and agreed the Arbitrator will frame the issues to be decided: ¹

The District proposed the following statement of the issue:

“Did the Fall River School District have good reason to non-renew the individual teaching contract of Steve Sauer in order to issue him a reduced contract in the areas in which he was certified when Mr. Sauer had advised the District that he had no intention of taking the necessary credits in order to renew his emergency license in English for the 2004-2005 school year?”

The Association proposed the following statement of the issue:

“Did the Fall River School District have just cause to non-renew the teaching contract of Steven Sauer for the 2004-2005 school year?”

For the reasons discussed below, the Arbitrator concludes that the following states the issue to be decided:

Did the District have good reason to non-renew the teaching contract of Steve Sauer for the 2004-2005 school year?

CONTRACT PROVISIONS

The parties' 2001-2003 Agreement provides, in relevant part:

ARTICLE II

MANAGEMENT RIGHTS

The Fall River School Board retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the terms of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly and unequivocally restricted by the express terms of the Agreement.

These rights include, but are not limited by enumeration, to the following rights:

¹ As will be discussed below, there is an issue as to whether the parties' 2001-2003 agreement or 2003-2005 agreement applies in this case.

1. To direct all operations of the school system;
2. To establish and require observance of reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees in positions within the school system;
4. To suspend, discharge and take other disciplinary action against employees;
5. To lay off employees from their duties because of lack of work or any other reason;
6. To maintain efficiency of school system operations;
7. To take whatever action is necessary to comply with State or Federal law; or to comply with State or Federal agency decisions or orders;
8. To introduce new or improved methods or facilities;
9. To select employees, establish quality standards and evaluate employee performance;
10. To contract out for goods or services;
11. To determine the methods, means and personnel by which school system operations are to be conducted;
12. To take whatever action is necessary to carry out the functions of the school system in situations of emergency;
13. To determine the educational policies of the school district;
14. To determine non-teaching activities, within the school day pursuant to past practice;
15. To determine the means and methods of instruction, the selection of textbooks and other teaching material, and the use of teaching aids and class schedules.

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ARTICLE III

GRIEVANCE PROCEDURE

...

If a grievance is submitted to arbitration, the parties shall request the Wisconsin Employment Relations Commission to appoint an arbitrator.

The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the Board contrary to an express provision of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way. The arbitrator shall have no authority to impose liability upon the school district, school board or

administration arising out of facts occurring before the effective date or after the termination of this Agreement. The decision of the arbitrator within the scope of his/her authority shall be final and binding upon the Board, the Association, and the teachers.

...

ARTICLE V

TEACHER EMPLOYMENT POLICIES

A. The Association recognizes the legal obligation of the Board to give to each teacher employed by it a written notice of renewal or refusal to renew his/her individual contract for the ensuing school year pursuant to Section 118.22(2) of the Wisconsin Statutes.

B. Teacher Personnel Defined – The term “Teaching Personnel” is defined according to the state certification code. Only degree teachers will be hired.

C. Contract Specifications:

1. It shall be the responsibility of the teacher to keep his/her file up to date.
2. No teacher will be assigned outside his certified area.
3. Proof of actual change in contract status must be furnished to the Superintendent prior to October 1 of the year for which the contract is issued. No contracts will be altered after October 1 regardless of any later change in status.

D. Teacher Assignment:

1. The Board retains the right to make grade, subject and activity assignments as necessary in the best interest of the district as long as the assignment(s) are within the certification limitations of the teachers.

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2. The teaching contract shall state the subject area and extra duties to be assigned. If changes become necessary, the teacher shall be notified as soon as possible, preferably before school begins.

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E. Teacher Dismissal and/or Non-Renewal of Contract.

1. Any teacher being considered for possible dismissal shall be notified by the administration; said teacher then has recourse as outlined by the State Statutes.
2. After being employed in the district for three (3) years, no teacher shall be disciplined or non-renewed without good reason. A preliminary notice of non-renewal will be given to the teacher by the last day of February and a notice of non-renewal will be sent by March 15.

...

G. Layoffs.

1. The date of May 15th has been established for notification of layoff commencing on the last day of the current school year.
2. If necessary to reduce the number of employee positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Teacher layoffs will be by area of certification in which they are currently working, with the teachers having greatest seniority within their area being retained; provided however that the teachers remaining are capable and qualified as demonstrated by their past ability and performance to perform the necessary services remaining. No teachers may be prevented from securing other employment during the period he/she is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. Teachers shall be eligible for recall for 15 months from the date of layoff. No new or substitute appointment may be made while there are laid off teachers available who are qualified to fill the vacancies. The teacher shall be notified at their last address (on file in the office) of an available position. The teacher shall have ten (10) days to accept or reject the contract offer. If the position is rejected, the reemployment rights shall be lost.

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ARTICLE XIV

TERMS OF AGREEMENT

- A. The provisions of this Agreement will remain in force until superseded by a new Agreement.
- B. Individual contracts will be written according to this Agreement in effect for the school year immediately proceeding the summer sessions.
- C. If any Article or part of this Agreement is held to be invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or part should be restrained by such tribunal, the remainder of the Agreement shall not be affected thereby and the parties shall enter into immediate negotiations for the purpose of arriving at a mutually satisfactory replacement for such Article or part.

The terms of this Agreement covering the fiscal year of July 1, 2001 through June 30, 2003, were agreed upon by the Board of Education on December 19, 2001 and ratified by the Fall River Education Association on December 12, 2001.

The parties' 2003-2005 Agreement provides, in relevant part:

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TEACHER EMPLOYMENT POLICIES

...

- E. Teacher Dismissal and/or Non-Renewal of Contract.
 - 1. Any teacher being considered for possible dismissal shall be notified by the administration; said teacher then has recourse as outlined by the State Statutes.
 - 2. After being employed in the district for three (3) years, no teacher shall be disciplined or non-renewed without just cause. A preliminary notice of non-renewal will be given to the teacher by the last day of February and a notice of non-renewal will be sent by March 15.

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The terms of this Agreement covering the fiscal year of July 1, 2003 through June 30, 2005, were agreed upon by the Board of Education on _____, _____ and ratified by the Fall River Education Association on _____.

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BACKGROUND

The Grievant, Steven Sauer, is a former member and president of the District's School Board and is currently employed in the District as a teacher. Sauer was on the Association's bargaining team until February of 2004, when he resigned from that position. Sauer has a law degree, Bachelor of Science degrees in Economics, Extension Education and Agriculture Education, and an Associate of Science degree in Business Management. At the time of his hire, Sauer was certified to teach Economics, History, Agriculture and Broad Field Social Studies. Prior to being hired in Fall River, Sauer had worked as an ombudsman for the Wisconsin Department of Agriculture, Trade and Consumer Protection, had been a lecturer at Madison Area Technical College, and a lecturer in English and American Studies at a provincial teachers' college in China and a substitute teacher in Taiwan.

Sauer was hired as a teacher in October of 1999 by the District. An English teacher had resigned after the start of the school year and Sauer was hired to teach History, Advanced Composition, English, Speech, Introduction to Composition and Literature. The District requested that the Wisconsin Department of Public Instruction (DPI) issue Sauer an emergency license to teach English, as he was not certified in English. The request was granted.

DPI requires that a school district demonstrate that it attempted to hire a licensed teacher and that, despite those efforts, it has no licensed teacher available to teach in the field in question, before DPI will issue an emergency license. To renew an emergency license, the

teacher must have completed six semester credits in an approved program toward full licensure in that field between the date the license was issued and August 31st of the year in which it expires.

The District requested a renewal of the emergency license for the 2000-01 school year. The request was granted and Sauer's teaching assignments included American Literature, History, English, Speech, Introduction to Composition and Literature. This continued for the 2001-2002 school year and the 2002-2003 school year.

In January of 2003, Heidi Schmidt, the present District Administrator, and Sauer met to discuss the difficulty he was having finding courses he could take toward English certification. Schmidt summarized their conversation in the following memorandum:

Date: January 20, 2003

To: Steve Sauer

From: Heidi Schmidt

RE: Summary of conversation on 1-17-03

The following is a summary of our conversation from 1-17-03. You discussed the difficulty you are having completing the certification in English. You stated that you had 3 credits in Writing and 8 credits in Literature, plus Student Teaching and another course (which I don't remember). Your concern is that these classes are held during the day when undergraduates can attend. You also stated your concern that the DPI would not issue you another emergency license, as you would not complete the 6 credits required. You also shared your desire to continue to teach English. Finally, you shared that the UW has not been flexible in accommodating your situation.

You had mentioned possible alternatives:

1. Teaching classes other than English (Agriculture, Business Law, Political Science, Tutorial/remedial)
2. Bumping a less senior person in the department
3. Part time teaching/part time administrative contact, which you would be assigned to teach English classes
4. If you received a less than full time teaching contract, you would need to look for other work

Our conversation concluded with the following:

1. You would contact Tony Evers to see what his suggestions are
2. You would check out all non-traditional offerings from various universities to see if you can get the certification.
3. We would read the language in the Master Agreement relative to bumping.

** As I reviewed the Master Agreement, I did not find language relative to bumping.

I reference you to p. 7(C)(1)(2)-Contract Specifications. “It shall be the responsibility of the teacher to keep his/her file up to date. No teacher will be assigned outside his certified area.

I also reference p. 7(d)(1)-Teacher Assignment – “The Board retains the right to make grade, subject and activity assignments as necessary in the best interest of the district, as long as the assignment(s) are within the certification limitations of the teachers.”

Finally, I reference p. 9(G)(2)-Layoffs – “If necessary to reduce the number of employee positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Teacher layoffs will be by area of certification in which they are currently working, with the teachers having greatest seniority within their area being retained; provided however that the teachers remaining are capable and qualified as demonstrated by their past ability and performance to perform the necessary services remaining. No teachers may be prevented from securing other employment during the period he/she is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. . . .

Let me know if there are other areas in the Master Agreement which pertain to your situation and answers to the above.

In February of 2003, Sauer wrote to and e-mailed Peter Burke at DPI inquiring about alternative methods of obtaining certification in English and the possibility of obtaining “alternative certification” in English and provided his background.

In March of 2003, Schmidt e-mailed DPI regarding Sauer’s difficulty in finding a college that offered English courses outside of the school day and asked what options were available in such circumstances that would permit the District to obtain a renewal of his emergency license to teach English. DPI responded that the college would have to verify the classes were not available to Sauer due to the schedule conflict. Schmidt passed the e-mails on to Sauer with a note that he should get written statements from the colleges that the classes were not available to him.

Schmidt and Sauer met on March 13, 2003 to discuss the situation. Schmidt summarized the meeting in the following e-mail of that date:

Steve. The following is a summary of our meeting of 3-13-03:

1. You will check to see what Cardinal Stritch can provide for you.
2. I will contact a source I have at DPI to plead the case.
3. Think about hs at risk.

H. Schmidt

Schmidt testified she could not recall who had brought up the subject of an "At Risk" program in the meeting.

By e-mail of April 4, 2003, Burke responded to Sauer's February inquiry regarding alternative means of obtaining certification in English. In it, Burke stated, in relevant part:

Steven – thank you for your letter and message. Sorry it has taken so long to reply. The circumstance now is as it has been – an individual needs the certification of a college or university to qualify for a license. It has always been true that the college has flexibility in its review of individual student's work; but that rarely occurs. The first opportunity for a true performance based alternative license is with the effective date of PI 34, July 1, 2004. Hopefully at that time situations like yours will have a better resolve.

Sauer forwarded Burke's e-mail to Schmidt on April 8, 2003.

On April 24, 2003, Sauer e-mailed Schmidt proposing an "at-risk" program in the District. Schmidt responded with the following e-mail:

Steve,

I did receive your proposal. I am waiting to hear what you found out from one university you were checking with for English certification.

The way the schedule is looking the at risk will not be part of your schedule for next year. There does need to be a plan in the future.

I will be meeting with a university person and DPI person on May 14 relative to licensing and will bring your scenario up. My network tells me PI34 will not be mandated; therefore no flexibility in teacher licensing.

You will need to pursue your English certification for next year or get the letter from the university that says you are unable to take courses due to their/your schedule.

If you have questions, please contact me.

Heidi Schmidt
District Administrator

By e-mail of May 29, 2003, Sauer informed Schmidt he planned to get letters from Cardinal Stritch and Marian Colleges and the UW-Madison, and appeal to DPI.

Sauer did not take any English courses during the 2002-2003 school year and did not complete the required six credits toward certification in English during the summer of 2003. He did complete courses in AP Economics and AP History. Sauer was ill and was in and out of the hospital that summer. Sauer had been informed by the University of Wisconsin School of Education and by Marian College that the English courses he needed were only offered during the school day during the school year and were not offered in the evening or during the summer. In August of 2003, Schmidt submitted a request for renewal of Sauer's emergency license to teach English courses for the 2003-04 school year, along with letters from those institutions indicating the courses were not available in the evening or during the summer. On October 31, 2003, DPI granted the request for Sauer's English license, but indicated the following:

Since you did not complete the required six credits during the 2002-03 school year, this license could be renewed IF you complete at least nine credits by August 31, 2004 in a program leading to licensure. I suggest that you contact UW-Madison or other colleges with a state-approved program in English (only a minor will be required if your college is willing) and find out if there is course work available online or if you could complete course work at one college and transfer it into the college where you are completing a state-approved program.

Cc: Heidi Schmidt
Fall River Schools

On November 21, 2003, Schmidt and Sauer discussed his obtaining an emergency license to teach English for the 2004-2005 school year. That same day, Schmidt sent Sauer the following memorandum:

Date: November 21, 2003

To: Steve Sauer

From: Heidi Schmidt

RE: Summary of today's conversation

Thank you for coming to speak with me about your emergency English license renewal for 2004-2005.

You stated that you would not have the 9 credits by August, 2004, as you did not have the motivation or means by which to take the credits. (According to your search, no required courses are offered during the times you would be available 2nd semester or over the summer.)

Therefore, it is my understanding that you will not be licensed to teach English for the 2004-2005 school year.

Schmidt and Sauer met on December 18, 2003 and at that meeting exchanged memoranda regarding the situation. Sauer responded to Schmidt's November 21, 2003 memorandum with the following:

To: Heidi Schmidt

12-18-03

Fr: Steve Sauer

This is in reply to your memo of Nov. 21, 2003 re: "Summary of today's conversation", the topic of which was an emergency English license renewal for 2004-05.

To clarify, I came to speak w/you about the license in response to the request noted at the bottom of my evaluation/observation report sheet of Nov. 17. But I also came in part to give a "heads up" that some thought might be given to a contingency plan in the event I was not able to secure appropriate English certification for the 2004-05 school year. That doesn't mean I have given up obtaining the certification. As of this moment, I am certified to teach English 9-12 and eligible to renew that certification. I am not motivated to take the nine credits suggested in the Oct. 31, 2003 correspondence from Mark Schwingle of DPI because it would not be possible w/o taking a leave from my position at FRHS during semester II of the present school year. I do plan to contact Mr. Schwingle, Dr. Zeitner at UW-Madison and persons at a number of other certifying schools in an effort to develop an alternative means to meet the DPI prerequisites. I was under the impression that that was what PI34 is all about.

On a different but related matter, I know you know the course offerings in physical science, social studies and English at FRHS are limited exclusively to survey courses. We do not offer second level courses intended to go beyond bear (sic) information. We have no Modern History, Third World History, advanced (or AP) History, Ancient Civilization, Political Science (including Civics and Law). The U.S. Constitution is worth a semester by itself, or the Bill of Rights for that matter.

In English there are no Women Writers courses, no Ethnic Writers, or a class in Shakespeare or Joyce where students can go beyond the survey courses and really experience the fun of knowing a subject well.

We offer general Biology, general Chemistry, general Physics and Physical Science.

Having been a board member for many years, I realize the difficulty FRHS has offering a small number of students a wide range of choices, even on a rotating basis. The point has been reached, however, where the lack of breadth and depth is hurting FR students vis-à-vis students from other area schools.

Also at that meeting, Schmidt gave Sauer the following letter of the same date:

Dear Mr. Sauer:

The School District of Fall River employs you for the 2003-2004 school year as a high school teacher. Since the 2000-2001 school year, you have been assigned to teach two high school English classes in addition to other courses you teach in the high school. You were required to secure a one year Emergency license for the 2003-2004 school year in order to teach the two high school English courses. You submitted the appropriate paperwork; however, you failed to take the six credits required to renew the English license. In October 2003, the Wisconsin Department of Public Instruction issued to you an Emergency license, retroactive to July 1, 2003, which will allow you to teach high school English during the 2003-2004 school year. However, according to DPI, you need to complete nine credits by August 31, 2004, in order to renew this license for the 2004-2005 school year.

On or before February 1, 2004, the Board must have written certification from a college or university and the Wisconsin Department of Public Instruction to confirm that you have registered for the nine credits to be completed by August 31, 2004.

If the information requested is not provided, the Board will be forced to issue you a non-renewal notice in order to reduce your contract and re-issue to you a part-time teaching contract with the District because of these issues related to certification. If you know now that you do not intend to complete the required credits on or before August 31, 2003, (sic) please provide such information to me as soon as possible, so as to allow the District to begin planning for the 2004-2005 school year. Finally, if the information requested is provided by February 1, 2004, your current contract will be renewed for the 2004-2005 school year.

Thank you for your prompt attention to this matter.

Sincerely,

Heidi A. Schmidt /s/
Heidi A. Schmidt
District Administrator

By letter of January 29, 2004, the Association's representative, UniServ Director John Horn, responded on Sauer's behalf to Schmidt's letter of December 18, 2003. In that letter, Horn questioned the need for Sauer to confirm he was registered for nine credits in English as he was currently certified to teach English, and if his assignment for the 2004-2005 school year was reduced, that would constitute a layoff and he would have bumping rights; also, notice for layoff would be by May 15th, rather than February 1st. Horn also asserted that non-renewal would constitute discipline without just cause, and indicated the Association objected to the District making a unilateral and arbitrary change in the manner the District assures its teaching staff are certified for their assignment.

Schmidt responded to Horn's letter with the following letter of February 9, 2004:

Dear Mr. Horn:

I write in response to your January 29, 2004, letter regarding Steve Sauer's teaching contract for the 2004-2005 school year. For the 2003-2004 school year, Mr. Sauer is under an emergency license in order to be certified to teach the classes to which he has been assigned. His emergency license allows him to teach the two High School English classes which are part of his assignment. Mr. Sauer failed to take the six (6) credits required to renew this licenses for the 2003-2004 school year. Notwithstanding, the Wisconsin Department of Public Instruction (DPI) issued him a waiver for the 2003-2004 school year, with the understanding that he would secure nine credits by August, 2004.

As a result of these certification problems, on December 16, 2003, the District advised Mr. Sauer that he needed to submit written confirmation from a college or university and DPI that he registered for the nine credits to be completed by August 31, 2004. In the same letter, the District advised that the Board will be forced to issue Mr. Sauer a non-renewal notice in order to reduce his contract and re-issue him a part-time teaching contract with the District because of these issues related to his certification.

Despite your assertions, the District's actions do not constitute a layoff under Article V, Section G of the 2001-2003 Master Contract between the School District of Fall River (District) and the Fall River Education Association

(Association); the District is not reducing the number of employee positions or the number of hours in a position. Nor do the District's actions constitute discipline with or without cause under Article V, Section E of the Agreement. To the contrary, the District is merely addressing a problem with a teacher's certification.

I hope this answers your questions regarding the District's actions related to Mr. Sauer's teaching contract for the 2004-2005 school year. While the District has imposed a deadline of February 1, 2004, for Mr. Sauer to submit proof of his efforts to become fully certified for his position for the 2004-2005 school year, the District would be willing to accept such proof any time before the final notice of non-renewal is issued to Mr. Sauer.

Please contact me if you would like to discuss this matter further.

Sincerely,

Heidi A. Schmidt
District Administrator

Horn testified that he, Sauer and another English teacher, Ethan Jahnke, subsequently met with Schmidt, and Principal Brad Johnsrud in mid-February of 2004 to discuss options regarding the situation with Sauer's English certification. Several options were discussed. One was to have an American Studies class with a combined curriculum of American literature and American history, with Jahnke certified to teach the former and Sauer certified to teach the latter. Another option was for Sauer to still get his certification to teach English. According to Horn, it was also during this meeting that the issue of Sauer's lack of certification to teach an Environmental Science class first came up, with Schmidt indicating that DPI had contacted her in that regard. Schmidt had received an e-mail from DPI on February 13, 2004 stating that a teacher licensed in Agriculture cannot teach a course as part of the science curriculum for science graduation credit.

Schmidt testified that by that time she did not believe Sauer would be able to obtain the nine credits in English he needed by August 31, 2004 to have the emergency license in English renewed. Schmidt further testified that Sauer did not give her any indication that he was going to pursue or obtain certification in English.

By letter of February 26, 2004, the District's Board of Education gave Sauer preliminary notice that it was considering non-renewal of his teaching contract for the 2004-2005 school year "based on issues related to your English certification." A March 9, 2004 draft of the 2004-2005 schedule listed Sauer as teaching only Economics and History.

On March 10, 2004, Sauer had a private conference with the Board regarding the non-renewal of his teaching contract. At that conference, Schmidt submitted documentation to support her recommendation that Sauer be issued a notice of non-renewal and a teaching contract only for the areas in which he is certified to teach. She also indicated that Sauer had been asked to agree to extend the non-renewal timelines, but had rejected that offer. Schmidt also indicated in that document that the non-renewal was not based on poor teaching performance. Sauer testified that he took the position that he would attempt to be licensed in English for the 2004-05 school year and that he also attempted to propose other options if he were not licensed.

By the following letter of March 12, 2004, Sauer was notified of the Board's decision:

RE: FINAL NOTICE OF NONRENEWAL

Dear Mr. Sauer:

Pursuant to Wis. Stat. §118.22(2) and Article V, Section E, 2., of the 2001-2003 Master Contract between the Board of Education and the School District of Fall River and the Fall River Education Association, the Board of Education of the District hereby gives you notice that the Board took formal action on March 10, 2004, to refuse to renew your employment contract with the District for the 2004-2005 school year, for the purpose of reducing your teaching assignment because of issues related to your certification. **Please understand that this action has nothing to do with your performance.**

Thus, pursuant to this action, which was adopted by a majority vote of the full membership of the Board, your current employment contract with the District will not be renewed. However, enclosed please find the teaching contract, reduced to those areas in which you will be certified to teach for the 2004-2005 school year, that the Board voted to offer to you for the 2004-2005 school year. Please sign the enclosed contract and return to the District Administrator's office **on or before April 15, 2004.**

Furthermore, if **on or before April 15, 2004**, you provide the District Administrator with written certification from a college or university and the Wisconsin Department of Public Instruction (DPI) to confirm that you will be able to complete the necessary credits by August 31, 2004, and that you will be able to secure a license, provisional or otherwise, from DPI which will allow you to teach the same two English classes you are currently teaching for the 2003-2004 school year, the Board will issue you a full-time teaching contract.

Sincerely,

David Brozek /s/
David Brozek, President
Board of Education

cc: District Administrator Heidi Schmidt
John Horn, TRUE

Sauer grieved his non-renewal.

On March 22, 2004, Sauer e-mailed the U.S. Education Department regarding the easing of qualification requirements and copied Schmidt on the e-mail. He e-mailed DPI as well in this regard, and Schmidt offered to use her contacts to find out more information for Sauer.

Sauer testified that subsequent to receiving the non-renewal notice, he sent letters to all of the 31 certifying institutions in Wisconsin inquiring about the possibility of obtaining certification in English or Environmental Science and as to what they required in that regard. Sauer advised Schmidt he had done this. Of those colleges, two colleges, including Edgewood College, offered the possibility of obtaining certification based upon prior education and work experience without having to take further coursework. Sauer pursued certification in English through Edgewood College; however, he did not inform the District's representatives that he was doing so.

On April 15 and 16, 2004, Sauer met with Principal Brad Johnsrud to discuss his non-renewal grievance. Sauer did not inform Johnsrud of his application for an English license through Edgewood or provide documentation that he would be licensed to teach English for the 2004-05 school year. On April 22, 2004, Johnsrud responded to Sauer's non-renewal grievance, denying the grievance on the basis that Sauer did not provide documentation that he would be licensed to teach "the subjects in question" in 2004-2005.

Sometime in April of 2004, Edgewood sent Sauer a license application form, which he completed. According to Sauer, he was assured orally by representatives of Edgewood that his application would be approved, but had nothing in writing. On April 22, 2004, Edgewood approved Sauer's application, on which it confirmed he had successfully completed the College's program to teach English in grades 6-12. According to an e-mail of May 12, 2004 from DPI to Schmidt, DPI received Sauer's application for licensure in English from Edgewood on April 28, 2004 and the license was issued, but without specifying the date it was issued.

On May 4, 2004, Sauer and Horn met with Schmidt and Johnsrud to discuss his grievance regarding his nonrenewal. Sauer concedes he did not tell Schmidt at that meeting that he had applied to DPI for an English license through Edgewood or of the status of the

application. He further testified, however, that he did not have an opportunity to do so, as Schmidt began the meeting by asking questions that he and Horn viewed as being “hostile” and the meeting ended after Horn “jumped in” and objected to the questions. Sauer testified that he did not learn DPI had approved his licensure until May 6, 2004. He indicated that after Schmidt’s letter to him of December 18, 2003 regarding his possible non-renewal, he no longer felt she was trying to help find a solution to his situation, and that later he felt she was unhappy with him for positions he had taken and concerns he had expressed in negotiations as part of the Association’s bargaining team.

According to Sauer, on May 6, 2004 he learned that DPI had accepted and approved his application for licensure to teach English. On May 7, 2005, Sauer informed Johnsrud that he was certified to teach English. Johnsrud relayed this information to Schmidt. Schmidt checked with DPI to verify that Sauer was certified in English and questioned how he could be certified without taking the coursework. DPI verified Sauer was certified in English.

By letter of May 10, 2004, Schmidt notified Sauer she was denying his grievance and summarized their meeting. She also acknowledged Sauer was now certified to teach English.

On May 12, 2004, the Board met to consider Sauer’s contract. At that meeting, Sauer was offered a 75% contract for the 2004-05 school year to teach Social Studies and English or a 100% contract as part of a grievance settlement that would also require him to obtain a license to teach Environmental Science in 2004-05. There was a grievance pending regarding the assignment of Sauer to teach Environmental Science. The District had changed its curriculum to make Environmental Science a required science class students must take. This change required that the teacher of the course be certified to teach science. Sauer had previously taught the course before the District made it a required science course. The administration was initially unaware the change would require a teacher certified to teach science to teach the course and apparently after learning this had still wanted Sauer to teach the class, which would require his obtaining that certification.

Sauer rejected the Board’s offers and on June 16, 2004 his non-renewal grievance was heard at the Board level. At that meeting, Schmidt opposed granting the grievance, arguing that when she had met with Sauer and Horn on May 4, 2004, he had not informed her of what he was doing to obtain certification and had admitted he had not even looked at UW-Madison’s schedule of classes to see if there were evening classes he could take, nor did he ask the District to accommodate him so he could take such classes. Horn testified that at the end of that meeting, in which the Board offered Sauer an 87.5% contract, the Association’s legal counsel, Lucy Brown, asked the Board President why the Board was only offering Sauer a 7/8ths contract and was told that it was because Sauer did not have the Environmental Science certification and that the Board had not been aware of that when it had non-renewed him.

By letter of June 18, 2004, the Board’s President notified Sauer that the Board denied his grievance, but was offering him an 87.5% contract to teach three sections of high school Social Studies, two sections of high school English, one study hall and one prep period and

enclosed the contract. Sauer signed and returned the contract to teach 87.5% for the 2004-05 school year. In July of 2004, the parties reached a settlement of Sauer's Environmental Science grievance.

The parties were unable to resolve their dispute, and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

District

The District first asserts that the Arbitrator must apply the "good reason" standard contained in the parties' 2001-2003 Agreement in evaluating the District's decision to non-renew Sauer's contract. While there is no generally-accepted view of what is meant by "good reason" as a standard for discipline or non-renewal, one can determine what the parties intended in agreeing to such a standard by reviewing decisions interpreting similar standards. The Wisconsin Supreme Court concluded that "Good and sufficient reasons" are those which are not fully frivolous and inconsequential. *MUELLER V. JENSEN*, 63 Wis. 2D 362 (1973). In *VILLAGE OF DEERFIELD*, DEC. NO. 26168 (WERC, 1989), the Commission interpreted "sufficient reason" to be a reasonable basis in fact. An arbitrator has concluded that in order to constitute a good and sufficient reason for discipline, the employer must make a proper showing of reasons to the trier of fact based on identifiable criteria that are not unreasonably found. *PPG INDUSTRIES*, 117 LA 1299 (2002). Given the foregoing, the Arbitrator must deny the grievance if the District is able to point to reasonable and identifiable criteria to support its decision to non-renew Sauer.

While the Arbitrator may not infer the just cause standard into the Agreement, if he concludes that the 2003-2005 Agreement applies to this matter, the Arbitrator must recognize that the Agreement does not include a definition for the standard "just cause", and there is no evidence to suggest that the parties agreed to be bound by the seven tests established by Arbitrator Daugherty. Not all arbitrators have felt bound to a mechanical application of the Daugherty framework, but have concluded that a proper analysis of just cause can be conducted utilizing basic standards of fairness. If the just cause standard is to be applied in this case, the Arbitrator must apply the generally-accepted analysis of that standard which turns on two elements. First, the employer must establish the existence of conduct by the grievant in which it has a disciplinary interest. Second, the employer must establish that the discipline imposed upon the grievant for the conduct reasonably reflects its disciplinary interest. The District further asserts that arbitrators have used the "preponderance of the evidence" standard as the appropriate standard of proof in just cause cases.

Due to the timing of the Board's decision to non-renew Sauer, the "good reason" standard applies. During a contract hiatus, a municipal employer's duty to bargain generally obligates it to maintain the *status quo* as to matters primarily related to wages, hours and conditions of employment. *CITY OF BROOKFIELD*, DEC. NO. 19822-C (WERC, 11/84). The

grievance filed regarding the decision to non-renew Sauer's teaching contract concerns the Board's decision made on March 10, 2004. The parties' 2001-2003 agreement expired on June 30, 2003 and at the time of the Board hearing, the parties were engaged in negotiations for a successor agreement. On March 10, 2004, the 2003-2005 agreement had not yet been fully executed or ratified by the parties. Therefore, on that date, the provisions of the 2001-2003 agreement were still in effect. While it is true that the parties ratified the 2003-2005 agreement a short time after the non-renewal hearing in March of 2004, the date that is important is the date on which the Board acted. On that date, the *status quo* controlled, and the "good reason" standard found in the 2001-2003 agreement should be applied to the dispute concerning Sauer's non-renewal.

Regardless of which standard is applied, the District must show that it was reasonable for the District to believe that Sauer would not be certified to teach English for the 2004-2005 school year, and that the District's response in non-renewing his teaching contract in order to issue a reduced contract to him was reasonable under the circumstances. Here, Sauer's conduct and statement gave the District every reason to believe that he would not be certified to teach English for the 2004-2005 school year.

When Sauer was hired to teach high school English and high school Social Studies, he understood and agreed that he would work toward securing a regular license in English so as to allow him to continue teaching high school English for the District. Each year until the 2002-2003 school year, Sauer completed the necessary credits to renew his emergency license in English, however, at some point during the 2002-2003 school year, Sauer had a change of heart and simply stopped taking the necessary credits to renew his emergency license in English. On January 17, 2003, he met with Schmidt and advised her that he was having difficulty finding English classes for his certification. It was at this time that Sauer began suggesting methods by which the District could accommodate him if he could not continue to renew his emergency license. He also told Schmidt that he intended to speak with Tony Evers at DPI about options, and intended to check with traditional and non-traditional colleges to determine whether it would be possible to secure English certification. Schmidt contacted DPI to determine what would happen to Sauer's emergency license application for the 2003-2004 school year, if he was unable to take the necessary credits to renew the license. She discovered, and shared with Sauer, that he would need to submit a statement to DPI explaining why he had not been able to take the necessary credits to renew his emergency license.

Also at this time, Sauer began communicating with Peter Burke from DPI, in what appeared to Schmidt to be an attempt to get around DPI's requirement that he take additional coursework to renew his English certification. The e-mail provided to Schmidt did not give her any information that would suggest to her that Sauer would be able to renew his certification in English or secure a regular English license for the 2003-2004 school year, or in the future. The fact that he was continuing to explore this alternative licensure, rather than taking courses to renew English certification, made Schmidt more skeptical that Sauer would be certified to teach English for the 2003-2004 school year. It was shortly thereafter that Sauer suggested that the District consider implementing an "At Risk" program. Schmidt saw this as

another way that Sauer was attempting to get around having to renew his English certification and advised him that such a program would not be part of his assigned courses for the 2003-2004 school year; and therefore, he still needed to secure his English license.

In October, 2003, when Sauer received his emergency license in English for the 2003-2004 school year, it included a letter from DPI explaining that his license was non-renewable unless he committed to taking nine credits in English on or before August 31, 2004. The following month, Schmidt and Sauer met to discuss the situation concerning his English certification. Sauer explained the difficulty he was experiencing in completing the necessary credits to renew his provisional certification, and told Schmidt that he would not have the nine credits by August, 2004, as he did not have the “motivation or means” by which to take the credits. Sauer suggested alternatives to renewing his emergency license in English for the 2004-2005 school year. Based on his statements and his inability to confirm that he would be certified in English for the 2004-2005 school year, and his continued proposals of ways for him to keep a full-time teaching contract without securing such a license, Schmidt told Sauer that she understood that he would not be licensed to teach English for the 2004-2005 school year. Sauer did not deny this statement. Schmidt viewed Sauer’s efforts at finding a way to avoid having to renew his English certification as demonstrating that he did not want to satisfy the requirements to renew his certification. From December, 2003 to April, 2004, Sauer continued to present alternatives to renewing his English certification. This attitude continued throughout the grievance process, as Sauer continued to suggest courses that he could teach other than English. While on a handful of occasions Sauer suggested that he was exploring an “alternative means to licensure” he never explained his plan to Schmidt, nor did he include her on the communications regarding his attempts to work with Edgewood College or UW-River Falls in exploring this alternative means of licensure. Further, Schmidt had never heard of such an alternative means of licensure and therefore it would not have been reasonable for her to rely upon Sauer’s vague statements about such. Given Sauer’s statement that he had neither the means nor the motivation to take the necessary courses to renew his English certification, and his persistent suggestions that he be permitted to teach courses other than English, it was reasonable for Schmidt to conclude that Sauer would not be certified to teach English for the 2004-2005 school year.

The District gave Sauer ample warning of the consequences of failing to provide the District with some assurance that he would be certified to teach English for the 2004-2005 school year. From the beginning of his employment with the District, Sauer knew that he was expected to maintain his English certification and that he needed to work toward full certification. Both when Schmidt met with Sauer on January 17, 2003, and again, on November 17, 2003, to discuss the situation, Sauer recognized that one of the District’s options was to reduce his teaching contract because he was no longer certified in English and advised Schmidt that he would have to look for other work if that occurred. Just over a month later, Schmidt directed Sauer to give the Board written certification from a college and DPI to confirm that he had registered for the nine credits that DPI required him to complete by August 31, 2004 in order to renew his English certification. She advised Sauer that if he failed to provide such information by February 1, 2004, the Board would be forced to non-renew his

teaching contract in order to reduce his contract. When Sauer failed to comply with this directive, she recommended the Board issue Sauer preliminary notice of non-renewal. Given the foregoing, Sauer had ample warning and clearly understood that the Board would non-renew his teaching contract if at any point, it believed that he would not be certified to teach English.

The District was forced to comply with statutory and contractual timelines when deciding whether to non-renew Sauer's teaching contract. Article V, Section E, paragraph 2 provides that: "A preliminary notice of non-renewal will be given to the teacher by the last day of February, and a notice of non-renewal will be sent by March 15." Similarly, Section 118.22(2), Stats., requires that "On or before March 15 of the school year during which a teacher holds a contract, the Board shall give the teacher written notice of non-renewal or refusal to renew the teacher's contract for the ensuing school year, and that if no such notice is given by that time, the contract then in force shall continue for the ensuing school year." Section 118.22(3), Stats., requires that 15 days prior to giving written notice of non-renewal, the Board shall give preliminary notice in writing that the Board is considering non-renewal of the teacher's contract. Thus, any suggestions that the District's actions were premature or hasty because Sauer was still certified at the time, fails to take into account the statutory and contractual timelines.

The District asserts that non-renewal was the appropriate process, rather than discharge or layoff, to address this situation. In *SCHOOL DISTRICT OF LACROSSE, DEC. NO. 24664-B* (WERC, 1988), the Commission concluded that non-renewal process is an acceptable means of dealing with a teacher who fails to obtain the necessary certifications in order to perform his teaching assignment. The Commission concluded that the layoff provision is appropriate for reductions in staff, position eliminations and cuts in programs, but not to address certification issues. In its decision, the Commission held that:

The grievant's own conduct was such that the District could reasonably fear that some new reason for inaction would appear if the grievant were given any further time. That concern must therefore be balanced against the reasonableness of the District's position that if in fact the grievant did not complete the requirements by July; the District would then have to hire a teacher at the last minute from a diminished pool of applicants. *Id.*

Thus, even though Sauer was still certified to teach English at the time he was subject to non-renewal, the reasonable expectation based on his statements and conduct was that he would not be certified for the 2004-2005 school year. Because the timelines followed by the District complied with the statutory and contractual requirements, the timing was appropriate.

The District asserts that the Board's decision to non-renew Sauer's teaching contract for the 2004-2005 school year and issue him a reduced contract was reasonable under the circumstances. It is a well-settled principle that the reasonableness of management's actions must be assessed in light of the facts available to management at the time. PRAIRIE FARMS

SCHOOL DISTRICT, Case 15, No. 43797, MA-6075 (Arbitrator Honeyman, 1990). When the Board decided to non-renew Sauer's individual contract, it was reasonable for the District to believe that he had no intention, nor any ability, to secure a license in English, provisional or otherwise, for the 2004-2005 school year. Sauer's statements and conduct, including most importantly his apparent commitment to teach anything other than English, demonstrated that he had no intention of taking the necessary credits to renew his English certification for the 2004-2005 school year. Schmidt had no basis on which to believe that Sauer's exploration of alternative means of licensure would be successful. Moreover, Sauer failed to share any meaningful information related to his quest for alternative licensure with Schmidt or any other administrators. This situation is similar to that in the PRAIRIE FARM SCHOOL DISTRICT award, supra., in which the arbitrator upheld the teacher's full non-renewal, concluding that based on his inaction, it was reasonable for the District to believe that the teacher would not be certified to teach all of his courses for the coming school year.

While it is true that Sauer was more active in pursuing certification renewal than the teacher in the PRAIRIE FARM case, he cannot be rewarded simply because his gamble paid off. Sauer ignored the warnings of DPI and the District for two school years, and approached his certification with a self-important attitude. Based on his actions and statements, the District can only believe that Sauer would seek certification his own way, and that if it ultimately did not work out, the District would have to accommodate him. Regardless of how it turned out, at the time at which it was necessary for the District to consider non-renewal of Sauer's teaching contract, it was reasonable for the District to believe that Sauer would not be certified to teach English for the 2004-2005 school year. Thus, the District had good reason, or just cause, to non-renew Sauer's individual teaching contract and issue him a reduced contract in the areas in which he was certified.

Last, the District asserts that the Board's decision to issue Sauer an increased teaching contract during the June 16, 2004 Board meeting is irrelevant. It is expected that the Association will argue that the real reason for Sauer's non-renewal were the problems he experienced related to the Environmental Science certification. The District continues to object to any mention of this matter, as it was resolved by a Memorandum of Understanding during the 2003-2004 school year. Further, it is undisputed that neither the Board nor administration made any reference to the Environmental Science certification matter during the March 10, 2004 Board meeting on Sauer's non-renewal. Moreover, if Horn's claim that the Board President told the Association's attorney that the Board did not increase Sauer's contract to a full teaching contract on June 16th because it had just learned that he did not have his Environmental Science certification and they were not aware of that when the original non-renewal notice was given, is believed, there is no basis then on which to conclude that the Board's decision on March 10, 2004 had anything to do with Sauer's Environmental Science certification. Thus, it is irrelevant to this matter at hand, and cannot be the motive for Sauer's non-renewal.

In its letter of March 12, 2004, the Board President advised Sauer that it had refused to renew his contract for the 2004-2005 school year for the purpose of reducing his teaching

assignment to 62.5% because of the issues related to his certification. He also advised Sauer that he would receive a full teaching contract, if on or before April 15, 2004, Sauer provided written certification from a college and DPI to confirm that he would be able to complete the necessary credits by August 31, 2004 and be able to secure a license to teach English from DPI that would allow him to teach the English classes he was teaching at the time of the letter. Shortly thereafter, the District issued Sauer a 5/8th teaching contract for the 2004-2005 school year, in grades 7-12, Broad Field Social Studies. It is not clear which courses the Board intended Sauer to teach during the 2004-2005 school year; however, it is likely that it intended to have Sauer teach three Social Studies courses, the Environmental Science course, and a preparation period.

During the Board meeting on June 16, 2004, the Board heard Sauer's grievance alleging that it had violated the Master Contract when it non-renewed his teaching contract on March 10th. The Board was not convinced that it had violated the Agreement and voted to deny Sauer's grievance. The Board had no obligation to increase his contract, yet, it decided to offer Sauer an increased contract to 87.5%. The motivation behind the decision to offer Sauer the increased contract is irrelevant and is not the action that the Arbitrator is expected to review and evaluate.

The District requests that the Arbitrator deny the grievance and rule that the District had good reason and/or just cause when it non-renewed Sauer's individual teaching contract.

Association

The Association asserts that the standard for non-renewal in the parties' 2003-2005 collective bargaining agreement, i.e., the just cause standard, applies to Sauer's non-renewal, rather than the "good reason" standard in the 2001-2003 agreement. While the provisions of the 2001-2003 agreement remained in effect until superseded, this occurred in March of 2004, when both parties ratified the 2003-2005 agreement. While the non-renewal decision on March 10th fell under the old agreement, the Board's subsequent consideration of the non-renewal occurred after the new agreement was ratified. Further, the District had previously asserted, with the agreement of the Association, that this grievance was being prosecuted under the 2003-2005 agreement. However, in this case the standards are essentially the same. There is no evidence in the case as to what the parties felt the "good reason" standard means, i.e., whether it was considered the equivalent to just cause or something else. Schmidt, who was on the District's bargaining team for the 2003-2005 agreement, does not recall any discussions surrounding the change to the just cause standard. If either side believed they would be losing something by the change, there would have been discussions that Schmidt would have recalled. The Association asserts that there is not a significant difference between requiring "cause" for doing something and a "reason" for doing it. However, even if the good reason standard is applied, the District did not meet this standard. The District needs more than simply a reason to non-renew a teacher; it needs a "good" reason for doing it. The word "good" clearly implies that there must be a reason that is not pretextual or that it was not whim or caprice. The District cannot present such a reason in this case.

Next, the Association asserts that when Sauer filed his grievance in March of 2004, the issue was whether the District had “just cause” to non-renew that portion of his contract that involved teaching English. However, when his grievance reached the Board level in June of 2004, the issue was whether the District had just cause to continue to partially renew his contract, in light of the fact that he was now licensed to teach English and the Board’s stated reason for his non-renewal no longer existed. The Association contends there is not just cause or good reason for either the March non-renewal or the denial of his grievance in June, 2004.

At the time of the March 10, 2004 private conference on his non-renewal, Sauer was still certified to teach English and was eligible for continued certification. Although Sauer was not seeking to take course credits to obtain an emergency license, and had told Schmidt this, he was seeking to obtain a full license through alternative certification. Schmidt knew that Sauer was pursuing this avenue of licensing, and under the circumstances, the non-renewal was not justified under either a just cause or good reason standard.

The Association cites MERRILL AREA JOINT SCHOOL DISTRICT NO. 1 (Yaeger, 1978) as involving similar circumstances where a teacher with an emergency license was non-renewed because he did not have a full license and had not yet completed the coursework for another emergency license at the time of his non-renewal. The arbitrator noted that the teacher could still get the license for the following year, and pointed out that there was always discharge available in August if the teacher was not appropriately licensed. The arbitrator concluded the inconvenience that might result for the District, if ultimately the teacher did not become certified, was outweighed by the impact of the non-renewal on the teacher’s job security. Similarly, in this case the District could have reduced Sauer’s contract at the beginning of the 2004-2005 school year, if he had not become certified in English. His individual teaching contract specifies what the District expected him to teach, and under Sec. 118.21, Stats., at least that portion of his contract would be void, if he was not appropriately licensed at the beginning of that school year. Any “inconvenience” to the District in securing a replacement, if Sauer were not certified by August of 2004, would not be great, as English is not an area for which there is a paucity of teachers. Thus, the District failed to demonstrate it had just cause or good reason to non-renew Sauer’s contract in March of 2004.

The Association asserts that the District’s failure to rescind its non-renewal cannot be justified under either standard. The reason for non-renewing Sauer had disappeared by the time of the grievance hearing in June of 2004, as he was fully licensed in English at that time and the District had taken no steps to find a replacement for the English portion of his position and was able to return the two English courses to his schedule. Other than intending to punish Sauer for some other perceived misdeed, there is no explanation for the Board’s failure to rescind his non-renewal. By law, a District cannot non-renew a teacher for other reasons after the non-renewal deadlines have passed.

Following the grievance hearing in June of 2004, in the very letter stating its denial of his grievance, the Board in substance rescinded the non-renewal when it returned the two English courses to Sauer’s schedule. By its very actions, the Board demonstrated that there

was no continued basis for the non-renewal. Therefore, there can be no justification for the denial of the grievance other than an improper one.

Schmidt testified that the Board did not give Sauer a full contract after he had obtained English certification in May, because it did not have any classes with which to fill his schedule. However, this stated reason is demonstrably pretextual. First, the Board reassigned Sauer to teach the classes for which he had been non-renewed following the June hearing on his grievance. Second, the Board had told Sauer on May 12th that it could offer him a full contract on that date. Third, there was one more English course in 2004-2005 than in the previous school year and the other English teacher was teaching an overload. Last, the District continued to change the 2004-2005 course schedule right up to the time school started in September of 2004 and there were classes that could have been assigned to Sauer.

When the Board non-renewed Sauer in March of 2004, it told him that he would have a full contract, if before April 15th he demonstrated that he would be licensed to teach the same two English classes. However, following the June Board meeting on his grievance, the Board gave him back the two English classes, but only gave him a 7/8th contract. The return of the English classes should have given him a full contract. It is only if the Board were taking away some other part of his schedule, i.e., something for which it had not non-renewed him, is it possible that the return of the English classes would not result in a full schedule. There is also clear evidence that the Board could have provided Sauer with an additional class, since at the May 12, 2004 Board meeting, the Board was prepared to offer him a full contract, if he signed a grievance settlement.

There is no evidence that the Board took some step between May 12th and June 16th that would make a full contract for Sauer impossible at a later date when it was possible in May, and it would have been an act in bad faith to take such an action during that time that would have done so. Further, there were at least two classes that could have been assigned to Sauer. He could have been given one of Jahnke's English courses, as Jahnke was teaching both Advanced Placement English and Advanced Composition during fourth hour. Taking a course from Jahnke's schedule would still have left him with enough courses for a full contract. Also, the District added a math class for "at risk" students, that any teacher could have taught, right before school began in the fall of 2004, but the District assigned this to a special education teacher who was not certified in math. Finally, the evidence shows that the District was altering the course schedule right up to the beginning of the 2004-2005 school year and Johnsrud testified that there is "quite a bit of jockeying" just before school starts. There is no evidence that some of this "jockeying" could not have included Sauer.

The Association asserts that not only does the evidence show that the stated reason for denying Sauer's grievance lacked any basis in fact, but also shows that other improper reasons were the basis for the denial of the grievance. There is unequivocal evidence that the District failed to renew Sauer's full contract as punishment for other situations unrelated to his English license. At the June 16th Board hearing on the grievance, Schmidt told the Board that Sauer was not "appropriate, ethical, and professional" and had presented false information to her at

the May 4th meeting on his grievance. She also asserted that “interwoven with this grievance has been Mr. Sauer’s second grievance over securing the Environmental Science license”, and that he would not sign a settlement agreement for the two grievances, implying that his failure to settle these grievances was bad faith on Sauer’s part. Schmidt also attacked the manner in which Sauer received his English license; clearly annoyed that he had obtained the license without having to take the coursework and student teaching, and had not taken classes for two years while other staff continued to take classes each year to work toward their certification. This personal attack was completely unrelated to the subject of the non-renewal grievance hearing and the hearing had not been scheduled as a disciplinary proceeding. Schmidt’s statement sought to have the Board continue the non-renewal because of alleged misdeeds that were not part of the initial non-renewal. Schmidt did not provide any valid reason for the Board to continue the non-renewal now that Sauer had his English license. This is entirely inappropriate in the context of a non-renewal that was expressly not performance or discipline-related. If Schmidt believes one of the teachers behaved inappropriately, she has all the remedies available to her in the parties’ agreement and does not have the right to use the alleged misdeeds to support her demand that the non-renewal not be rescinded.

At the June 16, 2004 Board grievance hearing, the Board did not fully restore Sauer’s contract, because he had not agreed to obtain a license for Environmental Science for the following year. His non-renewal in March was related only to his English license, and by law the Board cannot come up with new reasons for non-renewal after the time for notice of non-renewal and actual non-renewal have passed. Nor could the Environmental Science license issue ever have supported a non-renewal of Sauer’s teaching contract. The District knew in February, 2004, that Sauer was not appropriately licensed to teach the Environmental Science course, but never assigned him any course to fill the spot where that course had been. Even if the English license issue had not occurred, Sauer was having a 1/8th contract removed from his schedule for a situation the District now acknowledges was not his fault. The failure to provide Sauer with the remaining 1/8th of his contract thus becomes a layoff.

The non-renewed English courses were returned to Sauer’s schedule and only the course to fill the Environmental Science slot is missing. Sauer’s contract had not been non-renewed in regard to this class, nor by the District’s own admission, was there cause to non-renew that portion of Sauer’s contract. The District should never have assigned him to the course in 2002-2003, when it took away his Social Studies assignment in order to have him teach the course. There are numerous courses that Sauer can teach for the District that are presently being taught by persons who have less seniority. Thus, if there are too few courses to fill all teachers’ schedules, it should not be Sauer’s contract that is reduced.

The Association requests that the grievance be sustained and that the Arbitrator order the District to issue Sauer a full contract for the 2004-2005 school year and order that such contract be retroactive to the beginning of the year, order the District to remove all references to the non-renewal from Sauer’s file and any other District file, order the District to provide all pay and benefits that were not provided to Sauer because of the 2004-2005 contract reduction, and order the District to return to Sauer any personal days or pay deducted due to Sauer’s attendance at the hearings in this matter.

District Reply

The District asserts that the Association made various factual misrepresentations in its initial brief. First, the Association asserts that District Administrator Schmidt agreed that Sauer would search out alternatives to taking courses at local universities, including checking out non-traditional offerings from various universities to see if Sauer could get certification. While it is true that Schmidt wrote that Sauer would check out non-traditional offerings from various universities, Sauer never explained his plan to Schmidt, nor did he include her on the communications regarding his attempts to work with Edgewood College in exploring alternative means of licensure. Thus, Schmidt believed that Sauer was exploring the possibility of taking classes without attending a classroom, such as online courses, as opposed to having his body of work reviewed and considered for full certification. Schmidt never agreed to wait until Sauer had received word about a university or college reviewing his body of work for that purpose and was not even aware that such a process existed.

The Association also asserted that Principal Johnsrud testified that the District fills out the schedules of its teachers, but neglected to reference the explanation Johnsrud had provided earlier in his testimony. By failing to address the context in which Johnsrud made the comment, the Association attempts to characterize his testimony as supporting the assertion that the District fills out teacher's schedules in all situations. However, as the rest of Johnsrud's testimony demonstrates, the District only fills out teacher's schedules to accommodate students' needs and desires. Other than Sauer's unsubstantiated assertions, the Association presented no evidence to prove the District has a binding past practice of accommodating the certification problems of teachers.

The Association also asserted that Schmidt testified that the assignment of the Environmental Science course to Sauer had been a "mistake of the school district." Again, this statement does not tell the whole story. Schmidt explained that in the spring of 2001, the District decided to make the Environmental Science course a required course for all students, which necessitated offering it for two sections, rather than one as in the past. Further, the District wanted to offer it for science credit, not realizing that Sauer's Agriculture certification would not suffice and that he could not teach a course for science credit without being licensed in Environmental Science. This was the "honest mistake" to which Schmidt was referring.

The Association also suggested that Jahnke had an "overload" because he was teaching seven courses, with both Advanced Placement English and Advanced Composition during fourth hour. The word "overload" has meaning in the District. If a teacher is teaching an overload, he/she is entitled to additional pay. Here, during fourth hour, Jahnke simply taught students who were taking his course for the AP English credit and other students who were taking it for the Advanced Composition credit. Thus, any attempt to suggest that Jahnke had an "overload" assignment while Sauer's contract was reduced must be viewed in this light.

Next, the District asserts that Sauer altered his way of dealing with Schmidt because the administration would not be intimidated or manipulated into changing his teaching assignment,

rather than because he no longer believed the administration wanted to work in a cooperative manner with him on the issue of his English certification. A review of the record demonstrates that it was not the administration that would not cooperate with Sauer regarding the issue of his English certification, rather, it was Sauer who would not cooperate with the District in this regard. The record shows that the District asked Sauer to continue working toward his full English certification, a commitment he had made to the District from the day he was offered his teaching position in 1999. From the 1999-2000 school year to the 2003-2004 school year, the District took every step necessary to help Sauer renew his English certification annually, including for the 2003-2004 school year, when Schmidt went out of her way to help Sauer obtain his emergency license. Yet, when faced with the directive from DPI to complete nine credits by August 31, 2004 in order to renew the emergency license in English, rather than taking the English courses required for English certification, Sauer took a course in AP Economics and a course in AP History. He testified he took these courses in case the opportunity presented itself to teach the courses. Sauer was being uncooperative with the District's directive to renew his emergency license in English so he could create the opportunity for him to teach such classes. If the District would not let him teach any of those courses that he proposed, rather than take the courses necessary to renew his English certification, Sauer suggested that he could bump a less senior person in the Department or take a part-time teaching/part-time administrative contract.

During the May 4, 2004 meeting with Schmidt, Schmidt asked Sauer if he had reviewed the fall, spring and summer UW-Madison, Department of English's timetable for the courses he needed to complete his English certification. Sauer stated that he did not have time to review the timetable. Further, in discussing the problems related to the renewal of his English certification, Sauer had told Schmidt he did not have the "motivation or means" by which to take the credits needed to renew his English certification. This elusive and confrontational statement demonstrates that Sauer was being uncooperative even before he received the December 18, 2003 letter from Schmidt. Sauer was instead spending his time thinking of alternatives to him teaching English for the District. Given the foregoing, it is clear that Sauer, not the District, was being uncooperative with regard to the issue of his English certification. It is also important to note that Sauer's alteration of his way of dealing with the administration on December 18, 2003 does not explain why, to this date, the administration has seen no evidence of his communications to explore alternative means of licensure. Sauer claims that in February of 2003 he began exploring alternative certification when he contacted Peter Burke at DPI. Sauer provided Schmidt with a copy of his e-mail to Burke and thereafter failed to provide any further evidence of his "exploration", nor was any such evidence provided at hearing. The absence of this information confirming Sauer's efforts to obtain his English certification is inherently suspicious.

The District also asserts that it is the Board's non-renewal decision in March of 2004, not the June 16, 2004 grievance hearing, that the Arbitrator is charged with reviewing in this case. The Association and the District agree that the issue before the Arbitrator is whether the District had good reason/just cause to non-renew the teaching contract of Sauer for the 2004-2005 school year. It is also undisputed that the Board's non-renewal decision occurred on

March 10, 2004. The Association attempts to change the focus of the arbitration from the Board's non-renewal decision in March to the grievance hearing in June of 2004. For purposes of determining whether the District had good reason/just cause for its decision, the time and the decision to evaluate is extremely important, as the reasonableness of management's actions must be assessed in the light of the facts available to management at the time. Citing PRAIRIE FARM SCHOOL DISTRICT, *supra*. Further, "[a]s a general rule, when evaluating just cause for discipline, arbitrators restrict themselves to considering the information that was available to the employer when it imposed its penalty." *Discipline and Discharge in Arbitration*, ed. Norman Brand, p. 366 (ABA, 1998).

The Association is attempting to change the time when the District's actions are to be assessed because the facts in June of 2004 were more favorable to the Association. When the Board issued its non-renewal decision in March of 2004, the Board had a reasonable belief that Sauer would not be certified to teach English for the 2004-2005 school year. It is also reasonable to conclude that Sauer also did not believe that he would be licensed to teach English, or why else would he propose so many alternatives to teaching English for the 2004-2005 school year. While the facts are more favorable to the Association after May 7, 2004, when Sauer finally received word that he would be fully licensed in English, it is improper for the Arbitrator to shift focus from the real dispute, which is the Board's decision in March, 2004. If the Association intended to grieve the Board's actions on June 16, 2004, it needed to file a separate grievance from the one that it had filed and processed. While the failure to increase the teacher's contract is an appropriate grievance to bring before an arbitrator, it is not the issue before this arbitrator. Based on the contractual limitations found in Article III of the Agreement, the Arbitrator does not have the authority to review the Board's decision of June 16, 2004, and must disregard the evidence that occurred after the non-renewal decision was issued in March of 2004.

The District also asserts that the Association's references to the parties' settlement negotiations and subsequent actions must be disregarded when considering whether the District had good reason/just cause to non-renew Sauer's teaching contract. During the same time period there was the issue of Sauer's English certification, an issue also arose concerning his Environmental Science certification, however, the parties were able to negotiate a voluntary settlement of the grievance involving the latter. The District is concerned that the true motive behind negotiating the matter involving Sauer's Environmental Science situation was to create "evidence" to use against the District in this case.

The Association twice references a special meeting held by the Board on May 12, 2004 to consider Sauer's English license and asserts that the Board told Sauer they would give him a full contract for 2004-2005, if he signed a grievance settlement agreement. The Association is attempting to use this "evidence" to prove that the District had the obligation and/or ability to offer Sauer a full teaching contract at all times relevant to this dispute. However, the Association mistakes the meaning of the District's offer on May 12, 2004. At that time, the Board had two grievances pending concerning Sauer's licensure for the following school year. In an attempt to resolve both grievances, the Board decided it would be willing to offer Sauer a

full teaching contract for the 2004-2005 school year. Despite the Association's attempt to attribute more to this offer, nothing more than a desire to resolve the grievances can be read into the offer. It is noted that as of May 12, 2004, the Board had not yet spent the time and energy required to defend the instant grievance. In an attempt to avoid the continued dispute, the Board offered the option of filling out Sauer's schedule for the 2004-2005 school year simply as a means of settlement. It is well-established that various factors are considered by parties when negotiating settlement agreements. They may offer more to resolve a claim than they truly believe they are obligated to provide. Both arbitrators and state law (Section 904.08, Stats.) display a preference to avoid relying upon settlement discussions. Thus, the Board's offer to settle Sauer's grievances in May of 2004 do not prove anything other than what the Board would be willing to do in order to resolve the matter without going to hearing, and does not suggest that the Board conceded to any wrongdoing or intended to repudiate its earlier action. Placing any significance on the Board's offers to settle the grievance filed by Sauer relating to his Environmental Science certification will send a message to employers to avoid negotiating settlement agreements during the pendency of an arbitration, because such negotiations will be used against the employer at the hearing.

The Association also cites the Board's decision on June 16th to increase Sauer's contract from 5/8ths to 7/8ths, as evidence that it was repudiating its March decision to non-renew his teaching contract. However, the Board was specific in its actions when it denied Sauer's grievance, and there is no evidence to suggest that the Board increased his contract as a means of repudiating its actions in March of 2004. It is well established that evidence of subsequent remedial measures taken by a party may not be used against the party to establish liability. Section 904.07, Stats. If such evidence could be used against a party, it would served as a disincentive to take such measures in the face of litigation. The decision to increase Sauer's contract on June 16th could be viewed as a subsequent remedial measure. The same public policy regarding not considering settlement negotiations supports the refusal to consider such evidence as to subsequent remedial measures. Further, if the Arbitrator intends to place any significance on the Board's decision to increase Sauer's contract on June 16th, he must also place significance on the fact that Sauer signed and returned both contracts, demonstrating his acceptance of their terms. When considering both actions, the Arbitrator must recognize that each respective party was not intending to abandon its position concerning Sauer's non-renewal; rather, both actions were simply smart actions to take under the circumstances.

The District also asserts that the Association's reliance on the award in MERRILL AREA JOINT SCHOOL DISTRICT NO. 1 is misplaced. This case is distinguishable from the MERRILL case on several grounds. First, the teacher in MERRILL had been given conflicting information by DPI as to what was required of him regarding certification. Here, DPI told Sauer what was expected of him and he chose to ignore DPI's directives, stating that he did not have the "motivation or means" by which to take the credits. The situation that Sauer put himself in is comparable to the situation caused by the teacher in PRAIRIE FARMS SCHOOL DISTRICT, *supra*. Additionally, unlike this case, the teacher in MERRILL presented evidence that he was disadvantaged as compared to other teachers. Sauer failed to present any evidence to demonstrate that he was treated differently than any other teacher in the District. Thus, the Association's reliance on the MERRILL case is misplaced.

Finally, the District asserts that a teacher should not be permitted to hold a District hostage concerning his or her ability to teach certain courses for the upcoming school year. The Association suggests that the District could have reduced Sauer's contract under the parties' agreement or voided his contract under State Statute, Section 118.21, Stats., at the beginning of the 2004-2005 school year if he had not become certified in English. While it is true that the District could have waited until the beginning of the school year, if it did so, it would be detrimental to the District. The District would have to find a long-term substitute to teach the assigned courses, who may or may not be certified or qualified to do so. Further, a teacher who is still looking for employment in August is unlikely to be the most desirable teacher to be hired. Also, hiring a teacher at such a late date would certainly delay preparation, orientation and training. Further, in this case, the District was dealing with only one teacher who was jeopardizing his licensure by failing to take the necessary credits. If the Arbitrator concludes that the District must wait until the beginning of the 2004-2005 school year to determine whether a teacher, who has all but guaranteed he would not be certified to teach the courses to which he is assigned for the following school year, is certified, and if more than one teacher engaged in such conduct, the District could find itself trying to juggle its schedule with various teachers who are no longer certified to teach the courses they were assigned. This would be an unbearable result for a district.

Association Reply

The Association asserts that the District's initial brief significantly misstates many of the facts and also asserts other facts for which there is no substantiation in the record. First, there is a constant refrain in the District's brief that Sauer intentionally did nothing and told the District nothing in regard to his license issue; however, the evidence demonstrates the fallacy of the claim. Sauer approached Schmidt with the issues regarding his certification, and did not wait until the District told him he had a problem. He told Schmidt in January of 2003 that he was not able to take courses he needed to fulfill his certification requirement because he courses were offered by local universities only during the school day. Schmidt's memo of that meeting notes that they discussed Sauer's certification problems and that it was agreed that he would not only explore non-traditional offerings from other universities, but also contact DPI for its suggestions. Schmidt specifically notes Sauer's desire to continue teaching English. Following the meeting, Sauer copied Schmidt on an e-mail he sent to Peter Burke at DPI in which Sauer asked about alternative licensing for persons with his non-traditional background. Based on Burke's reply and other material he had read about PI34, Sauer decided to seek such alternative licensing. Sauer could not make any absolute statements to the District that he would be licensed for the 2004-2005 school year, but Burke's e-mail noted his situation was specifically to be addressed by PI34. His non-traditional background, which included significant academics and teaching experience, made him a prime candidate for the licensure. Also, because of the nature of alternative licensing, Sauer was not able to give assurances that he would receive a license until such license was issued, hopefully before July 1, 2004. During the 2002-2003 school year, no one in the administration told him that he should not follow that path toward certification. Despite Burke's statements about alternative licensing and Sauer's statements to her that he was seeking alternative licensing, Schmidt claims she had

no reason to believe that Sauer would get such a license. However, she did not tell him this and in fact never responded when he said he was pursuing alternative certification. Schmidt never asked Sauer for any documentation in this regard until the May 4, 2004 grievance meeting and never asked what Burke was referring to when he said that “situations” like Sauer’s would have better resolve under PI34. She never asked Sauer the basis of his belief that he could be alternatively certified and never undertook to ascertain if Sauer might qualify for such certification. Schmidt offered no basis for her belief and never told Sauer that she thought Burke was wrong.

Further, Schmidt assisted Sauer in obtaining an emergency license for the 2003-2004 school year even though he had not taken the necessary coursework. She gave him no ultimatums about doing the coursework, but instead contacted DPI in the spring of 2003 to find out what could be done. While Sauer did not take any credits over the summer of 2003, he brought up his plans to seek alternative licensing at his meeting on November 21, 2003 with Schmidt and again in his memo to her of December 18, 2003. Again, Schmidt did not inform Sauer that she believed his pursuit of alternative licensing was futile. Although Sauer was aware that the District insisted he be licensed to teach English for the 2004-2005 school year, prior to Schmidt’s December 18, 2003 formal letter to him, Sauer was not aware the District required that he become certified only in the way the District demanded.

There is no evidence to support the District’s argument that Sauer did not want to get certified in English and thus was proposing alternative teaching assignments. The proposals Sauer made were always made as contingencies if he was not able to be licensed by alternative means. His desire to continue to teach English was acknowledged both by Schmidt in her January 17, 2003 memo, and by Johnsrud, who testified that Sauer always intended to renew his English license. Further, suggestions for alternatives did not dominate Sauer’s discussions, as suggested by the District’s brief. Sauer proposed specific contingencies or alternatives only at the January 17, 2003 and February 16, 2004 meetings. At both meetings, he expressed his intention to obtain certification in English. In his December 18, 2003 memo to Schmidt regarding their November 21, 2003 meeting, Sauer made clear the connection between those contingencies and his efforts to obtain alternative licensing in English. Further, his memo does not, as claimed by the District, suggest specific alternatives for Sauer in case he was not certified in English for the 2004-2005 school year, rather, it discusses his concern that the District does not offer anything for the students beyond “survey courses”. This concern was not related specifically to his license issues, and he was not suggesting that he teach those courses.

The District’s assertion that after the November 21st meeting and when Sauer discussed alternative means of obtaining a license, Schmidt understood that Sauer was looking for a means of securing a license without sitting in a classroom, such as taking online courses, can be given no credence. Schmidt had clearly stated in her memo that: “You stated that you would not have the nine credits by August, 2004.” Sauer verified this understanding in his memo of December 18th when he said that he was not motivated to take the nine credits. Schmidt could not believe that Sauer would be planning to take online courses when she clearly

understood that he was not looking to take the nine credits. Finally, the District asserts that Sauer never denied Schmidt's statement in her November 21st memo that he would not be licensed to teach English for the 2004-2005 school year. Sauer's response memo of December 18th specifically states that he had not given up obtaining English certification and that he was still trying to obtain a license by alternative means. While Schmidt testified that Sauer did not discuss his pursuit of alternative licensing at this meeting, Horn's contemporaneous notes of the meeting unequivocally show that Sauer did raise the issue of alternative licensing. The District's administrators clearly ignored Sauer every time he raised alternative licensing and only responded to the contingency plans that he hoped the District would consider, if he could not obtain an English license.

The District's claim that Sauer's investigation of the "At Risk" program was another way of his attempting to get around his obligations to be licensed in English, is disingenuous. Not only did Schmidt not testify to this, the evidence does not support the allegation. In March of 2003, Schmidt sent Sauer an e-mail that said "Think about HS at risk." Schmidt acknowledged that she was not sure who had raised the issue, but she had asked Sauer to investigate it.

Finally, while it is accurate that Sauer could not be certain that he would be awarded a full English certification based on his experience and background, and understood that if he did not get the certification, the District could decrease his contract, he believed that since he was certified to teach English and had a legitimate expectation of being certified, that the District would provide him the opportunity to obtain the alternative certification before taking any action. The District did not, however, provide him that opportunity.

The Association also disputes the District's assertion that Schmidt's lack of belief in alternative licensing was reasonable. The District relies upon the note from Schwingle from DPI and Schmidt's statement that she had never known a teacher to obtain certification except by completing coursework to support its assertion. Neither supports a good reason for this belief. Schwingle's letter was only in regard to an emergency license, and had no bearing on Sauer's right or ability to obtain a full license to teach English by alternative methods. Further, the fact that Schmidt did not know anyone to have obtained a license by alternative means is not probative. Schmidt did not present herself as an expert on licensing, and made no claims to having any knowledge regarding licensing beyond her years as an administrator. Second, as Schmidt was aware, PI34 was to go into effect July 1, 2004. Finally, Schmidt's statement that she did not believe that Sauer could become licensed by alternative means is implausible. If she believed this, why did not she tell this to Sauer, as Sauer was not aware that there was a reason he should undertake to educate her about such licensing.

The Association also asserts that the District's actions in regard to the assignment of the Environmental Science course is probative evidence. The District now admits that it made a mistake with its assignment of the course to Sauer, and does not allege that he was obligated to obtain a license to teach the subject. Schmidt had Sauer's Environmental Science class removed from the draft schedule for the upcoming 2004-2005 school year. At the time of

Sauer's March 10th non-renewal conference, the Environmental Science issue was not before the Board and the Board determined to non-renew only Sauer's contract as it applied to his two English classes. The District acknowledges in its brief that the Board intended that Sauer would still have four classes after his non-renewal. However, it never assigned a course to fill the Environmental Science spot in Sauer's schedule. After Sauer filed a grievance about his assignment to teach a course outside his certification, the Board became aware of the issue.

The Association also disputes the assertion that it was improper for Sauer to wait to tell the District of his license to teach English. As Sauer explained at hearing, he was not certain that DPI would issue a license based on the Edgewood certification. Second, in its non-renewal notice to Sauer, the District and Board had expressly required Sauer to have proof of license from the DPI before it would consider his situation again. Based on that mandate, Sauer's failure to present evidence prior to obtaining his license was reasonable. If he had simply presented evidence of certification without licensure, Schmidt surely would have told him that the Board required proof of licensure. Further, the evidence is clear that Sauer sought to learn the status of the license application that Edgewood College had filed, and sought to expedite the licensing process so he could present his license to the District as early as possible. Sauer's May 4th meeting with Schmidt occurred before he knew he would be certified to teach English. Sauer kept checking on the status of his application and when he learned it, informed the District through Johnsrud on May 7, 2004, that he had obtained a full license to teach English. Schmidt then sent an e-mail to DPI the next day inquiring about how Sauer could have been given a license since he had not taken any courses. Schmidt was not checking to see if he had a license, as she had already seen that on the DPI website, but was questioning whether the license was legitimate. Despite Sauer having told her numerous times that he was seeking alternative licensing, Schmidt refused to give credence to his pursuit of the alternative license, and clearly did not think it was appropriate for Sauer to obtain a license in this manner. Schmidt's e-mail to DPI also validates Sauer's concerns that Schmidt might have attempted to sabotage his license application if she had been told of its submission to DPI.

The assertion that the return of the two English courses on June 16, 2004 is unrelated to the non-renewal issue is untenable. After deliberating in closed session on the sole issue of Sauer's grievance, the Board announced that it was denying the grievance, but giving Sauer back the two English classes that were the subject of the grievance. The actions were taken in conjunction with one another, and cannot be separated. The Board's actions effectively rescinded its March non-renewal of the two English classes. The only reason the Board denied the grievance was to cover up the non-renewal of the 1/8th contract based on the Environmental Science class the District had mistakenly assigned to Sauer, but could no longer assign to him.

The District's brief also states that Sauer and Horn claim that they heard the Board President tell Attorney Brown that the Board not increase Sauer's contract to full-time, because the Board had just learned that he did not have his Environmental Science certification, however, there was no contradiction to the testimony of Sauer and Horn in that regard. Schmidt testified that she did not remember what the Board's President's response was, apparently remembering that the question was asked. Further, if the Board President had not

given the response to which Sauer and Horn testified, the District would surely have presented evidence to that regard.

The District's discussion regarding scheduling and its inability to adjust the schedule has no substantiation in the record. First, the District claims it would be detrimental to the District to wait until closer to the beginning of the school year to confirm that a teacher would be certified to teach a certain class. While this may be so, this difficulty must be weighed against the loss of employment for which the teacher was appropriately certified to teach by the beginning of the school year. The District also overreaches. When teachers are taking courses to meet emergency licensing requirements, it is not known until the end of the summer whether the teacher has completed and passed the necessary courses for the emergency license. The District takes such chances on a regular basis. The District also asserts that if it did not non-renew Sauer in March and it turned out he could not teach the English class at the time school started, it could not then reduce his contract. However, Section 118.21(1), Stats., provides that a contract with a person not legally authorized to teach the named subject shall be void, and that the teaching contract shall terminate when the authority to teach terminates. This would have been the case with Sauer's contract, if he had not had the appropriate license at the start of the 2004-2005 school year.

It also should be noted that the District offers no proof that it could not provide Sauer with a full schedule at the time he obtained full licensure.

The Association also raises a number of substantive arguments in its reply brief. First, as to the burden of proof, it asserts that the District has the burden of proving that it had just cause/good reason to non-renew Sauer in March of 2004. The District attempts to distinguish the standards by writing the word "good" in "good reason" out of that standard to make it a lesser standard. It argues that the good reason standard is met if the District can point to any reasonable and identifiable criteria to support its decision. This position is not supported by the parties' bargaining history, the cases cited by the District, or other case law. The record shows that the parties changed the contract language from "good reason" to "just cause" without any discussion. Had either party considered the change to be material, there certainly would have been discussions. The cases cited by the District are also not helpful to its argument. PPG INDUSTRIES specifically defines "just cause" as "good and sufficient reason." The Wisconsin Supreme Court case of MUELLER V. JENSEN does not provide a usable definition of the "good reason" standard in the parties' agreement, as it is concerned with a statutory "good and sufficient reason" standard in the filing of a recall petition against a public official. Finally, the VILLAGE OF DEERFIELD decision involved the issue of whether there was "sufficient" reasons for holding another unit election. The modifiers "good" and "sufficient" are not equal as the latter implies that there is enough of a reason, while the former goes to the quality of the reason presented. The standard here is not that the Board needed a "reason" for its decision, it needed a "good reason". There are numerous cases that equate just cause with good reason.

As to what constitutes “just cause” or “good reason”, the Association does not dispute the District’s assertion that a proper analysis can be based on basic standards of fairness. However, it believes that the disciplinary framework for just cause is not appropriate in this case. The Board non-renewed Sauer and the notice expressly stated that the non-renewal was not based on any performance issue.

The Association reiterates that neither the Board’s non-renewal on March 10, 2004, nor denial of the grievance on June 16, 2004, meets the good reason/just cause standard. With regard to the March non-renewal, the record demonstrates the District knew from at least January, 2003 forward that Sauer was exploring, and had decided to seek, alternative licensing for his English license, but did not tell him that this would be unacceptable. It was not until December 18, 2003 that Schmidt told Sauer that he would have to take coursework, and locate and sign up for such coursework within the next month and a half. Until that point, Sauer believed that Schmidt was willing to assist him in pursuing alternative licensing. Thus, there is no long history of failure to act or insubordination by Sauer. Further, based on Schmidt’s lack of reasonable knowledge or belief regarding alternative licensing, her presentation to the Board was unreasonably biased against Sauer’s efforts. Based on the knowledge she had, a reasonable person would have either investigated further or given the teacher the opportunity to obtain the license. The cases cited by the District for the proposition that a school board may non-renew a teacher in Sauer’s position are substantively distinguishable. The teacher in the SCHOOL DISTRICT OF LACROSSE case had not failed to get certification, rather the certification the teacher had, and could continue to renew, was no longer acceptable for the program. In PRAIRIE FARM, the teacher in that case had allowed his license to lapse before the next school year, despite warnings from the District. The District obtained a provisional license for the teacher for the next year, but warned him that he had to be fully certified by non-renewal time the following year. However, the teacher again did nothing.

Here, the District appears to have non-renewed Sauer in March because he was not following the route the District wanted him to follow to be licensed in English. Sauer had no obligation to follow the route chosen by the District. The parties’ Agreement requires only that the teacher “keep his/her file up to date”. Sauer’s file was up to date at the time of his non-renewal as it had up to date certifications for English, and his file was always up to date as he obtained his full license before his emergency license to teach English expired.

Regarding the June 16, 2004 denial of his grievance, the Board’s decision at the grievance hearing is independent from its non-renewal decision, and must independently meet the good reason/just cause standards. It cannot do so, as the reason for non-renewal had disappeared and the District had not been harmed by the delay in obtaining the license, and offered no good reason that it would not be able to give Sauer a full contract. The District’s assertion that since it had good reason in March for non-renewal, it must necessarily have good reason in June to continue the non-renewal, comports with neither arbitral precedent nor fair play. Arbitrators have often taken the position that deadlines cannot be used to deny employment to an employee when there has been no harm to the employer for missing the deadline. Citing, WHITEWATER EDUCATION ASSOCIATION V. WHITEWATER UNIFIED SCHOOL

DISTRICT, 113 Wis. 2d 151, 159 (Court of Appeals, 1983). The Board also does not have the right to ignore evidence that nullifies its earlier decision, even if that earlier decision meets a good reason or just cause standard. To be able to do so renders the grievance proceeding meaningless. This is demonstrated by the example where the evidence initially points to a person having engaged in misconduct and the employer disciplines the employee for that misconduct, and then later discovers during the grievance procedure that it was not the employee who was guilty of the misconduct. As is the case here, the reason for the employer taking the action initially cannot be relied on later when it considers the grievance and the reasons for the initial action are no longer present.

The Association also asserts that there is clear evidence that the Board's June 16, 2004 actions had an improper basis. While the District objects to the mention of the Environmental Science issue, the Association has not attempted to make the Environmental Science grievance settlement a part of this case, but has shown that the Board's actions on June 16th in not rescinding its non-renewal were based on improper reasons, i.e., that the Board not rescind its non-renewal because it was annoyed at Sauer for not obtaining an emergency license to teach Environmental Science for the 2004-2005 school year. The Board has no right to uphold the non-renewal of a teacher after March 15th for reasons unrelated to the original non-renewal. The Association asserts that it has undisputed evidence to support this allegation. First, the District had removed Environmental Science from Sauer's schedule in late winter, and had not replaced it with any other assignment, despite acknowledging that the Board intended its non-renewal to leave Sauer teaching four courses, rather than the six taught by a teacher with a full contract. Yet, when the Board reassigned Sauer's two English classes to him in June, the Environmental Science piece of his schedule was still missing. The District does not claim that it was not obligated to provide Sauer with an assignment to make up for the Environmental Science class. The District also has always treated the Environmental Science class as connected with the non-renewal, as evidenced by Schmidt's and the Board President's statements at the June 16th Board meeting. To now deny the connection is outrageous and not credible.

DISCUSSION

As can be seen by the extent of that portion of the parties' briefs devoted to a recitation of the factual record, this case primarily turns on the facts.

There are potentially a number of issues in this case. First, there is some dispute as to the contractual standard to be applied in this case. While the Association concedes that the Board's decision on March 10, 2004 was made before the parties ratified the 2003-2005 Agreement and was, therefore, subject to the "good reason" standard in the 2001-2003 contract, it asserts that the Board's subsequent decisions regarding the non-renewal of Sauer's teaching contract were subject to the just cause standard in the new agreement.

In this case, there is, however, no substantive difference between the application of the "just cause" standard in the new agreement and the "good reason" standard for non-renewal in

the parties' 2001-2003 agreement. The non-renewal notice the Board sent to Sauer specifically emphasizes that the Board's decision "has nothing to do with your performance." Thus, the Board's decision was not a disciplinary action and the traditional two-step analysis to determine if there is just cause would not be appropriate. In this case, the question is whether there was a sufficient factual basis upon which a reasonable person would have concluded that Sauer would not obtain certification to teach English by the start of the 2004-2005 school year. For the following reasons, it is concluded that the District has not established that a sufficient basis for such a conclusion existed at the time of the Board's decision.

The Board's decision in March of 2004 must be viewed in the context of what had occurred in the prior school year, as well as what had occurred in the 2003-2004 school year up to that time. The record indicates Sauer did not take the six credits in English during the 2002-2003 school year or in the summer of 2003 that he needed to renew his provisional license to teach English for the 2003-2004 school year, due to the unavailability of such classes outside of school hours or the school year. In January of 2003, Sauer had discussed with Schmidt the difficulty of finding available classes and there is no evidence that Schmidt questioned whether that difficulty was real.

While Sauer did not take the required six credits to renew his English license for the 2003-2004 school year, he did obtain letters from Cardinal Stritch College and the UW-Madison indicating they not did offer the needed classes in the evenings or during the summer so that he was able to obtain his emergency English license for the 2003-2004 school year. Although the emergency license was granted, DPI stated that Sauer would have to obtain nine credits in English by August 31, 2004 in order to renew the license.

Also in early 2003, Sauer had contacted DPI regarding obtaining certification based upon his body of prior academic work and experience. Sauer shared DPI's response with Schmidt. While that response indicated that a college could certify a student on that basis, but that this "rarely occurs", it went on to state that PI34 would provide an opportunity "for a true performance based alternative license" effective July 1, 2004. In her April 24, 2003 e-mail to Sauer, Schmidt indicated she would bring up Sauer's "scenario" in her meeting with DPI and a university person, but that her network told her PI34 would not be mandated and "therefore no flexibility in teacher licensing." Thus, it appears that from the beginning, Schmidt did not view Sauer's pursuing an alternative means of obtaining certification as a viable option.

Schmidt and Sauer met again in November of 2003 to discuss Sauer's situation as to certification in English. In her memo to Sauer summarizing this discussion, Schmidt indicated Sauer had stated he was "not motivated" to obtain the nine credits he needed to renew his license, as no required courses were offered when he was available in the second semester or the summer. Schmidt concluded from this that Sauer would not be licensed in English. However, in his response of December 18, 2003, Sauer stated that he had not given up on obtaining the certification and planned to contact DPI and Dr. Zeitner at UW-Madison and persons at other certifying schools "in an effort to develop an alternative means to meet the DPI prerequisites" and that he thought that was "what PI34 is all about."

Schmidt testified that she interpreted Sauer's reference to "alternative means" of obtaining certification as finding courses which he could take on-line or otherwise take without attending classes. This could not be the case, as she had already concluded that Sauer was not going to take courses to earn the nine credits and Sauer had verified this in his December 18, 2003 memo to her. As to PI34, Schmidt testified that she did not know much about it, nor did she inquire as to what it entailed. However, Sauer testified that he explained to her what PI34 involved in their January 17, 2003 meeting. Further, her April 24, 2003 e-mail to Sauer indicates she had some knowledge as to PI34, but that she did not believe it would help Sauer. Schmidt conceded she did not know much about Sauer's educational or work background, other than that he had previously worked as an attorney. Thus, the claim that Schmidt had no basis upon which to believe that Sauer would be successful in pursuing alternative means to certification is based on her failure to learn more about what such alternative means entailed and about Sauer's background. Schmidt's claimed unfamiliarity in these regards and her unwillingness to gain that information, is not a basis for discounting Sauer's ability to obtain the English certification by alternative means, or the likelihood of his doing so, and is not a sufficient basis for Schmidt's or the Board's belief that Sauer would not be certified for the 2004-2005 school year to teach English.

The District makes much of Sauer's continuing to propose options to his teaching English as evidence that he did not intend to obtain the certification. While it might be viewed as demonstrating uncertainty on Sauer's part about whether he would be able to obtain the certification, considering or offering such options would seem to be a prudent action for one to take in his situation. This is especially the case after Schmidt's December 18, 2003 letter giving him the February 1, 2004 deadline for proving he was registered for the nine credits and stating his contract would be non-renewed if he did not do so. Further, the Association's representative, John Horn, testified, and his notes indicate, that at the end of their February 16, 2004 meeting with Schmidt and Johnsrud, besides having discussed other options, Sauer stated he may still get his certification. Sauer testified that he also told the Board in his private non-renewal conference that he still hoped to be certified to teach English.

In her letter of December 18, 2003, Schmidt gave Sauer a deadline of February 1, 2004, to provide the Board with written certification from a college and DPI confirming he was registered for the nine credits to be completed by August 31, 2004. This again demonstrates Schmidt's belief that there was only one way for Sauer to obtain certification in English, i.e., take the courses, and that pursuing an alternative means would be futile. Further, the District's claim that it had to act then, and could not wait to find out if Sauer would be certified to teach English, because of the problems it would have in finding someone at that point to teach the English classes, is diminished by the fact that it had taken no action by May to find someone, even though Schmidt and the Board assertedly did not believe Sauer would be certified. Moreover, the record indicates that there were other teachers in the District with licenses that would expire at the end of the school year, but there is no indication that they were given such a deadline to establish that they were already registered to take the courses needed to renew their licenses or face non-renewal.

This is not to say that the District did not have reason to be concerned that Sauer would not be able to obtain certification in English by the start of the 2004-2005 school year. Schmidt was aware of the difficulty Sauer was having in finding the necessary courses when he could take them and he had stated he was not motivated to take them when it would require a leave of absence from his teaching position in the District.² Also, obtaining certification from a college based upon one's past academic work and work experience was a rare occurrence according to Peter Burke's e-mail and PI34 was new at the time and not yet in effect. Further, it appears that Sauer considered himself to be sufficiently important and valuable to the District, that it would or should accommodate him, if he did not obtain the English certification. However, having reasons to be concerned or being put off by Sauer's attitude were not sufficient to establish a basis for non-renewing his teaching contract at that time.

Given Schmidt's and the Board's lack of knowledge of what PI34 entailed, and despite Schmidt's doubts about its viability as an option, given Sauer's educational background and prior work experience and the possibility of his obtaining certification in English on that basis, rather than taking coursework, the Board did not have a sufficient basis upon which to reasonably conclude that he would not be certified to teach English by the start of the 2004-2005 school year. Thus, it is concluded that the District did not have good reason to non-renew Sauer's teaching contract and issue him a partial teaching contract for the 2004-2005 school year. Having so concluded, it is not necessary or appropriate to address issues involving what occurred after the Board's March 10, 2004 decision to non-renew Sauer.

As a remedy, the District is to make Sauer whole by paying him the difference in the wages and the benefits he received for the 2004-2005 school year and the wages and benefits he would have received had his teaching contract not been reduced to 87.5 percent, and to remove any mention of the non-renewal from his personnel file. Whether Sauer was to use a personal day or not be compensated for attending the hearing are separate issues from those before the Arbitrator, and are not within the scope of the Arbitrator's authority to resolve in this case.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The District did not have good reason to non-renew Steven Sauer's teaching contract for the 2004-2005 school year. Therefore, the grievance is sustained and the District is directed to immediately make Steven Sauer whole by paying him the difference between the

² While the District notes Sauer never asked about taking a leave of absence, there is no assertion that it would have been granted, had he asked.

salary and benefits he received for the 2004-2005 school year and the salary and benefits he would have received had his teaching contract for that year not been reduced to 87.5 percent, and to remove any mention of the non-renewal from his personnel file.

Dated at Madison, Wisconsin, this 9th day of September, 2005.

David E. Shaw /s/

David E. Shaw, Arbitrator

