

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MERCER SCHOOL DISTRICT : Case 3
 : No. 47203
 and : MA-7199
 :
 MERCER EDUCATION ASSOCIATION :
 :

Appearances:

Ms. Kathryn J. Prenn, Attorneys at Law, 715 South Barstow, P.O. Box 1030,
 Eau Claire, Wisconsin, 54702-1030, appearing on behalf of the
Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, P.O.
 Box 1400, Rhinelander, Wisconsin, 54501, appearing on behalf of the
 Association.

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ARBITRATION AWARD

According to the terms of the 1991-92 collective bargaining agreement between Mercer School District (hereafter District) and the Mercer Education Association (hereafter Association), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the non-renewal of teacher J. A. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held at Mercer, Wisconsin on June 9, 1992. No stenographic transcript was taken of the proceedings. The parties filed their initial briefs by July 2, 1992 which were exchanged by the undersigned. Thereafter, the parties filed their reply briefs by July 24, 1992.

ISSUES:

The parties were unable to stipulate to the issues to be determined herein but they agreed to allow the undersigned to frame the issues. The District suggested the following issues:

- 1) Is the grievance procedurally arbitrable?
- 2) If the grievance is arbitrable, did the District violate the collective bargaining contract when it non-renewed the Grievant?
- 3) If so, what is the appropriate remedy?

The Association suggested the following issues:

- 4) Did the District violate Section X of the collective bargaining agreement when it non-renewed the Grievant in March, 1992?
- 5) If so, what is the appropriate remedy?

The Association urged that no procedural issue is properly before the undersigned.

Based upon the relevant evidence and argument in this case, I conclude that the District has properly placed the arbitrability issue before me.

Hence, the District's Issue 1 is adopted. In this regard, I note that I must find and decide Issue 1 in the affirmative before I may proceed to deal with the merits of this case. Should the answer to Issue 1 be affirmative, the Association's issues 4) and 5) shall be adopted.

RELEVANT CONTRACT PROVISIONS:

SECTION X - DISCIPLINE AND NONRENEWAL OF CONTRACTS

1. The Board, in recognition of the concept of progressive correction, shall notify a teacher in writing of any alleged delinquencies at the time of infraction; indicated expected correction; and suggest a reasonable period for correction.
2. When in the judgment of the Administrator a condition or situation warrants, the Administrator may suspend a teacher with pay pending action by the Board. Any charges shall be in writing with copies to the Board and MEA; and at the subsequent hearing by the Board, the teacher may be represented by MEA and/or legal counsel; and shall be accorded all constitutional rights, the right to due process and protection under provisions of the Wisconsin open meeting statute.
3. No employe shall be suspended, reprimanded, reduced in rank or compensation, deprived of any professional advantage, or otherwise disciplined without just cause. No employe, after serving a two year probationary period, shall be nonrenewed without just cause.

. . .

BACKGROUND:

The District employs 18 teachers in its Elementary School, Middle and High Schools, one teacher per class, K through 12. Grievant, J.A., was first employed by the District in 1967 as a regular classroom teacher, teaching 6th grade. Thereafter, J.A. also taught 6th, 7th and 8th grade mathematics, science and social studies. In 1986, J.A. began courses which would lead to a Masters Degree in Administration. From 1976 through 1988, J.A. taught various classes in 6th through 8th grades up to four classes per day, without any preparation period. During this time period, J.A. also served as Assistant Middle School Principal. J.A. then received two periods per day of released time to perform Administrative duties (including all student discipline for grades K through 12); he also received \$1,000 pay for having an extra period and \$1,060 pay for performing administrative duties.

On May 1, 1989, J.A. had made a request for District approval of a three credit Summer School course "Research in Educational Administration" which he described as "a research paper to complete my master (sic) Degree in Administration." The form on which J.A. requested approval stated: "If approved, payment will be made and credits recorded after grades/transcripts are presented to the Administrator." Section XIV of the labor agreement, states the procedure for requesting and receiving course approval and payment for credits, as follows:

. . .

5. Application for initial approval of credits under this Section shall be submitted to the administration on special forms, available in the office, by May 1. Applications for actual approval of credits shall be made as soon as possible after such information is made available to the applicant. Administration will recommend approval or rejection to the Board at its May meeting.
6. A formal report from the college indicating course or courses completed, and including grades shall be submitted to the Administrator in order to receive compensation."

. . .

On June 6, 1989 although J.A. had not yet completed the three credit course covering his Masters Thesis, the District, by its bookkeeper, sent J.A. a letter indicating the Board of Education had approved his course and enclosing a \$150.00 check to reimburse J.A. for the course. J.A. cashed the check he received.

For the 1989-90 school year, then-district Administrator, Dr. Carl Munson persuaded the Board of Education to make J.A. a full-time principal. As part of this deal, Dr. Munson gave J.A. three released periods per day to perform administrative duties. For the 1989-90 school year, the Board of Education offered J.A. and he accepted and signed a contract as a full-time principal. J.A. stated that prior to signing the principal's contract he did not tell the Board of Education that he did not have his principal's license because he thought he would have his Masters Degree completed by the start of the 1989-90 school year. However, at the start of the 1989-90 school year, J.A. had not completed his Masters Degree. J.A. therefore did not have a principal's license in 1989-90. In addition, he never applied for a temporary principal's license to cover the 1989-90 school year from D.P.I. and J.A. did not inform the Board of Education that he had failed to complete his Masters Thesis during the Summer of 1989. 1/

The principal's contract which J.A. signed on August 7, 1989, did not break down the amount to be paid for such services. It merely listed compensation for a 210-day school year at \$38,500.00. J.A. acted as Attendance Officer, Safety Director and Athletic Director as a part of his Principal's contract. That contract also contained the following language:

. . . Said Principal agrees, to furnish evidence of

1/ The Union proffered evidence regarding what J.A. told Dr. Munson as well as Munson's alleged responses thereto on the subject of J.A.'s principal's license. The District objected to the receipt of this evidence as hearsay. I note that the Union offered no explanation why Dr. Munson was not called to testify and I have not considered the evidence proffered in reaching this decision. What Dr. Munson may or may not have said to J.A. regarding not worrying about his lacking a principal's license in 1989-90 is inadmissible hearsay.

certification by the State of Wisconsin through the Department of Public Instruction, that he is certified to perform as a school district Principal

J.A. did not sign a teaching contract for 1989-90 nor did he resign as a District teacher in 1989 or thereafter. J.A. did sign a Letter of Intent, "to renew the contract of employment offered to me for the 1989-90 school year. . . "due to the fact that no master agreement existed between the parties" as of April 15, 1989. The evidence is undisputed that in years where there was no signed labor agreement between the parties by April, the District's practice was to send all professional staff such letters of intent. J.A. admitted that he did not pay union dues during 1989-90.

In December, 1989 District Administrator Dr. Munson decided to leave the District. J.A. had been a part of the interviewing team involved in finding a new District Administrator until Dr. Munson left employment with the District. Thereafter, J.A. was not involved in the interviewing process. In January, 1990, the Board of Education gave J.A. additional administrative responsibilities due to Dr. Munson's having left the District. By letter dated May 16, 1990, not having found a replacement, the Board asked J.A. to apply for the Administrator's opening. J.A. met with the Board of Education on May 17, 1990. At that meeting, J.A. indicated he was not interested in the opening. At the instant hearing, J.A. stated that the reason he told the Board (in 1990) that he was not interested in the Administrator's opening was because he knew he did not have his Masters Degree, he knew that the District was going to be audited and he did not want to subject the District to such an inquiry. J.A. admitted that he did not tell the Board on May 17, 1990 that he did not have his principal's license.

Although J.A. stated he was asked to draft an Interim (Acting) Administrator's contract for himself and he did so (including a \$50,000 annual salary for the job), the Board of Education ultimately issued J.A. a Principal's contract for the 1990-91 school year. On May 21, 1990, J.A. signed that Principal's contract for \$40,617.50 (a 5 to 5.5% increase over 1989-90). Notably, that contract contained the same language (quoted above) regarding the Principal's agreement to furnish evidence of DPI principal certification. As of May 21, 1990, J.A. had not completed his Masters Thesis and he had not received his Masters Degree. Nor did J.A. have a temporary principal's license at any time relevant to these proceedings.

In July, 1990, the Board of Education hired Mr. Jack English to fill the District Administrator's position. Checking Department of Public Instruction, documents due each Fall showing certifications of the professional staff members at the District, Mr. English found a DPI form on file with the District which showed that J.A. had only a teacher's license, not a principal's license.

English asked J.A. about this discrepancy and J.A. admitted he did not have a principal's certification. 2/

English investigated the matter and then presented the facts to the Board. The Board decided to ask J.A. to meet with the Board on August 9, 1990 to discuss the matter and present evidence, at which time the Board would consider whether to void J.A.'s 1990-91 Principal's contract for his failure to possess proper certification. At the August 9th meeting, J.A. was shaken and upset. He had been applying for administrative position in other Districts but he had not completed his Masters at that time and was unsure whether he would

2/ Notably, J.A. did not tell English or the Board that Dr. Munson had told him not to worry about not having a principal's license at this time or at any time prior to the instant hearing.

have a job for the 1990-91 school year. J.A. explained at this meeting that he had been too busy to complete his Masters Degree from 1989 forward, because of the duties of his Principal's job. J.A. did not tell the Board at the meeting that Dr. Munson had previously told him not to worry about not having a principal's license. Mr. English stated that at the August 9th meeting, he observed that J.A. was angry about his principal's contract being voided.

The Board unanimously voted to void J.A.'s 1990-91 principal's contract at the August 9th meeting but the Board also offered J.A. a teacher's contract as an Elementary School teacher (teaching science in grades 4 through 6) at that time. The Board made clear that this contract required J.A. to serve a two year probationary period. J.A. stated (and English confirmed) that J.A. was grateful for this offer, that he was fully aware of the two year probationary period required by the contract and he agreed to it. J.A. also stated that he would have taken almost any job offered to him by the Board at that point in time. The question of J.A.'s seniority was not resolved at the time the Board offered to him the teaching position. As stated in its letter dated August 10, 1990 (which J.A. received), the Board indicated that J.A.'s seniority would be subject to negotiation with the Union, that J.A. would be placed at his previous salary step (Step 21, BA & 24) and that J.A.'s acceptance of the teaching contract would subject him to a two year probationary period. The 1990-91 teaching contract signed by J.A. stated a salary of \$32,794 and stated "This is the first (year) of a two year probationary period."

In late August, 1990, English spoke to Union President Gust about J.A.'s seniority. English stated without contradiction that Gust told English that he felt no urgency to determine J.A. seniority since there was then one teacher per class at the District and a layoff would not be a problem, in Gust's view at this time, Gust was aware of but he did not raise any issue regarding J.A.'s probationary period under the contract that J.A. had signed.

FACTS:

During the 1990-91 school year Mr. English set a goal of evaluating all staff as the part of his administrative plan. Upon a search of the District's personnel files, English found that no evaluations had be done on any staff since 1977. The 1977 evaluations appeared to be virtually identical -- all were generic and contained satisfactory ratings. English felt this was completely inadequate.

In January, 1991, English evaluated J.A. (as well as other classroom teachers), using a form which had been mutually agreed upon by a joint committee made up of teachers and District managers. Of the 14 performance categories listed on J.A.'s evaluation form, three were "not rated" (NR), seven were listed as "needs improvement" (N) and five were listed as "satisfactory" (S). J.A. received no "unsatisfactory" (U) ratings although such a rating was possible on this form. In two of the areas where English gave J.A. "NR" for no ratings, English nonetheless had written comments beneath each one sentence category, as follows:

5. Use of clear, concise explanation of material and concepts.

Good at my observation, but feedback indicates a need to explain math concepts more completely.

. . .

13. Punctuality and performance in recordkeeping,

budgeting, and various reports.

Although a number of lesson plans were not submitted, as required.

In the areas where English had rated J.A. as needing improvement. (N), beneath each performance category English had placed comments as follows:

1. Involvement in curricular and other district program development.

Participated and provided materials for development of a teacher evaluation form with a committee.

*A more student involved experimental curriculum needs to be addressed.

2. Adaption of curriculum instruction to meet individual student abilities and needs.

More flexibility and patience in dealing with students' needs and abilities is needed.

4. Creation of classroom environment.

More motivational and theme related displays, decorations, etc. will improve the learning atmosphere.

8. Monitoring and remediation of student understanding of lessons.

During observation, I observed students encouraged to approach the front for help, or to raise their hands, but monitoring from desk to desk was not done. Feedback also a need for more individual student remediation.

9. Illustration of motivation and variation of teaching techniques.

My day to day informal observation, as well as feedback, indicates a distinct need for more teacher expressed interest in teaching to motivate students.

11. Communication and relationship development with parents and other employees.

Some parental feedback indicates a need for better human relations skills, with parents, concerning their childrens' problems.

12. Illustration of ability to relate to students and concern for their development.

More appropriate correcting of student academic performance is needed, at times.

English wrote the following in the area on the evaluation entitled

"Recommendations for Improvement:"

1. Develop techniques to modify assignments, in terms of length, difficulty, or assessment relating to math. Monitor during and after explanations of material for student understanding. Show enthusiasm when presenting material.
2. During student work time remediate problems, as well as encouraging students to come in before or after school for help. Be patient with students encountering help, or not responding correctly during question/answer periods. Avoid remarks, or demeanor that students perceive as "putdowns", even though they may be just an attempt at humor.
3. Examine ways to motivate yourself both internally, as well as techniques to exhibit interest in the material and the students' development.
4. Initiate participatory, experimental science lessons to compliment text material for the grade level you teach science. This may be extended as responsibilities of your position (was supposed to be initially) in the future. Teaching science effectively is not easy and requires preparation. Our post visitation conference did not reveal any plans for improvement in this area.

In the area on the form entitled "General Evaluation Comments" English wrote:

Mr. A. has served in the Mercer Schools for over Twenty years, a number including various administrative responsibilities. He served as full time principal preceding his removal last summer, due to a lack of certification for the position. Although this is J's first year back as a teacher with no administrative duties in many years, any speculation that this present assignment is a "let down" would constitute speculation on my part, as evaluator, particularly since I have no comparasons (sic) with his past years' performance as a teacher.

However, from day to day observations and conversations, along with non-solicited feedback from parents, students, and staff, I conclude that a number of areas relating to effective teaching need improvement. These areas relate to what I believe to be the exhibiting of enthusiasm, motivation, and human relations skills rather than the potential to teach effectively.

After having prepared this evaluation, English held a conference with J.A. to go over the evaluation. At this time J.A. did not contest any of the ratings given by English; English stated that J.A. merely said "I'm not going

to be here anyway. I'm going to have my license and I'm out of here." J.A. made no written response to this evaluation. English stated that in his view J.A.'s performance in 1990-91 was "less than standard, less than acceptable". English stated at the instant hearing that if anything, he had been too charitable in his ratings of J.A.'s performance, especially in light of the fact that J.A. was a teacher with over twenty years of experience. At the hearing, J.A. stated that this was the first evaluation he had ever received, that he felt it was negative in some areas but that an "N" rating merely meant to him that improvement was needed.

On February 26, 1991, English sent J.A. a Notice of Preliminary Consideration for Nonrenewal of his teacher contract and J.A. requested a private conference. The private conference was held on March 14, 1991. At no time did J.A. or the Union request or indicate that J.A. was entitled to a full due process (just cause) hearing. J.A. was represented by Mr. Degner and J.A. had full opportunity to present evidence and argument at this meeting. At the meeting, J.A. was told the reasons for his being considered for nonrenewal. At this meeting, J.A. stated he was improving and Degner said that after 20 years' employment, J.A. should have the Board's consideration. English stated and J.A. admitted that no discussion of J.A.'s two year probationary period was had at this meeting. English had recommended that the Board nonrenew J.A. prior to this private conference.

At the end of this meeting the Board voted a tie, 2 to 2, on the nonrenewal of J.A. As a result, J.A. was retained and he was issued a contract for the 1991-92 school year. Notably, no reference was made in that 1991-92 contract to the two year probationary period which had been referenced in J.A.'s 1990-91 contract. 3/ English stated that in closed session prior to the 2/2 vote, some Board members stated that J.A. was still on probation and that if the Board renewed J.A.'s contract for 1991-92, the Board would have the 1991-92 school year to further evaluate his performance. English admitted that the Board never told J.A. that he was still on probation at this March 14th meeting. J.A. admitted that no representative of the Board ever told him that he was no longer subject to a probationary period for 1991-92.

During negotiations for the 1992-93 collective bargaining agreement, the Union never raised J.A.'s seniority or his employment/probationary status. Furthermore, English stated that during the last week of the 1990-91 school year, J.A. told him that he (J.A.) would not be returning to the District in 1991-92. English stated that J.A. had missed the last day of school without calling in that year and that J.A. had not ordered school supplies by March or April of 1991, as English would expect of returning teachers. However, J.A. never resigned and he returned to teach for 1991-92. J.A. was then assigned to teach two periods of Junior High School Studies (Grades 7 and 8) and Science in grades 4, 5 and 6.

During the 1991-92 school year there were several problems regarding J.A.'s performance. In the Fall of 1991, English received several complaints from teachers regarding the student noise levels in J.A.'s (upstairs) classroom. English personally investigated the complaints and he memorialized his findings regarding this problem in a memo dated November 14, 1991. In regard to this complaint, J.A. stated at the instant hearing that the entire 6th grade had come into his classroom on the date in question because the

3/ English stated that for new employes, the Board makes no reference to their (two year) probationary period in their individual employment contracts and that to his knowledge the only time such a reference was made by the Board was on J.A.'s 1990-91 individual teacher contract.

pencil sharpener in the 6th grade room was broken, thus causing noise. J.A. stated that he spoke to English about this matter and asked English to put in a bell system upstairs so that students would get to their rooms promptly. J.A. stated he felt English accepted his explanation and that the matter would be dropped. In contrast, English stated that J.A. never gave him the above explanation regarding the noise complaint.

On December 6, 1991 English wrote J.A. a memo concerning his prior observations of J.A.'s classroom performance. This memo read as follows:

The following are for you to follow. As indicated, I will be in again soon to view a class involving #3 below.

1. "Tighten up" behavior during cooperative learning sessions in grades 4 - 6. Many kids were on task. However, deal with those who engage in horseplay, excessive talking, or behavior unrelated to the exercise.
2. In grades 4-6 insist on students getting to class on time. Limit students going to lockers and other places. Also keep students as quiet as possible. Make them earn quiet conversation time with proper behavior. Insure that students finishing early have work to do.
3. In Junior High classes, structure class to include lecture, discussion, or answering of questions for at least a half hour. Do not allow talking, inappropriate comments, or other disruptive behavior during this time. During the 20 minute remaining time, students must have work and keep their conversation tone low. Students should be in their seats. If they violate, insist on dead silence for awhile.
4. At no time, tolerate disrespect toward you from students. Use detention, contact parents, or other punishments, and feel free to send people to the office who are out of hand.

(As I indicated, I will withhold completing your regular evaluation until I see how the above areas are being dealt with.) Please contact me if you need clarification on this or other matters. As I indicated, progress in some areas has been noted. As I see it, you must address areas of structuring activities and student expectations.

As indicated in the December 6th memo, English discussed his observations with J.A. after the observation was completed. At this time, English stated, J.A. did not challenge any of English's comments or statements. J.A. did state that he would work on performance in these areas.

In a memo dated December 18, 1991, English memorialized a post-observation conference he had previously had with J.A. on his job performance. The relevant positions of that memo are as follows:

. . .

I noted improvement in the structuring of the class. Students, overall, were attentive and on task. You stressed the key points of the readings, asked questions, and walked around helping with the assignment. Afterwards, you went over the questions (I had departed.) Therefore, the "structured" phase of the class if one counts the beginning oral reading and question review, well exceeded 30 minutes. I noted no student disrespect toward you.

Relative to further improvement, please work on the following:

- 1) Stress, even more, your intolerance for comments unrelated to the lesson during the discussion, reading, etc. please. Don't allow students to interrupt you or others.
- 2) During "work time" tighten up the few remaining students who socialize loudly. Move violators to seats away from the group, or use other means. Be firm.
- 3) Use your seating chart to keep friends who get together excessively.

I see a real opportunity to tighten up all of your classes that need it after the break. It is a minor "fresh start" and you can restate expectations and work on consistency. All in all, I am pleased with your efforts and appreciate your working on my suggestions/directives. I would like to visit an elementary class and the 8th grade next month, and look forward to a positive new year with you. . . .

Again, English stated, at the post-observation conference, J.A. did not dispute English's comments made in his December 18th memo.

On January 20, 1992 English observed J.A.'s 8th grade Social Studies class and wrote J.A. a memo indicating student behavior was on task except for two students English named in the memo. English closed the memo by asking J.A. to call the parents of the students involved in the misbehavior. English stated at the instant hearing that J.A. later admitted to him that he (J.A.) had never called the students' parents. 4/ English also observed that the two students named in his January 20th memo were not difficult to handle in other teachers' classrooms as far as he knew.

On February 19, 1992, English wrote out a formal evaluation of J.A.'s performance for 1991-92. English called upon his prior five or six in-class observations of J.A. (30 to 45 minutes each), as well as parent and other teachers' comments made during the evaluation period and his day-to-day observations of J.A. In that evaluation, English rated J.A. "satisfactory" in

4/ J.A. stated at the instant hearing that he decided it was unnecessary to speak to the parents of the students mentioned in English's January 20, 1992 memo because one child later apologized and the behavior of the students improved.

six categories (1, 4, 6, 8, 10, 11) on the same form used to evaluate J.A. in 1991. Three categories (3, 5, 14) were not rated, but English listed comments thereon as follows:

3. Adaption of curriculum instruction to meet individual student abilities and needs.

unsure as to individualization.
5. Involvement of student in classroom activities.

During group activities have noted most students are involved. During presentations and discussions - limited.
14. Involvement in professional growth activities.

None noted.

In the categories rated satisfactory, positive comments were listed next to 5 of the 6 categories so rated, but in regard to item number 4, English listed a negative comment as follows:

4. Creation of classroom environment.

More science related displays in elementary class are evident. Any social studies related items in the "history room" would add to the environment.

In two categories (9 and 13), English rated J.A. as both "N" and "S". The comments English placed next to these categories were as follows:

9. Illustration of motivation and variation of teaching techniques.

Have noted improvement in varying science activities, as well as overall personal motivation toward the job. However, more apparent interest/dedication is needed.
13. Punctuality and performance in record keeping, budgeting, and various reports.

In terms of the attendance and detention record keeping - continual problems exist.

*academic area (sic) related are fine.

English rated J.A. "N" (needing improvement) on three categories (2, 5, 8) with comments thereon as follows:

2. Planning and development of lessons, materials and assignments.

Progress noted in the area of upper elem. science, but more "hands on" experiment type activities are needed.
5. Organization of classroom procedures.

While improvement is evident, student "on task" time needs to be extended. Also during group work,

expectations for behavior needs to be stated and enforced.

8. Use of techniques toward maintenance of proper student behavior.

Still a problem area. Most students during my visits were well behaved. However, certain students who are problems are not dealt with consistently. Also noted and reported is an unusually high noise level. Things are too "loose."

In the area entitled "Recommendations for Improvement," English commented as follows:

December 6 and 18 memos also still appropriate. Included. Individuals who disrupt must be addressed firmly with calls home, detention, or use of the office as previously directed. (See 12/6 12/8 memos) class time must be structured to allow a minimum of "assignment work time." Then on task, quieter behavior must be enforced. More effort is needed to follow up on attendance, and accurately assign detention on the daily bulletin.

In an area below "Recommendations" on the form (which English had left blank in the January 20, 1990 evaluation) English commented as follows:

Progress made on previous evaluation's Recommendations for Improvement. (Numbers below should correspond with the numbers of the specific recommendations.)

1. Not applicable no longer teaches math.
2. Have noted improvements in helping during class, and interaction with students.
3. Have noted some improvement in observable motivation.
4. Some variation in science activities. Much more experimental activities needed.

Finally in the area entitled "General Evaluation Comments" English commented as follows:

It is my overall assessment of Mr. A. teaching performance that he has improved over last year. At the same time, I cannot rate his overall performance in the satisfactory mode, as a teacher/attendance officer.

J. has proven to be cooperative with me, and made efforts to better interact with the students, as well as improve in a number of areas. However, more effort, and consistency, along with more visible motivation and creativity is needed. (emphasis in original)

Mr. English stated that he discussed this evaluation with J.A. but that J.A. never questioned or disputed any ratings given on the February 19th evaluation.

J.A. was given a copy of the evaluation but he did not return it with comments.

By letter dated February 24, 1992, the Board notified J.A. he was being considered for nonrenewal. J.A. received this letter on February 25th. J.A. thereafter requested a private conference with the Board regarding his nonrenewal as well as a list of reasons for his being considered for nonrenewal.

In a memo dated February 28, 1992, from Mr. English to J.A., English addressed three subjects: "Classroom Monitoring of Behavior, Excessive Deficiency Notices, Special Education Student Mistreated by other students." The memo read as follows:

Regarding our conference of 2/26 please note the following regarding the first two items above.

- (1) Sending home to 50% of your elementary science students deficiency notices is excessive, and indicates teaching or other problems. If, as you state, some were not necessarily "D's" or "F's", this should have been noted or another form used.

Further, I have told you not to penalize Special Education and Chapter 1 students who are out of class for these classes for work missed. You indicated that you were still doing this.

- (2) When guest speakers, such as with Ms. Bartelt, are in your class, you have a professional obligation to assist, if not take the lead, to correct student disruptions and rude behavior.

If you require clarification on these items or others, feel free to contact me.

In addition, I also need to see you regarding your possible role, as teacher, in permitting undue harassment of special education students by others in your 6th grade class. This was in relation to the trip that various students were planning whereby special education students were to be excluded. Students who I asked, claimed that you were fully aware of the plan, and were in agreement. Ms. Kohegyi wanted to see you yesterday at about 3:35, but you had left early and could not be found.

Related to this, the sixth grade does not need class officers. Please inform the students.

In addition, English testified as follows: On February 26, 1992, English held a conference with J.A. regarding the items summarized in his February 28th memo. In that conference, English stated that he discussed the deficiency notices issued by J.A. J.A. explained that the students who received the notices had not been working up to their ability and that he (J.A.) had not issued deficiency notices to half his science students. J.A. also explained that he felt grading special education students differently was appropriate especially in light of all the science class time these students missed due to their attendance at special education classes. English stated at the hearing that J.A. issued deficiency notices to 18 of his 36 students and that the District's normal procedure regarding deficiencies is to issue them if students

are, in general, doing below average work. No other District teacher has issued deficiency notices as J.A. did in 1992.

In regard to Miss Bartelt's experiences in J.A.'s classroom, English said that staff had reported to him that Miss Bartelt (a speech teacher employed by CESA 12 working half-time at the District) had been seen crying after she had taught a voice control class to J.A.'s class. English interviewed Miss Bartelt and she said that J.A. did nothing while the children were being rude to her. At their meeting on February 28th, English testified that J.A. told him that Bartelt was a teacher and she should have been able to handle the students in the class. English indicated that he disagreed with J.A.'s opinion and believed that since Bartelt was not a regular classroom teacher, but a volunteer teaching extra classes in J.A.'s classroom, J.A. should have stepped in to stop student misbehavior in his classroom. In regard to reports of undue harassment of special education students in J.A.'s classroom, English stated that on February 28th, J.A. did not deny that he had been aware of and allowed some sixth graders to plan a trip designed to exclude special education students.

At the instant hearing, J.A. confirmed the majority of English's testimony regarding what he and English discussed on February 28th. However, J.A. explained that his issuance of deficiency notices had been to 36% of his 6th grade science students, not 50%, and that he had done this to motivate students who were working two grades below what they had received in the past. J.A. stated that his actions were designed to get his students to work up to their potential.

In regard to his grading special education students with "P" rather than on the District regular grading system (A, B, C, D, F), J.A. testified that he felt such grading was necessary because these students could not be graded on the normal system. J.A. also stated at the hearing, that he was not aware that special education students should be dealt with on the same basis as other students.

Regarding the Bartelt incident, J.A. stated that Miss Bartelt asked him if she could teach a two day unit in his classroom on voice control. J.A. agreed and he was present in the room during the classes. On the first day, Miss Bartelt showed some slides, and J.A. stated, some of the students were rude and misbehaved. One student interfered with the use of the projector. Ultimately, J.A. sent the student out of the room who had interfered with Miss Bartelt's slide show. After Miss Bartelt taught the first class, J.A. stated he talked to his class and said that if they were rude again during Miss Bartelt's second class, he would remove the offending students from the classroom. J.A. confirmed that the reason he did not jump in to help Miss Bartelt with the class was because she was responsible as the teacher of the class.

Finally, regarding the allegation of undue harassment of Special Education students, J.A. testified that he was aware that the sixth graders had a secret meeting, called by their class officers, "to get back at" the special education students so that the other students could have their own class trip without special education students being present. J.A. stated that since class officers were abolished for sixth grade and all trips were cancelled, in J.A.'s opinion, the problem regarding treatment of special education students in his class had been clarified. J.A. therefore thought that English would drop the matter.

On March 3, 1992, English responded to J.A.'s request for written reasons for his being considered for nonrenewal and he also indicated that J.A.'s private conference would occur on March 12th. English's letter read in part as

follows:

. . .

You are being considered for non-renewal, as I am of the judgement that your job performance as a teacher has been less than is expected for the Mercer School District. Problems and deficiencies exist in areas such as:

- 1) Control of student behavior.
- 2) Motivating of students toward performing their best.
- 3) Organization of classroom procedures to keep students "on task" and challenged.

. . .

At his March 12th private conference, J.A. spoke to a few of the above items of criticism. UniServ Director Degner also spoke in J.A.'s defense -- stating that J.A.'s evaluations had not been that bad and that J.A. was not a probationary teacher. The Board later voted unanimously to nonrenew J.A. at the March 12, 1992 private conference.

At the hearing, English stated that J.A. never filed any action challenging his two year probationary period. English stated that at the time J.A. served his probationary period, three or four other District teachers were also on probation. English stated he spent much more time supervising J.A. than he did supervising other District probationary teachers. English stated that in his view, a teacher must be satisfactory in performance in a majority of the categories evaluated in order to be acceptable at Mercer; that the District should not have to wait until a teacher's performance is unsatisfactory overall before that teacher may be deemed unacceptable for work at Mercer. English stated that an "N" rating on District's evaluation forms means that the teacher's performance was less than satisfactory in that area.

J.A. finished his Masters thesis and received his degree in the Spring of 1991.

POSITIONS OF THE PARTIES

Initial Briefs

District

The District argued that the instant grievance is not procedurally arbitrable. The District noted that as of August, 1990, prior to J.A.'s signing a 1990-91 teachers contract, both the Union and J.A. knew that J.A. was subject to a two year probationary period. Neither J.A. nor the Union objected to the imposition of this probationary period until 1992 when the District nonrenewed J.A. Such objection, the District asserted, was untimely. In addition, the District observed, the Union presented no evidence that the District agreed to waive grievance time lines regarding the Union's objection to J.A.'s two year probationary period. Thus, the District contended, the grievance should be dismissed as the Arbitrator lacks jurisdiction to determine the grievance herein.

Beyond its procedural arguments, the District contended that J.A. was

subject to the two year probationary period listed in his 1990-91 teachers contract. The District urged that absent a provision detailing retrocession from his administrative position back to a teaching position and given the Union and J.A.'s clear notice and knowledge of the two year probationary period, from 1990 through 1992, the fact that there was no mention of this probationary period in J.A.'s 1991-92 individual contract is not determinative.

In this regard, the District pointed out that the collective bargaining agreement requires a two year probationary period for new teachers; that no reference has been made to this probationary period in individual teacher contracts in any District probationary teacher's contract other than J.A.'s 1990-91 contract. Therefore, whether the District's failure to reference the two year probationary period in J.A.'s 1991-92 teacher contract was intentional or a mistake, such silence was consistent with the District's past practice on the subject. In addition, the District indicated that the two nonrenewal notices J.A. received were never objected to by the Union or J.A.; that the Board never indicated that J.A. was not subject to the two year probationary period and the Board consistently disagreed with the Union when it finally raised the issue. In the District's view, the Union had a responsibility to negotiate J.A.'s seniority following his return to a teaching position and it never did so. All of these facts, the District asserted, demonstrate that the Union's reliance on the District's failure to list the probationary period in J.A.'s 1991-92 contract should not, in fairness, be determinative of the issues here.

The Union's argument that because J.A. never resigned as a teacher prior to the 1990-91 school year, he was truly a bargaining unit member at all times relevant and, therefore, not subject to a probationary period is specious, in the District's view. The District urged that its practice of issuing a letter of intent by March 15th to all teachers in years when no collective bargaining agreement has been signed explains why J.A. received such a letter of intent for the 1989-90 school year. J.A., notably, was not issued a teacher contract for that year and paid no union dues during 1989-90 when he was employed per his individual contract as a principal. Given the recognition clause contained in the labor contract as well as the record as a whole, the District contended J.A. could not reasonably and logically be considered a nonprobationary teacher in 1989 through 1992.

The District argued that J.A.'s testimony was not credible in seven listed areas and that it should therefore be wholly discounted by the undersigned. In the circumstances of this case, including the District's having given J.A. several chances to improve which J.A. did not take full advantage of, the District urged that the grievance should be denied and dismissed on the merits.

Union

The Union contended that J.A. did not have to serve a probationary period since his 1991-92 teacher contract was silent on the issue and J.A. had not broken his employment at any time during his 25 year tenure with the District.

In this regard, the Union noted that J.A. had signed a letter of intent for the 1989-90 school year and J.A. never resigned from the District teaching position he had held prior to 1989-90.

The Union also asserted that such J.A.'s promotion to principal would tend to show that the District was happy with J.A.'s performance of his part-time principal and teaching job held beginning in 1976. The Union claimed that members of the Board of Education were angered by J.A.'s refusal to accept the Board's offer to become the new District Administrator in May of 1990 and that this anger motivated the Board and the new District Administrator to void J.A.'s 1990-91 principal's contract on the ground that J.A. was not then a

licensed principal. The Union asserted that the Board of Education was angered by J.A.'s failure to complete his Masters Degree. The Union claimed that in August, 1990 the Board needed to reduce the School budget and that the Board used the voiding of J.A.'s principal's contract as a vehicle to accomplish this.

The Union urged that J.A.'s teaching performance had been satisfactory to the District for more than 20 years before he received his first adverse evaluations from Mr. English in 1990 and 1991.

The Union observed that J.A. signed the 1990-91 teacher contract which included the two year probationary period under duress. The Union asserted that because J.A. had taught similar assignments as a teacher in the past for the District, there was no reasonable basis or need for the Board to impose a probationary period upon J.A. Furthermore, the Union urged that it objected to a probationary period for J.A. at the appropriate time, in the Spring of 1991 when the Board first threatened to non-renew J.A.'s teaching contract. The Union claimed that it instructed J.A. after the Board failed to nonrenew his contract for 1991-92, that if a reference were made to a probationary period in his 1991-92 contract that the issue should be grieved. The Union contended that District Administrator English wished to "clean the slate of past administrative personnel" and that English evidenced "vindictiveness" in his efforts to assure the nonrenewal of J.A.

The Union contended that the labor agreement also protected J.A. from having to serve a second probationary period. The use of the word "employee" rather than "teacher" in Article X, paragraph 3, in the Union's view, also demonstrated that J.A. should have been entitled to the just cause standard upon his nonrenewal. The lack of any separate procedure for layoff, any procedure for discounting or losing seniority or for requiring a new probationary period for those who leave the bargaining unit and thereafter re-enter said unit, indicated, in the Union's view, that the parties to the contract intended to treat all "employees" the same applying, one probationary period and assuming District-wide tenure rules in other areas, whether an employee is a teacher or a principal.

The Union further argued that the District did not have cause to nonrenew J.A. In this regard, the Union observed that in his 1991 evaluation J.A. had been rated as needing improvement in 9 of 14 categories and satisfactory in 5 categories. J.A. received no unsatisfactory ratings in 1991. J.A. improved on his 1992 evaluation, receiving either "satisfactory" or "no rating" in 11 categories and only 3 "needs improvement" ratings. Again, J.A. received no unsatisfactory ratings in 1992. Finally, the Union observed that the parental complaints raised by English in his memos were followed up on and dealt with by J.A.

In sum, the Union urged that a finding that J.A. had been nonrenewed for cause would contravene generally accepted arbitral standards. Where as here, the grievant had received no unsatisfactory evaluations, no warnings or letters of reprimand and no complaints in 22 years of employment, where the grievant had been promoted to principal and was later sought after by the Board to become District Administrator, where the new District Administrator, biased against J.A., had never explained his evaluation policies/procedures or what each rating meant, the Union asserted, no reasonable, logical or fair basis existed for J.A.'s nonrenewal. Given that several provisions of the labor agreement demonstrate that only one probationary period need be served even after an employe has exited and re-entered the bargaining unit, the District should have been required to show "some probable cause" that J.A. could not fulfill teaching duties before being allowed to subject J.A. to a second probationary period. The District failed to demonstrate such "probable cause"

and therefore, the Union concluded, the grievance should be sustained.

Reply Briefs

District's Reply Brief

The District first observed that the Union failed to contradict English's evidence that he and Union President Gust discussed J.A.'s seniority and employment situation for 1990-91 in the Fall of 1990 and Gust then raised no objections to J.A.'s probationary period or to any other feature of J.A.'s employment. Second, the District urged that the Union's arguments, that in the labor agreement, "employee" refers to any District employe and as such J.A. could not be subjected to a second probationary period, were unfounded and irrelevant. The District observed that the contract's recognition clause specifically excludes supervisors such as principals, that it specifically covers only teachers and that the Grievant was nonrenewed, not laid off.

The District pointed out that the Union had made numerous statements in its initial brief which were completely unsupported by any record evidence, as follows:

1. References to the parties intent at the bargaining table in 1990.
2. A reference to the Board's wish to cut positions to explain the Board's having voided J.A.'s principal's contract.
3. A reference to J.A. being instructed to file a grievance by the Union if the probationary period were referred to in his 1991-92 teacher contract.
4. A statement that there were no complaints about J.A.'s teaching in 22 years.
5. A reference to J.A.'s "internship as administrator in the summer of 1990" while J.A. actually served as acting administrator from early June until the middle of June 1990.
6. A misstatement of the status of teacher evaluations for 1991-92.
7. References to collusion or conspiracy to remove J.A.

Based upon the record, the District urged dismissal of the grievance in its entirety.

Union's Reply Brief

The Union contended that because the District did not object to the timeliness of J.A.'s grievance until the hearing herein, the District's timeliness objection came too late. In addition, the Union urged that J.A.'s grievance over the application of a two year probationary period is a continuing violation and therefore arbitrable. Further, the Union contended that J.A. could not have had full knowledge of the affect of the second probationary period on his employment until he was nonrenewed because the Union and the District never concluded bargaining over J.A.'s seniority. The Union noted that the labor agreement contains no penalties for failure to follow the contractual timelines for filing grievances. In these circumstances, the Union urged that the grievance be found timely filed.

Regarding the issue of the second probationary period J.A. served and whether just cause should be applied to his nonrenewal, the Union argued that J.A.'s having been employed first as a teacher in the bargaining unit and then as a principal and thereafter returning to a unit teaching position, does not mean he must automatically serve a second probationary period. The Union cited many cases for the proposition that unit seniority may be deemed retained by an employe serving outside the unit for a time (as in J.A.'s case) who thereafter returns again to the unit. Here, where a break in seniority is not defined by the labor agreement such that J.A.'s seniority should have been deemed broken or terminated, service of a second probationary would be unfair, in the Union's view. In conclusion, the Union asserted that the record herein demonstrated that the District lacked just cause to nonrenew J.A. and that it used "some technical trickery in nonrenewing a long term non-probationary employe" with whom the District had become upset "because the employe did not accept an administrative position for which they (the District) were grooming that employe."

DISCUSSION:

The District has challenged the arbitrability of the grievance as written. I find, based on the reasoning below, that the grievance is arbitrable. In addition, after reviewing all of the evidence, I further conclude that although this case is grievable, the standard to be applied to judge the appropriateness of the Board's actions here is not a just cause standard but a lesser standard.

Under this labor agreement just cause is to be applied only to the nonrenewal of nonprobationary teachers. Thus, the proper standard to apply here is whether the Board's actions were arbitrary, capricious or discriminatory. The latter standard is properly applied here because no standard is stated for the non-renewal of probationary teachers at the District in the labor agreement yet the arbitration of such non-renewals are not prohibited (as they are in many labor agreements).

The "Statement of Grievance" reads as follows:

The Mercer Board of Education, on Thursday, March 12, 1992, violated the collective bargaining agreement between itself and the Mercer Education Association when it nonrenewed J.A.'s contract for the 1992-93 school year. The collective bargaining agreement provides for just cause in Section X, Discipline and Nonrenewal of Contracts, paragraph 3. The Board of Education, without just cause, voted to non-renew the contract for Mr. A. Further, the Board of Education has denied that Mr. A., a 25 year employe of the district, is afforded just cause under the collective bargaining agreement.

The time for objecting to the requirement of a new two year probationary period, in my view, was in August, 1990 when the Board offered J.A. a teaching contract with the express requirement that he serve a two year probationary period. Neither J.A. nor the Union objected to nor sought to discuss this condition. Rather, J.A. signed the 1990-91 teacher's contract offered to him and he fulfilled that contract. The District fulfilled its end of that bargain as well by paying him, as promised, at a Step 21 BA 24 rate. The fact that neither the Union nor the District ever agreed upon J.A.'s seniority position does not require a different conclusion. In that regard, I note that the uncontradicted evidence of Mr. English showed that he and Union President Gust met and agreed that there was no need to determine J.A.'s seniority for lay off

purposes since the District could not afford to lay off anyone given that there was one teacher per class in the District at that time. The lack of specific agreement regarding J.A.'s seniority, under principles of equity and contract law, should not defeat the entire executed contract, which both parties completely performed and regarding which no objections were raised during the life of that contract.

The Union raised numerous defenses to J.A.'s 1990-91 teaching contract on behalf of J.A. which would require the application of a just cause standard to this case despite the language of Section X Para. 3. The Union urged that J.A. signed the 1990-91 contract under duress so that the probationary period should not, in fairness, be enforced against him. However, the only evidence of duress offered by the Union was J.A.'s testimony that he was worried that he would not have a job for 1990-91 due to the Board's having voided his 1990-91 principal contract so late in the year; that because he did not have his masters degree in August, 1990, he knew he could not get an administrator's job at another district for 1990-91; that he would have signed almost any contract offered to him by the Board in August, 1990 due to these concerns; and that he was grateful to the Board for offering him a 1990-91 teaching contract.

These facts are insufficient to prove "duress" as it is commonly understood in law. Generally, proof of duress requires a showing that threats of bodily harm or criminal action were made by the party seeking a contract to the person allegedly under duress or to that person's family. General economic needs/motivations of a party to a contract are not sufficient to constitute duress. In the instant case, there was no evidence to prove that the District ever threatened J.A. in any way. Furthermore, the economic pressure to find a job before the start of the 1990-91 school year which J.A. felt when he signed the 1990-91 teacher contract, was not created by the District in order to get J.A. to sign a contract. On the contrary, the undisputed facts showed that the Board, which was under no obligation to offer J.A. a teaching contract for 1990-91, did so out of concern for J.A., to help him out. Therefore, I find that the Union failed to prove the defense of duress. Thus, the Union and J.A. cannot now use duress as either a defense to J.A.'s 1990-91 executed teacher contract or as grounds for rescission or cancellation of that contract. 5/

The Union argued the requirement that J.A. serve a second probationary period for 1990-92 amounted to a continuing violation of J.A.'s rights and of the labor agreement which the Union implied it could grieve at any time. In this regard, I note that the labor agreement sets out time limitations for

5/ The Union proffered no corroborating evidence to support its claims in its briefs that the Board had been grooming J.A. to be its District Administrator and that the Board was angered by J.A.'s refusal to take the District Administrator's job when offered in May of 1990. I further observe that no evidence was offered to prove that the Board's alleged anger against J.A. caused it to void his principal's contract in 1990. Rather, the undisputed evidence showed that the Board voided J.A.'s 1990-91 principal's contract because he lacked proper DPI certification to perform that job. Finally, as the District argued, I can find no evidence on this record to show that the Board voided J.A.'s 1990-91 principal's contract because it needed to reduce its budget for that year.

I also agree with the District's arguments on another point. The Union offered no record evidence (contrary to its statements in its brief) that it ever instructed J.A. in 1991 to file a grievance if there were mention of a probationary period in the 1991-92 teacher contract offered J.A. by the Board.

grievance processing as follows:

SECTION V - GRIEVANCE PROCEDURE

1. DEFINITION: The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this agreement. The "grievance" shall mean a complaint by an employe in the bargaining unit that there has been a violation in some aspect of the collective bargaining agreement or other condition of employment. "Days" are defined as district business days.
2. Grievances shall be processed in accordance with the following procedure:

Step 1

- A. An earnest effort shall first be made to settle the matter informally between the teacher and his/her administrator.
- B. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the Administrator within ten (10) days after the facts upon which the grievance is based first occur. The District Administrator shall give a written answer within ten (10) days of the time the grievance was presented in writing.

Step 2

- A. If not settled in Step 1, the grievance may, within ten (10) days, be appealed to the School Board. The Board shall give a written answer within thirty (30) days after receipt of the appeal.

. . . .

Clearly, there is no stated time limitation on the initial filing of a grievance in this contract. However, it should be observed that were the Union allowed to prevail on its argument, District employes whose employment status has been clearly impacted in a negative way and who have clear notice and knowledge of such impact on a date certain, would be able to claim, two or more years after the "injury" occurred that the injury to them had been ongoing and that they could grieve at any time. This would result in stale complaints, a potential lack of documentary and/or testimonial evidence and the parties' experiencing difficulty in presenting and defending such grievances.

Based on the record in this case, in August, 1990, J.A. had notice and knowledge 6/ of the probationary period he was to serve during 1990-92. Yet

6/ I find it difficult to believe the Union's assertion that J.A. did not know the meaning and usage of the two year probationary period he agreed to in 1990.

neither J.A. nor the Union contested the requirement that J.A. serve such a probationary period in 1990 or 1991. This is not a case where the grievant missed a reasonable or stated time frame for filing the grievance by days or weeks. Here, J.A. waited years to file.

I note, as the Union properly observed, that the labor agreement does not state a specific time limit for the initial filing of grievances. However, in my view, it would be potentially unfair to allow J.A. to raise the propriety of the probationary period he had had full knowledge of and to which he had agreed two years after that probationary period commenced. Where as here, there is a formal grievance procedure contained in the labor agreement which contains time limitations for processing grievances at the upper steps of the grievance procedure, a reasonable time for the initial filing of grievances should be inferred from the parties' stated interest in allowing grievances to be addressed and in processing cases with overall, reasonable promptness.

In the circumstances of this case I find, contrary to the Union's assertions, that J.A.'s 1990-92 probationary period did not constitute a continuing violation; that a reasonable time frame for filing a grievance on J.A.'s probationary period should be inferred; and that J.A.'s objecting to the requirement that he serve a probationary period in this case is untimely.

The Union argued that portions of the labor agreement otherwise protect J.A. from having to serve a second probationary period despite the express terms of his 1990-91 contract. On this point it should be observed that normally in labor relations, as in other areas of business, a contract signed with knowledge of its terms and without duress should be abided by by both parties who signed the contract. Thus, under the facts of this case, J.A. should not be allowed to abrogate those portions of his 1990-91 teacher contract which he dislikes, while at the same time retaining the \$32,794 paid him by the District pursuant to that contract.

Beyond these general principles of fair play in business relationships, however, I note that the Union's arguments on this point are flawed. I agree with the District that the labor agreement specifically defines those individuals covered by the agreement as "teachers" and specifically excludes supervisors, (such as Building Principals). Given the express, clear language of the Recognition Clause, the fact that "employee" is used in the contract at times while "teacher" is used at other times is not significant. Notably, the labor contract is silent on the treatment of employes who become supervisors and who later return to the bargaining unit. However, in my view, the Union's argument is an attempt to broaden the effectiveness of the just cause provision of the agreement to cover those like J.A. who were on probation and expressly intended to be excluded from that just cause standard. Were I to rule in favor of the Union on this point, such a ruling would render meaningless the last sentence of Section X Para. 3 and effectively extend the bargaining unit beyond its intended bounds.

It is significant as well that Section X Para. 3 states by clear implication that an employe must have served a two year probationary period before just cause must be used to nonrenew that employe. On this point, the Union asserted that prior to 1989, J.A. served such a probationary period and as such, the just cause standard must be applied to this case. The Union's approach would ignore J.A.'s failure to complain about the insertion of the two year probationary period in his 1990-91 teaching contract. The undisputed facts of this case also demonstrate that by voiding J.A.'s 1990-91 principal's contract, the Board terminated its employer-employee relationship with J.A. for

1990-91. 7/ The facts of this case support the Board's right to void J.A.'s principal's contract on the ground that J.A. did not satisfy the condition precedent therein of procuring and maintaining a DPI principal's certification and on the ground that he had therefore signed the 1990-91 principal's contract, knowing that he did not possess a valid license for the job which was required by DPI and the Board. As observed in footnotes 1 and 2 supra and the accompanying text, on August 9, 1990 at his meeting with the Board, J.A. did not give the Board any credible explanation or reasons for not getting his Masters before signing the 1990-91 principal's contract. In addition, J.A. had requested and received money for his Thesis course work from the Board yet he had failed to complete that course work in a timely fashion. And, although he had several opportunities J.A. never revealed to the Board that he had failed to complete his Masters. In these circumstances, it was wholly appropriate for the Board to treat J.A.'s contract as voidable at its option.

Under general contract law principles, when a contract is voided, it is as if it never existed. This is so in this case because the condition precedent, that J.A. possess and maintain a valid principal's license, did not occur or exist. By offering J.A. a teaching contract with a two year probationary period after voiding his principal's contract, the Board of Education made clear that it intended to treat J.A. as a new employe, subject to a new probationary period. J.A. accepted this completely. He signed the 1990-91 teaching contract with gratitude and with full knowledge of its provisions.

The Union has emphasized that the District's failure to place any reference to J.A.'s probationary period in his 1991-92 teaching contract requires a conclusion that the Board did not intend to subject J.A. to the second year of that probationary period. The evidence does not support such a conclusion. In this regard, English testified without contradiction that no other teaching contract (other than J.A.'s 1990-91) had ever referenced a probationary period -- even those for newly hired teachers in the District - under the Board's consistent past practice. Nonetheless, such newly hired probationary teachers were consistently subject to a two year probationary period, also required by the labor agreement. The Board's requirement that J.A. serve a probationary period beginning in 1990, demonstrates clearly that the Board was conditioning its offer of the 1990-91 teaching contract on J.A.'s acceptance of such a probationary period. I do not find it significant that the probationary period was omitted from J.A.'s 1991-92 teaching contract given the District's past practice described above. I also note that J.A. knew full well that his serving a probationary period had been an important part of the deal he struck with the Board in August of 1990. It was merely wishful thinking on J.A.'s part to believe that the omission of a reference to the probationary period meant that the Board did not intend him to be subject to such a period and its rigors in 1991-92.

The Union further asserted that J.A. never resigned as a teacher either before 1989 or thereafter and that he signed a letter of intent to return as a teacher for 1989-90, requires that J.A. be treated as a regular non-probationary teacher from 1990 forward, despite the deal cut between him and the Board for 1990-91. This argument is belied by the facts of record. Specifically, I note, that it is undisputed that it has been the District's practice to send Letters of Intent whenever the Union and Board have failed to complete negotiations for a successor agreement by March of any school year

7/ J.A. essentially admitted this at hearing when he stated that he was grateful that the District offered him a teaching contract for 1990-91 after voiding his principal's contract.

prior to the expiration of an effective labor agreement. Thus, the significance of the Letter of Intent signed by J.A. in 1989 is diminished greatly. Furthermore, I note that J.A. then signed a principal's contract for 1989-90, that he did not sign a teacher's contract for that year and that he worked and was paid as a Principal during 1989-90. Also, J.A. did not pay any union dues during the 1989-90 school year. In these circumstances, the Union's argument that J.A.'s tenure as a teacher remained unbroken is simply not supported by the evidence.

Finally, I disagree with the Union's argument that the lack of separate provisions in the labor agreement covering an individual's leaving and re-entering the bargaining unit means that the parties intended to treat unit and non-unit District employes the same so that no person could serve more than one probationary period. On the contrary, the absence of such provisions is the rule rather than the exception in non-industrial contracts, in the undersigned's experience.

Beyond this, I note that there is no other provision of the labor agreement which would specifically support the Union's arguments on this point. Absent evidence of bargaining history or past practice to show that the labor agreement is silent on the point at issue for the reasons the Union asserted, it would be contrary to the normal principles of contract construction and contrary to the normal application of recognition clause language to conclude that the Union and the District intended to treat all "employees" (unit and non-unit) the same, as the Union has claimed. Therefore, the Union's arguments on this point must fail.

In all of the circumstances and based upon the evidence of record I have concluded that the grievance is procedurally arbitrable, but only as to whether the District was arbitrary, capricious or discriminatory in nonrenewing J.A.'s probationary teaching contract. I turn now to the merits of the nonrenewal, applying this standard.

The record shows that English evaluated J.A. along with all other teachers in accordance with his administrative plan as new District Administrator. The evidence also demonstrated that the evaluation scheme and evaluation instrument were agreed upon by a joint committee made up of bargaining unit employes (including J.A.) and District representatives. The scheme of the ratings -- not rated (NR), needs improvement (N), satisfactory (S) and unsatisfactory (U) -- was therefore jointly agreed upon and implemented in a non-arbitrary fashion. The uncontradicted evidence showed that English decided to make regular evaluations a part of his new administrative plan because he had found his predecessors had performed no evaluations since 1977, and those evaluations on record in the District appeared to be merely generic. Thus, English's decision had nothing to do with J.A. personally or his situation, except that J.A. would be evaluated along with other District teachers under the scheme.

I note that no evidence was submitted to show how English intended to apply the ratings used. However, it is also clear based on this record that the Union never sought information or negotiations on this point and that J.A. was evaluated using the form in question in January, 1991. Based on J.A.'s January, 1991 evaluation, English sent J.A. a Preliminary Notice of Nonrenewal which indicated J.A. had a right to a private conference with the Board. It is significant that neither before the March 14, 1991 private conference nor thereafter did J.A. or the Union seek to discuss English's evaluation techniques. Nor did the Union or J.A. challenge any of the ratings given by English to J.A. or the Board's use of the private conference approach instead of offering J.A. a just cause hearing.

As noted above, English had rated J.A. as needing improvement in seven categories of 14 and placed negative comments on two categories despite rating these with an "S" rating. I agree with the District that J.A.'s 1991 evaluation was less than acceptable for a probationary teacher and that as such, it was not unreasonable for the Board to issue its Preliminary Notice of Nonrenewal.

After having survived this first challenge to his competency in 1991, I note that there were continued and varied problems with J.A.'s performance which English continued to document. This was done in an professional manner and in an atmosphere free of anger, trickery or "vindictiveness", contrary to the claims of the Union. Memos and class observations made by English in November and December, 1991 and in January, 1992 demonstrate J.A.'s work problems on many levels.

In February, 1992, English evaluated J.A. again. That evaluation rated J.A. as needing improvement in three categories and rated his performance as both "N" and "S" in two categories. English specifically referenced his December 6 and 18 memos in J.A.'s evaluation indicating that the criticism therein was "still appropriate". However, English's General Evaluation Comments on J.A.'s 1992 evaluation as well as the whole of J.A.'s 1992 ratings on his evaluation, tend to show that English did not have an axe to grind in relation to J.A. It is noteworthy that again J.A. neither challenged English's ratings on the evaluation form nor did he seek information regarding how English arrived at those ratings or write any response to English's comments. Based upon the record evidence and applying the arbitrary, capricious, discriminatory standard, I find that the Board had a reasonable basis upon which to nonrenew J.A. pursuant to English's observations, evaluation and discussions with J.A. memorialized in the memos of record and I shall not disturb the Board's decision. 8/ I therefore issue the following

8/ I agree with Mr. English that the District should not have to rate a probationary teacher unsatisfactory ("U") overall, before it has grounds upon which to find such a teacher's performance is unacceptable, warranting nonrenewal.

AWARD

The grievance is procedurally arbitrable.

The District did not violate Section X of the collective bargaining agreement when it nonrenewed the grievant in March, 1992.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of September, 1992.

By _____
Sharon A. Gallagher, Arbitrator