

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

POYNETTE EDUCATION ASSOCIATION

and

BOARD OF EDUCATION, SCHOOL DISTRICT OF POYNETTE

Case 16
No. 65026
MA-13090

Appearances:

Wisconsin Education Association, Stephen Pieroni, Legal Counsel, 33 Nob Hill Drive, Madison, Wisconsin, appearing on behalf of the Association

Lathrop & Clark, LLP, Attorneys at Law, by Shana R. Lewis, 740 Regent Street, Suite 400, Madison, Wisconsin, appearing on behalf of the Employer.¹

ARBITRATION AWARD

Poynette Education Association, herein referred to as the “Association,” and Poynette School District, herein referred to as the “Employer,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission (herein WERC) to serve as the impartial arbitrator to hear and decide the dispute specified below. The undersigned held a hearing on the following dates: November 29, December 7, 8, 12, 22, 28, 29, 2005, January 4, 13, February 21, March 21, 27, 29, 31, April 18, 26, May 9, and May 10, 2006, in Poynette, Wisconsin. The undersigned also visited the locker room site with the parties, including Grievant, on December 29, 2005 and March 27, 2006. Each party filed post-hearing briefs, the last of which was received October 9, 2006.

ISSUE

The parties stipulated to the following issues:

1. Did the Employer have just cause to discharge the grievant, Dennis Bravick, on July 12, 2005?
2. If not, what is the appropriate remedy?

¹ Attorney David E. Rohrer participated in the preparation of the brief.

RELEVANT AGREEMENT PROVISIONS

“ . . .

Article III – Teacher Non-Renewal or Dismissal

No non-probationary teacher shall be dismissed, suspended, non-renewed, reprimanded or otherwise disciplined without just cause. Teachers new to the district shall be classified as probationary during their first three years of employment with the district. Just cause protections do not apply to probationary teachers.

Article IV – Grievance Procedure

The Board of Education and the P.E.A. each recognizes the right of any individual teacher(s), or P.E.A. to present grievances to his/her employer in person, or through representation of his own, and the corresponding right of the employer to confer with him/her in relations [sic] thereto. Without limiting the preceding legal rights and duty, the parties to this Agreement agree as follows:

A. Definition

Grievance is defined to be and limited to a dispute concerning the interpretation or application of the terms of the written agreement entered into between the parties on wages, hours and conditions of employment for the professional employees for whom the P.E.A. is the negotiating representative.

B. Procedural Steps for Teachers

. . .

4. If the grievance is not resolved in Step 3, the P.E.A. may submit the grievance to the Wisconsin Employment Relations Commission (WERC) for arbitration under its rules. The decision of the arbitrator shall be final and binding on the parties.

(a) If there is a charge for the services of an arbitrator, the district and the P.E.A. will share the expenses equally.

. . . .”

RELEVANT RULE PROVISIONS

SCHOOL DISTRICT OF POYNETTE BOARD POLICY

“ . . .

2. Harassment Policy

a. Policy Statement

1. It is the policy of the School District of Poynette to maintain a learning and working environment that is free from harassment. No employee, volunteer or student of the district shall be subjected to harassment on the basis of . . . sex. . . .

2. It shall be a violation of this policy for any employee of the School District of Poynette to harass another employee or student through conduct or communications as defined in Section II....

. . .

4. Each employee of the school district is responsible to create an atmosphere that promotes equity and is a bias free environment. Further, each employee shall support the implementation and understanding of all components of the Anti-Harassment Policy and procedures.

5. Violations of this policy or procedure which have been reviewed by the Board of Education will be cause for disciplinary action.

b. Definition of Harassment

1. Harassment is any unwanted, deliberate or repeated unsolicited comments, gestures, graphic materials, physical contacts, or solicitation of favors which are based upon one's group membership when:

. . .

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance or creating an intimidating, hostile, or offensive environment.

An important part of the definition is the word “unwelcome or unwanted.” The law does not prohibit the mention of sex, race, age, national origin, etc., in the work place. It prohibits unwelcome or unwanted attention.

2. Sexual harassment, as set forth in Section II-A, may include, but is not limited to the following:

. . .

c. unwelcome repeated remarks or looks toward a person, with sexual or demeaning implications.

...”

CLASSROOM INSTRUCTOR JOB DESCRIPTION

“... .

PERFORMANCE RESPONSIBILITIES

To create and maintain a classroom environment that promotes learning.

To promote favorable professional communication to students, their families and the community.

... .

To model a consistent [sic], fair and caring relationship with students.

... .

To work toward and maintain stated district goals and policies.”

SCHOOL DISTRICT OF POYNETTE MIDDLE SCHOOL STUDENT HANDBOOK

“... .

GENERAL DUTIES OF A TEACHER

1. The principal role of the teacher is to model and promote educational excellence, to impart knowledge, and aid in the development of thinking skills for lifelong learning.

2. Each teacher is expected to assume the responsibility of the classroom disciplinary problems

3. All teachers are granted the authority necessary to secure good discipline. . . .

4. A teacher should not confine himself/herself to the mere supervision of his/her own classroom

17. Public relations is a critical function of all staff. . . .

18. Teachers are expected to adhere to all policies of the Board of Education. A copy of the Board of Education Policy Handbook is available in each building.

. . .

HARASSMENT POLICY

I. THE POLICY

A. It is the policy of the School District of Poynette to maintain a learning and working environment that is free from harassment. No employee, volunteer or student of the district shall be subjected to harassment on the basis of . . .sex . . . as required by s. 111.31-111.295, Wis. Statutes.

B. It shall be a violation of this policy for any employee of the School District of Poynette to harass another employee or student through conduct or communications as defined in Section II. . . .

D. Each employee of the school district is responsible to create an atmosphere that promotes equity and is a bias free environment. Further, each employee shall support the implementation and understanding of all components of the Anti Harassment Policy and procedures.

E. Violations of this policy or procedure which have been reviewed by the Board of Education will be cause for disciplinary action.

II. DEFINITION

A. Harassment is any unwanted, deliberate or repeated unsolicited comments, gestures, graphic materials, physical contacts, or solicitation of favors which are based upon one's group membership when:

. . .

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance or creating an intimidating, hostile, or offensive environment.

An important part of the definition is the word "unwelcome or unwanted." The law does not prohibit the mention of sex, race, age, national origin, etc., in the work place. It prohibits unwelcome or unwanted attention.

B. Sexual harassment, as set forth in Section II-A, may include, but is not limited to the following:

. . .

3. unwelcome repeated remarks or looks toward a person, with sexual or demeaning implications.

. . .

III. DISCIPLINE/CONSEQUENCES

A. Anyone who engages in harassment in the school setting may be subject to disciplinary action up to and including dismissal. Any employee who permits harassment of students, other employees or volunteers may be subject to disciplinary action up to and including dismissal.

. . . .”

FACTS

The Poynette School District is a Wisconsin municipal employer operating a school district in Poynette, Wisconsin. It operates a high school and junior high school. The buildings are across a parking lot from each other. The Association is the collective bargaining representative of various professional employees of the Employer including teachers. The Grievant, Dennis Bravick, was employed by the Employer continuously for more than the last 16 years as a physical education teacher until his discharge on July 12, 2005. He is a member of the bargaining unit. He was considered an adequate teacher and he had no relevant prior disciplinary history. He was discharged for having repeatedly entered the girls' locker room while sixth grade girls were changing.

Mr. Bravick has taught elementary physical education classes for most of his career with the Employer. His classes for sixth graders included units on various sports, one of which was swimming. The classes included students of both sexes. The swimming unit was taught at the high school swimming pool. Sixth grade students would leave the junior high school and walk to the high school swimming pool. They would change in their respective locker rooms and enter the pool area for instruction. Girls often wore their swim suits to school underneath their regular clothing. Instruction was conducted with students in the pool. Students who were excused from swimming would sit in the bleachers in the pool area and watch the instruction of others. Mr. Bravick routinely ended the instruction period about 10 minutes before the scheduled end of class to afford the students an opportunity to change in the locker rooms. The amount of time afforded students was minimal and students had to change quickly.

The high school pool is connected to the high school with doors on one wall. The four doors are, respectively, one door leading directly to the high school cafeteria, two doors leading into the girls' locker room (one to the bathroom and one to the shower room), and one door leading to the boys' locker room. On the walls of each locker room opposite the pool area wall, there are doors that lead to the hallway. After they have changed, students exit the locker room by those doors. The pool area has a cavernous echoing nature. There is a large exhaust fan which operates during the school day and provides a high level of continuous background sound.

Mr. Bravick used the following routine at the end of swimming class. He would direct the students in the pool to go to the locker rooms to change. The female students who did not swim would leave the bleachers and either go into the locker room before the other students started showering or go into the locker room through the shower room door and wait along the privacy wall until the other girls finished using the showers. When the students left the pool area, Mr. Bravick would routinely walk to the door leading to the cafeteria and lock that door to insure that students did not wander into the pool area and accidentally drown.

The door to the bathroom in the girls' locker room was normally kept locked and only opened momentarily to allow access to disabled students. There were no disabled female students in the 2004-5 sixth grade class. Mr. Bravick would then walk to the door leading to the shower room in the girls' locker room. Ordinarily that door would close automatically, but during the relevant time period the door was broken and remained open unless forced shut. The door leads to a floor-to-ceiling "privacy" wall about 10 feet long. The wall ends several feet before the other wall of the shower room, which contains a door through which girls enter after leaving the pool. Mr. Bravick would stand at the threshold of the shower room door and shout "turn off the showers" as a signal that students should finish changing and prepare to go to their next class. As noted, there are several noisy exhaust fans in the pool area causing a high level of background noise in the pool area. It should also be noted that for some reason the girls' showers sounded like they were still "on" when, in fact, they were off. There were several occasions when Mr. Bravick sent students into the girls' locker room to shut off the showers because of the false sound. In the normal routine, after Mr. Bravick had shouted "turn off the showers" into the girls' locker room, he would close and lock the door so that girls could not wander back into the pool area. Mr. Bravick would then enter the boys' locker room through the door to the boys' shower room and lock that door behind him. He would then monitor the boys in the locker room until they were done changing and exit with them. Both the boys' and the girls' locker rooms each had a door on the wall opposite the pool area which led to a hallway. Students would exit the locker room into the hallway and make their way back to the junior high school. Students would ordinarily leave in groups and socialize while walking to the junior high school.

In the years prior to 2004-5, the Employer assigned a female employee to monitor the girls while they changed in the locker room. The Employer discontinued the practice for the 2004-5 school year, over Mr. Bravick's objection. Sixth grade girls ordinarily have modesty

issues. The girls shower with their swim suits on and usually change in a way that gives them substantial privacy. For instance, some girls change in the locker room bathroom and some put up towels or other screens around their locker while changing.

For the 2004-5 school year, Mr. Bravick taught three sections of sixth grade students. They were:

1. Third period, Tuesday and Thursday
2. Third period Monday and Wednesday
3. Seventh period Wednesday and Third period Friday.

The swimming unit for sixth grade in the 2004-5 school year commenced February 28, 2005, and lasted for the first two weeks of March, 2005. The first day of the swimming unit was February 28, 2005.

Prior to March 5, 2005, sixth grade students began to discuss allegations that Mr. Bravick had entered the girls' locker room on Thursday, March 3, during the sixth grade third hour gym period (9:30 a.m. to 10:15 a.m.) The rumor was reported to Poynette Police Department Officer Gary Napralla at about 1:00 p.m. on March 8, 2005.

Student F and Student E are in the third period Tuesday and Thursday gym class. They talked in the locker room following the March 8, class about Student F having seen Mr. Bravick come into the shower room on March 3, 2005, during their shower time at the end of third period. Student F supported Student E in reporting the matter to adults and went with her immediately after the close of gym class on March 8 to talk to Ms. Amy Cole, the school guidance counselor. Ms. Cole reported that information to the then-building principal James Carelli, who reported the matter to Superintendent Barbara Wolfe. She directed him to assign a male and a female to investigate the matter. Principal Carelli assigned Assistant Principal James Kintzer and High School Assistant Principal and Athletic Director Dana Breed to investigate the matter. The two selected investigators had had prior experience conducting investigations and neither was hostile to Mr. Bravick. Officer Napralla and Mr. Carelli agreed to have the police investigation conducted separately from the Employer's investigation.

Mr. Kintzer and Ms. Breed began their investigation on March 9, 2005. They conducted interviews between that date and March 18, discontinued for spring break, and resumed immediately thereafter on March 28, 2005. Twelve girls were interviewed from the Tuesday-Thursday third period class, 7 from the Monday-Wednesday third period class, and 12 from the Wednesday seventh period - Friday third period class. The two investigators met jointly with and interviewed each girl but took separate notes. Students were told the interview was confidential. Each girl was told to report only what she saw or heard with her own senses. Each was asked if anything unusual happened in the physical education classes.

Students were first asked to show what happened on a composite map of the locker room. The investigators several days later in their investigation changed their procedure and asked each girl to mark locations on a separate map. They then asked girls who had marked the composite map to make individual maps. Later, each was given a separate diagram of the locker room to mark what they had seen. Each was directed not to discuss the matter further with others. The composite map was later lost. After each interview, Kintzer and Breed verified the line of sight of each girl. They re-interviewed one girl when her line of sight and presence in school later on in March was in question. The investigators confined themselves to determining whether each girl gave a plausible observation. They did not compare students' statements for inconsistencies with other students' observations.

Students continued to discuss this matter with each other and circulated a sign-up sheet on Wednesday March 9 for other sixth grade girls to list their name as having seen Mr. Bravick in the locker room.

On March 10, Pupil Services Director Alan Chittick briefly notified Mr. Bravick of the nature of the allegations. This occurred at about 9:30 a.m. Mr. Bravick expressed frustration at the "false" accusation. He immediately entered Principal Carelli's office and told Mr. Carelli something to the effect of: "This is what you get when you don't have a female supervisor in the girls' locker room." He stated that he wanted a female supervisor in the girls' locker room and that the door to the girls' shower should be repaired so that it closed automatically. He later took steps to ensure that the door was promptly fixed. He was called to a meeting with District Administrator Wolfe and Mr. Carelli in Ms. Wolfe's office near the end of the day of March 10. At that time he was again informed of the allegations and placed on administrative leave.

Investigators Breed and Kintzer interviewed Mr. Bravick with union representation on March 17, 2005. He denied ever entering the girls' locker room. He recited his normal practice as specified above and stated that he never passed the threshold of the door leading to the girls' locker room. He stated his belief that the girls were telling lies.

Mr. Bravick and union representatives met with Mr. Kinzer and Ms. Breed on April 15, 2005. Mr. Kintzer and Ms. Breed presented Mr. Bravick with a copy of their preliminary report indicating that they believed he had entered the girls' locker room on a number of occasions. Mr. Bravick repeated his previous position and made requests for further investigation that would include interviewing the teachers of the accusing students and interviewing the boys in the sixth grade. It should be noted that none of the girls in the seventh, eighth or ninth grade made similar allegations nor were any allegations raised regarding prior years.

On April 26, 2005, Mr. Kinzer and Ms. Breed filed their report. They concluded that:

1. Mr. Bravick entered the girls' locker room on multiple occasions;
2. Mr. Bravick was untruthful;
3. Mr. Bravick falsely accused the students of lying and falsely tried to shift the blame to students; and
4. Mr. Bravick violated Board of Education policy XA(2)(b) (sexual harassment).

On June 15, 2005, District Administrator Wolfe filed charges with the Poynette Board of Education based on the foregoing report. The Board of Education held a hearing on July 12, 2005, pursuant to Sec. 118.22, Stats., after which it voted to uphold the discharge of Mr. Bravick on the basis of the allegations made by Ms. Wolfe. Mr. Bravick filed a grievance protesting his discharge and the same was properly processed to arbitration.

The police investigation began on March 8, 2005, and concluded on March 15, 2005. Poynette police (primarily Officer Napralla) interviewed 18 students and re-interviewed some of those students on a later date. Officer Napralla interviewed Mr. Bravick on March 10 about the time he was being placed on administrative leave. Mr. Bravick also denied ever "stepping" over the threshold of the girls' locker room door. Officer Napralla offered Mr. Bravick an opportunity to take a lie detector test to which Mr. Bravick responded positively. No evidence was presented concerning whether the test actually was conducted.

Officer Napralla prepared a typed report. Officer Napralla testified that the report contained an inadvertent typing error erroneously stating that some students had alleged that Mr. Bravick was in the girls' locker room on March 2, 2005, a day when Mr. Bravick was not at school.

On April 5, 2005, Columbia County filed a criminal complaint against Mr. Bravick alleging four counts of invasion of privacy in violation of Sec. 942.08(2)(b), Stats., by entering the girls' locker room on March 2, March 3, March 4, and March 9, 2005. Section 942.08(2)(b), Stats., is a Class A misdemeanor. Mr. Bravick was admitted to bail with respect to said complaint, which bail agreement contained provisions, among other conditions, that restricted Mr. Bravick from being in the Employer's buildings.

The arbitrator conducted an in-person "visit" to the locker room on December 29, 2005, with both parties present, including Mr. Bravick. The Arbitrator was not aware of the bail conditions at the time of the "visit." Columbia County subsequently charged Mr. Bravick with "bail jumping" in violation of Sec. 946.49(1)(a), Stats., a misdemeanor, for having visited the site. On March 8, 2006, Columbia County withdrew the charges of invasion of privacy

and entered into a deferred prosecution agreement with Mr. Bravick concerning the "bail jumping" charge. The deferred prosecution agreement generally prohibits Mr. Bravick from going on the Employer's premises with certain exceptions. It also provides in relevant part:

In the event you are reinstated to your teaching position with the Poynette School District through the arbitration process, conditions (f) through (h) [relating to being on the Employer's premises] shall be modified to allow you to perform the obligations of your position, though the remainder of the agreement may continue for the full 24 month term at the discretion of the District Attorney's Office. However, the District Attorney's Office agrees to consider termination of this agreement after review of the arbitration decision.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to discharge Grievant Dennis Bravick for willfully entering the 6th grade girls' locker room while students were changing clothes on March 3, 8 and 9, 2005. These actions are so outrageous that they justify discharge. In any event, they clearly violate Bravick's fundamental teaching responsibilities, the rule requiring providing truthful information to the Employer, and the Employer's policies, including, but not limited to, its sex harassment policy.

The arbitrator has indicated that he intends to apply the "clear and satisfactory" burden of proof specified in Sec. 111.07(3), Stats. The same is more than a mere preponderance of the evidence, but less than the "clear and convincing" mid-range standard of proof used in Wisconsin courts. However, the appropriate standard is "preponderance of the evidence." Most arbitrators refuse to apply heightened burden of proof standards in arbitration in Wisconsin. This standard has been applied by arbitrators even in stigmatizing discharge cases. Employees who pursue discrimination claims under federal or state law are required only to prove discrimination by a preponderance of the evidence. It is anomalous for an employee to bear a lower burden of proof than an employer must meet.

The proper test for just cause is whether the employee committed the act with which he is charged and, if so, whether the act warranted the penalty imposed. The Employer conducted a fair investigation. It interviewed 34 girls one at a time, with a male and female investigator. It asked students to state only what they saw with their own eyes and what they heard with their own ears. They did not present students with leading questions. The investigators instructed students not to share what was said during the interview with other students. The investigators then checked the reporting students' individual lines of sight. If

they could not verify the line of sight, they questioned the student again. They did this with student P. They also complied with the Association and Mr. Bravick's request to interview other individuals. They met with Mr. Bravick on March 17 and April 15, 2005. Mr. Bravick continued to state at both times that the girls were lying and that he never crossed the threshold.

Although the Association has criticized Mr. Kintzer for not keeping a copy of the list of student names that students E and V made, Mr. Kintzner testified that he had viewed the list as irrelevant. Accordingly, it was reasonable for him to have disposed of it. Similarly, there is no reason to doubt the integrity of the investigation simply because the girls' parents were not present when the girls were interviewed.

The Employer has shown by a clear and satisfactory preponderance of the evidence that Mr. Bravick entered the girls' locker room as charged by the Employer. At the very least 17 girls have credibly testified that Mr. Bravick entered the locker room. In order to believe that the girls are lying, one would have to conclude that they conspired together or each had a motivation for lying. Not all of the girls are in the same class. This fact leads to the inevitable conclusion that Mr. Bravick entered the locker room on more than one occasion. These girls took the frightening step of telling the investigators and coming to the hearing and testifying because they honestly believed what they saw. The Association will no doubt dwell on the inconsistencies in the prior statements of the girls who testified. There are inconsistencies. Many of these are differences of recollection of facts which were minor in comparison to the salient event. Not all of the girls were in the same location or in the same state of undress. It is understandable that girls testifying many months later would make errors in their testimony.

Mr. Bravick was dishonest with investigators when he denied ever crossing the threshold of the girls' locker room. Arbitrators have included lying as grounds for dismissal even if it was not raised as an independent ground at the time of discharge. Here the Employer has charged Mr. Bravick with lying to investigators. Even if the Arbitrator were to find that Mr. Bravick mistakenly entered the girls' locker room, the fact is that he still lied to investigators. The two together justify his discharge. The Employer has a right to expect that employees be totally honest when entrusted with children. Further, Mr. Bravick compounded this violation by again lying under oath at the arbitration hearing.

Finally, the Employer argues that even if the Arbitrator concludes that the Employer lacks cause to discharge Mr. Bravick, he should nonetheless be denied reinstatement because he has been dishonest with investigators.

In reply to the Association's argument, the investigation was not partisan against Mr. Bravick and not flawed. Neither Mr. Kintzner, nor Ms. Breed had any motive against Mr. Bravick. Neither sought the investigatory assignment. Indeed, they were reluctant to make a finding against Mr. Bravick. The Employer's refusal to turn over documents to the Association until the Employer made charges is supported by Sec. 103.13(6)(a) and (g), Stats.

The Association's thematic overview of the case is the accusations are: 1. the product of adolescent imagination; 2. result from student bias against Mr. Bravick; 3. testimony by easily led students who testified to what they heard as if they had seen it. The Association's exhibits 1 and 57 should not have been admitted because Wisconsin case law prohibits one witness testifying about the credibility of another. In any event, many students listed as credible thereon testified against Mr. Bravick. The Association's own teachers generally indicated that it was hard for this large a group to fabricate a story. No staff member overheard students making up this story. The Association relies upon an outside expert to support its case, while teachers who know the students generally say that they could not have fabricated this story. Why did the Association rely upon an expert like Dr. Rickman who used arcane concepts when it argued that the investigators should have readily identified the students' statements as false? Dr. Rickman's testimony is not that enlightening about the facts of this case. The best this testimony can show is that there may be some possibilities of psychological errors in the girls' testimony. This evidence would hardly be admissible in court.

It is not uncommon for girls this age who undergo a stressful event to make inconsistent statements about the event. The girls in this case lack any motive to lie. The girls denied being under peer pressure or that they had any reason to want to get Mr. Bravick fired. While some may have heard stories, each denied being influenced by those stories. Any inconsistencies in their testimony do not reflect intentional falsehood but understandable errors in memory. Even the Association's witnesses had similar errors in their testimony. Common sense buttresses the students' testimony rather than the Association's case. One does not have to believe Mr. Bravick is a pedophile to conclude that he entered the locker room. Even if this were merely incredibly bad judgment, he still lied to the Employer and the arbitrator about his actions. The grievance should be denied.

Association

The allegations against Mr. Bravick are the product of adolescent imagination and bias. The girls who leveled these allegations have not put forth a coherent or credible set of accusations. This is further exacerbated by the fact that the Employer's investigators gave every benefit of the doubt to the student-accusers. The accusations started with E and V who collected names of students who "saw" Mr. Bravick in the locker room. This soon spread from sixth grade student to student during breaks. Some girls took hearing Mr. Bravick say "turn off the showers" as if he were in the locker room. Others were motivated by statements by their older sisters that Mr. Bravick had "looked down their shirts." Still others were motivated to get attention from their peers by being part of the group that made the allegations. Others were motivated to use false allegations to change gym teachers.

The investigation in this matter was not fair and impartial. It may have resulted in crucial evidence exonerating Mr. Bravick being lost. The conclusions of the Employer are unreliable and should be rejected. The investigation was done on the basis of determining

what the girls "believed they saw" rather than determining what actually happened. They also did not determine if the girls' stories made sense. The investigators also failed to seek any exonerating evidence, including video coverage from the hallway surveillance camera. They "lost" valuable evidence, including the list of girls who said they had seen Mr. Bravick in the girls' locker room which was gathered by students E and V and submitted to Mr. Kintzer on March 9. They also destroyed the composite map they had students create during the first interviews to show where they saw Mr. Bravick in the locker room. It is also clear that the investigators did not cross-check or even make notes about obviously contradictory statements by students or the failure of students to support each other. For example, the investigators interviewed student H, followed by Student R, yet they did not question Student R or Student H, when Student R obviously failed to corroborate Student H's story. Further, they accepted Student H's story as true even though other students were stating they believed Student H was making things up. Even though Student DD had told them of her concern only minutes earlier, they did not even ask Student H about whether she was "making things up." They also failed to ask follow up questions when students' stories obviously contradicted each other.

Ms. Breed and Mr. Kintzner's testimony indicated that they were unwilling to grant Mr. Bravick a presumption of innocence. For example, J stated Ms. Breed and Mr. Kintzner used leading questions. J at first placed herself in a position from which she could not see what she claimed she saw. Ms. Breed and Mr. Kintzner pointed this out. She then changed her story to account for the inconsistency. The investigators then accepted her revised statement without asking any probing questions.

The second example is that Ms. Breed testified that she "pressed" students to give accurate information. However, she "pressed" student F to change her story from "not sure" to "100% sure" and then obliterated the indecisiveness

The proper burden of proof is "clear and satisfactory preponderance of the evidence." The Employer has failed to demonstrate by a clear and satisfactory preponderance of the evidence that Mr. Bravick was in the girls' locker room on repeated occasions.

The Employer has not met its burden of proof. It failed to show that the accusers corroborated each other. Of the 12 girls in the March 3 class, five accused Mr. Bravick of entering the locker room. None of these five corroborated each other. Six girls saw nothing. Of the two students who initially reported Mr. Bravick entering the locker room, one said she did not see anything. V reported a commotion occurring only on March 8 but not March 3.

The students' diagrams fail to corroborate each other when viewed as a composite. The composite shows that some students would have been in other student's line of sight. However, none of these students remembers the other student as being in their line of sight.

The testimony of M, N and C, contradict the testimony of the the 5 students who accused Mr. Bravick of being in the locker room on March 3. They say he entered the locker room on March 8, but did not report anything occurring out of the ordinary on March 3.

The fact that there were conflicting reports of commotion on March 3 undermines the credibility of the five students who accused Mr. Bravick of being in the locker room.

O's testimony does not corroborate the student accusers who claim to have seen Mr. Bravick in their locker room on March 4. O could only have seen Mr. Bravick in the locker room on three dates, March 1, 3, or 10. It is incredible that she would not know which date. It is unlikely that O saw Mr. Bravick at location A-B from where she was standing. This is so because she would have been standing in the line of sight of the five students who alleged they saw Mr. Bravick at location A. Because none of these five accusers claim to have seen O standing directly in her line of sight, it must be concluded that O did not see Mr. Bravick in the locker room on March 3.

It is not credible that Mr. Bravick entered the locker room on March 1 without other students seeing him. It is also incredible that Mr. Bravick entered the locker room on March 10 because he was already aware at that time that he was under investigation.

Student O's testimony is also contradicted by the fact that she told a teacher that she had not seen Mr. Bravick in the locker room herself. This teacher testified that he believed Student O was speaking spontaneously and honestly when she talked to him.

Student N's testimony undermined the credibility of the other students. She did not swim. She testified that she stood at the privacy wall and watched Mr. Bravick shout "turn off the showers" as he closed the door leading to the shower. It is not likely that if Bravick were motivated by an intention to intimidate students that he would have stayed there. If he were so motivated, he would have pushed past her into the locker room.

The student accusers in the Tuesday-Thursday class, Students N and C, who claim they saw Mr. Bravick enter the locker room on March 8 are not credible. It is unlikely Mr. Bravick could have entered the locker room without more students seeing him. These accusations are diametrically opposed. The District falsely attempted to characterize student M as having seen Mr. Bravick on March 8. It falsely altered its record to change the date from March 10 (when Mr. Bravick was aware of the charges) to March 8. Student M's story is also inconsistent with the other two students' stories.

Student N and Student C's allegations contradict each other. Student N said she saw Mr. Bravick in the locker room directly behind her, while Student C said he only poked his head around the end of the privacy wall. No one saw Mr. Bravick walk directly past them to stand behind Student N. Accordingly, that scenario is impossible.

The allegations arising from the Monday-Wednesday class are not credible. The stories of Students G, P and Q are largely inconsistent and changed over time. Their stories are even more incredible when one considers that 10 of 13 students saw nothing. Student G could not recall which of her two diagrams related to March 9. Student G also insisted Mr. Bravick was in the locker room on March 2, a day when Mr. Bravick was absent. If Student G's observation of an earlier event were true, why did no other student see him in the locker room on that date? Student G gave an obviously false but detailed story about Mr. Bravick offering to tie up a girl's swim suit after a boy untied it. In fact, Mr. Bravick was absent the day that event occurred. Student G is not believable.

Student P changed her story and contradicted herself. She placed Mr. Bravick at different places when she related her story to investigators at different times. Her line of sight was impossible, yet the Employer's investigators stated they verified it.

Student Q's allegations were not corroborated by other students. She also claimed that Mr. Bravick entered the K-8 locker room on two different times in one day. The Employer's investigators did not follow through on this claim.

The assertions that Mr. Bravick was seen in the locker room on March 9 by seven girls in the seventh hour Wednesday-Friday third hour class are not credible. The girls said they saw Mr. Bravick at five different locations at the same time. The only date that the students could have seen Mr. Bravick was March 9.

Student L embellished her story by claiming she ran through the locker room when she saw Mr. Bravick. No other student reported seeing this. Student L is also incredible because she told Student J not to recant her story. Student L falsely denied doing this.

Student I on cross examination expressed doubt as to whether she had seen Mr. Bravick in the locker room.

Student R dramatically changed the location at which she allegedly observed Mr. Bravick. No other student corroborated her dramatic version even though other students would have had to have seen it, had it actually occurred.

Student H is entirely incredible. Other students identified her as deliberately lying. No student corroborated her report. She also falsely reported seeing his hands around the privacy wall on March 2, a day when Mr. Bravick was absent.

Student J said he was standing in the door leading to the hallway. Other students would have seen this had it actually occurred. Mr. Bravick was aware of a surveillance camera in the hallway. It is very unlikely he would have done this.

Student S provided a diagram where she placed Mr. Bravick near the privacy wall. This was inconsistent with her line of sight. She later changed the location to where he looked around the bathroom door. No other student saw that.

Student K claimed to have seen Mr. Bravick in the locker room on two separate occasions. She gave contradictory versions to Officer Napralla and the investigators. She stated Mr. Bravick came in a second time and handed a towel to Student H. That story has been discredited. She also gave two different versions to the District's investigators on different occasions. Teacher Wilson reported that this student was prone to make exaggerations and tell stories.

The girls' stories are internally inconsistent, inconsistent with each other, and overall inherently implausible. The fact that these stories are as inconsistent as they are is an indication that they are entirely fabricated. The Employer's investigation did not cut through these inconsistencies. What the Employer claims took place is entirely implausible. It does not make sense that someone like Mr. Bravick would do this in broad daylight. In the end, what matters most is the consistency and credibility of the testimony and not the number of students called as witnesses.

Mr. Bravick is completely credible as a witness. The instant grievance must be denied unless the Arbitrator concludes he lied. During the hearing the Arbitrator was able to take the measure of Mr. Bravick as a person. He clearly is intelligent and has a great deal of common sense. He meticulously described the discrepancies among all of the students' accusations and provided attendance records to identify possible dates. Mr. Bravick's defense relied upon common sense to show the absurdity of the allegations. Mr. Bravick's conduct was consistent with that of an innocent person. The absurdity of the allegations makes the burden upon the Employer very heavy indeed. It would take a powerful motivating force for Mr. Bravick to have entered the locker room. Entering the locker room to tell the girls to turn off the showers is not a powerful motivation. The girls showered with their swimsuits on. Mr. Bravick saw them in class with their swim suits on. There was no motivating force in seeing the girls with their swimsuits on in the shower. Why would Mr. Bravick announce his presence? Why didn't the girls report this situation immediately. Why didn't girls refuse to return to his class? No girls from other grades came forward. Dr. Robert Gordon's testimony established that Mr. Bravick showed no signs of pedophilia or chemical dependency. Dr. Gordon testified that the facts are not consistent with a person who is a voyeur. Yelling loudly before entering the locker room is inconsistent with that behavior. The alleged behavior is inconsistent with a person who worked for the Employer for 17 years.

Dr. Maureen Rickman's analysis of the data related to the student allegations provides a useful paradigm for the arbitrator to consider whether the student reports are reliable. She testified that there were a number of psychological processes that explain the students' testimony: suggestibility, the misinformation effect, immature ascribing intentionality and errors in encoding. Accordingly, the Association asks that the grievance be denied.

In reply to the Employer's argument, the quantum of proof is higher than a mere preponderance of the evidence. The District did not meet this burden. There are substantial issues which indicate that the reports from some of the sixth grade girls, while numerous, are nonetheless unreliable. For example, there were 45 female students in the sixth grade physical education classes taught by Mr. Bravick. Only two came forward to lodge a complaint about Mr. Bravick. Indeed, neither of those two students proved to be reliable. Student E gave contradictory statements about the location of where she allegedly saw Mr. Bravick. The arbitrator found that it was impossible for her to have seen him given her line of sight. E also exaggerated her claims by initially asserting that she had seen Mr. Bravick in the locker room five times the previous year. She then blithely retracted those claims, thus demonstrating she cannot be trusted. Similarly, Student K exaggerated her claim by saying that Mr. Bravick peeked his head around the corner and said turn off the showers every time they have class. Later she changed her story from seeing him two times to seeing him one time. In any event, the reliability of the claims are diminished by the fact that few students came forward. In asking whether anything "unusual" happened, Kintzner and Breed's questioning of the students was leading and suggestive, in the light of the fact that rumors were swelling.

The Employer has not disputed that that no student accuser corroborated any other regarding any of the days in question. The Employer appears to accept the significant lack of corroboration as within acceptable limits. This contradicts common sense. The Employer attempts to buttress its argument by asserting that the girls had no motive to conspire against Mr. Bravick. The Employer, however, fails to discuss Dr. Rickman's testimony, in which she explained how adolescents' memory can be distorted by "rehearsing" their story with friends. Dr. Rickman testified that it is possible that 50% of the female students could be influenced by the "misinformation effect." This explains how 19 girls could claim Mr. Bravick entered the girls' locker room, even though he had not. The failing of the Employer's argument is that it is based upon the assumption that 17 girls can't be wrong. Therefore, the Employer has failed to prove by a clear and satisfactory preponderance of the evidence that Mr. Bravick entered the girls' locker room.

Arbitral law is not particularly helpful in this case because of the unique circumstances. The Employer's alternative argument, that Mr. Bravick lied to the Employer's investigators is unfounded and should be rejected by the arbitrator. Even if the girls' testimony is believed in some small part, this would not necessarily mean that Mr. Bravick deliberately lied; he could have been mistaken and/or acted unintentionally. Additionally, the Employer's argument that, because Mr. Bravick was allegedly dishonest in his responses, the Employer has lost confidence in him in dealing with the protection of students is without merit. This record demonstrates rather that the Employer failed to weed out false accusations from well-founded ones. The traditional reinstatement/make-whole remedy is appropriate and necessary.

DISCUSSION

The determinative issue in this case is the credibility of the numerous sixth-grade girls who have accused Mr. Bravick of being present in their locker room. As I noted at the conclusion of the hearing, the primary factual issue is whether Mr. Bravick intentionally and repeatedly improperly entered the girls' locker room during their post-swimming class changing period. I conclude that he did and I conclude that discharge is the only appropriate remedy for the misconduct.

1. Quantum of Proof

There is considerable debate in the arbitration profession concerning the quantum of evidence an employer must produce to sustain its position in discharge cases. Many arbitrators have opted for enhanced burdens of proof in discharge cases, particularly those that severely impact the reputation of the employee.² The Wisconsin Legislature long ago took the unusual step of establishing the burden in proof in actions before the WERC in handling unfair labor/prohibited practice complaints for violation of collective bargaining agreements. Section 111.07(3), Stats.,³ provides in relevant part:

" . . . and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

I am satisfied that the better view in labor arbitrations occurring under the Municipal Employment Relations Act is to apply that standard and no other.

2. Just cause

The concept of "just cause" which the parties have voluntarily included in their collective bargaining agreement is long recognized in the field of labor law. See, Paperworkers v. Misco, 484 U.S. 29, 41, 126 LRRM 3113 (1987); cited approvingly, Milwaukee Teachers' Education Ass'n v. Milwaukee Board of School Directors, 147 Wis.2d 791 (Ct. App., 1988). It incorporates into the collective bargaining agreement a well-established body of law developed by labor arbitrators over the years and recognized by the courts as at the core of the common law of the shop.⁴ The Employer relied heavily upon its

² See, Elkouri and Elkouri (Ruben, Ed.), How Arbitration Works, (6th Ed, BNA), pp. 949-952.

³ Section 111.70(3)(a)5 and (3)(b)4, Stats., make it a prohibited practice for a municipal employer or employee to violate a collective bargaining agreement. Section 111.70(4)(a), Stats., makes Section 111.07(3), Stats., applicable to prohibited practice proceedings before the Commission.

⁴ See Ch 6, National Academy of Arbitrators, The Common Law of the Workplace, Second Edition, (BNA, 2005); Dane County v. Dane County Union, Local 65, 210 Wis.2d 267, 281-284 (Ct. App, 1997).

rule violation theories to establish just cause for the discharge. For reasons discussed below, the discharge in this case is appropriate based upon the *per se* doctrine. The *per se* doctrine is that there is some employee misconduct which is so obviously wrong and so serious that the conduct itself warrants discharge without prior warning or progressive discipline.⁵

3. Factual issues

a. Student Credibility in General

I acknowledge that there is much in this record for which there is no fully satisfactory explanation. Nonetheless, the record does generate a predominate view of the facts.

The main focus of this case is whether the accusing students' sense-impressions of Mr. Bravick entering the girls' locker room while girls were changing is credible, even though there are serious factual difficulties in some witnesses' testimony and even though there are inconsistencies among students' testimony as a whole.

For the most part, the students who testified were straightforward in their testimony and demonstrated by their careful demeanor that they were intending to tell the truth as they knew it. The vast majority of the students had no personal motivation to deliberately lie. Even if individual students were motivated by peer pressure, conspiracy, or by the embarrassment of having to recant their former stories, it is virtually impossible that all of these girls were motivated by those factors.

Similarly, it is highly unlikely that this number of girls could conspire to create a false complaint against Mr. Bravick. Rather, it would be highly likely that some would reveal the conspiracy to the investigators, as some did with respect to student H's attempt to line up false witnesses for her version of what occurred.

The Association heavily relies upon the testimony of Dr. Maureen Rickman. This testimony was very helpful in understanding how memory can be affected by a number of factors. This testimony was helpful to both parties.

Dr. Rickman testified about the psychological process affecting memory. She defined suggestibility as the susceptibility to have one's memory of an event altered by various means, providing information, rehearsing the memory in a collaborative way, leading questions, etc. The younger a person is, the more susceptible they are to suggestibility. (Dr. Fish, the Employer's expert, disagreed that there was a difference for 11 year olds.) With respect to the

⁵ Abrams & Nolan, "Toward a Theory of 'Just Cause' in Employee Discipline Cases," 1985 Duke L.J. 594 (1985); Huntington Chair Corp., 24 LA 490, 491 (McCoy, 1955).

concept of rehearsing a memory, the process can give meaning to observations and the memory can be altered to conform to the meaning ascribed. This process takes place in the first twenty-four hours after an event. People tend to encode salient (important) events into their memory, but not encode minor events. Emotional events tend to always be more salient. When there is an emotionally salient event, there is a "fish-eye" lens. There is a distortion of the unimportant information. Rewards also affect salience and adding a reward may make what would otherwise be unimportant, salient. People are more suggestible to matters which are less salient.

She discussed the research done by Elizabeth Loftus which, among other things, demonstrated that "rich false memories" can be created by credible associates who discuss the existence of an event which never occurred, with another. That person then invents a whole narrative concerning the false event. This appears to have occurred with respect to student G as discussed below.

She noted that girls in the 11 year-old range are just beginning to understand "intentionality." Some described Mr. Bravick as "peeking" which ascribes a motive to his looking.

The key aspect of Dr. Rickman's testimony was her conclusion that the vast majority of the witnesses' testimony can be explained away by the misinformation effect.⁶ The difficulty of Dr. Rickman's testimony on that point is that it is highly unlikely that the psychological factors she enumerated could reasonably have affected the large numbers of students involved in this case. First, it is highly unlikely that students would view Mr. Bravick's shouting into the locker room to turn off the showers as anything unusual. Thus, it is highly unlikely that such shouting was a "salient" event. It is much more likely that the presence of Mr. Bravick in the locker room would be "salient." Second, I find it highly unlikely that this large number of students would have this level of false memory. Third, I find it highly unlikely that these students would be as consistent as they have been overall if this were the product of any form of error.

There are only two ways in which the students in this case would all have this level of false memory. One way is if they rehearsed their stories with other witnesses. The other would be if they had been led to do so by the investigators. The key points of the stories were that Mr. Bravick was seen in the locker room at, or about, the time he shouted "turn off the showers," and that he was seen by most students at or near the end of the privacy wall. In this context, the investigation was not sufficiently leading to produce that level of consistency. The investigators asked students what they saw but did not suggest specifically what they saw.

⁶ Tr. pp 3525, 3534

Even though there was much discussion among the students prior to the investigation, it is highly unlikely that they discussed the details of what they saw. It is more likely that they merely reported to each other their mutual sense-impressions of Mr. Bravick being in the locker room. The 47% misinformation effect specified in "Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory" occurred when the false details were actually communicated to the subjects in those studies. Accordingly, the large number of students reporting Mr. Bravick as being in the locker room is not explained by psychological factors.

The Association also heavily relies upon inconsistencies in each girl's testimony and upon inconsistency among the girls' stories for its position that their perceptions are not reliable. I recognize that it is not uncommon for honest witnesses to have errors in their testimony. This is particularly true when they are asked about a brief event or when they are first asked about their observations many days after the event. It is also true when the student views a brief incident which she does not find threatening. Finally, youthful observers may have more difficulty remembering facts or accurately communicating those facts to adults. Most of the errors which occurred are better viewed as being consistent with the "flashbulb" effect discussed by Dr. Rickman, rather than undermining the accuracy of their having had the experience of seeing Mr. Bravick in the locker room.

b. Third Period Tuesday and Thursday

Because the core of the Employer's case rests upon the number of students who reported these incidents, I first direct my analysis to the class with the highest number of students who reported seeing Mr. Bravick. Thus, I first focus on the third period - Tuesday/Thursday class. There were 12 female students in this class. Six of the 12 girls alleged that Mr. Bravick entered the girls' locker room on March 3 and no other time. Three of the 12 appear to allege that he entered the locker room on March 8 and no other time. The Employer has concluded that Mr. Bravick entered the locker room on both occasions. The Union has concluded that he did not do so at all.

The fact that some students were alleging Mr. Bravick was in the locker room on March 3 is consistent with the fact that some students in this class reported that they had seen Mr. Bravick in the locker room prior to the next class on March 8. See, for example, Joint Exhibit 11, pp. 8-9. It shows that incident was an item of rumor and discussion well prior to Tuesday March 8 at 1:30.

The six students who reported Mr. Bravick's presence in the locker room on March 3 were surprisingly consistent in what they reported. The students were D, B, A⁷, F and E. I also conclude that O is included in this group. The Association disputes Student O being in

⁷ Student A's police report, Jt. Ex 11, p. 44 taken on March 9 could be read as stating the incident occurred on March 9, but also indicates it had happened some time earlier because it refers to actions girls took in subsequent classes to protect themselves from exposure.

this group because of her statement as to where she was standing when this incident occurred. In the Association's view, O would have been in the line of sight of the other students at that time. It concludes that she would have been seen by the others if she were in that group. I am satisfied that it is more likely that there was an error in her testimony as to where she was standing, rather than an error to her sense-impression of seeing Mr. Bravick in the locker room. She was not present in school on March 8. Therefore, it is impossible for her to have seen Mr. Bravick in the locker room on March 8. The testimony of all of these students indicates that Mr. Bravick came past the end of the privacy wall, unannounced, about the time that he shouted to them to turn off the showers. He then turned and left immediately.⁸

The other three students, Students C, N and M, during their testimony were unable to recall the day of the week or the date on which they saw Mr. Bravick in the locker room. I am satisfied that they had no motive to testify falsely. Their testimony as to Mr. Bravick being in the locker room is generally credible. I am satisfied that it is more likely that the date of occurrence ascribed to them in the investigators' reports (i.e., March 8) is wrong, and that the occurrences to which they testified were on March 3, than that their testimony is false. The students did not keep calendars. The determination of the date of an incident reported by a student required some interpretation by the investigators. The investigators' notes as to the interview with Student C and Student N place the event on March 8. See, Joint Exhibit 12B, p. 3, 6, Joint. Exhibit 12 C p. 1, 6. For student M, they place it on March 8 or 10th. See, Joint Exhibit 12 B, p 6 12C p. 6. The interview of Student C was conducted March 10. The interview of Students N and M were conducted March 16. Students M and N saw Mr. Bravick in the locker room on the same date. It is very possible that the reference to March 8 as the date of the observation is the product of error by the students or by the investigator as to these students. That conclusion is more difficult with Student C who was interviewed by the Employer's investigators on March 10. The notes of both of the Employer's investigators show March 8 as the date of the incident. It would appear that the error came from the student. This student's observations were sufficiently specific that it is more likely she got the date wrong than she was wrong with her impression of seeing Mr. Bravick in the locker room. In any event, I am satisfied that there is insufficient evidence to support the conclusion Mr. Bravick entered the locker room on March 8.

These students as a group presented a remarkably consistent view of what occurred. All but Student N saw him in various phases coming around the end of the privacy wall as he essentially said "turn off the showers." Because each was interviewed separately without the presence of the others, it is virtually impossible that they could have rehearsed their stories and

⁸ Student O denied to a teacher that she saw Mr. Bravick in the locker room. I find that she has recalled sufficient specific facts to demonstrate that she did see him in the locker room.

all remained steadfast in their recitation of details of their observation. Further, were the stories pure fabrication, one would expect that the stories would be more incendiary. Only student N said she saw Mr. Bravick well beyond the privacy wall and into the locker room. It is unlikely that Mr. Bravick could have penetrated the locker room as much as student N believed without many more students seeing him in that position. Nonetheless, her sense-impression that he was in the locker room is credited.

Accordingly, the conclusion that results from the better evidence in this case is that Mr. Bravick briefly came into the shower room just past the end of the privacy wall on March 3 with respect to the third period/Tuesday and Thursday class, but did not go past the privacy wall with this class on March 8. The better inference is that he went far enough past the privacy wall on March 3 to be seen by a large number of students. He then retreated from the locker room immediately after saying "turn off the showers." Accordingly, Mr. Bravick had to have known that he had penetrated the girls' locker room past the end of the privacy wall at the time he did it.

c. Seventh Period Wednesday Class, Third Period Friday

I turn now to the Wednesday (Seventh Hour) - Friday (Third Hour) class. The Employer's case with respect to this class turns on the large number of students reporting Mr. Bravick's presence. There are 20 girls in this class, seven of whom have stated they saw Mr. Bravick in the locker room. The Employer's case is complicated by the fact that one student was lying about an incident she claimed occurred and attempted to get others to lie. It is also complicated by the fact that the observations of all of the students as a whole appear to be contradictory.

This swim class met three times before Mr. Bravick was suspended, i.e., on March 2, 4, and 9. Mr. Bravick was not in school March 2 and there was a substitute teacher. On March 4 there were only nine girls in class because the others were excused for Band. Two of the accusing girls were absent from class on March 4. Student S identified the date of occurrence as a Wednesday. The remaining students effectively identified March 9 as the date of the incident. The better view of the evidence is that the students who claimed to see Mr. Bravick in the locker room all allegedly saw him on March 9.

The Union's theory is that many of the students' testimony is so improbable that none of them can be believed. Students S, R and T gave versions of Mr. Bravick's conduct which substantially contradicted the versions given by other believable students, i.e., Students K and L. Student I and Student L's versions also tended to contradict each other. For the reasons discussed above, the better view of the evidence is that Students S, T, K and L's sense-impressions of Mr. Bravick being in the locker room are believable even though they all seem to have errors in their testimony.

Students K⁹ and L gave versions in which Mr. Bravick came around the end of the privacy wall, briefly entered the shower room, and quickly retreated after stating "turn off the showers." These versions are similar to the observations of witnesses in the Tuesday-Thursday class. This is the better interpretation of the evidence.

Students S, R and T were first interviewed by the Employer's investigators on March 28 (or later) which is more than 19 days after the incident. It is understandable that they would not have accurate memories. I am satisfied from the conduct of all three that they intended to testify honestly.

Specifically, Student T testified that she saw Mr. Bravick enter and leave from the doorway to the hall, rather than come around the privacy wall. It is not likely Mr. Bravick would have done this because it would have involved a very unusual route of travel. Further, it is unlikely this would have occurred without many more students seeing Mr. Bravick at that location. Nonetheless, Student T's impression of seeing Mr. Bravick in the locker room is credible. Student T remembered seeing him at the time he said "turn off the showers." I am satisfied that it is unlikely that she would have recalled this detail were her memory entirely false. I don't believe either the investigators or the students discussed what happened to the extent that the memory could have implanted with that detail. Student T's overall testimony was honest and she made no effort to describe circumstances she no longer remembered. She also expressed appropriate feelings which one would expect to be associated with having observed Mr. Bravick being in the locker room (feelings of fear), without exaggerating those feelings. She stated she felt "unsafe." Accordingly, Student T's sense-impression of having seen Mr. Bravick in the locker room beyond the privacy protection is credited.

Student S gave different versions of what she saw at different times. She was first interviewed on this issue by officer Naprella on March 11, 2005. This was much closer to the incident. At that time, she told him she saw Mr. Bravick "peek" around a "corner." The map she drew with Officer Naprella's assistance put Mr. Bravick coming into the shower area past the privacy wall. This version is consistent with what students K, L, and R saw. The diagram S completed stated it occurred on March 9. By contrast, she was first interviewed about 20 days later by the Employer's investigators. She told investigators and testified at the instant hearing that she was not fully dressed at the time she saw Mr. Bravick in the locker room. She stated that she saw him "peeking" around the corner of the bathroom door. This made her "uncomfortable." Student S testified in a forthright manner. It is highly unlikely Student S had any motivation to falsify her testimony. Accordingly, I credit Student S's perception of Mr. Bravick being in the locker room and conclude that it is most likely that she viewed him as having substantially passed the privacy wall into the shower area.

⁹ Although Student K is not a reliable reporter of other facts, her sense-impression and the version about coming around the wall are credible.

Student R was not interviewed by the police. She was first interviewed by the Employer's investigators on March 28. She testified that she saw Mr. Bravick walk through the locker room from the bathroom door to the hallway exit. This could not have occurred without many more students seeing the same thing. She stated that she saw the back of Mr. Bravick's head and identified him because none of the boys would have been in there and Mr. Bravick was wearing his hat. Her testimony lacks details which would support a conclusion that it is trustworthy. Also, her testimony raises a serious question as to whether it is the result of speculation based upon too many inferences. Student R talked to Student J and others. Student J later recanted her observation and denied seeing Mr. Bravick in the locker room. For these reasons, this testimony is not given any weight.

Student I was generally a credible witness. She testified in a forthright manner. Further, having relocated from the district, she had little to gain by testifying falsely or even appearing at all. She identified "turn off the showers" (tr. p. 462) and expressed emotions appropriate to having seen Mr. Bravick in the locker room (tr. p. 472). She testified she was not fully clothed at the time and saw his head around the end of the shower room wall which wall was closest to the locker room and on the side of the privacy wall. Her state of undress was challenged on cross. She did say she was not facing the shower at the time she saw him and turned around to see him. This testimony is credible to the extent that I conclude she did see Mr. Bravick in the locker room.

Student H is a very important witness, not because she was telling the truth, but because she was not credible. Many of the students told investigators she was not reliable. She stated that she heard the door to the shower room open and Mr. Bravick ask: "Whose towel is this?" She stated that she went to the edge of the privacy wall and stated it was her towel. Mr. Bravick then came around the edge of the privacy wall facing into the shower area, and handed her the towel. She then stated she asked him if he was going to leave whereupon he left.

Other students told investigators that H wanted to get Mr. Bravick fired because she was getting bad grades. She actively had sought to have other students falsely state that they had seen the towel incident. Her own testimony reflected that she was fabricating her testimony. For example, she struggled to explain basic facts in a credible manner. Her testimony as to her reaction (asking him if he was going to leave) was very improbable and reflects an emotional position which was unlikely. Rather, than expressing a level of fear at the time, she expressed an absence of fear and a level of uncharacteristic assertiveness against a power figure. See, for example, Tr. p. 925-6, 929. This student's testimony is not entitled to any significant weight in this proceeding.

It is important to note that many students reported Student H's effort to get others to lie about Mr. Bravick. This fact shows how likely it is that at least some students would have reported a conspiracy against Mr. Bravick if one had existed.

The Association has correctly questioned why more students did not see Mr. Bravick's alleged conduct if it had occurred in fact. The better view of the evidence is that Mr. Bravick went past the end of the privacy wall so briefly that more students did not see him.

d. Monday-Wednesday Third Hour

This is the testimony which is most inconsistent with the Employer's case. In this situation, there is not a large number of student witnesses sharing a perception of Mr. Bravick's presence in a single event. There are only three direct student witnesses in this class. It is highly unlikely that Mr. Bravick brazenly entered the locker room in the most extreme version presented by one of the students without a much larger number of students witnessing the event. Further, if the most brazen version were true, it is highly unlikely that those students would have been reluctant to tell investigators what occurred.

Student G stated she saw him twice, once in each week that he taught the class. She told Officer Naprella that he had done this "several" times. Her mother believed Student G saw him only once. If she saw him twice, the first time would have been February 28. Mr. Bravick was absent on March 2, the only other day of class that week. G was also absent March 2. The second alleged sighting was March 7, based upon her testimony that the second sighting occurred the next time she was in class. If she is wrong about the second date, it could be March 9. She had considerable difficulty trying to identify the dates of the occurrences. In her view, she saw him after he had substantially penetrated the shower room. She said that, in the first incident, Mr. Bravick walked in facing the office and looked around. She ran into an alcove of lockers and then peered out. He was still there, but had started on his way out. According to her version of the second time, Mr. Bravick had penetrated the shower room as far as the opening between the shower and locker rooms. He faced straight into the locker room area. He stood there for at least 15 seconds. She stated that he said "turn off the showers" on the first occasion, but not on the second occasion. Student G was highly emotional when she testified. Her version of the first incident is contradicted by the other evidence. It is virtually impossible that Mr. Bravick would have entered the locker room on February 28 in the manner described by this witness without some other students having seen this.

This witness is prone to exaggeration and fanciful testimony. This witness also gave other testimony about Mr. Bravick which is incredible. This student gave a very detailed account of an incident involving a girl's swimsuit untied by a boy. She testified in detail about Mr. Bravick's offer to tie it up and her involvement in it. The incident allegedly occurred March 2, when Mr. Bravick was not present. The swimsuit incident did occur on March 2. In fact, she was also absent that day. She also gave an entirely fanciful version of Mr. Bravick bringing in a gym bag containing a towel into the locker room. This story reflects the story student H was trying to concoct. This story was recited to the Union's investigator. G is not a reliable witness.

By contrast, I find it was Mr. Bravick's ordinary pattern to stand at the threshold of the locker shower room door and shout into the locker room. This witness was honest, but is prone to the types of encoding and suggestibility errors described by Dr. Rickman. Her testimony is not sufficiently reliable to support discipline.¹⁰

Student Q testified she saw him once and that it was either March 7 or 9. Student Q said she was in the shower when she saw him "peeking" his head around the edge of the privacy wall.

Student P could not remember when she saw Mr. Bravick in the locker room, but did see him on one occasion. She was first interviewed by the Employer's investigators on March 16. At that time she said she saw Mr. Bravick peering around the corner of the privacy wall. She later modified that version. She testified she saw him as he walked back toward the privacy wall after he had substantially penetrated the shower room. The fact that she changed her story indicates that she had difficulty recalling the specific facts at the time she was first interviewed.

While I am satisfied that Students Q and P were telling the truth as well as they could and that inaccuracies in their testimony were unintentional, I conclude that their recollections are not sufficiently reliable to support the Employer's allegation. As noted, Mr. Bravick's normal practice was to reach in and close the door to the girls' shower after shouting "turn off the showers." Q and P testified consistently with witnessing Mr. Bravick closing the door to the girls' shower in his normal routine. Girls normally showered with their swim suits on. If they "bounced" around the end of the privacy wall at the same time Mr. Bravick was closing the door, they would have seen him. Dr. Rickman's testimony well explains how their recollection could have been distorted by the conduct of other students between the time of the incident and the time they were first interviewed. Accordingly the evidence presented as to this class is insufficient to establish that Mr. Bravick ever entered the locker room with respect to this class.

IV. Mr. Bravick's Testimony

Mr. Bravick testified in this matter and reiterated the position he had taken in both the Employer's and the police investigations. Specifically, he testified to his daily routine in closing doors and denied ever crossing the threshold. The routine was verified by a number of student witnesses. Officer Napralla witnessed the routine in connection with other classes at other times. I am satisfied that Mr. Bravick testified accurately as to his routine.

¹⁰ There is no easy explanation in this record as to how this witness was able to associate "turn off the showers" with the first incident. It is obvious that she talked to Student H in detail about this incident as student H was trying to enlist others to support her false testimony. It is unexplained how the two came up with the detail about the statement "turn off the showers."

Mr. Bravick was a long term teacher with more than 16 years' experience. His testimony reflects the fact that he recognized that he was not supposed to enter the girl's locker room at all except in circumstances not present in this case. The nature of his testimony reflects that he is fully aware of the nature of his responsibility to protect the learning environment by, among other things, scrupulously protecting the privacy of his students. Further, Mr. Bravick was fully aware of the puerile vulnerabilities and tendencies in girls of this age.

There was a minor inconsistency in Mr. Bravick's testimony. He suggested throughout the hearing that the towel incident never occurred. During the locker room visit, he acknowledged that he did call into the locker room: "Whose towel is this?" He said Student H came around the end of the privacy wall in her swimsuit from the shower toward the door to the pool. He then stepped in and tossed the towel to her. This was inconsistent with never stepping over the threshold. It was also an unwise thing to do. This testimony raised questions as to whether Mr. Bravick really realized how vulnerable to student misperception he was if he were to be along the privacy wall.

V. Due process issues

The just cause principle entitles employees to due process.¹¹ The scope of the investigation was to determine whether there were credible reports of Mr. Bravick having invaded the girls' locker room on multiple occasions. The limited scope of the investigation did not prejudice the result of this case and, therefore, it is not necessary to address the scope as a potential independent violation of the due process principle. However, it is necessary to address the destruction or loss of evidence which would have been helpful to Mr. Bravick in his defense.

Mr. Kintzer acknowledged that he destroyed the list prepared by students of alleged witnesses to the events. This document might have listed students who later recanted, students who were pressured to sign, or otherwise led to information which would have supported the Association's position. The investigators also inadvertently lost a composite map showing where some students placed Mr. Bravick in the locker room. These were the first students who were interviewed. These actions independently violated the procedural responsibility of the Employer under the just cause principle.¹² The errors would not affect the result in this case. These actions were unintentional. I have made a finding to that effect, but I have imposed no further remedy with respect to those violations.

¹¹ Common Law, *supra*, p. 171.

¹² There was a surveillance video in the hallway where students exited. Images are lost after a period of time. Most of the evidence was lost before the Employer was notified of the complaint. The evidence is insufficient to demonstrate that the Employer could have saved any significant evidence.

IV. Just Cause

A major difficulty in this case is that there is no reasonable explanation for Mr. Bravick's conduct on this record. The simple explanation, that he mistakenly entered the locker room, is not supported by the facts. As I noted at hearing, any person can make an honest error and walk into the wrong locker room. While that might occur once in a very great while, it is not believable that it would have occurred on two occasions relatively close together. Other explanations are possible but hard to believe. Because of this fact, it is hard to fit this case into the policy violation theories alleged by the Employer. The better view of this record is that the level of misconduct is too severe and too damaging to the Employer's interests to support anything other than discharge.

The Employer has alleged a number of grounds for the discharge. One of those was an allegation of sexual harassment. It has two theories. There is no doubt that this conduct violated the privacy of the girls. Nonetheless, the sex harassment theory has difficulty. The Employer alternatively alleged that the invasion was voyeuristically motivated or motivated by a form of sexual intimidation. The actions of Mr. Bravick are inconsistent with voyeuristic motivation. It is unlikely that Mr. Bravick would have announced his presence with his direction to turn off the showers, were he to have been voyeuristically motivated. I have found that he only briefly went past the end of the privacy wall. It is unlikely that he would have stopped at just past the end of the privacy wall if he were voyeuristically motivated.

The second harassment theory was based upon non-contact sexual intimidation. It is conceivable that Mr. Bravick was motivated to obtain some form of gratification by intimidating the girls concerning their privacy. It is hard to believe that after 16 years of service, he would suddenly start this behavior. It is also highly unlikely he would do anything this brash. If this were the reason for this conduct, the conduct certainly was unwanted by the female students. It also was of a nature which tended to create a hostile environment. However, it does not fall squarely within the definition of harassment. It was not: "unwanted . . . comments, gestures, graphic materials, physical contacts, or solicitation of favors." While it was unwanted and deliberate, it was not repeated for any single girl. Sexual harassment also forbids sexual "looks." However, the evidence is insufficient to conclude that Mr. Bravick was "looking" at the girls as intended by the policy. The overwhelming circumstantial evidence indicates that at least part of Mr. Bravick's purpose was to supervise the girls in the locker room. However, this cannot be the full explanation. He never made any effort to warn students that he was going to enter the locker room. Thus, his conduct may, in part, have had a business "purpose" as an element.¹³ Because discharge is clearly warranted under the just cause doctrine alone, I find it unnecessary to address arcane issues surrounding the sex harassment doctrine.

¹³ There is no fully satisfactory explanation for Mr. Bravick's conduct. The explanation most favorable to Mr. Bravick other than mistake is as follows. The behavior of the girls in the locker room is ordinarily such that the Employer used to assign a female employee to be in the locker room when the girls changed. The showers sounded like they were on when, in fact, they were off. Mr. Bravick could have entered because he felt they were being defiant in not turning off the showers or because he reacted to their behavior. Once the students made the complaints, he recognized his very poor judgment and defensively denied what he had done.

The third theory espoused by the Employer is dishonesty. Mr. Bravick has steadfastly denied entering the locker room. However, if Mr. Bravick's conduct were the result of the non-contact harassment type basis, he would certainly be a "troubled" individual and the psychological process of "denial" might be involved. "Denial" may not be the same as the dishonesty contemplated by the Employer's rule. Discharge might not be warranted for that form of dishonesty.¹⁴ Since the focus of the discharge in this case was the conduct of intentionally entering the locker room, it is better to address the main issue rather than the peripheral issue.

The Employer has a parental-like responsibility to guard the privacy of students entrusted to its care. It owes district parents the highest duty in protecting their children from any harmful circumstance. The learning environment cannot be effective unless students can be assured that their personal privacy is protected by all district employees, professional and non-professional alike. Professional employees occupy a unique position of trust in the eyes of impressionable students. The Employer can only discharge its duty if it can rely on its teachers to respect students' privacy without question. Mr. Bravick was fully aware of this responsibility and failed to maintain that trust. The Employer has every right to question whether he can be trusted to do so in the future. The conduct in this case is so severe that it warrants summary discharge. Accordingly, the Employer had just cause to discharge Mr. Bravick and did not violate the collective bargaining agreement when it did discharge him. The grievance is denied.

AWARD

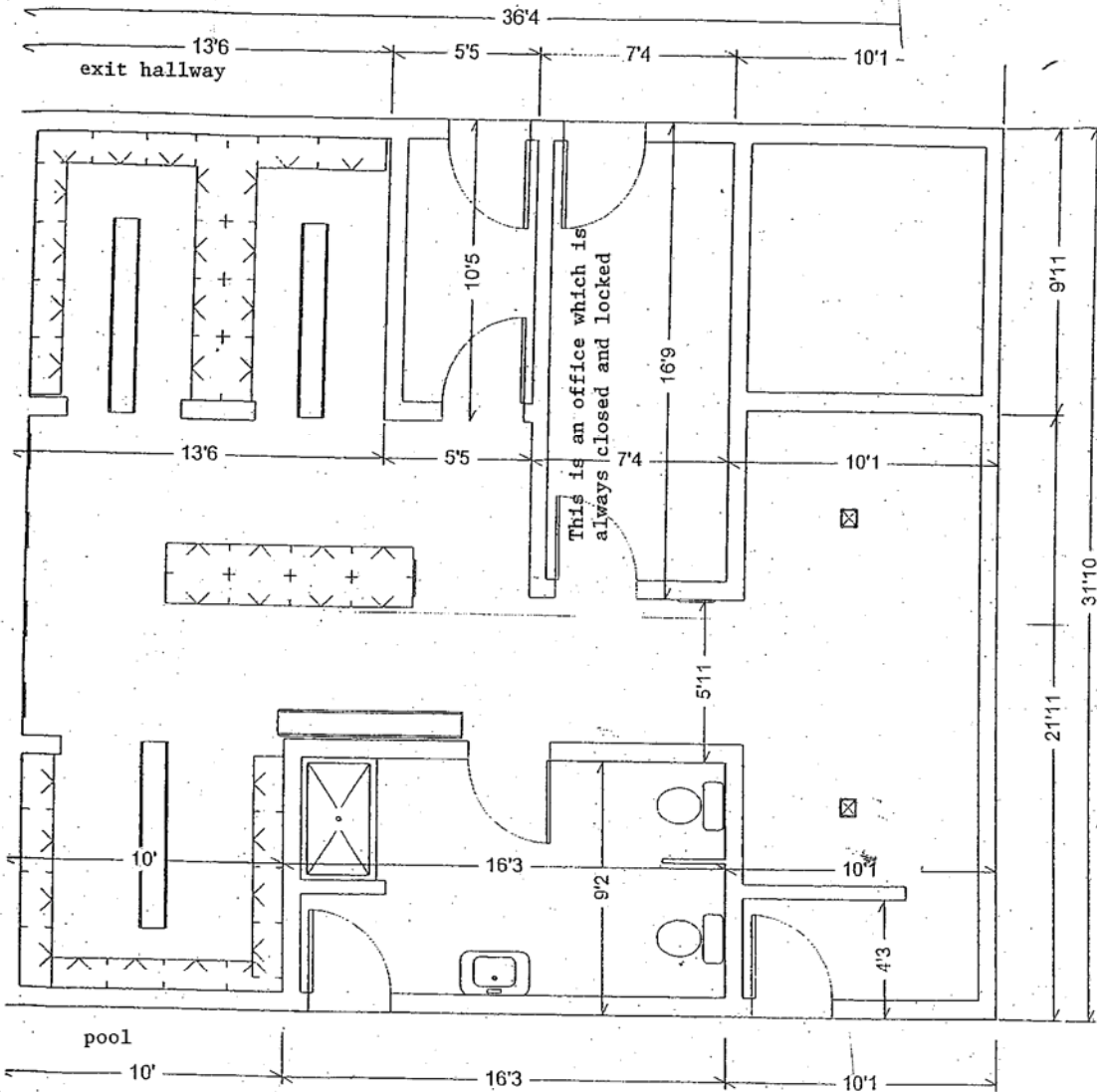
1. The Employer potentially violated the just cause provision of the collective bargaining agreement by inadvertently losing exculpatory evidence. The violation does not affect the Employer's right to discharge Mr. Bravick.
2. The Employer did not violate the collective bargaining agreement when it discharged Mr. Bravick for just cause.

Dated at Madison, Wisconsin, this 26th day of December, 2006.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

¹⁴ See, Common Law, *supra*, Sec. 6.24

Appendix A Map of Girls' Locker Room



Poynette High School
Girls Pool Area Locker Room
Scale: 1/4"=1'