

BEFORE THE ARBITRATOR

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**CHILTON PUBLIC SCHOOL DISTRICT**

and

**CHILTON EDUCATION ASSOCIATION**

Case 18,  
No. 69148  
MA-14501

(Randall Discipline Grievance)

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**Appearances:**

**Paul C. Hemmer**, Davis & Kuelthau, S.C., 605 North Eighth Street, Suite 610, Sheboygan, Wisconsin, 53081, appeared on behalf of the Chilton Public School District.

**Jim Carlson**, UniServ Director, N7778 Rangeline Road, Sheboygan, Wisconsin, 53083, appeared on behalf of Grievant Brad Randall and the Chilton Education Association.

**ARBITRATION AWARD**

The Chilton Public School District, herein the District, and the Chilton Education Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission to resolve a grievance filed by the Association concerning the discipline of one of its members, Brad Randall, herein Randall or Grievant. Commissioner Paul Gordon was designated as the arbitrator. Hearing on the matter was held on September 30, 2009 in Chilton, Wisconsin. No transcript was prepared and a briefing schedule was set. The parties filed written briefs on November 6, 2009 and both declined to file reply briefs. The record was closed on November 9, 2009.

**ISSUES**

The parties stipulated to a statement of the issues as:

Did the District violate just cause and/or other applicable articles of the collective bargaining agreement when it suspended Brad Randall for three days for the incidents alleged in the April 24, 2009 Notice of Suspension?

If so, what shall be the remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE IV MANAGEMENT RIGHTS**

Except as herein limited by the specific and express terms of this Agreement, the Board, on its own behalf and on behalf of the district electors, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it and the laws and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

- A. To executive management and administrative control of the business and operational activities of the school system and its properties and facilities, and the assigned activities of its employees.
- B. To hire all employees and, subject to the provisions of law, determine their qualifications and the conditions for their continued employment, or their dismissal, and to promote and transfer any such employees.

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- D. To decide upon the means and methods of instruction, the selection of textbooks, other instructional materials, and the use of teaching aids.
- E. To determine the class schedules, duties, responsibilities and assignments of teachers and other employees with respect thereto, and non-teacher activities within the total school program, and the terms and conditions of employment.

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**ARTICLE V GRIEVANCE PROCEDURE**

A. Purpose:

This grievance procedure is designed to insure adequate consideration and appropriate solution of grievances, and hereinafter defined, at the lowest possible administrative level; and nothing in the procedure should be construed to inhibit the continuation of rapport and reasonable informal discussion with teachers, the Association, Principals, Superintendent, and his staff.

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**ARTICLE VI ARBITRATION**

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- F. It is understood that the function of the arbitrator shall be to interpret and apply specific terms of the Agreement. The arbitrator shall have no power to advise on salary adjustments, except the improper application thereof, nor add to, subtract from, modify or amend any terms of this Agreement.

- G. The arbitrator may rescind, confirm or modify disciplinary action, including action resulting in loss of pay to the employee involved, but may not exceed the provisions of this Agreement relating to wages and other conditions of employment. It may also order the employee involved not to lose his pay for time spent in arbitration.

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#### ARTICLE VIII TEACHER RIGHTS

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- B. Before a teacher is subjected to documented disciplinary procedures, reduction in rank or compensation, dismissal or non-renewal, the following procedures will be followed:
1. The employee has been informed of organizational rules related to the orderly, efficient and safe operation of the school district.
  2. The employer shall provide appropriate warning, oral or written reprimand.
  3. Specific charges leading to such action shall have been made in writing to the employee.
  4. An investigation shall be conducted to determine the accuracy of the allegations made to or by the employer against the employee.
  5. The employee may request and shall be granted a hearing with the employer regarding such charges. The employee shall have the right to counsel representation at the hearing and the right to grieve any decision and/or action of the Board at the conclusion of the hearing.
  6. The employer has disciplined the employee in a non-discriminatory fashion appropriate to the documented/substantiated offense.
  7. Grievances filed under this provision of the Agreement shall commence with the Arbitration step of the Grievance Procedure.

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#### BACKGROUND AND FACTS

Grievant is a vocal music teacher at the District Middle School and High School and is a member of the Association. He has been employed by the District in the music department for 21 years. By letter of April 24, 2009, Grievant received a three day suspension without pay. The reasons for the discipline largely center around two incidents that are detailed in the disciplinary letter. The record supports the great bulk of the factual statements and allegations made in the letter, although some matters are supplemented by other facts not referenced in the letter. Grievant's credibility will be dealt with separately. The two incidents will first be summarized.

The first of the two incidents stemmed from some of Grievant's vocal students missing a planned concert due to winter weather conditions. This resulted in incompletes for their grades. Grievant was instructed by the Principal that he needed to arrange for other concert opportunities for those students so that they could be graded and those grades then turned in by February 13th to count towards their final grade. In the absence of performing at such a concert they would have incompletes on their record, which would later turn to F grades. Grievant failed to submit student grades for make up concerts in a timely manner for the second quarter of the 2008-2009 school year resulting in a number of those students incorrectly getting F grades. Grievant admits that he was tardy in submission of the grades. He additionally admits he was also a few days late in arranging make up concert events required to make up the work that had resulted in the F grades. He contends the delays were in no way willful or intentional, but that he inadvertently turned in the grades late. He also notes that even though late, the correction to the F grades did occur.

The second incident was the late planning and poor communication to parents about a March 24, 2009 concert, and then misleading building principals about that. Grievant admits that he should have provided better notification to parents about the concert, but he does not admit that he purposefully mislead his building principals.

Grievant and the Association do not contest that the two incidents provide grounds for a suspension. They do contest the level of discipline, arguing that the discipline should be reduced to a one day suspension.

The April 24, 2009 Notice of Suspension from Principal Appel provided:

This notice of suspension is based upon your continuing unsatisfactory teaching and employment performance, specifically two incidents that occurred during, and extended through the months of December, 2008 and January, February, and March, 2009. These unacceptable outcomes are founded upon your lack of planning, which continues to have a negative impact on student learning, and on your relationship with students and parents. This notice of suspension is disciplinary and will be placed in your personnel file, maintained at the District office.

**Incident #1:** Students receiving a grade of F in music for not making up the December, 2008 performance.

The Chilton Middle School concert date was Sunday, December 14, 2008. The end of the quarter was Thursday, January 22, 2009. As you will recall, the District gave teachers additional time for submitting their grades because of inclement weather days. You reported on second quarter report cards that 14 students received an "incomplete" grade, because the students had not made up the December 14, 2008 concert.

Ann Hanamann and I spoke to you previously, advising that when students are given incompletes, they have 10 days to make up any missed assignments or the incomplete becomes an F. During the week of February 9, 2009, I addressed with you my concerns over the many incompletes that you had given. I also told you that these needed to be made up by February 13, 2009, in order for Ann to run the honor roll report for the second quarter. In addition, we also discussed a parent having left messages with you concerning the issue of incomplete grades, and that you had not yet returned the phone calls. You assured me that you would take care of all of this.

On February 17, 2009, you sent out an email requesting staff to be present for a student concern make-up. After receiving your assurances, I was very surprised to learn that the concert had not yet been made up. After speaking with Ann, she informed me that she had in fact turned all the incompletes into F's at the end of the day on Friday. This was necessary to run the honor roll report and send the information to the press. Ann also confirmed that during our conversation in her presence, you stated you would have everything done by Friday, February 13, 2009. Ann trusted that this had been done and proceeded with the required steps of turning all incompletes into F's and running the honor roll report. As a result, students were needlessly disadvantaged through your lack of diligence.

**Incident #2: Late planning and poor communication of March 24, 2009, concert.**

On March 24, 2009, you held a concert at 5:30 pm at the Engler Center for 7-12 grade choir students. My office received numerous calls and complaints over the lack of notice for this concern. You sent a letter home with students on the day of the concert, only after Ann contacted you asking if you were having a concert on Tuesday night.

I attended this concert and counted approximately 148 persons in attendance. Both before the performance and afterwards, I was approached by parents who were quite upset about the lack of parent notification for this concert.

I met with you on Wednesday, March 25, 2009 at 9:30 am to discuss this incident. You told me several things during this meeting, which are summarized as follows:

1. Students were given a music folder at the beginning of the year. They were supposed to tear out the sheet in the back of the packet that had all of the scheduled performances listed, and take the sheet home.
2. You told me that last week Thursday, March 19, 2009, that you sent a letter home regarding the concert with all 8<sup>th</sup> grade choral students (you indicated 7<sup>th</sup> grade was in testing so they did not receive the letter). I

asked you to submit a copy of this letter to me. I also informed you I could ask students about this letter and inquire if they still had a copy of it.

3. You selected Wednesday, March 18, 2009 as a concert date on your performance list last September. You indicated that you did not have the performance list finished in time to have it listed on the school calendar, developed in the spring of each year for the next year.
  - Upon receipt of your building usage form in the District office, I was called concerning the date you selected, as there was a conflict with the ES musical. Dr. Schaid and I then met with you on March 1<sup>st</sup>, 2009 and assisted with finding an open date. Tuesday, March 24, 2009 was selected. You told us you would complete the building usage form and take care of advertizing the concert date, since this allowed several more weeks to publicize.
4. You stated that you felt the performance was outstanding and said, "Wow, it was excellent. The kids were well prepared!"
5. I told you that Dr. Schaid and I would be meeting with you again the following Tuesday, March 31, 2009 to further discuss events surrounding the March 24, 2009 concert.

As noted above, on Wednesday, March 25, 2009, you stated that on Thursday, March 19, on Thursday, March 19, 2009 you sent a letter home with 8th grade students notifying parents of the Tuesday, March 24, 2009 performance. After speaking with parents and students, I do not believe this to be true. Rather, I am compelled to conclude that you lied to me regarding the alleged communication. On April 1, 2009, in a meeting with Dr. Schaid and I you changed your story and placed the blame on a student aide for failing to send out the information. Through follow-up communication with the student aide, I was informed that she was never directed, by you, to send home student copies announcing the upcoming concert. Again, this is contrary to your statement on April 1 to Dr. Schaid and I. I am shocked that you would not take responsibility for your lack of planning, but rather make another false statement in an apparent attempt to avoid sanction.

I find inexcusable, your attempt to put the blame on students. This has been your pattern. You most recently blamed students for not making up the December, 2008 concert, thus causing several to receive an incomplete and ultimately an F. At the start of our meeting of Wednesday, March 25, 2009, you attempted to shift the blame to students, stating that they had the schedule in their music packets in September and that "they should have already known" of the March 24, 2009 concert, even though the date was not accurate.

A review of your employment records discloses similar failings on your part during the recent past:

Dr. Schaid and I met with you on Friday, February 1, 2008, to discuss concerns surrounding your music program and your overall teacher performance. In the course of the meeting we reviewed the following:

1. On Friday, January 25, 2008, you failed to submit your grades to the MS office prior to the deadline of 3:00 pm. You clearly understood this requirement as you wrote on a medical leave request that "My grades will need to be in by Thursday evening". You were granted a medical leave day on January 25, 2009, but on the condition that you would have your grades completed and turned in by Thursday, January 24, 2008. This did not occur. Further, you inaccurately informed parents and staff that your grades were not included on report cards because of a technical difficulty, rather than your failure to submit the grades on time. I also heard you tell a mother in the hallway before school on Tuesday, January 29, 2008, that it was a technical "SNAFU". – *Your false and misleading explanation to parents and staff for the absence of your grades created the perception that the District was at fault, rather than you. While researching this incident, my office secretaries indicated that this is not the first time that you were unable to meet the grading timeline established for all teachers. No other teachers failed to turn in their grades on time, in January, 2008.*
2. In January, 2008, I also became aware that you had been allowing students regular access to your grade book and that you frequently had high school aides grading your assignments for MS students, and then entering the grades in your grade book. This unauthorized practice clearly violated the obligation of the District to preserve the confidentiality of student records. This is something which you most certainly knew or should have known, but chose to ignore.

In addition, you had indicated to Dr. Schaid and I that the student performers who sang the solo selections (group) were identified a few weeks previous to the concert and that they and the whole group were well prepared. I spoke to three of the singers who, contrary to your statement, indicated that they were first informed that they were to sing their group selection the night of the concert during rehearsal prior to the program.

**On the basis of your history of repeated unsatisfactory work performance, as detailed above, which has directly and adversely impacted students, families and the School District of Chilton, along with your false statements regarding your communication with respect to, and preparation for the March 24 concert, you are suspended for three days, without compensation, to be served on April 27, 28, and 29, 2009.**

**In addition, you are required to take the following actions:**

1. You will write a letter to all of the concerned students and parents explaining and apologizing for the lack of communication and planning with respect to opportunities to make up the Sunday, December 14, 2008 concert. On the basis of all other academic work during the first semester, you will assign a grade to each student who received an "F" as a consequence of not making up the concert before February 13, 2009. The letter must be sent to my office for approval before it is sent. This must be completed no later than May 4, 2009.
2. You will write a letter to all of the concerned students and parents explaining and apologizing for the lack of communication and planning with respect to the March grade 7-12 choir concert. In this letter, you must clearly state that no student who missed this performance will be required to make up this concert, nor will their grades be impacted. The letter must be sent to my office for approval before it is sent. This must be completed no later than May 4, 2009.

A review of your personnel file reveals at least 70 documented instances of unsatisfactory work performance as a teacher and an employee of the District over a period of years. The vocal music program at the middle school and high school continues to deteriorate or at best remain stagnant rather than improve. This is occurring despite the requirements for change repeatedly shared with you, to include, your most recent growth plan. Your inability to properly schedule and provide notice of the March 24, 2009 performance had both a negative impact on our students and their families, to say nothing of reflecting adversely on our District. This pattern of unacceptable conduct involves rudimentary tasks which should be easily accomplished. Irrespective of whether you voluntarily take those steps necessary to finally correct your unacceptable work, this pattern of conduct will not be permitted to continue. You are apparently indifferent to the fact that for most students this will be the only opportunity in their lives to participate in music coursework and activities at an advanced level.

The School District will not be indifferent and will not permit you to be.

Any recurrence of the conduct described above involving failure to properly schedule and provide notice of student performances or any other false official statement will result in further and more severe disciplinary action to include, but not limited to, additional non-compensated suspension, non-renewal of your contract, or dismissal.

(Emphasis supplied)



Grievant did not notify the District as to any changes in the incompletes by February 13<sup>th</sup> as he had been directed to. He did provide the fourteen students a chance to make up the missed concerts by his having arranged of other performances in the schools. He did not have all those make up concert opportunities and related grades completed within the February 13<sup>th</sup> time limit set by Principal Apple. After the last of the make up concert opportunities, he did make the changes to the incomplete grades to reflect the final actual grades, and turned those in late. He first contended at the hearing in this matter that he had some make up concert opportunities for some students before February 13<sup>th</sup>.

Prior to the March 24<sup>th</sup> concert Grievant did cause to be published in two newspapers serving the District a notice and advertisement of the upcoming March 24<sup>th</sup> concert. The 2008-2009 vocal calendar tear out page from the choral music portfolio (referred to above as the music packets) shows a date of 18-Mar-09 for the Showcase Concert. Grievant did not have the March 18<sup>th</sup> concert entered on the District master calendar.

No students testified at the hearing on this matter.

In determining the level of discipline in this case, the building principals considered all of the disciplinary history of Grievant with the District (Jt. Exhibit 3), the facts and ramifications of the two incidents, and its conclusion that Grievant had lied about sending out a letter/notice of the March 24<sup>th</sup> concert by giving a letter/notice to the students on March 19<sup>th</sup>.

The District Information Technology Director searched the District computer system for documents prepared by Grievant and then testified that the search did not disclose a March 19<sup>th</sup> letter/notice. The same computer search showed a letter/notice document was made and edited on March 24<sup>th</sup> at a time in the morning after the time Grievant testified he began distributing the letter/notice to students. The date on the letter/notice that Grievant submitted as evidence is March 20<sup>th</sup> (Exhibit D-2), and refers to the concert being "This evening."

Grievant's disciplinary history contains at least 20 separate entries, some with multiple instances, having to do with numerous work deficiencies. There are repeated deficiencies noted which include preparation for activities including concert and music events, teaching methods, following financial and fiscal protocols, student grade reporting, including an incomplete, use of student aides, failing to follow up with parent contacts, among other things. Since 1991 he has had several disciplinary warnings and reprimands, and numerous corrective directives, notices of poor performance, counseling sessions and an improvement plan. In 1993 he was issued a two day disciplinary suspension for failure to comply with directives and policies concerning item purchases without a purchase order. Since then he has had no other suspensions.

On three or four other occasions the District has imposed three day unpaid suspensions for teachers who have had single instances of excessive physical force with students.

Further facts appear as are in the discussion.

## POSITIONS OF THE PARTIES

### Association

In summary, the Association argues that in the first incident Grievant's conduct was not intentional, but inadvertent. Make up concerts were made available and the correct grades were eventually turned in. As to the second incident, Grievant admits he should have provided better notification to parents about the March 24<sup>th</sup> concert, but denies misleading his building principals about sending a letter to parents announcing the new date. He admitted to the Principals that the letter of March 19<sup>th</sup> did not go out, and that is why he sent a notification letter to parents on March 24<sup>th</sup>. He further advertized the concert in two local papers and had students tell their families about it. Copies of the newspaper advertisements admitted into evidence show that he did not lie about this as the District attempted to portray as a pattern of dishonest behavior.

The Association argues that the District did not have just cause for issuing the three day suspension because it did not adhere to the accepted tenets of progressive discipline. Throughout the hearing the District asserted it complied with these tenets by previous letters of concern and an earlier suspension. The Association challenges that the earlier suspension is relevant to this matter because it was issued in 1993, almost 16 years prior to the current suspension. Using the earlier suspension as a basis for discipline here is inconsistent with arbitral precedent, citing arbitral authorities. Because the 1993 suspension is not relevant, it does not represent progressive discipline relating to the current suspension. Because the District did not adhere to progressive discipline, it did not have just cause for a three day suspension.

The Association also argues that the District did not have just cause for issuing the three day suspension because the three day suspension was excessive for the offenses. The District testified that the suspension here was consistent with three day suspensions involving other employees. But all four were issued for offenses related to excessive physical interactions with students. Grievant's actions do not nearly rise to the level of excessive physical interaction with students. A reduced penalty is appropriate in the immediate matter, citing arbitral authority. The District has historically assigned harsh three day suspensions only to employees who engaged in excessive physical contact with students. Even considering Grievant's prior similar offenses to those in this matter, a three day suspension is excessive.

The Association argues that Grievant's transgressions now and in the past are largely related to lapses in attention and to timeliness and detail. They are not willful or intentional and are not as serious as excessive physical contact with students. Grievant admitted his tardiness in submitting grades and tardiness in notifying parents about the March concert. He did not deny similar incidents occurred in the past. Had Grievant's earlier two day suspension occurred recently, the Association may have found the District's claim credible. Since it occurred 16 years earlier, it is irrelevant to this matter. Here, the penalty far exceeds the offenses. Grievant's transgressions cannot be fairly compared to excessive physical contact with students.

The Association requests the suspension be reduced to no more than one day and that Grievant be reimbursed for lost salary and benefits.

## District

In summary, the District argues that the February, 2009 grading problem and lack of timely notice of the March 24, 2009 concert are recent incidents of a long series of incidents of Grievant failing to properly organize and plan academic activities, follow directives, and conform to District policies, all of which have had adverse consequences for students. This last instance also had an adverse impact on family members, the community and the public standing of the District. For the first time at the arbitration hearing Grievant asserted he provided the 14 students an opportunity to make up the concert, but presented no evidenced of that claim. The High School principal testified that at no time in the course of the grievance process or conferences with Grievant did he state he made opportunities available. Grievant's claim must be rejected as untrue.

The District argues that in the absence of a collective bargaining contract provision, the concept of progressive discipline is not applied in a formulaic or mathematical manner, citing arbitral authorities. Considering the lengthy disciplinary history of the Grievant, the District exercised discretion in electing when and to what degree to increase disciplinary penalties. Progressive discipline should not be applied in lockstep manner in this case. Deference should be granted to the administrative decision to impose a three day suspension as it was consistent with the severity of the misconduct and past record of the Grievant, citing arbitral authority. Here, Grievant's unsatisfactory work and misconduct were of sufficient severity in view of his record to authorize progressive discipline steps to be skipped, citing arbitral authority.

The District argues that there is a difference between a harsh measure of discipline and one that is clearly excessive and unreasonable. The previous actions of the District were not effective in correcting Grievant's problems. The three day suspension here in response to Grievant's conduct and previous record was not clearly excessive, unreasonable or arbitrary. The Principals did not abuse their discretion. The highly unsatisfactory overall conduct of the Grievant, together with the adverse impact of his lack of planning and organization upon students and their parents, as well as his lack of honesty, were weighed and considered. It is not necessary for the arbitrator to substitute his judgment in this case.

The District also argues that the collective bargaining agreement does not incorporate any terms requiring the District to have imposed a specific form of discipline on April 24, 2009. It also does not incorporate a multi-track disciplinary system. The Principals appropriately considered all of the disciplinary history of the Grievant in Jt. Exhibit 3. The arbitrator must consider the entire disciplinary history of the Grievant as well.

The District argues that arbitral precedent establishes that lying to a supervisor to avoid sanction is a serious act of misconduct which must result in serious consequences, and lying is an aggravating factor with respect to the level of discipline to be imposed. Compared to other reported cases, her Grievant does not have a relatively clean record. In addition to the failure to provide timely notice of the March 24<sup>th</sup> concert, to minimize potential sanctions he lied about having sent home letter with students on March 19<sup>th</sup> and March 24<sup>th</sup>. He misrepresented that students and parents would have notice of the March 24<sup>th</sup> concert by virtue of the vocal

calendar in the course materials provided the previous fall. The March 24<sup>th</sup> date was set later and could not have been in the calendar or referenced in the course materials. Grievant then presented a false accusation against a student aide, blaming her for failure to copy and distribute a concert notice. This dishonesty is an aggravating factor related to the level of discipline. It is outrageous.

The District further argues that a review of Grievant's prior disciplines discloses he was previously warned, counseled, mentored, and disciplined for conduct which was the same or similar to that under review in this case, reviewing approximately 22 entries from the personnel record. The events of December 14<sup>th</sup> through March 24<sup>th</sup> demonstrate the same performance issues occurring since 1991. The District has demonstrated extraordinary forbearance and patience. Grievant has previously been counseled, mentored and instructed with respect to planning, timely publicity of music events, not delegating tasks to students which he should complete himself, not waiting until the last minute to publicize concerts and arrange building access. He also disregarded these types of matters in other scheduling and coaching responsibilities. He had prior incomplete and F problems for failing to turn in grades timely, once trying to change a grade instead. He has a long history of failing to adhere to District fiscal policies. He also misinformed, misled, and disadvantaged students and the community in an unauthorized fundraising activity, missed a 7:00 am appointment with a student who was left alone, failed to appear at a practice without reason, excluded a qualified student from a field trip while letting a disqualified student attend, failed to call parents when needed, and has shown he is indifferent to the adverse impact of his conduct. Of greatest concern are prior issues involving integrity, citing examples. Grievant was certainly on notice as to the disciplinary consequences of failing to organize, plan and conform to District rules and policies in early 2009. He cannot assert that the discipline which he received here was arbitrary, capricious, unreasonable, or an abuse of discretion. He cannot turn forbearance and consideration against the District. He continues to unsatisfactorily perform the most fundamental tasks required of a vocal music teacher. There is no reasonable basis upon which to conclude that a three day suspension was without just cause in this instance, particularly under the legal standard that disciplinary decisions ordinarily are not to be disturbed.

The District argues that Grievant still has not produced the alleged March 19<sup>th</sup> letter notice to parents about the March 24<sup>th</sup> concert. The Principal contacted the students who were unable to confirm the alleged letter had been provided to them. The Information Technology Director testified to a computer search that failed to disclose the existence of a March 19<sup>th</sup> letter. Grievant changed his explanation to the Principal that he had given the task to a student aide, who did not complete it, to which he later tried to qualify his answers at hearing unsuccessfully. The aide told the Principal and Administrator she had no knowledge of the alleged March 19<sup>th</sup> letter, or a copy of it. The Grievant falsely stated he prepared the March 19<sup>th</sup> letter and falsely accused that aide of not copying and distributing it. This was all in an attempt to shift blame and avoid sanction. As to the March 24<sup>th</sup> alleged letter notice, Grievant testified it had been prepared weeks in advance but not distributing it until March 24<sup>th</sup>. He stated he gave it to some students before 9:30 am on March 24<sup>th</sup>. There is no evidence of interrupted classes for this, and the Information Technology Director testified that the properties document for Grievant's March 24<sup>th</sup> alleged letter was created on March 24<sup>th</sup> at 7:48 a.m. and modified at 9:52 a.m., after the time he allegedly began distributing it. It was

dated March 20<sup>th</sup>, no doubt modified in anticipation of criticism for late notice. His only explanation at hearing was that this was impossible. The Principal testified that parents complained about the March 24<sup>th</sup> concert, none stating they received a written notice. One parent blamed their child for not bringing home a notice. It must be concluded that the letter dated March 24<sup>th</sup> was not sent home and that Grievant falsely represented that this had occurred. This is an aggravating factor appropriately considered in assessing a three day suspension. Appropriate discretion was exercised.

The District also argues that at least three teachers were previously suspended for three days which each arose out of a single incident of using excessive force with students. Grievant's conduct was no less abusive or harmful. Students received failing grades, students and parents were upset, students and parents took extraordinary measures to attend the March 24<sup>th</sup> concert, misrepresentations were made about students not giving the notice to parents, an aide was falsely accused, and selections were sung without adequate preparation. A three day suspension of Grievant on April 24<sup>th</sup> was compatible and consistent with the discipline previously issued to other teachers.

The District requests that the grievance be dismissed.

### DISCUSSION

The issue in this case is not whether there was just cause to discipline Grievant, but rather as to the level of discipline. Grievant contends he should only have a one day suspension in view of progressive discipline principals and the three day suspension is excessive. The District contends the three day suspension was not unreasonably or an abuse of discretion in view of the serious, recurring nature of the conduct and work record of the Grievant.

Although the parties have stipulated to a just cause issue, their collective bargaining agreement does not define just cause. It does have a provision in Article VIII B.6 which states:

The employer has disciplined the employee in a non-discriminatory fashion appropriate to the documented/substantiated offense.

The collective bargaining agreement requires that discipline be appropriate to the offence. This is the same concept as in the traditional definition of just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri, How Arbitration Works*, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the Employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the Employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See, *BIG BUCK BUILDING CENTER, A-6354 (GORDON, JULY, 2007)*. See also, *ADVANCE BOILER AND TANK COMPANY, A-6365 (GORDON, DECEMBER, 2009)*, *AMERIGAS PROPANE, A-6129 (GORDON, APRIL, 2006)*. That is the standard that will be used here.

The first element of just cause is not at issue. The District has established conduct in which it has a disciplinary interest, and Grievant does not argue that it has not. In order to apply the second element of the just cause standard is it necessary to set out the nature of the Grievant's conduct. Here, both instances relied on in the April 24, 2009 Notice of Suspension have several aspects in which the District had a disciplinary interest.

The first instance was the students receiving a grade of F for not making up the December, 2008 performance. Grievant did not schedule the make up performances in time for the incomplete grades to be changed before becoming Fs. And he was late in turning in the grades for the students who did have a make up concert. Grievant had been specifically instructed to have those make up concerts set and grades in by a certain date, February 13<sup>th</sup>, and he did not do that. He presents no reason why he could not have done so. He did not return a parent telephone call. These things show a lack of planning and follow through. The incompletes and F grades impacted student honor roll status with its student and parent concern - a concern that would exist for a time even if eventually corrected. The honor roll is published in local media, and the public standing of the District is negatively impacted by Grievant's oversights. It adds additional administrative work for the District to re-enter grades. The students did, eventually, receive the proper grades. It is noted by the undersigned, however, that the District did not take immediate action after February 13<sup>th</sup> to consider this incident a disciplinary matter. It waited until after the events of the second incident, over a month later, to take disciplinary action over the incomplete grades and late make up concert scheduling. In contrast, the District did have two or more conferences with Grievant after the second incident and did other investigation of the second incident before issuing discipline.

The second incident stems from Grievant's not entering the March concert into the District master calendar and avoiding Wednesdays, which was a serious shortcoming similar to some of his past problems. This caused a need to reschedule at the last minute. The lack of adequate notice resulted in a smaller audience of parents, family and others, which also impacted student opportunity to perform for a larger audience. Parents were justifiably upset. It does negatively reflect on the entire Scholl District in the public eye. This is directly attributable to Grievant's lack of planning, attention to detail, and lack of follow through. Grievant's attempt to provide a written notice letter to parents was a total failure, and his explanations simply are not believable. He shifted, or attempted to shift, responsibility in part to a student aide. This ultimately does not reflect at all negatively on the student, but it does reflect negatively on Grievant.

Having noted that Grievant's explanations about attempting to send written notice to parents about the March 24<sup>th</sup> concert being not believable, further comment is warranted. The credibility problem faced by Grievant here has to do primarily with whether there was a March 19<sup>th</sup> letter, which he ultimately conceded during the investigation was not sent out, whether a student aide was to copy and distribute a letter, and whether there was a March 24<sup>th</sup> letter prepared and distributed to students. Strong circumstantial evidence as set out in the April 24<sup>th</sup> Notice of Suspension indicates that these letters, particularly the first one, were not produced and distributed contrary to Grievant's statements. However, much of this conclusion is based upon statements of students, parents, and the student aide who did not testify. This is similar to the contention in the Notice of Suspension as to the student solo performers statements

indicating they were first informed of singing their solos on the night of the concert. The accuracy of all these student statements and the circumstances surrounding their observations has not been examined through cross examination. There were no written statements from them. This is understandable in a case such as this where it is reasonable to anticipate that the District would not want to disrupt or disturb students in what would obviously be a very uncomfortable situation for them were they to be asked to testify or even make written statements. The District is not being criticized for that. Grievant did produce a copy of a letter dated March 20<sup>th</sup>, which may have had a typographical error rather than a false date. The Testimony of the Information Technology Director checking the properties of the document suggests it was not made when Grievant said it was. Use of a different computer was not ruled out. Besides the letters and blaming the aide, Grievant appears to have acknowledged everything else he is accused of doing, and demonstrated by newspaper entries that he did publicize the concert despite District's attempt to discredit him on that. It is also important to note that Grievant's conduct must be assessed based upon the allegations and grounds in the April 24, 2009 Notice of Suspension, not on his actions at the hearing in this matter. How accurate or credible his testimony was at the hearing was not a reason he was issued a three day suspension, although that does effect a finding that the District was accurate in its assessment of his credibility during the investigation. At the end of the day, Grievant's lack of credibility as reflected in the Notice of Suspension and his trying to shift some of the blame to a student aide are aggravating circumstances, particularly as they relate to the second incident.

The issue turns to the second element of just cause, whether the discipline imposed reasonably reflects the District's disciplinary interest. That question considers other matters in any given case, such as concepts of and application of progressive discipline, the employment record of the employee and comparable discipline of other employees, all of which have been raised by the parties here. The District points to a long and tortured employment history of Grievant going back to 1991 and containing a 1993 two day suspension. It argues that progressive discipline should not be applied in a lockstep fashion, but rather a three day suspension here is justified by the facts and the entire employment record. The Association argues that using such old disciplines, particularly the suspension, is not justified or relevant in this case. The District argues that Grievant's conduct was as egregious as the single incidents where teachers used excessive physical force on students and thus deserves a three day suspension. The Association points out that three day suspensions have only been given where there was excessive physical force, and that is not the situation here. The District contends Grievant lied during the investigation and that is an aggravating factor, which the Grievant denies. His lack of credibility has been addressed above.

The parties disagree over how the concept of progressive discipline is to be applied in this case. Generally, just cause does consider aspects of progressive discipline. A prior work records is considered along with the nature of the offenses involved. Generally, progressive discipline is consistent with measuring the level of the discipline against the disciplinary record of the employee and the nature of the violations involved. Comparable disciplines of other employees, if any, are also relevant. More severe disciplinary steps follow each other progressively. But that is not, as the District argues, to be applied in a lock step fashion in each case. The District is correct in that it need not wait for a one day suspension before applying a two day suspension, and then a three day suspension after that, etc., if the record

and nature of offense demands otherwise. Not applying a lock step progressive discipline, absent contractual provisions, cuts both ways. As the Association argues, at a certain point progressive discipline results in some prior disciplines becoming so old as to carry little, if any relevance or weight in adding to the level of discipline for a new offense. To use a very old two day suspension, argues the Association, as a foundation to now impose a three day suspension is contrary to principles of progressive discipline.

The District has made it clear that it took Grievant's entire work and disciplinary record into account when it issued the three day suspension. That included the 1993 two day suspension. However, that suspension is now 16 years old. After a certain point prior discipline does lose its impact in assessing appropriate current discipline. It becomes stale. That is the case with the two day suspension in 1993. Roughly half of the disciplinary entries in Grievant's file predate 2000, for example. While there is no bright line set out in the parties' collective bargaining agreement for how long to consider past discipline, the undersigned is not persuaded that the earlier disciplines, particularly the two day suspension in 1993, had a sound basis for being considered in assessing the discipline in this case. Those disciplines are too remote in time to have any weight here. That is not to say that the District is limited by concepts of progressive discipline to having to start with other warnings or a single day suspension in this case. The balance of Grievant's more recent work and discipline record and the significant ramifications of the violations here are valid considerations in determining that a suspension, and one of more than one day, would be appropriate. But that is not what the District did here. It specifically included the entire disciplinary history back to 1991.

It is significant that the District did not promptly take steps to discipline Grievant after the February 13<sup>th</sup> missed grade make up date. Rather, it waited until after March 25<sup>th</sup> and the ensuing investigation into the concert notice incident to then include the incomplete grades incident as a basis for the discipline. While the undersigned recognizes the propriety of including both incidents in the current discipline, the assessment of how much weight to put on that first incident is lessened in view of the District not acting on it sooner. If that matter were significant enough in the District's views to be considered along with the latter incident in assessing a three day suspension, its lack of taking disciplinary action on it sooner, even before the second incident, weakens its case and detracts from its significance.

In considering the other instances of the District issuing three day suspensions, it is striking that they have all been for excessive physical force used against a student. There are no examples in the record of a three day suspension being issued for any other performance issues or violations, cumulative or not. While Grievant's violations are serious, they are qualitatively different than excessive physical contact. While disruptive and distressing to the students and parents, both incidents fall short of improper use of physical force. The correct grades were ultimately credited to the students. A concert was held on March 24<sup>th</sup> albeit with only about a third the normal attendance. No grades were impacted there. The first incident did not provoke an immediate disciplinary reaction from the District.

More than a suspension was included in this discipline. As directed in the Notice of Suspension, Grievant did apologize in writing to students and parents of the first incident, and



he did write another letter of apology to the students and parents with respect to the second incident. Even though the District itself has been damaged in the public eye, Grievant, through the letters, has been made to publicly be seen, correctly, as the cause of that damage. This rectifies to some extent the District's standing in the community. These letters were, appropriately in the view of the undersigned, part of the discipline issued in this case. They too, must be considered in assessing the overall level of discipline.

Grievant has taken a number of actions, and failed to take other actions, that the District has a disciplinary interest in. He has been warned and counseled about these things even in the recent past, and continues to lack proper planning and follow through. Something more than a warning or reprimand is in order as that has not, at least relatively recently, been effective in correcting his behavior. Something more than a one day suspension is in order, especially considering the aggravating circumstances of his lack of credibility and blaming a student aide. However, the three day suspension was built on a foundation that included the stale two day suspension and similarly remote disciplines. Other three day disciplines are not qualitatively similar. Grievant has made two public apologies. These considerations lead to the conclusion the level of suspension needs to be reduced and that a three day suspension is excessive. The District is correct that progressive discipline need not be implemented in any lock step fashion. Even if the previous two day suspension is stale, that does not mean the District needs to start with a single day. There are two incidents here that have several components of disciplinary action as well as aggravating circumstances. The record supports a two day suspension, the reduction from three days being in consideration of the stale suspension, comparable disciplines of others, the public apologies made by Grievant, and the first incident being of a lesser seriousness than the latter.

The three day suspension, in addition to the letters of apology, is excessive and, thus, without just cause and in violation of the collective bargaining agreement. There was just cause for a two day suspension and the letters of apology. As a now recent suspension, that should serve to get Grievant's attention to detail and follow through, to correct his deficiencies and understand that more missteps have the potential for more serious discipline.

Accordingly, based upon the evidence and the arguments presented in this case I issue the following

**AWARD**

1. The grievance is sustained in part and denied in part.
2. The suspension will be reduced to two days rather than three days, and Grievant's personnel record is to be changed to reflect this reduction.
3. Grievant will be made whole for salary and benefits for one day

Dated at Madison, Wisconsin this 16<sup>th</sup> day of February, 2010.

Paul Gordon /s/

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Paul Gordon, Arbitrator

