

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

D.C. EVEREST AREA SCHOOL DISTRICT

and

**D.C. EVEREST PARAPROFESSIONAL UNION
LOCAL 1908 AFSCME, AFL-CIO**

Case 62
No. 67754
MA-14007

(Pospychalla Discharge Grievance)

Appearances:

Ronald J. Rutlin, Attorney, with **Shawn C.E. Rauckman**, Attorney, on brief, Ruder Ware, L.L.S.C., 500 First Street, Suite 8000, P.O. Box 8050, Wausau, WI 54402-8050, appeared on behalf of the D. C. Everest Area School District.

John Spiegelhoff, Staff Representative, AFSCME Wisconsin Council 40, AFL-CIO, 1105 E. Ninth Street, Merrill, WI 54452, appeared on behalf of D.C. Everest Paraprofessional Union Local 1908.

ARBITRATION AWARD

The D.C. Everest Area School District, herein the District, and the D.C. Everest Paraprofessional Union Local 1908, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Union concerning the termination of employment of one of its members, Susan Pospychalla. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on May 22, 2008 in Weston, Wisconsin. A transcript was prepared. A briefing schedule was determined and the parties filed briefs and reply briefs by August 18, 2008 and the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Union states the issues as:

Did the District violate the collective bargaining agreement when it first suspended the grievant without pay on November 14, 2007 and then subsequently terminated the employment of Susan Pospychalla on November 21, 2007?

If so, what is the appropriate remedy?

The District states the issues as:

Did the Union fail to timely appeal the grievance to step four of the grievance procedure resulting in the settlement and waiver of the grievance pursuant to Article 8, Section 3 of the collective bargaining agreement?

If the answer to the first issues is no, did the School District have just cause, under all of the facts and circumstances, to suspend and subsequently terminate the grievant?

If the answer to the first and second issues is no, what is the appropriate remedy?

This case involves a dismissal. The collective bargaining agreement contains a just cause provision for dismissals. There is also a timeliness issue. Accordingly, the District's statement of the issues is adopted.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – SCHOOL DISTRICT FUNCTIONS

The District possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

1. To direct all operations of the school system;
2. To establish reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees to positions within the school system;
4. To relieve employees from their duties because of lack of work or any other legitimate reasons;
5. To maintain efficiency of school system operations;
6. To take whatever action is necessary to comply with state and federal laws;
7. To introduce new and improved methods or facilities;
8. To change existing methods or facilities;
9. To determine the kinds and amounts of services to be performed as pertains to school system operation and the number and kinds of classifications to perform such services;
10. The Union recognizes the Board has the right to contract out for goods and services. However, the Board agrees to provide the Union thirty (30) calendar days notice prior to entering into any subcontracting agreement that would result in the layoff or reduction of hours of bargaining unit personnel;
11. To determine the methods and means, and personnel by which school system operations are to be conducted; and
12. To take whatever reasonable action is necessary to carry out the functions of the school system in situations of emergency.

Any dispute with regard to the reasonableness of the application of said management rights with employees covered by the Agreement may be processed through the grievance and arbitration procedure herein.

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ARTICLE 7 – DISCIPLINE PROCEDURE

The District may take appropriate disciplinary action including suspension, dismissal, and demotion, for just cause. It is understood that the just cause standard is inapplicable to dismissals of probationary employees.

ARTICLE 8 – GRIEVANCE PROCEDURE

- A. Definition of Grievance: A grievance shall mean a dispute between an employee, group of employees or the Union and the Board concerning the interpretation or application of this contract. The grievance procedure shall not be used to change existing work schedules, hours of work, working conditions, fringe benefits or position classifications.
- B. Subject Matter: Only one subject matter shall be considered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the specific sections(s) of the agreement alleged to have been violated, the relief sought, the date the incident or violation took place, and the signature of the grievant and the date.
- C. Time Limitations: Failure of a party to file a grievance or appeal a grievance within the time limits provided herein shall be deemed a settlement and waiver of the grievance. If it is impossible to comply with the time limits specified herein because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.
- D. Steps in Procedure: In the event of a grievance, the employee shall perform his/her assigned work and grieve the complaint later. Grievances may be processed by an employee during normal working hours without loss of pay, provided the employee first receives permission from her/his immediate supervisor. An employee may choose to have her/his appropriate Union representative with her/him at any step of the grievance procedure.
Step 1: The employee shall initially discuss her/his grievance within ten (10) working days after she/he knew or should have known of the cause of such grievance to the Building Principal or the Director of

Human Resources. If the grievance is not satisfactorily resolved orally at this step, the grievant shall present a written grievance to the Building Principal or the Director of Human Resources within five (5) working days after the grievance was orally presented. The building Principal or Director of Human Resources will further investigate the grievance and submit a written decision to the grievant and her/his representative within five (5) working days after receiving the written grievance.

Step 2: If the grievance is not settled in Step 1, a written appeal may be made by the employee and/or her/his representative to the Director of Human Resources within ten (10) working days of the receipt of the Step 1 answer. Within ten (10) working days of the receipt of the appeal, the Director of Human Resources shall meet with the Grievant and her/his representative in an effort to resolve the matter. The Director of Human Resources shall answer the grievance in writing within ten (10) working days of this meeting.

Step 3: If the grievance is not settled in Step 2, a written appeal may be made by the employee and/or her/his representative to the Superintendent within ten (10) working days of the receipt of the Step 2 answer. Within ten (10) working days of the receipt of the appeal, the Superintendent or her/his designee and the Director of Human Resources shall meet with the grievant and her/his representative in an effort to resolve the matter. The Superintendent shall respond to the grievance in writing within five (5) working days of the meeting.

Step 4: If the grievance is not settled in Step 3, a written appeal may be made by the employee and/or her/his representative to the Board of Education within ten (10) working days of the receipt of the Step 3 answer. Within ten (10) working days of the receipt of the appeal, the Board of Education shall meet with the grievant and her/his representative for the purpose of resolving the matter. The Board of Education shall respond to the grievance in writing within five (5) working days of the meeting.

E. Arbitration

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5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the express terms of the Agreement.

BACKGROUND AND FACTS

Susan Pospychalla, the Grievant, had worked for the District as a special education aide for approximately four years before the District terminated her employment on November 21, 2007, after having suspended her without pay on November 14, 2007. At that time she was working with developmentally, emotionally and cognitively disabled students at the junior high school. There were no disciplinary matters of any nature whatsoever during her employment with the District prior to her suspension and termination. There is no credible, believable evidence that she ever caused any physical or emotional harm to any student.

Grievant had started her employment with the District in September of 2003 as a kitchen worker, and in December of 2003 became a special education aide at Riverside elementary school. She worked as an aide there through the end of the 2004-2005 school year. After first coming to Riverside she passed her three month probationary performance appraisal. Her reviews were done by Riverside principal Patricia LesStrang. Out of 24 scored performance factors¹ she had no unsatisfactory, four that needs improvement, three that were in between needs improvement with meets standards, and 17 meets standards. Besides two specific comments on some of the performance factors (Continue to work on being in assigned place at specified time. Need to work on being tactful) there were two overall comments which were very similar, the slightly more detailed of which stated:

Susan has jumped into her position & has been willing to do whatever tasks are necessary. We will be working with Susan on taking more initiative, allowing students more processing time, learning the individual differences of students and what works best with each, reliability in her schedule, and professionalism.

Grievant then passed her six month probationary performance appraisal in June of 2004. Out of 25 scored performance factors she had no unsatisfactory, none fully in needs improvement, two in between needs improvement and meets standards, 20 meets standards, one in between meets standards and exceeds standards, and three exceeds standards. There were nine specific comments on the performance standards, uniformly, if not entirely, complimentary to Grievant on her improvement other than one that mentioned “. . . an area to continue working on – i.e. abruptness, tone”. Besides a generally favorable comment on progress made since last appraisal (She has definitely shown growth! Way to go!) and plan to work on during the next year, there was an additional comment which stated:

Susan has made significant gains since her last evaluation. Susan has many strengths – follows the instructional format for implementing lessons, wants to do her job correctly, her patience has increased, is accepting constructive criticism more readily, is open to trying things another way, and is continuing to grow in her position. I am pleased with the progress made so far. I know this is a difficult position – working with our most challenging students. I appreciate Susan’s contributions!

¹ All of the several performance appraisals mentioned herein used the same 25 performance factors.

LesStrang made a comment in the six month recommendation of continued employment which stated:

Susan has made lots of progress since her last evaluation. She is more open to suggestions and is learning a lot. I would like to see her continue working on her communication skills. I believe she will experience even more success then. I appreciate all of Susan's hard work!

Grievant's next performance appraisal was her annual appraisal completed in June of 2005, which included some written feedback from Associates. Some of their comments were: "She could improve on organizational skills; Susan will say what is on her mind. At times this is not appropriate; and, Things tend to come out very harsh and abrasive and can trigger other behaviors". Out of 25 scored performance factors she had no unsatisfactory, none fully in needs improvement, six in between needs improvement and meets standards, 15 in meets standards, and 4 in exceeds standards. There were 12 specific comments of the performance standards, which were generally complimentary. Three comments suggested some need: "I want to see the CD team work together more closely; Continue to moderate tone of voice & keep appropriate boundaries on what needs/should be communicated. It is improving though!; and, Has missed quite a few days this year." In explaining progress made since the last appraisal, the comments included:

I believe Susan has made gains and will continue to improve.

LesStrang also had a general additional comment:

Susan has increased her skills this year through attending [illegible] Crisis Intervention, First Aide Certification, a literacy inservice, an Autism Spectrum Disorder workshop, & protocol for care of seizures. Mrs. Pospychalla has connected with one of our most challenging students which has been a real benefit to our program. I have appreciated her hard work and willingness to help out where needed.

Grievant and LesStrange discussed the contents of the various performance appraisals when they were provided to Grievant during the appraisal process.

Grievant then worked at the high school where she continued as an EEN Assistant in the 2005-2006 school year, and as a CWD Assistant in 2006-2007. Her annual performance appraisal of June, 2006 had no unsatisfactory, one needs improvement, 21 meets standards, and four exceeds standards. The single specific comment of the performance standard, B.4, was: Limit sarcastic humor. In explaining progress made since the last appraisal, the comments included:

- Sue has made good progress on achieving her goals. She has developed good rapport with her students.

- Completed the Pro Act training.
- Became more familiar with reading and understanding psych files for the students she worked with.
- Spent time as an outside mentor during out-of-school activities. i.e. horback (sic) riding, Christmas get-together, etc.

Two goals for the next year were to continue to grow in knowledge of students and to work closer with teachers to refine knowledge of expectations in their classroom. There were no other additional or generalized comments.

Grievant's performance appraisal of June, 2007 had 24 scored performance factors. There were no unsatisfactory, no needs improvement, 22 meets standards, and 2 exceeds standards. There were no specific comments as to performance factors. In explaining progress made since last appraisal, the comment was:

Mrs. Pospsychalla continued to work on maintaining positive rapport with her student and also working with other students as needed.

A goal was identified for the next year as:

Mrs. Pospsychalla's student will be graduating this year.

There was an additional comment:

The district appreciates the assistance offered by Mrs. Pospsychalla over the last two years as she worked individually with her student and helped her develop appropriate skills to be successful in the community.

After both of the high school performance appraisals had been prepared by the principal and provided to Grievant he asked her if there was anything she wanted to discuss about them. She said she was fine with them and there was no further discussion.

Grievant read all of her performance appraisals, but when signing them did not read the statement above her signature that indicated the contents has been discussed with her, that signing did not necessarily indicate her agreement, and that she could add a written response to attach. She handed the performance appraisals for the high school back to the principal. The record does not indicate that Grievant kept or was allowed to keep copies of the Riverside performance appraisals.

Over the next summer Grievant was contacted by administration in the District's special education department and was informed that the school psychologist said what a good job she, Grievant, had done with a low functioning girl at Riverside and asked if she would be interested in being a particular student's one-on-one aide at the junior high. Although grievant

said she was really happy at the high school, if she was needed at the junior high she would be happy to change. Grievant then started working the 2007-2008 school year at the junior high school.

The junior high school has eight special education teachers on staff. Some have classrooms where most of the kids are in that room most of the day. That is the type of setting involved in this case. Other of the special education teachers are out and integrated into the regular classrooms and support kids in a wide variety of ways. Generally, students in the special education program are kids born with disabilities or birth defects and are all cognitively disabled. Nearly all of them have IQs below 70. Functional levels for a majority are from about kindergarten through fourth grade. They have a wide range of additional disabilities from autism to cerebral palsy and emotional, physical and intellectual limits that are significant. They have individual educational plans. They are the most vulnerable students in the school.

Grievant was assigned to work as an aide in a classroom devoted to special education students. The program there was similar to the ones she had worked in at Riverside elementary and at the high school. She already had had certain training, Pro ACT, which some of the other staff had to take to be able to meet the needs of at least one particular student. There were two other aides in the classroom, Mary Bohr and Carrie Million. Bohr has been an aide for approximately 17 years and had worked with teacher Lisa Wistrom for several years. Million had been an aide in that classroom the previous year. Aides assist the teacher in the classroom, help the teacher give one-on-one attention and small group attention, help with student personal hygiene and personal needs, some clerical work, grading, and other duties as assigned or directed by the special education teacher. The teacher of the cognitively disabled students in that classroom was Lisa Wistrom, who was in her seventh or eighth year teaching such students. Although aides take direction from the teachers they work with, Wistrom was not Grievant's supervisor and was not responsible for Grievant's performance appraisals.

There was an increase in the number of students in that classroom room from the 2006-2007 school year to the 2007-2008 school year. There had been 8 kids in that program and that increased to 12. In addition, the variety of a number of new kids that came into the program was significantly higher than the prior year. They were much more severe in their needs behaviorally, academically and cognitively. That prompted the increase of additional support staff from two to three positions, Grievant's being the position that was added. For a class of cognitively disabled students, on a difficulty scale of one to ten, with one being easy and ten being very difficult, Wistrom rates the 2007-2008 class at least a nine.

The school year started on or about September 2, 2007. At the very start of the year or within a few days of the start, Wistrom told aides Million and Bohr to write or document in a notebook kept in Wistrom's desk, anything Grievant did that they felt was inappropriate, not necessary, or out of the ordinary. Wistrom did not tell them why she wanted them to do this. Wistrom had not worked with Grievant before.

Million began to make occasional notations, the first being September 4th. She later reported the first incident to Wistrom which concerned Grievant having sung “Tinkle, Tinkle little star” while Grievant and Million were helping a child use the restroom. Million did not interpret that to be mean spirited, but “just found it not appropriate, more fun, trying to ease him maybe.” Wistrom instructed Million to continue writing her observations. Million had written two other notations for that day. One concerned “Hurring (sic) through lifts – not counting”. The other was Grievant having put her arms on two students’ shoulders and saying “you guys are my favorites”. Wistrom did talk to Grievant about the tinkle matter and Grievant did not do that again.

Grievant has, and sometimes uses a loud voice in front of the students. Some of those occasions concerned individual student matters. This caused concern of Wistrom and Boher about Grievant violating student confidentiality. Wistrom does have occasional discussions with the aides while in the classroom about some individual student matters which conversations are not private and while students are present. Wistrom testified that she spoke with Grievant about confidentiality. Wistrom also testified that she is aware that the District has a policy on confidentiality, and that she did not review that with Grievant.

Million then became uncomfortable writing in the notebook, stopped writing, and would tell Wistrom about things she had seen or heard. Wistrom told her she needed to write that in the book. Million wrote a few occasional entries in the book and again stopped writing. Million made entries on September 11th, September 21st, and October 10th. Wistrom also began writing in the notebook on September 13th and on October 4th. There is no indication in the record that Wistrom or anyone else ever told Grievant that they were keeping notes about her, prior to her being suspended and terminated.

Towards the end of September Wistrom began to feel that she was losing control of her classroom. In October she felt like she was losing control of the students: “We were not accomplishing what I thought was a reasonable amount of stuff to be accomplishing. The students were starting to withdraw from everything. . . . I was starting to feel very stressed because I couldn’t get a grasp on the students as well as the staff.” She approached the Principal, Steve Pophal, and told him she was having trouble with her aides. Pophal told her to write up a list of concerns that she had and turn that in to him. There is no indication in the record that Wistrom told Pophal that she had already been keeping notes about Grievant and had instructed Million and Bohr to keep notes about Grievant. Near the end of October or beginning of November Wistrom wrote down lists of concerns she had about Grievant and Million. None are dated. There were approximate 14 entries for Grievant concerning the same and similar matters to those in the note book. She later typed them. They are grouped generally under matters of “confidentiality” and “very demeaning to students.” In summary, confidentiality matters were: discussing a student’s menstrual cycle; a different student’s hygiene; and, issues that may come up about any of the students. The demeaning topics included: the tinkle matter; declaring some students favorites in front of others; being hard on students to the point of tears; yelling at kids; snaps at them; not giving them space to be

normal; not giving enough processing time; not following directions by coddling certain students when asked that they do things independently; working on something asked not to; still needing instructions on how things are done; told a student in front of his parent that his new haircut was sexy; told students she was a correctional officer and would not hesitate to use that training; is concerned that she gets her breaks; and, doesn't use break time for her email or restroom. Wistrom felt that some of the entries were matters that happened repeatedly. Wistrom had a similar number and similar type of entries for Million which she had also reduced to writing – on the same pages as those for Grievant.

In the beginning of November Wistrom typed up the list of items she'd written concerning Grievant, in basically the same form and content as her written notes. Then Wistrom felt that the kids' self esteem was very low and they would not perform anything asked to do, and that it was a tense, negative atmosphere. On or about November 13th Wistrom emailed the typed list to Pophal. Wistrom also emailed a similar list to Pophal about Million. Pophal became concerned for the safety and welfare of the kids, and forwarded the documents to Kim Hall, the District's Human Relations Director.

The next morning Pophal and Hall met with Grievant and suspended her pending the outcome of an investigation into the allegations. They did not give her specifics about the allegations but just gave her some generalities and left it at that. Pophal and Hall were particularly concerned about the emotional welfare of the students. Grievant was given a letter dated November 14, 2007 from Hall confirming the suspension. The letter stated in part:

On November 13, 2007, Principal Steve Pophal shared a lengthy list of concerning issues with me regarding your job performance. The list included such items as lack of confidentiality, your inappropriate communications with students, how you respond in the classroom, lack in following directions, etc.

On November 14, 2007, the district suspended you because of the concerns. Steve Pophal and myself met with you and briefly explained the district's concerns and position.

The District scheduled another meeting with Grievant for November 19, 2007.

The District then began investigating the allegations against Grievant and the allegations against Million. As to Grievant, to investigate the matter Pophal interviewed Wistrom for a more in depth explanation regarding her list. He interviewed Bohr, but the record does not show that he interviewed Million regarding Grievant. The only people he interviewed about Grievant were Wistrom and Bohr. He reviewed the personnel record of Grievant. By November 16, 2008 at 9:50 a.m. as to both Grievant and Million, he had interviewed six staff members and expected to interview more. He had received written statements from three of them and expected to receive three more. In an email to Hall of that date, besides matters of the logistics of the investigation, he made the following comments about the merits of the case:

There is one issue I suspect either or both of them may use as a defense. We have a wheelchair student we are struggling to establish bathroom protocol on.

A new toilet was recently ordered and we may need to get purchase a lift as well. This has been a contentious issue for CM in particular. However, the bottom line is this is no defense for the allegations leveled against both staff. To make a long story short, my investigation to this point confirms the written statement we used to suspend both. In fact, some of the additional information I've discovered paints both in an even more negative light.

Pophal obtained a written statement from Bohr as well, dated November 15, 2007, which stated:

I have only worked with Susan Pospychalla since the beginning of this school year. Susan is a person who yells a lot. On November 6th, Carri went home ill (or so she said) and there was no sub. Lisa was out of the room all afternoon for an IEP meeting. Susan yelled constantly and the students weren't even misbehaving. At one point, she pulled a chair to a corner and made Cody sit on it facing the wall.

Susan used inappropriate language at school. She often tells the students they are little weasels. When talking to another adult in the room, she doesn't bother to lower her voice and her language can be very crude.

Susan hasn't caught on to all the academics in our room. She still hasn't quite grasped how to grade some things.

Lisa has told Susan a number of times that the 4 minutes passing time between classes is our student's own time. But sometimes Susan will still insist that they stay in the room. She seems to target C__ and K__ for that.

(redaction added)

Pophal obtained a written statement about both Grievant and Million from teacher Chad Brecke, who had some cognitively disabled students in his classroom. His statement indicated that throughout the fall semester he observed Grievant's performance on many occasions in room 115 and throughout the building. His statement went on:

Both women have a genuine concern for the students with which they work. Last week when I accompanied Mrs. Wistrom's students to McDonald's Carrie and Susan volunteered to lift J_ if need be to get him in and out of the restaurant. This is not an isolated incident of the CD aides going above and beyond to allow all of the children the opportunity to participate. Given the dynamics of the group of students in the room it appears on the outside that the team is performing quite successfully when compared to past experiences in similar situations for the kids.

In the ten years that I have been here I have not witnessed students in room 115 learning at a level higher than the past two years. The situation for students in the junior high CD program has increased most dramatically; due to

staffing changes. Last year was an excellent year with the team of professionals working in that room as an efficient team. Since last year the dynamics of that group has been radically altered by some changes in the personal relationships between some of the individuals.

It became obvious this fall that some of the members of the CD team had lost respect for the efforts of one another. This mounting stress eventually boiled over on numerous occasions and was beginning to impede learning in room 115 and beyond.

In my classroom Miss Million does her best to help the students grasp the challenging content and success. She goes out of her way to help and often does most of the work for the students. Most of the frustration the CD students have experienced in Research and Development has been due to the absence of Miss Million. They are dependent upon her to work because she either takes materials they need with her or they fear they will upset her if a project does not turn out to her liking.

I realize something drastic had happened when Miss Million started missing the beginning of my 7th hour to take her breaks. At first I had little indication what issue was causing this scheduling conflict. It emerged that Miss Million had become frustrated with her position due to the fact that she felt under trained when it came to helping J_ in the restroom. Carrie shared with me how much more confident she felt assisting J_ after finally receiving the training she felt was necessary from Diane Durante.

My frustration with the situation that currently exists in room 115 mainly stems from the fact that certain personnel in Room 115 struggle to get along. When this has come to affect the services kids receive it is only a matter of time before the students escalate to crisis. A lot of resources have been put into planning and implementing of strategies to make Room 115 successful place for students this year. I hope we can continue to be as proactive for the benefit of the students.

(redaction added)

Brecke testified at the hearing as to the content of his statement. As to his observations of Grievant, she did seem to care deeply about the students she worked with, she had a genuine concern for the students she worked with, was real active with the kids maybe in a motherly way, and was good in terms of discipline if it needed to be in a very appropriate way. Brecke also testified as to the remainder of his statement and what he meant by the tension in room 115, that most of that tension, he believed, was created between Ms. Million and Ms. Wistrom. He felt there was stress in room 115, meaning that a lot of it was personal between Ms. Million and Ms. Wistrom and the fact that Ms. Million was involved in a relationship with Ms. Wistrom's brother, and that kind of exploded.

Grievant testified, credibly, at the hearing that:

A: “The only time that I willfully did not follow her instruction was she told me not to praise the kids so much and I tried not to, but I couldn’t. I really, I think they really needed the praise and so I just fell back into the old habit of – she said don’t praise them for every little thing and --

Q: And who is she?

A: Ms. Wistrom told me that, so, but kids need to be happy, I think, when they’re in school, especially if they’re cognitively disabled and they need to be positive with what they’re doing, and that’s just what I tried to foster.”

In preparing for the upcoming meeting with Grievant and her Union representatives, Pophal and Hall considered some questions they were going to ask her. One set of questions was on the topics covered in Wistrom’s document and the other employee interviews referred to above. The other set of questions was developed by Pophal by going through Grievant’s previous performance appraisals.

On November 19th Pophal and Hall met with Grievant, Union Local President Gail Klay, and Union Staff Representative John Spiegelhoff. Hall began by asking Grievant about the conduct issues as alleged by Wistrom. Grievant admitted some items, explaining some of them. She denied some items. Some items she did not remember. Hall did not mention any dates for any allegation. Pophal then asked Grievant questions he had from her previous performance appraisals from both the high school and Riverside elementary. She admitted some with explanations, denied some, and could not remember others. The record does not disclose that either Hall or Pophal gave Grievant a copy of the conduct allegations or her prior performance appraisals either before or during the interview. They did not credit Grievant’s explanations of the allegations. Both Pophal and Hall drew the conclusion that Grievant was not being honest and was being evasive because she either did not recall or denied many of the issues they each had raised with her and had denied or could not recall subjects or comments made on the prior performance appraisals. This made them both conclude that she was not being honest or remorseful, and those conclusions weighed heavily in their support of a recommendation and decision to terminate Grievant’s employment.

Pophal, although he was Grievant’s ultimate supervisor by virtue of being the Principal, could not remember, at the hearing, if he had been Grievant’s immediate supervisor or if her immediate supervisory was the school psychologist. Bohr, who testified at the hearing and had a chance there to review the written statement she had given to Pophal, when asked if there was anything she had observed that she felt was impacting on the classroom that Grievant was doing which was not listed in her written statement to Pophal, answered: “It’s kind of hard to remember now exactly; what I told him.”, and “You know, its been six months. I don’t recall.”

Pohal and Hall then met and conferred after the November 19th meeting. Hall typed her notes from the interview and reviewed Grievant's prior evaluations. They met with Hall's direct supervisor, Tom Owens, the assistant superintendent of business and personnel. Hall and Owens then talked with the District Superintendent and the decision was made to terminate Grievant's employment, with Hall concurring with a recommendation to terminate. Pophal was involved in the discussions and supported the recommendation to terminate employment as reflective of him not feeling Grievant was being honest with him during the interview, and hearing no remorse. They were concerned for the safety and well being of the students. The District terminated Grievant's employment by letter to her of November 21, 2007, received by her on November 23, 2007, which stated in pertinent part:

On November 14, 2007, the district suspended you because of a lengthy list of issues brought to my attention regarding your job performance. The list includes lack of confidentiality, inappropriate communications with students, inappropriate responses in the classroom, insubordination, and failure to follow directions.

The district investigated these allegations and confirmed their accuracy. Also, factual documentation substantiated that many of your responses during our investigation were misleading. The district is responsible for the well being and safety of students and because of your conduct we have no options but to discharge you from employment. Your termination of employment is effective as of the date of this letter. It is unfortunate that working with children has proven not to be a good vocation for you, but we do wish you well in the future.

Copies of the letter were sent to the Union President and the Union Staff Representative. The parties disagree over whether Million was also terminated or resigned.

The Union and Grievant filed a grievance over the termination on or before November 27, 2007, contending the District violated Article 2 and Article 7 of the collective bargaining agreement. The Parties mutually agreed to advance the grievance to Step 3 of the grievance procedure, and that meeting was held on December 6, 2007. By letter of December 11, 2007 from the District Superintendent Kris Gilmore the District denied the grievance. The letter was addressed to Mr. John Spiegelhoff as Staff Representative, with copies to Grievant, Gail Klay as Union President, and others.

The District did not receive any communication either verbally or in writing concerning the grievance by January 3, 2008, when Hall sent a letter of that date via facsimile, email and U. S. mail to the same individuals as above, stating:

This letter is to notify you, per Article 8 – Grievance Procedure of EPU contract, the union is required to appeal to a Step 3 answer within ten (10) working days to the School Board. The district's Step 3 answer was dated

December 11, 2007. The union has not made a written appeal to the districts Step 3 answer within the required time limits. Since the union failed to appeal within the limits provided, according to Article 8, Section C., the grievance is deemed settled and waived.

The Union Staff Representative responded, via facsimile and U. S. mail, on the same day to the District's letter

I am in receipt of your facsimile this morning. I am not sure how you are counting the days for the Union to appeal to Step 4 but for whatever it is worth, the Union has not failed to respond in a timely manner as you allege.

I received the Step 3 response from the District by facsimile on December 11, 2007 and Gail Klay received the letter on December 12, 2007 as her carbon copy letter was sent by interdepartmental mail. Ms. Klay is the President of Local 1908 and the steward assigned to these cases. Since she, as the steward, is responsible for grievance processing, the time limits started when she received Kris Gilmore's letter on December 12, 2007. Since there was no school from December 24 through January 2, 2008, the Union certainly is not considering these days as "working days." Therefore, the Union's time lines started on December 13, 2007. Assuming *arguendo*, the timelines started on December 11, 2007 or even December 12, 2007, the Union has still met its contractual time limits of ten days.

Please consider this letter a formal appeal to Step 4 of the grievance procedure for both Susan Pospychalla and Carrie Million. Please notify the Union when the District intends to schedule a hearing on this matter with the school board.

The District responded by letter of January 3, 2008, noting, among other things, that the contract does not specify a title or position to whom the grievance should be responded, it just states a representative. It noted the contract time limitations in working days, not working days when school is in session and that Union employees worked all but the two holidays of December 25 and January 1. It noted the Union could have requested an extension of the time limits but the union failed to do so. The letter maintained that the union failed to meet contractual time limits regarding the grievance, and noted the union could appeal this decision to the School Board. Again on the same day the Union responded in writing contesting what the parties had considered working days and again requesting a Step 4 hearing with the School Board, among other things.

The parties held a Step 4 hearing and by letter of January 25, 2008 the district denied the grievance.

Union President Gail Klay, who is an IMC Assistant, had signed the grievance along with Grievant and received the District's December 11th letter on December 12th. She did not work and was not paid between December 24, 2007 and January 2, 2008. Klay had not believed the District held the position that Christmas vacation/break (her unpaid days) were counted against the time limits for filing an appeal, not having been specifically told this by the District before. Previously there has been one grievance filed and processed during the period of a teachers' convention where the District did not raise the issue of counting those days as working days towards appeal time limits. Some members of the bargaining unit work during the summer when school is not in session. She understood that if a grievance were filed during the summer for a bargaining unit member she would have a responsibility to get a grievance in timely or waive it, and to process it.

The District considers the working day to be any day in which members of the bargaining unit are working. There are people in the bargaining unit that work anywhere from 180 days to 12 months over the year. From December 11, 2007 to January 3, 2008 there were some members of the bargaining unit working, except for Christmas Day and New Year's Day, and some members who were not working. Employees that work during that time are paid. Aides, such as Grievant, would not be working.² During that time there were members of the bargaining unit at work in the central administration building as office staff in the high school, and there were members of the Union that worked at the fieldhouse. Christmas break began December 24, 2007. School resumed January 3, 2008. Employees are paid for the holidays. In the 30 year experience of the Districts' assistant superintendent for business and personnel services, the Union has not taken the position that working days are defined only by days individuals work as opposed to days that people in the bargaining unit work. On Union matters the District sometimes deals with the Local Union President, and sometimes with the Staff Representative. Hall usually deals with the Local President on labor matters.

After the District denied the Step 4 grievance appeal the matter proceeded to this arbitration. Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Union

On Timeliness

In summary, the Union argues that the Step 4 appeal was timely and that the District attempts for the first time in the Parties working relationship and through grievance arbitration to rewrite the collective bargaining agreement and the contractual language. Union President Klay was not physically present and not paid between December 24, 2007 and January 3, 2008. The pertinent language in the contract regarding timeliness hinges on the language of ten (10) working days. The definition of working days is clear in the contract – the days the

² Aides do not work 12 months of the year. Some administrative and clerical employees work 12 months a year.

employees are working and being paid. The person responsible for grievance processing, President Klay, was not working from December 24, 2007 to January 2, 2008. The District sent the appeal letter directed to the Staff Representative despite the fact that Klay was the person who filed the grievance on behalf of the Grievant. Klay has no reason to believe that the District held the position that Christmas vacation/break (her unpaid days) were being counted against the time limits to appeal to the next step. Hall and Owens testified they never noticed the Union either verbally or in writing that this was the position of the District. The District engages in a “gotcha” game by never noticing the Union of their position on “working days” despite other prior grievances working their way through the grievance process during non-working non-paid days (teachers convention) as testified to by Klay.

The Union also argues that, assuming *arguendo* the language is ambiguous and different interpretations could be applied to working days, arbitral precedent holds that doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process a grievance, and the definition of the term “working days” may vary depending on who is being required to act. In this case the Union President was required to as she was the person who filed the grievance on behalf of Grievant. Despite the Staff Representative appealing the grievance within the ten working days, the person who is ultimately responsible for appealing the grievance is the Union President and she was not at work and not being paid. Klay was responsible for appealing the grievance to the next step and not the grievant as she was terminated from her employment. Appealing the grievance to the next step in the grievance procedure is in the domain of the local Union. Despite the fact that the Staff Representative appealed the matter to step three, the person who was responsible for grievance processing was not “working”. Therefore the Union believes the contract is clear on this matter and the grievance was timely filed.

The Union argues that the possibility exists that the language could be construed ambiguous and the District gave no examples or past practice at the hearing that this was how the parties operate. The District has not demonstrated concrete examples of how the parties interpreted this language in their example of an eleven month employee filing a grievance during the summer. There has never been an employee who has ever filed a grievance during the summer. The parties have never encountered such an issue in their relationship. The District argument is purely academic. Union witness Klay gave an example of a grievance filed and processed during the period of teacher’s convention where the district did not raise the issue of counting those days (as working days despite the employees not working) towards the appeal time limits. The District acquiesced to a practice of not counting days towards the appeal time limits by their failure to raise this issue at the time of the other grievance being processed. The District argument fails in respect to clear contract language. Their argument fails to recognize the fact that contractual language may be ambiguous and failing to demonstrate through testimony or exhibits examples of past practice as an interpretive aide on how the Parties defined “working days.” The arbitrator should find the grievance was filed timely and award on the merits of the dispute.

The Union further argues that the collective bargaining agreement is not clear in reference to the issue of working days. It just simply states “working days.” The District offered no evidence regarding a common understanding of how the Parities have defined working days when processing grievances. The District did not raise the issue of timeliness when a previous grievance was filed during the time of teachers’ convention. At the time of teacher’s convention members other than educational assistants of Local 1908 (secretarial) were working on these days. The District cannot have it both ways – argue the time limits apply for working days during Christmas break and then argue that they do not count during teacher’s convention. The District also has failed to notify the Union they took this position. Owens and Hall are involved in the grievance processing. They have received grievances from Local 1908 prior to this grievance. They failed to raise the issue and failed to notify the Union of this position. The District argues the language is clear and unambiguous. This is simply their position – they argue nothing else. However, the record demonstrates the language is ambiguous. The Union’s interpretation is reasonable and has not prejudiced the District in any form or fashion. The grievance should not be time barred.

On the Merits

In Summary, the Union argues that the District investigation is procedurally flawed. The District suspended Grievant without pay and without any semblance of an interview with her to get her version of events. It is apparent the intent of the District is termination despite the outward appearance of them conducting a fair and just investigation during the suspension. This is buttressed by the nature and substance of the interview with Grievant on November 19th. Pophal and Hall had already predetermined she was going to lie. She was asked leading questions without dates and not allowed adequate time to respond. There was no evidence of physical or sexual harm. Emotional harm is not grounded in any subjective measure, and is purely speculative. It cannot justify suspension and termination.

The Union argues that on November 14th Grievant was merely informed of the allegations with no opportunity to respond. On November 19th the District had a predetermined result in mind. The lack of meaningful investigation should be considered against the District, citing arbitral authority. The District had scripted questions intent on receiving “correct” answers from Grievant. When Pophal is surprised to hear Grievant answer “I don’t recall” or “that is not true”, he comes to the conclusion that she is lying, which reinforces his intent to terminate. The investigation was simply a means to an end and violative of due process.

The Union contends due process was also violated when the employee was never put on notice her conduct would lead to discipline much less termination. Notice of misconduct at the time it occurred is a stalwart of the just cause standard, citing arbitral authorities. Here, Grievant was seldom talked to about the specific incidents and, for the most part, Wistrom simply kept the notebook in her desk until November 13th. The District in essence stockpiled the allegations and then just summarily discharged the grievant. This is contrary to arbitral authorities. There are also two contrasting versions of whether Wistrom effectively noticed

Grievant of the alleged misconduct. Credibility is an important aspect of this notice issue. Wistrom is not credible. She gave inconsistent testimony as to instructing Million to continue to record Grievant's misconduct in the notebook. She is not credible in her testimony as to Grievant's morning and afternoon breaks. If Wistrom is not credible on these issues, then how could she be credible when she asserts under oath she gave Grievant a plethora of warnings about her conduct? In reality, Wistrom gave very little notice if at all as the Grievant testified. She did not give the Grievant any meaningful notice of her misconduct. There was only the "tinkle, tinkle little star" incident, where Wistrom did speak to her and she did not repeat the behavior. The District engages in double jeopardy by later bringing it into the discharge. Wistrom's conduct regarding the notebook and her lack of credible testimony leads only to the conclusion that she stockpiled alleged offenses, gave the list to Pophal months later, and the District attempts to make a case for discharge.

The Union further argues that the District's supervision hierarchy creates additional issues regarding notice to the employee of misconduct. Wistrom was not Grievant's immediate supervisor. She does not possess supervisory authority over Grievant. She cannot state to Grievant that Grievant will be discharged for behavior. The Grievant's immediate supervisor never did speak to her prior to the discharge. Since this never occurred, the Grievant was never noticed at a high level in the School District administrative structure. The District has simply summarily discharged the Grievant, violative of the well accepted doctrine of progressive discipline. Progressive discipline is rooted in the belief that employees are salvageable and can make meaningful adjustments to their behavior through corrective action on behalf of the employer, citing arbitral authority. It is undisputed that Grievant has never been formally disciplined throughout her employment with the District. Despite this, the District discharged her after stockpiling misconduct over three months without notice.

The Union argues the magnitude of the alleged misconduct needs to be discussed to determine if discharge or a lesser form of discipline was truly warranted. The seriousness of the confidentiality of student information allegation was embellished by the District. The District embellished the seriousness of the sexy haircut comment. None of the allegations leveled by the District call for the discharge of this employee.

The Union contends that the District's allegations of the Grievant's other incidents of misconduct are generalized, not fact based (opinion) and not grounded in policy violation. The allegation of telling students they are lazy is taken out of context, and it was not mean spirited or belittling and was not emotionally harmful. Allegations of calling students sloppy or stupid are denied and not proven. Allegations of not enough processing time for students is not grounded in any student IEP and Wistrom never gave Grievant any specific directions or assistance in developing a plan for the students. The tinkle, tinkle little star comment must be taken in context, was not and was not intended to be emotionally harmful, it was not done again. It is now double jeopardy to raise the issue again. The allegation of declaring other students are her favorites and calling them little weasels are not grounded in District policy. Grievant is charged to establish a relationship with the students she works with. Grievant did not make a public statement to all the students. This was not mean spirited or belittling to

students, and is taken out of context. Wistrom did not direct her not to do this and this is stockpiling. The miscellaneous allegations of misconduct are not grounded in policy and are opinions and not fact based. The allegations she does not give students space to be normal kids and coddles them puts her in the “damned if you do and damned if you don’t” position. The allegations are baseless. As to allegations of insubordination, Wistrom does not possess supervisory authority so this is not insubordination, citing arbitral authorities. Wistrom did not give direct orders but rather was non-specific and vague. Grievant did not refuse to obey directives and Wistrom is not credible. As to the allegation that Grievant needed step by step instruction, this was made after about twenty school days when Grievant, unlike the other two aides, had not worked with Wistrom before. And she was asking what needed to be done with students. She should not be faulted for asking questions. The allegation is not founded in policy, is not meritorious and is stockpiling. Concerning the allegation of the correctional officer comment, Grievant was trained in ProAct, never had to use it, and would only use ProAct if needed. In context, Grievant had asked Wistrom for a refresher course in ProAct, and Wistrom only wrote in her notebook rather than talking to the Principal about it. This allegation is not based in a policy violation.

The Union argues that the Bohr testimony is filled with opinion, little fact, and no weight should be given to it. Bohr did not know and did not ask Grievant why she did certain things. The District has not shown any policy implications in any of Bohr’s testimony. And Grievant’s job evaluations showed improvement. They provided no reason for Grievant to believe she was in danger of being disciplined, much less terminated. They indicate she was a good employee. They are not tangible notice to Grievant that discipline was imminent. There is no possible way she went from stellar to cellar in a period of three months as the District asserts.

The Union further contends that the District’s right to suspend or discharge is not unfettered. It requires just cause, and is reviewable in arbitration. The District’s citations serve no substantial guidance in the instant dispute, and are all factually distinguishable. Some turn on credibility. Arbitral law demonstrates the arbitrator is vested with the authority to determine the level of appropriate discipline for proven offenses, citing authorities. The record is devoid of evidence that Grievant violated the students’ IEPs. The District is left with a myriad of allegations not grounded in policy and that are speculative, issues related to notice, progressive discipline and due process violations.

District

On Timeliness

In summary, the District argues that the Union clearly failed to comply with the grievance timelines clearly and unambiguously set forth in Article 8 of the agreement. The Union did not appeal to Step 4 until January 3, 2008, which is 15 working days after the District sent its Step 3 answer. The agreement states that an appeal must be made “within ten (10) working days of the receipt of the Step 3 answer.” After the Step 3 answer the Union did

not appeal the grievance within the time period proscribed by the agreement. On January 3, 2008 the District sent a letter to the Union notifying it that pursuant to Article 8, Section C of the agreement, the grievance was settled and waived. The Union then contended that ten “working days” had not passed. The Union’s contention ignores the clear language of the agreement. It is clear about the ten (10) working days to appeal, and it is clear about the consequences of failing to file an appeal within the time limits. It shall be deemed settled and waived. If it is impossible to comply with the time limits specified herein because of work scheduled, illness, vacations, etc., the limits may be extended by mutual consent in writing. Here, the Union did not appeal within ten working days. The Union attempts to circumvent its failure to timely file an appeal by arguing the “working day” time limit did not expire between December 11, 2007 and January 3, 2008. During that time, however, there were only two days that bargaining unit members were not working – December 25, 2007 and January 1, 2008. The Union’s argument is not supported by the agreement and is not supported by arbitral law, citing authorities. Ignoring those pre-defined steps eviscerates the entire agreement. Harsh results are sometimes part of the parties’ collective bargaining agreement, and it is not within the arbitrator’s authority to second-guess those results. The arbitrator must enforce the agreement as written. Under Article 8 Section E the arbitrator is prevented from modifying the terms of the agreement.

The District argues that to allow the grievance to proceed to a decision on its merits would require a finding that “working days” and “school day” are one and the same. The Union argument is that days between December 24, 2007 and January 2, 2008 were not working days and should not be counted in the ten day period after December 11, 2007. That argument is contrary to the intention of the parties and is not supported by arbitral law. If the parties had intended to use “school days” they could have used that language rather than using the term “working days”. A working day is any day in which members of the bargaining unit are working. In the relevant period there were only the two days that members of the bargaining unit were not working. Certain employees were not working on some of the other days. This is the first time that the Union has taken the position the working days are defined only by days that certain individuals are working as opposed to days in which employees in the bargaining unit are working. Grievances can be filed during the summer and those days are considered working days even though certain employees in the unit do not work during the summer. Klay’s testimony confirms this. Finally, if summer breaks and other breaks in the school year were not considered “working days” for purposes of the agreement, the second sentence in Article 8 Section C would have little if any meaning. That sentence provides, “If it is impossible to comply with the time limits specified herein because of work schedule, illness, vacations, etc., these limits may be extended by mutual consent in writing.” Even if summer and winter breaks were not vacations, they affected some employees’ work schedules. The Union did not obtain the District’s consent in writing. It simply allowed the time period to expire. The District should not be prejudiced by the Union’s inadvertence. There is no language in the agreement that would permit such a result.

The District also argues that it is incredible for the Union to argue that Klay had no reason to believe that vacation days would be counted against the ten (10) working days time limit. The agreement is crystal clear on that issue. In the very next sentence after the language which provides that a grievance is deemed settled and waived if a party fails to file an appeal within the specified time limits, the agreement specifically addresses the treatment of vacation days and changes in work schedules. According to the clear language of the agreement when a member of the bargaining unit is on vacation or cannot comply with the time limits because of his or her work schedule, the ten (10) working day time limit remains in effect unless it is extended by mutual consent in writing, citing Article 8 Section C. The fact that Klay was not working during certain days in December 2007 and January 2008 does not excuse the Union from its contractual obligation to file a written appeal within ten working days of the District's decision. Some members of the bargaining unit were working during that period of time. No extension was requested. The District is not trying to rewrite the agreement. It asks the arbitrator to enforce the agreement language as drafted. The grievance must be dismissed.

The District contends that the Union's argument on the timelines issues is absurd and would lead to ridiculous results. It would lead to a situation where "working days" would vary depending on who the Union President is and when they work to determine what the timelines are under the grievance procedure. It is the Union, as an institution, who has the responsibility to comply with the time limits. It was the Staff Representative who filed the untimely appeal. And, there was no reason for the District to give notice to the Union of its position with respect to how it interpreted "working days". The contract is clear and unambiguous and the issue has never come up before. Klay testified that she believed there was one grievance processed during teachers' convention when the Union didn't consider the days the teachers were off as working days. There was no testimony that there was a reason for the District to raise the issue and that in fact the appeal was filed in a manner that would have required the teacher convention day not to be counted as days in establishing timeliness for the appeal. This hardly establishes any type of past practice. On the other hand, the parties have consistently complied with the timelines under the contract.

On the Merits

In summary, the District argues that it acted within its rights by suspending and ultimately terminating Grievant's employment. The suspension and discharge for performance related problems were for just cause and did not violate the agreement. The District has the inherent right to suspend and terminate employees, citing arbitral authorities. Article 2 of the agreement - the management rights clause - retains in the District the right to direct all operations of the school system, relieve employees from their duties, and determine the personnel by which the District's operations are to be conducted. The only restriction of the District's rights to discipline employees is that the discipline must be for just cause. There is not a substantial amount of case law that speaks to a situation like this one, but there is some guiding precedent. Citing arbitral authority, the clear and convincing evidence standard has been applied in similar situations. Poor performance can be a basis for termination for just cause in similar situations.

Here, the District had just cause to suspend and discharge Grievant. She exhibited many of the same performance problems and conduct that led to just cause terminations in the cited cases. She abused students' rights to confidentiality, made inappropriate comments to students, failed to follow her immediate supervisor's instructions, and generally exhibited overall unprofessional performance. All of these problems were discussed with the Grievant before she was suspended, but the problems continued. Violating student confidentiality is a major concern. Those students are very vulnerable and disclosure results in shutting down. And it creates a legal problem as by law such information cannot be shared. Grievant engaged in demeaning and intimidating conduct. These are documented and were discussed with her several times before her suspension. Grievant was very impatient with students and would not give them sufficient processing time. She snapped her fingers in front of student's faces. Wistrom frequently talked to Grievant about being more patient and giving them more processing time, but nothing changed. Grievant repeatedly failed to follow Wistrom's instructions that students should work independently. That is part of their IEPs. Grievant also frequently did things she was specifically instructed not to do, like not to do a new story reading. She was talked to but nothing changed. She made statements that she would use her corrections officer training, a big concern to Pophal. They had ProAct training. Grievant's conduct had direct and severe consequences. Those students were the most vulnerable in the school. Wistrom witnessed the children shutting down, crying, and other problems. Wistrom determined that the Grievant was the source of the problems due to all of the performance and conduct problems described.

The District argues that Grievant was well aware of the problems and had sufficient time to correct them. Wistrom had numerous one-on-one conversations with her regarding her concerns. By October Wistrom went to Pophal, who asked for her concerns in writing. When supplied with them, Pophal was immediately concerned. The District had cause to suspend Grievant while it conducted its investigation. Their decision was reasonable and of primary concern for the safety of the students. The decision to terminate was made only after the investigation confirmed the validity of the allegations against Grievant. Bohr confirmed what Wistrom described, and felt that since Grievant has been gone the classroom environment had improved. Grievant was given the opportunity to refute the allegations but failed to do so. On November 19th she admitted several of the allegations. She denied some allegations, but Pophal and Hall concluded that she was being evasive and misleading in her answers to their questions. They asked about past evaluations, knowing the issues were raised with Grievant in the past and her denial made them doubt the veracity of most of what she was telling them. The decision to terminate was based on Grievant's poor performance and conduct, and the District's belief that if they put her back to work, the problems would continue and the students would be irreparably harmed. The District had just cause to terminate Grievant's employment. The case is similar to other cited cases.

The District further contends that the arbitrator must defer to the District's determination as to the proper penalty to be imposed for the Grievant's misconduct. The arbitrator should not substitute his or her discretion for that vested with the employer, citing

arbitral authorities. This principle is especially significant in this case. The District's decision was made pursuant to policy and to comply with state and federal law, ensuring the well being and safety of the students. The Union offered little evidence that the District's decision was unreasonable, arbitrary or capricious.

The District argues that the Grievant was terminated for cause after an appropriate investigation. The District conducted a complete investigation. The District moved quickly, interviewing Wistrom the day after the suspension. The District had no reason to question Wistrom's judgment or motives. Grievant testified her working relationship with Wistrom was wonderful. The record contains no evidence to support a conclusion that the Grievant's termination was a foregone conclusion. The District next interviewed Bohr, an experienced bargaining unit member with first hand knowledge of the happenings in the classroom and could offer unbiased opinions. Bohr gave a written statement. Her evidence is hard to discredit. And most is fact based. She was qualified to offer an opinion as to what was happening in the classroom. The Bohr interview confirmed Wistrom's concerns. The prior performance evaluations established many of the same problems. Such as the need to be more tactful, accepting guidance from others, and giving students more processing time. The evaluations confirmed Wistrom's concerns, including confidentiality. They contained Grievant's signature, indicating they had been discussed. No written responses to them were ever filed by Grievant. The District had no reason to doubt the allegations. At the November 19th meeting the Union did not object to the way the meeting was conducted. The questions were not designed with the intent to receive "correct" answers. Rather, they were geared towards testing Grievant's propensity to tell the truth and refuting her contention that many of the problems which led to her suspension had not been discussed with her previously. After that meeting the District still continued to deliberate and consider carefully all of the information, including: there was no remorse, there was no I made a mistake, what can I do, I shouldn't have done this, there was no empathy, nothing to indicate that things were going to be different.

The District argues that the student's interests were paramount. There is no evidence to support the Union contention that termination was a foregone conclusion when the investigation was commenced. Given the special needs nature of the students that the Grievant was in contact with, the District needed to proceed cautiously in order to avoid any more damage to these vulnerable children. It was this vulnerability that made Pophal and Hall determine to suspend Grievant when the problems with her performance became known. The Union dismisses the importance of these things. The District's concerns were based on things already happening in the classroom. Students began to display concerning behavior. Wistrom was well equipped to recognize these problems, and attributed it to Grievant. The class has improved since. The observations of Wistrom and Bahr are totally credible and undisputed. It was after taking all of these facts into consideration that the District concluded that the chances of irreparable harm to the students in the classroom required the immediate termination of the Grievant.

The District also argues that the problems with the Grievant's performance and conduct were discussed with her repeatedly and nothing changed. Wistrom and Grievant testified differently. One is lying. Wistrom has no motivation to lie and no explanation has been offered by the Union. Grievant testified Wistrom was sweet, wonderful and helpful. Grievant could only contend Wistrom was motivated by friendship with another teacher. Grievant's motivation for lying is clear – her continued employment. It is not surprising she would deny having had numerous conversations with Wistrom regarding Wistrom's concerns. Grievant admits having talked to Wistrom about concerns, but simply downplays the importance of those conversations. Concerning prior evaluations, Grievant's contention is hard to believe given the fact that each evaluation contains her signature acknowledging that the evaluation was discussed with her. Grievant never recognizes that her actions were completely inappropriate in Wistrom's classroom. These incidents must be viewed as a whole. The District's administrative team of professional educators concluded that the potential harm to the students was just too great to permit putting the Grievant back in the classroom. Adding her lack of remorse and unwillingness to change, there can be no question that the District had cause to terminate Grievant's employment.

DISCUSSION

The District has raised a timeliness issue as to whether the Union timely advanced the grievance from the Step 3 denial by the District to the Step 4 appeal to the School Board within ten (10) working days as provided in the collective bargaining agreement. That issue must be resolved to determine if the merits of the grievance arbitration can be reached. The issue centers on the meaning of "working days" as used in the grievance process.

The Step 3 denial letter was dated Tuesday, December 11, 2007 and sent that day to Grievant, Local Union President Klay, and Staff Representative Spiegelhoff by facsimile and U.S mail. Klay actually received the letter via interdepartmental school mail on December 12, 2007. The District had winter break starting December 24, 2007 through January 2, 2008 with school resuming on January 3, 2008. Christmas Day and New Year's Day were scheduled holidays. Some members of the bargaining unit worked during the break (other than the two holidays) and some did not. Klay did not work and was not paid during the break. By letter of January 3, 2008 the District notified the Union, with the Staff Representative being notified by facsimile, that it had not advanced the grievance to Step 4 and that the District was considering the time to do that expired, resulting in a settlement and waiver of the grievance. On that same date the Union responded in writing that it denied being untimely because Klay was responsible for processing the appeal and was not working while there was no school from December 24, 2007 through January 2, 2008, so these were not being considered working days, and requested a hearing with the School Board as provided at Step 4 of the grievance process. The District responded on the same date pointing out the agreement does not specify a title or position to whom the grievance should be responded it just states a representative,

maintained that the Union failed to meet the timeline, and that the Union could have requested an extension of the time limits but failed to do so. The Union responded, again that same day, adding to its position that the parties had never considered vacation days as working days as a longstanding practice.

Although the collective bargaining agreement defines a work year and a normal work week, it does not further define a work day or a school day. The agreement provides in Article 8:

C. Time Limitations: Failure of a party to file a grievance or appeal a grievance within the time limits provided herein shall be deemed a settlement and waiver of the grievance. If it is impossible to comply with the time limits specified herein because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

and

Step 4: If the grievance is not settled in Step 3, a written appeal may be made by the employee and/or her/his representative to the Board of Education within ten (10) working days of the receipt of the Step 3 answer. Within ten (10) working days of the receipt of the appeal, the Board of Education shall meet with the grievant and her/his representative for the purpose of resolving the matter. The Board of Education shall respond to the grievance in writing within five (5) working days of the meeting.

The language for Step 4 is clear. It refers to working days. It does not refer to school days. These are not interchangeable terms with the same meaning. Employees in the bargaining unit do not work merely on school days, although some of them do only work those days. Some of them work on days other than school days. The record indicates that some work 12 months and over the summer when the normal school year or even summer school would not always be session. Some worked during the break involved in this case. The language in Step 4 does not differentiate between employees or classifications of employees who only work on school days and those who work on non-school days. Working days occur whether all employees are working or only some employees are working. There is nothing in Step 4 or Article 8 generally which makes the ten (10) or "working days" dependent on who in the Union might be working during those days. Article 8 only provides that the employee may have her appropriate Union representative with her at any step on the grievance procedure. Grievant had both the Local President and the Staff Representative present at the Step 3 meeting and all three received the December 11, 2007 denial letter. After that there were at least 12 or more working days during which some bargaining unit members worked before the Union filed a written appeal to move to Step 4.

The language in Step 4 is not ambiguous. Grievant suggests that it might be considered ambiguous, but has not pointed out any ambiguity in the language itself. A contract term is ambiguous if it is susceptible of more than one meaning, that is, if plausible contentions may

be made for conflicting interpretations thereof.³ None is apparent in the language. Article 8 uses the same working days in reference to all time limits in the grievance process. And there is no ambiguity or conflict between the language in Step 4 and that in any other clause of the collective bargaining agreement which might render the Article 8 reference and the agreement itself ambiguous.

When language is not ambiguous there is usually no resort to past practice as an aide in interpreting the language. However, sometimes past practice establishes how parties have defined or used language in applying an agreement. That is the type of argument the Union is making here. It contends that “working days” are and have been considered “school days” for purposes of processing grievances. The Union presented generalized testimony of Klay that on one occasion during teachers’ convention there was a grievance where no objection was raised by the District as to working days being used to figure the time limits. In order for a past practice to become binding as part of a collective bargaining agreement, such practice must be well established. As set out in Elkouri & Elkouri, How Arbitration Works, (6th Ed.) pp. 605–609, a past practice, to be binding, must be unequivocal, clearly enunciated and acted on, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Here, the evidence does not establish a past practice. There was one teachers’ convention instance. The details of the number of working days or other facts surrounding that grievance procedure have not been presented. While there have been other grievances between the parties, the record does not demonstrate that those grievances involved timeliness issues or that the subject of working days was involved. There is no indication that either party clearly enunciated to the other or acted on their view of the facts of the contended practice. What the contended practice is isn’t readily ascertainable from the scant evidence presented. There is no evidence that it took place over a reasonable period of time as a fixed and established practice accepted by both parties. And, even if a party does not object or strictly enforce its contractual rights on a given occasion, that does not mean that it has acceded or agreed to a practice, or waived its right to enforce the contract language. No past practice has been established here to show that Step 4 or Article 8 generally is ambiguous and thus in need of past practice for interpretation. It follows that no past practice has been established to show that the parties have established a practice whereby “working days” are to be considered “school days”. Nor has there been shown a past practice where the parties consider working days to be only those days where a particular employee or even the Local Union President are actually at work on a working day for that individual. There is no evidence upon which to draw an inference that the District has been lax about observing time limits. Simply put, there is no past practice which helps the Union argument here.

The parties chose to use the term “working days” in Article 8. As the District points out, had they meant or intended to use “school days” they could have written the language that way, but did not. This is a strong indication that the plain language means just what it says, working days, and not school days. There is no reason for the District to have ever told, or

³ See, Elkouri & Elkouri, How Arbitration Works, (6th Ed.) p.434.

noticed, the Union that it considered working days to be just that, working days, as opposed to anything else. What Klay may have understood based on what the District never said does not change the plain meaning of the language.

The language of Step 4 must also be read with the rest of Article 8. In doing so it becomes apparent that the parties anticipated that vacations, work schedules and other things might make it impossible to meet the various working day time limits. Section C states in part:

If it is impossible to comply with the time limits specified herein because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

This language addresses potential conflicts between working days and days that a grievant or Union representative may not be available, and builds in a mechanism to deal with such conflicts – that of mutual consent to extend the limits. As the District argues, this indicates that the days keep running as working days. Keeping in mind not all bargaining unit members work a schedule that is the same as school days, this is another strong indication that the parties used the plain meaning of “working days” to mean just that, and not school days, in Article 8. And that is the very situation here, where it was Klay’s work schedule which placed her out of the worksite and off her work schedule during the winter break. The record is silent as to the Staff Representative’s availability during that time. But no record or argument has been made that Article 8 depends on the Staff Representative’s working days, as opposed to the bargaining unit members’.⁴ Klay received the December 11th denial letter at least by December 12, 2007. She, and even the Staff Representative, had at least seven working days before Klay went on winter break to consider if the Union needed to ask for the District’s consent that the times be extended if the break was going to make it impossible to comply with the time limit. Klay, the Staff Representative in her stead, and the Union actually had until the tenth working day to at least make the request to extend the time limits. There was no discussion between the parties as to an extension and there was no mutual consent in writing to extend the time limits. Some administrators were working during the winter break. There is nothing in the record to indicate the District did anything to prevent or delay such a request, or that it would not have even considered such a request had one been made either before or during the winter break.

To accept the Union argument would be to render at least that part of Section C regarding work schedules meaningless in this case. Contract construction and interpretation cannot render provisions meaningless, and is yet another indication that working days are not the same or considered the same as school days for Step 4.

The Union argues that the definition of working days may vary based on who is being required to act, and in this case that person was Klay, who wasn’t working during the break.

⁴ That is not to say that the availability of a Staff Representative would not be considered in a request for an extension of time, given the employees right under Article 8, Section D to choose an appropriate Union representative.

1978). In that case the agreement required grievances to be signed by the grieving employee and filed within 2 "working days." The employee was disciplined on Saturday and filed his grievance the following Wednesday, which was his next regularly scheduled workday. The arbitrator, believing flexibility was needed, reasoned that the contract places the obligation on the grieving employee. "He instigates the complaint and is required to sign it. The term 'working days' must then apply to his own work schedule." Id. at p. 262. The case here is quite different. Grievant was required to sign the grievance under Article 8, and she did so along with the Local President, filing the original grievance in a timely manner. After that, and particularly for Step 4, it is the employee and/or her representative who may make the appeal within the ten (10) days. Article 8 gives the Grievant the right to choose her representative. Both the local Union President and the Staff Representative had appeared with Grievant at the Step 3 meeting, and the denial letter was sent to all three of them. The District and the Union deal with each other through both the Local President and the Staff Representative alternately. Other than requiring the Grievant to sign the original grievance, the agreement gives flexibility to the Grievant and the Union as to who can file a Step 4 appeal. Given that flexibility and the significantly longer time periods than in INDIAN HEAD, INC., that case is not persuasive precedent for finding that the Step 4 reference to working days should only be applied to Klay's individual scheduled working days. This is especially so in view of the express provisions in Article 8, Section C, above to extending time limits for work schedules. The agreement's recognition that a work schedule may make it impossible to comply with time limits, expressed in working days, renders it impossible for the undersigned to find the case or concept expressed in INDIAN HEAD, INC., as a reason not to apply the plain meaning of the language.

Step 4 requires the appeal be made within ten (10) working days of the Step 3 denial. The "working days" are not "school days" for purposes of Step 4 and Article 8. The denial was received by Klay no later than December 12, 2007. No extension of time was consented to. The written appeal to Step 4 was not made until January 3, 2008. This was more than ten (10) working days after December 12, 2007. The written appeal was not made within the time limits of Article 8, Section D, Step 4 of the collective bargaining agreement. The District made no representations upon which the Union relied to its detriment. The Union has presented no evidence or argument as to whether or why they could not have complied with the time limit, other than a differing interpretation of what the language meant. And the District has not waived the issue. The Union has not presented any extenuating circumstances not contemplated by the agreement which would allow a tolling of the time limit or other interpretation of the language to allow the undersigned to conclude that the Step 4 time limits have been met.

Under Article 8, when the time limits are not met or extended by mutual consent, the first sentence in Section C can be invoked.

C. Time Limitations: Failure of a party to file a grievance or appeal a grievance within the time limits provided herein shall be deemed a settlement and waiver of the grievance. . . .

That is what the District did on January 3, 2008. It choose to rely on its right under the collective bargaining agreement to have the grievance deemed settled and waived based on the failure to timely advance the grievance to the next step in the process. That is the first basis upon which it requests dismissal of this grievance. “In the vast majority of cases, arbitrators strictly enforce contractual limitations on the time periods within which grievances must be filed, responded to, and carried through the steps of the grievance procedure where the parties have consistently enforced such requirements.” Elkouri & Elkouri, How Arbitration Works, (6th Ed) p. 217, and citations therein. “If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus, the practical effect of late filing in many instances is that the merits of the dispute are never decided.” Id., pp. 220, 221, and citations therein. This case has strict time limits in the agreement and no permissible construction of the language or consideration of the other facts, events and procedures in the case presents a valid reason not to enforce those time limits or the agreed result in Section C if they are not met. The arbitrators are not free to merely fashion equitable results. The agreement says what it says, and the arbitrator is limited by Article 8, Section E.5., which provides, among other things, that [t]he arbitrator shall not modify, add to or delete from the express terms of the Agreement.” To conclude that the Step 4 reference to working days is really school days or only working days that the Union President actually worked, or any similar conclusion, would be to modify or add to the language of the agreement. This an arbitrator cannot do.

The Grievance was not timely appealed at the Step 4 level. As a result, the District had the contractual right to consider the grievance settled and waived. The Union failed to timely appeal the grievance to step four of the grievance procedure resulting in the settlement and waiver of the grievance pursuant to Article 8 Section C of the collective bargaining agreement. The merits of the grievance cannot be reached by the arbitrator.

Accordingly, based upon the record and arguments of the parties, I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 7th day of November, 2008.

Paul Gordon /s/

Paul Gordon, Arbitrator

