

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :

of a Dispute Between :

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MID-STATE VOCATIONAL, TECHNICAL :

FACULTY ASSOCIATION : Case 51

: No. 45201

and : MA-6528

:

MID-STATE AREA VOCATIONAL, TECHNICAL :

AND ADULT EDUCATION DISTRICT :

:

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Association.
Mr. Guy-Robert Detlefsen, Jr., appearing on behalf of the District.

ARBITRATION AWARD

Mid-State Vocational, Technical Faculty Association, hereinafter referred to as the Association, and Mid-State Area Vocational, Technical and Adult Education District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a non-renewal. The undersigned was so designated. Hearing was held in Wisconsin Rapids, Wisconsin on June 24, 25,26,27 and 28, October 3, 4,7,8,10 and 11, December 9, 10,11,12 and 13, 1991, January 6, 7,9,10,29,30 and 31, February 25 and 26, March 9, 10 and 11, 1992. The hearing was transcribed and the Association orally argued its position and the District filed a post-hearing brief. Both parties filed reply briefs, the last of which was received on August 3, 1992 with the Association reserving the right to file a response to Tabs G and J of the District's brief. The Association filed a response to Tabs G and J of the District's brief on November 23, 1992.

BACKGROUND 1/

The grievant, Patrick Kubley, hereinafter the grievant, was employed by the District commencing in February, 1979 as a Traffic Safety Instructor. In 1984, the grievant was given a nonrenewal notice from that position due to a lack of enrollment and bumped into a counseling position in Student Services. The grievant occupied this counseling position until his nonrenewal which is the subject of the instant arbitration. On September 10, 1990, at approximately 1:00 p.m., the grievant met with a prospective student. The meeting was short, lasting about five minutes, and the prospective student was dissatisfied with the grievant's performance. This prospective student complained to her husband, who in turn relayed the complaint to Brian Oehler, the Assistant Director and Administrator of Educational Services. On or after October 19, 1990, an investigation of the grievant's performance was commenced by the District. On October 22, 1990, the grievant was informed by letter from the District Director that an investigation of the incident noted above as well as other related matter was being initiated. On November 2, 1990, the District Director informed the grievant by letter that the administration intended to

1/ Given the length of the hearing and the number of exhibits, the undersigned has limited this section to a brief statement of events leading to the grievant's non-renewal.

recommend his nonrenewal to the District's Board. The reasons for the recommended non-renewal were:

Without properly obtained prior approval and/or authorization and/or contrary to express direction:

1. Refusal and failure to use the front door to the Student Services area contrary to repeated requests to do so by the Student Services Supervisor.
2. Failure to properly and adequately counsel students and prospective students including, but not limited to failure to provide students with proper adequate information needed during the admission process.
3. Misuse of professional time.
4. Failure to properly and adequately document on the file jacket counseling given to students.
5. Failure and refusal to provide weekly travel schedules.
6. Failure and refusal to provide proper and adequate notice of planned time away from the office.
7. Failure to be available to students and prospective students for counseling at appointed times on a repeated basis.
8. Failure to be available for counseling to students and prospective students who walk into Student Services.
9. Failure to properly proctor the CPP/ACT test, i.e. remaining in attendance in testing room.
10. Failure to adhere to office procedures in Student Services.
11. Failure and refusal to perform tasks assigned including, but not limited to:
 - a. Failure to follow-up on prospective students as assigned.
 - b. Failure to review and bring up-to-date applicants' files in the summer of 1990.
 - c. Failure to follow through on file, programs, and counseling actions to be taken.
 - d. Failure to review the status of files.
12. Failure to follow the directives of the Student Services Supervisor.
13. Failure to deal with the Student Services Supervisor in a professional fashion.

On January 3, 1991, the District's Board decided to nonrenew the grievant and the nonrenewal was grieved and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Whether or not the District had just cause to nonrenew the grievant, Patrick Kubley? If not, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE III

ASSOCIATION RESPONSIBILITY

1. The Board recognizes under Section 111.70 of the Wisconsin Statutes the right of every professional employee to organize, join and support the Association for the purpose of engaging in collective bargaining.

2. Neither the Board nor the Association shall discriminate against any employee or in the hiring of any employee on the basis of race, color, creed, national origin, sex, sexual orientation, age, marital status, arrest and conviction record, handicap, or membership in or association with the activities of any employee organization.

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ARTICLE VI

WORKING CONDITIONS

Section A - Retention - Dismissal

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1. Renewal - Non-Renewal

a. The Board may refuse to renew any professional employee's teaching contract for the ensuing school year for reasons of insubordination, misconduct, immorality, inefficiency or other just cause.

District's Position

The District contends that the standards for nonrenewal and discharge are not the same and the parties' agreement has separate provisions for nonrenewal and discharge. It submits that the grievant's nonrenewal was for insubordination, misconduct, inefficiency and other just cause including, but not limited, to the items set forth in the nonrenewal notice set out in the Background above. It submits that the tests of just cause are less stringent in a nonrenewal than in a discharge and documents excluded in a discharge are not barred in a nonrenewal proceeding. It notes that just cause cannot be defined absolutely and suggests the formulation of the standard by Arbitrator Fleischli in Joint School District No. 2, Village of Marshall and Marshall Education Association (1974), 2/ is appropriate here. The District asserts that the standard by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359 (1966), referred to as the seven tests, has also been met in this case.

The District submits that the evidence of the grievant's conduct establishes that it had just cause for his nonrenewal. The District argues that the grievant did not properly or adequately counsel prospective students in that he failed to expend adequate time to establish the necessary rapport with prospective students and failed to show interest in them but rather evidenced indifference to them. It claims that he merely handed out materials like a clerk. The District lists the following failures on the part of the grievant:

1. Failure to provide JTPA staff information he knew they requested.
2. Failure to make initial telephone contacts with prospective barber cosmetology students.
3. Failure to notify Dr. Bellanti of special needs students or to recommend academic interviews.
4. Failure to give advance notice to other counselors to take tours he had arranged when he was going to be gone.

The District insists that the grievant had notice of his duties because he was a professional counselor and Dr. Bellanti had reviewed the grievant's job description with him. The District claims that the grievant misused his breaks and exceeded the accepted standard of 15 minutes and was given prior notice that he had to correct his behavior.

With respect to student files, the District points out that the grievant failed to keep notes on the file jackets and didn't file referrals and case notes in the student files. The District submits that the grievant misused

2/ Decision No. 12683.

time by reading the newspaper during work hours and socializing. It claims that he failed to deal with his supervisor and others in a professional manner; failed to inform the clerical staff of his whereabouts; and failed to follow the proper procedures with respect to the Ability to Benefit form.

Among his other failures, the District lists the following:

1. Failed to adequately counsel students who were displaced workers.
2. Failed to be available to walk-in students.
3. Failed to recommend academic interviews for students with low stanine scores and low high school grades.
4. Failed to submit weekly travel schedules.
5. Failed to follow up on prospective students.
6. Failed to follow the supervisor's directives and, in particular, those regarding the use of the back door.

The District alleges that the grievant combined breaks with his lunch period and extended his lunch breaks by eating his lunch in his office after his lunch break was over. The District argues that the above litany of misconduct is supported by the record and constituted insubordination, misconduct, inefficiency and other improper conduct which provides just cause for his nonrenewal. The District maintains that there was no discriminatory motive connected to the nonrenewal and no thought was given to any of his union activities. The District maintains that there was just cause for the grievant's nonrenewal so he is entitled to no relief and the grievance should be denied in all respects.

ASSOCIATION'S POSITION

The Association contends that under any definition of just cause, the District has the burden of proof and has failed to prove that just cause existed for the grievant's nonrenewal. The Association's position is that the just cause standard formulated by Arbitrator Daugherty in Enterprise Wire Co., see above, should be applied in the instant case. It submits that the District's assertion of a collegial model of just cause is nothing more than an employment-at-will standard and must be rejected. The Association states that although the District called many witnesses, few really mattered. It notes that Tom Liska, the grievant's supervisor, was the seventeenth witness called.

It submits that the grievant was not provided an evaluation until after his nonrenewal although Liska claimed it was completed in June, 1990. The Association posits that Liska is not credible because the evaluation was not written until after November, 1990, and Liska's testimony about the grievant coming to his office in May, 1990 to ask for an appointment to receive his evaluation is simply incredible. It asserts that Liska's testimony on the follow-up on the orientation list was false, and he recanted it but only on cross-examination although he had the opportunity to correct his testimony on direct. It claims that Liska's testimony is unpersuasive as compared to the grievant's testimony which is more credible. It argues that the District's witnesses took every opportunity to blame the grievant for a parade of horrors but they failed to offer reliable proof. It notes that the District's witnesses have serious discrepancies in their testimony.

The Association questions the District's motives in this case for spending enormous resources on it. It notes that the concerns about the grievant are minor and since specific directives have been given, the grievant has followed them without any criticism. The Association questions the timing of the nonrenewal. It asserts that the District could have given the grievant the same directives it did on November 2, 1990, and informed the grievant that if he didn't get his act together by March 1, he would be nonrenewed. The

Association maintains that if there was a problem, a more fair way would be to work with the grievant but it does not believe the District acted in good faith.

The Association asks that the grievant be reinstated with backpay and interest, reimbursement for the loss of fringe benefits and the purging of all records related to the nonrenewal including the 1989-90 evaluation by Liska. It submits that interest on backpay is warranted as a result of the District's abuse of process in the unwarranted consumption of resources for everyone caused by the length of the hearing and the District's brief.

District's Response

The District submits that none of the elements of abuse of process are present in this case. It submits that the grievant refused to cooperate in the investigation which in turn lengthened the hearing. It argues that the decision to nonrenew the grievant was made in good faith and was based on complaints from students, Association members, clerical and other staff and a review of the grievant's performance. It reiterates the reasons set forth in its brief for the nonrenewal and maintains that the grievant as a professional should have known what was expected of him and besides, his supervisors put him on notice as to what was expected. It claims that the record establishes that the grievant for a long period intentionally and substantially disregarded the District's interests. The District asserts that interest on any backpay is not an appropriate remedy. It asks that the grievance be denied.

DISCUSSION

There is some disagreement between the parties concerning the standard of just cause that should be applied to the grievant's nonrenewal. Inasmuch as this is a nonrenewal, the District had the burden of proof and the burden of going forward. Additionally, the standard burden of proof in this matter is the preponderance of the evidence. As the District pointed out, the standard of just cause cannot be defined absolutely. While both sides have suggested formulations of just cause in this case, the undersigned believes that the standard to be applied to the grievant's nonrenewal is as follows:

1. Did the evidence establish the grievant's misconduct upon which the nonrenewal was based?
2. Was the grievant given fair notice of the problems with his conduct in the performance of his job?
3. Was the grievant given a fair opportunity to modify his behavior after such notification?

As to the first issue, the evidence with respect to the grievant's misconduct demonstrates the following:

The grievant testified that starting in 1984 he would take a break of 20 minutes each in the morning and afternoon, normally in the library. 3/ This was his pattern from 1984 to his last day of employment. 4/ I do not credit the grievant's testimony. Betty Hoekstra's notes of her observations of the

3/ (2-25-92) TR-192.

4/ (3-11-92) TR-206.

grievant indicates that the grievant's breaks were greater than 20 minutes. 5/ For example, on 1-15-87, a 35 minute break; on 1-21-87, a 30 minute break in the morning and a 40 minute break in the afternoon; on 1-22-87, a 32 minute break; on 1-27-87, a 34 minute break; on 1-28-87, a 28 minute break in the morning and a 28 minute break in the afternoon; on 1-29-87, a 45 minute break; on 2-3-87, a 30 minute break; on 2-5-87, a 30 minute break in the morning and a 39 minute break in the afternoon; on 2-6-87, a 34 minute break in the morning and a 37 minute break in the afternoon. 6/ I credit Hoekstra's notes over the grievant's testimony. Additionally, Carol Prochnow's notes of 9/9/88 indicates the grievant took a 35 minute break in the morning and a 30 minute break in the p.m. 7/ Also, the daily schedules for the week of January 21, 1991, indicates 15 minute breaks in the a.m. and p.m. on Monday, Thursday and Friday. 8/ I credit Libby Rosandick's testimony that on February 10, 1987 she discussed with the grievant that 15 minutes was the standard length of breaks. 9/ I do not credit the grievant's testimony that no one from the Administration ever said anything to him about the length of time he spent on breaks in the library 10/ or that if he were told that breaks were 15 minutes, he would have remembered it. 11/ Based on the record as a whole, it must be concluded that the grievant misused the amount of time for breaks.

I also find that the grievant misused time when he was out of the office but not on breaks. For example, on the daily schedule it would indicate something like "at I and student," 12/ yet it is admitted that no notes were placed in the student's file so there was no way to later identify what student was seen or if in fact any student was seen for any length of time. 13/ On October 15, 1990, the grievant listed on the daily sheet "At 'I' + student + Lyle W.". Lyle W. refers to Lyle Wanless but the grievant never saw Lyle as Lyle was meeting with Ore-Ida representatives at that time. 14/ At best, the grievant was putting down who he intended to see but with whom he had no appointment, or at worst, simply falsifying the schedule so he could blow off time. Assuming the more favorable scenario, the grievant was still wasting time in a very inefficient procedure. It appears that the grievant spent a substantial amount of time in this manner with little documentation to establish what he was doing. I find that this was also a misuse of time.

Because the grievant was out of the office more than he should have been, it follows that he was not available to counsel walk-in students. Again, by way of illustration, on January 21, 1987, the grievant kept a student waiting

5/ Ex-91.

6/ Id.

7/ Ex-3, Sec. E.

8/ Ex-284.

9/ Ex-295, 6-26-91 TR-217, 3-11-92 TR-915.

10/ 2-25-92 TR-195.

11/ 3-11-92 TR-205-206.

12/ Ex-5, Sept 21, 1990 at 10:00 a.m., May 16, 1990 at 2:00 p.m.

13/ 1-29-92, TR-187, 2-26-92, TR-180.

14/ Ex-3, Tab F., 1-6-92, TR-64.

20 minutes and had to be called back from the library. 15/ There was an issue raised that the student did not have an appointment so the grievant did not keep a student waiting and the secretary should have called him earlier. 16/ I think the record establishes that the student did not have an appointment, 17/ however, the grievant had taken a 40 minute break. Had the grievant taken only a 20 minute break as he testified, there would have been no waiting by the student. The grievant's suggestion that the secretary should have called him earlier does not excuse his failure to be available for the student.

It is undisputed that the grievant did not put student referral forms in the students' files but rather kept them in a separate file. 18/ The grievant's claim that he did this because he felt the information was confidential is simply not credible. The referral forms were returned to the instructors and the information in each and every case is not confidential as a review of the referrals quickly demonstrates. 19/

The record also demonstrates that the grievant made few if any case notes in the students files either on the file jacket or on separate case notes. 20/ The grievant would put cryptic, Agreed to Goal, but not much else. The grievant testified as follows:

I would make some notes when I felt it was necessary to refresh my memory if a student would come back in the future, I definitely wanted some notes so I knew what we had discussed so I could take off from there. So, I make notes to myself, private notes. I would call those counselling notes. I kept those in my lower right-hand desk drawer of my desk. 21/

If he needed notes to refresh his memory, it certainly follows that someone picking up the student's file without any prior contact would definitely need notes as to what was discussed. While certain counseling was confidential such as personal matters, AODA, etc., not everything related to academics was confidential and the grievant's asserting these all were confidential is not credible.

I find that the grievant failed to properly counsel prospective students. A prospective student, Loraine S., was seen by the grievant on August 3, 1989, at 1:00 p.m. 22/ She had an appointment but met with the grievant for only about ten minutes during which time the grievant gave Loraine some pamphlets and told her about registration and orientation. 23/ Loraine testified that

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- 15/ Ex-91.
 - 16/ 11-7-91, Tr-66, 2-25-92, TR-212-216.
 - 17/ Ex-98.
 - 18/ 2-15-92, TR-35.
 - 19/ Ex-165.
 - 20/ 2-25-92, TR-33.
 - 21/ Id.
 - 22/ Ex-5.
 - 23/ 3-11-92, TR-74.

the grievant was impersonal and made her real uncomfortable and she was very upset because she felt she received no information nor any counseling and felt dismissed at the end of the meeting. 24/ The grievant indicated that Loraine was not happy with having to make a separate trip back to school to get registered. 25/ Loraine denied that and indicated that what upset her was the way she was treated, which was that she was not treated like a person and that completion of registration in one day was not a factor. 26/ I credit Loraine's testimony over the grievant's because the grievant has had many meetings with students, whereas this was Loraine's first meeting with a counselor and she would more likely recall it, so her testimony is more credible. Furthermore, there would be absolutely no reason for her to lie about the meeting. Thus, I conclude that the grievant's explanation is simply not credible.

Christine S., a prospective non-traditional student, met with the grievant on September 10, 1990, at 1:00 p.m. 27/ The daily schedule for September 10, 1990, does not list Christine nor does it indicate that the grievant had any other appointments at that time. 28/ Christine testified that the meeting lasted less than five minutes and the grievant seemed preoccupied and showed little interest in her. 29/ The grievant gave her some catalogues and papers and later when she called by telephone he informed her to make an appointment to take the CPP test. 30/ The grievant testified that the meeting was pretty uneventful and not very different from other meetings with prospective students, that he treated Christine with courtesy, gave her all admission information and answered all the questions. 31/ Christine indicated that the grievant was indifferent and nonchalant and just didn't care. 32/ I credit Christine's testimony. She saw the grievant once and the event impressed her very negatively so it is more likely she could recall the events more clearly than the grievant who didn't consider this meeting very different from other meetings with prospective students. Christine's testimony establishes that the grievant's conduct in her meeting was one of indifference and a failure to properly provide counseling to a prospective student.

The evidence establishes that the grievant used the back door of the office despite express instructions not to do so. The grievant's supervisor, Liska, put up a sign on the door which stated that it should be used only in an emergency. 33/ The grievant used the back door on October 18 and again on October 26, 1990, at which time he was stopped by Liska and told to use the main entry. 34/ On November 2, 1990, the grievant was given a copy of a

24/ Id. at TR-75-77.

25/ Ex-10, B-9.

26/ 3-11-92, TR-84.

27/ 1-24-91, TR-21.

28/ Ex-5.

29/ 1-24-91, TR-22, Ex-3-A.

30/ 1-24-91, TR-29.

31/ 2-25-92, TR-39, Ex-10-A.

32/ Ex-3-A.

33/ 12-9-91, TR-123.

34/ Ex-3, C.

memorandum entitled "Reaffirmation of Office Policies" which stated that department personnel were to use the main entrance except in an emergency. 35/ The grievant used the back door on November 2, 1990, after receiving this document and was warned then by Liska that any further use would result in swift and severe discipline. 36/ I do not credit the grievant's testimony that the sign was placed on the door after November 2, 1990. 37/ The evidence establishes that the grievant ignored his supervisor's instructions and was insubordinate.

The evidence established that the grievant did not submit a weekly travel schedule to Carol Prochnow. 38/ The grievant's explanation that his whereabouts was more definitively explained by the daily schedule is not satisfactory. 39/ The grievant denied receiving the job description from Dr. Bellanti when he became a counselor. 40/ Dr. Bellanti testified that he reviewed the job description with the grievant when the grievant joined the student services staff. 41/ I credit Dr. Bellanti's testimony based on the demeanor of the respective witnesses' testimony.

A summary of the above discussion reveals a pattern of a lack of credibility on the part of the grievant. It is unnecessary to extract from the record additional examples. Given the lack of credibility on the part of the grievant, I find that the record establishes sufficient wrongdoing and malfeasance on the grievant's part such that the District has met its burden of proof with respect to the first element of just cause set out above, namely the evidence establishes misconduct upon which the nonrenewal was based.

Although the Association raised the issue that the grievant's nonrenewal was based in part on his union activity, the evidence failed to establish that the grievant's nonrenewal had any connection with his union or protected concerted activities.

The second element of just cause is whether the grievant was given fair notice that his performance was unsatisfactory. The record establishes that the grievant was given ambiguous and contradictory information about his

35/ Ex-176.

36/ Ex-3-C.

37/ 3-9-92, TR-30.

38/ 12-12-91, TR-96.

39/ 2-26-92, TR-168.

40/ 3-9-92, TR-86 - Ex-20.

41/ 6-25-91, TR-248-249.

performance. He was given criticism and instructions about certain conduct followed by evaluations which indicated his performance had improved and was very satisfactory.

It should be noted that many of these incidents occurred a number of years in the past. For example, on February 10, 1987, Libby Rosandick spoke to the grievant about the length of breaks and the lunch hour as well as his lack of enthusiasm for the job. 42/ Rosandick also spoke to the grievant on March 3, 1987, about sick leave and his whereabouts on certain dates. 43/ Rosandick never followed up on the grievant's adhering to her instructions on break time. 44/ On February 3, 1988, Rosandick gave the grievant a written evaluation with all functions marked satisfactory and never indicated anything about exceeding break times. 45/ On September 13, 1988, a number of supervisors including Rosandick, Oehler, Cunningham and Anhalt met with the grievant and expressed concerns about the amount of sick leave used by the grievant as well as his use of the lunch period and his commitment to the District. 46/ On July 7, 1989, Rosandick gave the grievant a written evaluation with all functions marked satisfactory and indicated that she was pleased with the additional effort put forth by him and that his inaccessibility problem was definitely improving. 47/ The grievant's sick leave usage had decreased and no-one ever talked to him about extended lunch breaks. 48/ It should also be noted that the parties' agreement requires that sick leave be used in one-half day increments and no exception could be reached for the grievant. 49/

In August, 1989, when Tom Liska became the grievant's supervisor, he immediately became aware of a number of instances related to counseling of students where prospective students were dissatisfied with the grievant's performance. 50/ Liska met with the grievant on August 28, 1989, and discussed these incidents and laid out his expectations. 51/ Liska testified that he explained what counseling techniques should be employed and the amount of time to accomplish proper counseling and that five minutes was not sufficient time to counsel a prospective student. 52/ The grievant felt he was already meeting Liska's expectations and made no change in the amount of time he spent with students. 53/ Liska testified that during the 1989-90 school year, he saw the

42/ Ex-295.

43/ Ex-3A-3.

44/ 3-11-92, TR-36-38.

45/ Ex-11, Appendix E.

46/ Ex-3B.

47/ Ex-11, p.2.

48/ 2-25-92, TR-22,141, 2-26-92, TR-87.

49/ Ex-1, 2-25-92, TR-12.

50/ Ex-3,B.

51/ 1-6-92, TR-25-29.

52/ 1-6-92, TR-25-29.

53/ 2-26-92, TR-107.

grievant meet students for three to five minutes many times such that it was a consistent pattern. 54/ Liska took no action based on these observations. 55/ Kathy Timm reported to Liska on two or three occasions after February 1, 1990, that the grievant was out of the office more frequently when Liska was gone, yet Liska never discussed this with the grievant. 56/ On August 2, 1990, Gail Vollert reported to Liska that it appeared that the grievant did not spend the necessary time to counsel a prospective student. 57/ Liska did not discuss this with the grievant but merely put a copy of Vollert's memo in his mail tray. 58/ On September 26, 1990, Liska sent a memo to the grievant about keeping a student waiting while the grievant made copies of the daily schedule. 59/ The grievant responded by a written memo on October 1, 1990. 60/ Liska and the grievant met on October 4, 1990, and discussed this incident 61/ and no further action was taken. Liska did not give the grievant any evaluation until after the grievant's nonrenewal. 62/

While it appears that on occasion, the grievant was informed that his conduct was not satisfactory, the grievant never changed his conduct either with respect to breaks or the amount of time counseling prospective students. The grievant did change his sick leave usage because his health improved. His supervisors did not take further action to check on the grievant's performance in these areas and in fact gave him very satisfactory evaluations indicating improvement or did nothing even when the problem was observed or reported to the supervisor. The message to the grievant was obviously ambiguous and unclear and he had no reason to believe that his conduct was so unsatisfactory as to result in his nonrenewal. Given the supervisors' conduct, it is reasonable to conclude that these were minor points or that the grievant's conduct was not very serious or that it was condoned. In short, it was never made clear to the grievant that his conduct was so unsatisfactory that any future repeat of his conduct would result in his nonrenewal.

The District has argued that the grievant's conduct was so egregious that as a professional he should have recognized and known that his conduct was so unsatisfactory that nonrenewal would result. The problem with this argument is that the District's supervisors were aware of the grievant's actions and yet they did not give the grievant clear instructions to correct his conduct. It appears that they condoned the grievant's conduct and as this occurred over so many years, it was incumbent on the District to warn the grievant because he could have believed that his conduct was appropriate. Even though his conduct was not appropriate, the grievant could have believed that any misconduct was minor because it did not warrant any warning from his supervisors. Additionally, the grievant could have reasonably believed that his actions were merely

54/ 1-29-92, TR-145-146.

55/ 1-7-92, TR-67.

56/ 1-9-92, TR-13.

57/ Ex-3,D, 1-6-92, TR-41.

58/ 1-6-92, TR-41, 2-25-92, TR-178.

59/ Ex-3,G.

60/ Ex-3,G.

61/ 1-9-92, TR-98.

62/ Ex-204, 2-26-92, TR-201-202.

an acceptable, albeit different method of doing things and that his use of professional judgment with respect to how he performed his duties was acceptable to the District.

Based on the foregoing considerations, the undersigned finds that the grievant was not given fair notice that his performance was so unsatisfactory so as to warrant his nonrenewal. Thus, the District has failed to meet this element of just cause to nonrenew the grievant.

With respect to the third element of just cause, the grievant was not given a fair opportunity to correct his behavior. The Association's attorney succinctly argued that the District could have given the grievant the same notices it gave him on November 2, 1990, and told him to get his act together before March 1, 1991, or they would nonrenew him. 63/ This would have given the grievant fair warning and would have given him the opportunity to correct his behavior, and if he failed to do so, he could be properly nonrenewed. By not doing this, the District did not establish just cause for the nonrenewal. Had the District informed the grievant that he had to correct his problems or he would be nonrenewed, it would have properly informed him and he would have full knowledge that he would have to get on with his life should he fail to comply with the District's directives.

Much argument was made about the length of the hearing and had the District given the grievant a reasonable opportunity to correct his behavior, any failure by the grievant to do so would have made such a long hearing unnecessary. It would have made clear to the grievant that he had to change or be nonrenewed.

In conclusion, the undersigned finds that the District lacks just cause to nonrenew the grievant, not because the grievant's conduct was not shown to be unsatisfactory, but rather because the District failed to properly warn the grievant and give him the opportunity to correct his deficiencies. Had it done so, a hearing might not have been necessary. The District's failure to take action when the supervisors had knowledge of the misconduct amounted to condonation of the grievant's conduct and the satisfactory evaluations after discussing the grievant's conduct lead to the conclusion that it was the District's failure in this regard that was the reason it lacked just cause to nonrenew the grievant.

With respect to the remedy, the undersigned directs the District to immediately reinstate the grievant with full back pay and benefits since the time of his nonrenewal. The undersigned feels that despite the grievant's misconduct, the District's failure to properly warn the grievant was the reason it lacked just cause and without just cause, the District must be held accountable for the grievant's loss. Although the Association requested interest on the backpay, the undersigned has declined to order this remedy because the parties' agreement does not provide for such a remedy and the District's conduct was not arbitrary, capricious or in bad faith so as to warrant interest on the backpay awarded. Additionally, the undersigned directs that the nonrenewal notice be removed from the grievant's file as well as the Bellanti and Liska evaluations which were not given to the grievant until after his nonrenewal. They could and should have been given to him earlier and might have resulted in the grievant's improving or would be proper evidence to support his nonrenewal.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The District did not have just cause to nonrenew the grievant. The

63/ 3-11-92, TR-232.

grievant shall be reinstated and made whole for the loss of wages and benefits less any interim earnings. The notice of nonrenewal and the evaluations by Bellanti and Liska given to the grievant on January 7, 1991, shall also be removed from the grievant's file. The undersigned will retain jurisdiction for a period of 30 days solely for the purpose of resolving any disputes with respect to the remedy herein.

Dated at Madison, Wisconsin this 4th day of December, 1992.

By _____
Lionel L. Crowley, Arbitrator