BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DEERFIELD EDUCATION ASSOCIATION,
GERALD R. WICHLACZ, GRIEVANT

and

DEERFIELD SCHOOL DISTRICT

Case 29
No. 52184
MA-8864

Appearances:

A. Phillip Borkenhagen, Executive Director, Capitol Area UniServ-North, 4800 Ivywood Trail, McFarland, Wisconsin 53558, Bruce Meredith, Staff Counsel and Laura Amundson, Staff Counsel, Wisconsin Education Association Counsel, 33 Nob Hill Drive, Post Office Box 7008, Madison, Wisconsin 53708, on behalf of the Grievant.

Davis & Kuelthau, S. C., by Daniel G. Vliet and Mary L. Hubacher, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, on behalf of the District.

ARBITRATION AWARD

Deerfield Education Association, hereinafter the Association, and the Deerfield School District, hereinafter the District, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, William K. Strycker, was designated to arbitrate the dispute. The hearing was held on April 15, 1995 and May 23, 1995. It was noted at the hearing that a disciplinary hearing had been held before the School Board on September 20, September 22, October 11, October 25 and November 3, 1994. For purposes of the arbitration the parties stipulated to the submission of the transcripts and exhibits from the School Board hearing. The parties submitted post-hearing briefs in the matter on July 20, 1995. Reply briefs were submitted by the parties by August 7, 1995, at which time the record was closed.

The parties were notified about a change in the arbitrator's employment status but both requested that he retain jurisdiction and issue the award. Based upon the evidence and the arguments of the parties the undersigned makes and issues the following Award.

ISSUE:

The Association and Grievant propose the following issue:

> Did the District violate the terms of Article II, Section D of the Collective Bargaining Agreement when it failed to conduct a suspension hearing for the Grievant within 72 hours of his suspension on August 16, 1994.
>
> If so, what is the appropriate remedy?

The District states the issue as follows:

> Whether the District violated Article II of the collective bargaining when it placed the Grievant on administrative leave on August 16, 1994.
>
> If so, what is the remedy?

As the parties were not able to agree, the undersigned frames the issue as follows:

> Did the District violate the terms of Article II of the collective bargaining agreement when it relieved the Grievant, Gerald Wichlacz, of his duties with pay effective August 16, 1994, and did not conduct a hearing within 72 hours thereafter. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

> ARTICLE II. MANAGEMENT BOARD DUTIES
>
> It is agreed that the Board of Education, as management, possesses the sole right to operate the school district, to carry out the statutory mandates and goals of the educational programs. Management rights repose in management. However, such rights may be exercised within the provisions of this agreement. The management rights include, but are not limited to:
>
> A. To manage and to direct the employees of the school district.
>
> B. To hire, promote, transfer, assign, or retain employees in positions within the school system and educational programs.
>
> C. To establish reasonable work rules and rules of

conduct.

D. To suspend, dismiss, non-renew, or take appropriate disciplinary action against employees for just cause.

(1) Suspension: Nothing in this agreement shall preclude suspension with pay by administration action, where deemed necessary by the administration, in the best interest of the school district and students enrolled in the public schools. Any suspension of an employee must be the subject of a school board hearing held within 72 hours of the suspension. The teacher has a right to attend this hearing with representation.

. . .

ARTICLE III. GRIEVANCE PROCEDURE

C. Grievances shall be processed in accordance with the following procedures:

Step No. 1 - Step No. 3. . .

Step No. 4 . . .

(A) -(D) . . .

(E) It is understood that the function of the arbitrator is to provide a decision as to the interpretation and application of the article or sub-articles/sections of this agreement. This decision shall be binding. The arbitrator shall not have the power, without specific written consent of the parties, to either advise on salary adjustments except the improper application thereof, or to issue any opinions that would have the parties add to, subtract from, modify, or amend any terms of this agreement.

BACKGROUND:

Gerald Wichlacz, the Grievant, has been employed by the Deerfield School District as a teacher since 1980. During this time he taught science courses and had extensive responsibilities in the area of chemistry. Prior to the 1994-95 school year the Grievant was the only teacher certified to teach chemistry within the District. During this time the Grievant received favorable evaluations regarding his teaching and performed other extracurricular responsibilities.

The Grievant served as the District's K-12 Science Coordinator from 1991 until the end of the 1992-93 school year. The Science Coordinator was responsible for ordering science supplies for the District. This required maintaining accurate inventories in order to avoid duplicate and unnecessary purchases. While serving as the Science Coordinator he was asked to prepare an inventory of chemicals housed in the chemical storage room. Although inventory requests were made on several occasions, the Grievant failed to comply.

During the 1991-92 school year Mr. Wichlacz served as the District's Chemical Hygiene Officer. The Chemical Hygiene Officer was responsible for developing and implementing the District's Chemical Hygiene Plan. This plan, which was completed during the first semester of the 1991-92 school year, established procedures to protect employes and students from health hazards associated with the use of chemicals in the laboratory. The plan contained rules regarding the use, storage, accidents, spills and disposal of chemicals used within the District. In 1992 as Chemical Hygiene Officer the Grievant represented that there were no hazardous chemicals within the District. Hazardous chemicals include those that were known or suspected carcinogens, explosive, radioactive, mutagens, highly toxic and corrosive. Later investigation revealed that several extremely hazardous chemicals had been and currently were on school premises. The Chemical Hygiene Plan also identified proper chemical storage procedures. The plan referenced the Flinn Chemical method of sorting chemicals into specific families. The Chemical Hygiene Plan also identified a list of responsibilities that needed to be completed. This included basic safety procedures such as labeling items in the storage room, completing inventory reports on chemicals, identifying hazardous materials and establishing a waste disposal program. This list was developed during February of 1992, however none of the items identified were completed during the remainder of 1992 or during the 1992-93 school years. The Grievant was provided paid time to work on chemical related issues, as well as plan compliance.

In December of 1992 the Deerfield Fire Department required that a list of flammable chemicals be provided by mid-February of 1993. Ms. Linda Duncan, High School Principal, asked various departments to compile lists for their respective areas. The Grievant was asked to prepare a flammable chemical list for the science area. When she did not receive the list by mid-February, she made several follow-up requests. The Grievant responded that he did not have enough time to complete a list. Although the District agreed to provide additional paid time to Mr. Wichlacz so that the list could be completed, he did not complete the flammable chemical list. As a result, the District Administrator, Mr. Ed VanRavenstein, Director of Instruction, Dr. Ruth Ann Faber and High School Principal Duncan inventoried the flammable chemicals during the summer of 1993.

The Administrators discovered that the chemical storage room was very messy and

disorganized. They spent several days cleaning the room. Mr. Wichlacz was invited to assist in the process and told that he would be paid. He spent less than four hours during the time consuming project.

Since 1987 the Grievant has been paid over $9,000 for extended contract and additional hours of work. Part of this payment was to develop and monitor the Chemical Hygiene Plan, serve as Science Coordinator and Chemical Hygiene Officer. During the first semester of 1991-92 Wichlacz was provided one period a day to develop the K-12 Chemical Hygiene Plan. In the second semester of the 1991-92 school year one hour per week of extended contract totalling 18 hours was provided to the Grievant to monitor the Chemical Hygiene Plan. During the 1992-93 school year he received one class period every other day in lieu of study hall because of his service as Science Coordinator, Chemical Hygiene Officer and Environmental Education Liaison. During June of 1993 he was paid for 27 1/2 hours to work on the chemical inventory. In November of 1993 three substitute teachers were employed for three days to allow regular instructors including the Grievant to work on cleaning the science area in preparation for an inventory.

During the 1993-94 school year, Ms. Carol Banaszyski, newly appointed Science Coordinator, became aware that chemicals in the storage area had not been inventoried. While this had been a responsibility of the Grievant, it had not been completed. In the Spring of 1994 Ms. Banaszyski began compiling an inventory list so that needed chemicals could be ordered for the following school year. While conducting the inventory she became very concerned about the condition of the room, the condition of some stored chemicals and the presence hazardous chemicals. School representatives took still pictures and videotaped the area before any clean up began. Boxes and containers were stacked on top of each other, chemicals and containers cluttered the shelves and counter tops, empty boxes, bags and food packages were littered throughout the room, some of the chemical storage containers were rusty and in otherwise poor condition. These concerns and the lack of an inventory were summarized in a memorandum to the Grievant.

Dr. Faber and Mr. Wichlacz met to discuss the concerns over the condition of the room. Mr. Wichlacz explained that he knew better than anyone else about proper safety procedures and believed the room to be safe. He was invited to participate in another clean up but he refused to do so unless he was paid. The administration felt that maintaining the room in a reasonable condition was part of his normal job responsibilities and did not authorize additional payment. The Grievant resigned as Chemical Hygiene Officer in late spring of 1994.

In June of 1994 Dr. Faber and Ms. Duncan inventoried chemicals that were present in the storage area. The process revealed that a number of chemicals were not stored in compliance with OSHA requirements, the Flinn method, or District policy. They discovered that there were numerous hazardous chemicals present in the storage area. They also discovered that numerous chemicals were stored in containers without labels.

As they concluded that the problem was significant, the District contacted MacNeil Environmental, Inc. (MEI) and requested professional assistance in evaluating the situation. The officials from MEI inspected the room on July 22, 1994 and were appalled at its condition. MEI officials recommended that numerous chemicals be disposed of because of the danger they posed. The officials also recommended that numerous chemicals be disposed of because of their age. The District hired a hazardous waste specialist to remove the dangerous chemicals at a cost in excess of $14,000.

After reviewing the MEI report and the events of the summer, the administration met with Mr. Wichlacz on August 16, 1994. The Grievant denied that he was responsible for the unsafe conditions. He maintained that the room was in a safe condition. District Administrator VanRavenstein testified that he relieved the Grievant of his responsibilities with pay because of the severity of the problems and the Grievant's response. The Grievant was informed in a letter dated September 6, 1994 that the Administration would be scheduling a disciplinary hearing before the Board. On September 20th the hearing before the Board began. It was continued on September 22nd, October 11th, October 25th and finally concluded on November 3rd, 1994. Both the Administration and the Grievant were given the full opportunity to present evidence and call witnesses.

After the hearing the Board voted to suspend the Grievant without pay from November 15 until January 15, 1995 for the following reasons: (1) Mr. Wichlacz did not comply with the District's safety policies or generally accepted safety standards in the way in which he maintained the chemistry lab and chemical storage area; (2) Mr. Wichlacz failed to prepare a chemical inventory and by his failure exposed staff and students to unnecessary risk of harm; (3) Mr. Wichlacz falsely represented that the District did not possess any hazardous chemicals when in fact there were numerous hazardous chemicals in the chemical storage area; and (4) Mr. Wichlacz failed to comply with his responsibilities as a teacher as set forth in the job description for teachers.

On August 26, 1994 the Association and Grievant filed a timely grievance. The grievance was denied, resulting in the instant arbitration proceeding.

POSITION OF THE PARTIES:

The Association and the Grievant:

The Association and the Grievant argued that the District's case is flawed because it ignores the explicit procedural requirements of the collective bargaining agreement. The contract specifically requires that a hearing with the School Board occur within 72 hours when an employe is suspended. The timing in this case is not disputed. A conference was held between the Administration and the Grievant on August 16, 1994. On that date the Grievant was informed that he was being relieved of his responsibilities with pay. The first part of the hearing before the

School Board began on September 20, 1994.

The Administration's contention that no discipline was administered to the Grievant because they were continuing to conduct its investigation is without merit. Neither the Association nor the grievant waived the 72-hour time frame, nor was a waiver sought by the Administration. The Association and the Grievant also argue that the District's position was determined prior to the conclusion of the August 16th conference. The administrative team had prepared a script relating to the action to be taken against the Grievant. The Administration had concluded prior to the August 16th meeting that the conditions in the storage room were harmful and dangerous. The discovery, confirmation and remedial efforts occurred over a ten-week period proceeding the meeting.

There can be no doubt that the Grievant was involuntarily relieved of his responsibilities for alleged problems in the performance of his duties. Also Association President Aleson and Executive Director Borkenhagen, who attended the August 16th conference, testified that the Grievant was told by the administrative team that he was "hereby suspended with pay." Both testified that they had heard the term "suspended" used twice during the meeting. While Administrator VanRavenstein admitted that his action on August 16th was done "in the best interest of the School District and the students enrolled" in the high school, he denies that this action constituted a suspension.

The Association and Grievant further assert that the Administration and Board had ample time between August 16th and the beginning of school on August 22nd to conduct the contractually required meeting. The Administration's contention, that the Board would have to go through a lengthy evidentiary hearing to determine whether a suspension with or without pay was appropriate, is misplaced. While the Board could not conduct a "sham" proceeding, it clearly is not required to hold an exhaustive hearing for the purpose of suspending the Grievant with pay. The contract contemplates a short "preliminary hearing" to determine whether there is a basis for the allegations. Nothing in this situation would have prevented the Board from conducting this preliminary-type hearing.

The District defends its action by calling the action an "administrative leave," however no document given to the Grievant ever contained this term. The collective bargaining agreement does not contain such a term. Further, at hearing Administrator VanRavenstein intimated that he may consider the action a "non-disciplinary suspension". This terminology also does not exist within the contract. Testimony provided by Administrator VanRavenstein and Director Faber expressed concern about the seriousness of the safety violations and the lack of the Grievant's acknowledgement. Relief from duty for alleged improper conduct is a suspension no matter how it is later characterized.

The 72-hour requirement contained in the contract is to insure that a quick initial hearing occurs since it gives some closure to the matter. It allows all parties to know that the problem will

be resolved promptly. This serves as a protection to both the District and the employe. The Association and the Grievant further assert that bargaining history supports them. Former Association negotiator John Polzin testified that the timeframe in the contract had been increased from 48 hours to 72 hours during the late 1970's. The reason for increasing the time frame was concern that if an event occurred on a Friday, it would not be convenient for the School Board to meet on a Sunday. As a result the 72-hour time frame would cover the Friday through Monday time span. His testimony was not challenged by the District. The Association and Grievant submit that the question of remedy in this case is somewhat perplexing. While the Grievant did not suffer an economic loss because the suspension was with pay, the Grievant was denied the negotiated protection of a Board of Education hearing within 72 hours. In addition to a cease and desist order, the Association and Grievant request that the number of days the Grievant went without a hearing should be subtracted from any penalty the arbitrator concludes is appropriate.

District

The District argues that the contract provision, requiring a hearing within 72 hours of a suspension for just cause, was not applicable because the Grievant was placed on paid administrative leave. Further this action was not disciplinary in nature but allowed the Administration additional time to complete its investigation. The District contends that, when an employe is to be suspended as a disciplinary measure, the employe is entitled to a hearing before the Board within 72 hours of the Administration's actions. That restriction is not applicable when an employe is placed on paid administrative leave during the employer's investigation to determine if disciplinary action should be recommended to the Board, which is the case in this matter.

The District cites several cases as authority in support of the contention that leaves of absence with pay pending an investigation into allegations of misconduct are nondisciplinary in nature. In Northwest United Educators v. Shell Lake School District WERC Decision No. 20024 (Crowley, 1983) Arbitrator Crowley ruled that suspension during the course of the employer's investigation into allegations of misconduct "is not considered to be disciplinary in form or result and is not tantamount to a finding of guilt."

Clearly in this case the seriousness of the Grievant's conduct combined with a lack of acknowledgement of the safety risks, created a continuing threat to the safety of the students and staff. The District was appropriately concerned that allowing the resumption of teaching duties while continuing the investigation would continue those risks. Because of the seriousness of the allegations, the District needed to place the Grievant on administrative leave until the investigation could be completed. It would have been irresponsible of the District to allow the Grievant to continue given his response to the allegations. Allowing him to conduct his "business as usual" approach would have subjected the District to greater financial liability. Placing Mr. Wichlacz on paid administrative leave insured that he did not suffer a negative economic impact during the District's investigation.

The Association and Grievant Reply:

The District's assertion that it could indefinitely place Wichlacz on administrative leave ignores the clear language of the contract as well as the parties' bargaining history. The contract explicitly identifies that any suspension requires a Board hearing within 72 hours. Whether the District calls the Grievant's suspension an administrative leave, it does not eliminate the hearing responsibility. The District's reliance on Shell Lake is misplaced. The language and bargaining history in Shell Lake are not nearly as explicit as in this case.

In summary, once a teacher is removed from classroom responsibilities the Board is obligated to grant some form of hearing within 72 hours. Even if an investigation is ongoing, the teacher could be suspended with pay and provided with a hearing, until the investigation is complete. Unlike Shell Lake the benefit of a prompt hearing had been bargained on behalf of the employes and cannot be ignored.

District Reply:

The action taken by the District does not constitute a disciplinary suspension and thus makes the 72-hour hearing requirement inapplicable in this matter. The Administration had not decided to take disciplinary action against the Grievant prior to the August 16, 1994 meeting. Mr. VanRavenstein testified that the purpose of the meeting was to inform the Grievant of the ongoing investigation, share information that had been gathered regarding the extent of the safety issues and obtain his response. The Grievant's continued denial that safety issues existed raised concerns about allowing the Grievant to return to teaching duties until the investigation had been completed. As this was not a disciplinary suspension, the need for the Board hearing within 72 hours did not exist. The investigation did continue as additional reports from members of the administrative team were received.

The District also argues that a critical element of the suspension which is loss of pay is missing from this case. It is undisputed that the Grievant continued to receive his normal pay while on administrative leave. This fact alone underscores that this was not a disciplinary suspension.

DISCUSSION:

The issue to be decided in this case is whether the District violated the terms of Article II of the collective bargaining agreement when it relieved the Grievant of his duties with pay. The essence of the dispute lies in whether this action constituted a suspension under the contract thereby requiring a Board hearing within 72 hours, as argued by the Association, or whether the action constituted an administrative leave with pay pending additional investigation, as characterized by the District. It is undisputed by the parties that, if an employe is suspended with or without pay, the School Board is obligated to hold a hearing within 72 hours of the suspension. It is also undisputed by the parties that the collective bargaining agreement does not contain

specific provisions regarding administrative leave.

The District asserts that since this is not a disciplinary suspension as contemplated in Article II, a hearing before the Board within 72 hours was not required. In evaluating the District's position it is helpful to review the events leading up to the action. During late 1992 and the Spring of 1993, the Grievant was asked several times to submit an inventory of flammable materials so that a report could be provided to the fire department. Because the Grievant failed to perform this function, administrators entered the chemical storage room near the end of the school year so that the inventory could be completed and discovered that the room was messy and in a state of disarray. The administrators completed the flammable material inventory and cleaned the room.

In May of 1994 Science Coordinator Carol Banaszyski entered the chemical storage room to conduct an inventory so that supplies for the next school year could be ordered. The Grievant had been asked previously to complete an inventory of chemicals but had not complied. In May of 1994 the Science Coordinator reported the deplorable condition of the chemical storage room to the Administration. Principal Duncan and Director of Instruction Faber were also concerned about the condition of the room and spoke with the Grievant. Mr. Wichlacz responded that he did not have sufficient time to maintain the room; that it was in a safe condition and that the Administration's concerns were unwarranted. Mr. Wichlacz indicated that he would only assist in the clean up activities if he were compensated. The Administration's viewpoint was that maintenance of this room was part of his normal responsibilities and therefore any cleaning should be done without additional compensation. The Grievant refused to participate.

In June as the administrative team was cleaning the chemical storage room, members became aware of several disturbing things. They noticed that previously unreported hazardous chemicals were being stored in the room. Some chemicals were stored in unlabeled containers. Some storage containers were rusted and otherwise unsafe. Because of the extent of the problem, the District contacted MacNeil Environmental Incorporated (MEI) for professional assistance. Representatives from MEI inspected the areas and identified numerous serious problems. These included the improper storage of chemicals, the improper labeling of chemicals, use of unsafe storage containers, maintaining hazardous chemicals and maintaining excessive amounts of some chemicals. These problems posed health and safety problems for the staff and students and were in violation of the Chemical Hygiene Plan developed by the Grievant. The District met with the Grievant on August 16, 1994 to address these concerns and obtain responses. The Administration was very concerned because Mr. Wichlacz failed to acknowledge the seriousness of the situation and was uncooperative. He was unconcerned with his lack of compliance with the District's safety policy and the Chemical Hygiene Plan. The Administration feared that his "business as usual" attitude provided the potential for unsafe practices to continue. Because the Administration was worried about the safety of the staff and students, Mr. Wichlacz was told at the conclusion of the meeting that he would be relieved of his duties with pay pending the completion of the investigation and submission of recommendations to the Board of Education. UniServ Director

Borkenhagen and Association President Aleson testified that District Administrator VanRavenstein used the term "suspension" on two occasions in conjunction with this action. Administrator VanRavenstein and other administration members present do not believe that the term suspension was used.

Whether the term"suspension" was referred to during the conversation is not crucial when the events leading up to the decision are analyzed. The undersigned concludes that the action taken by the District represents a suspension with pay and is controlled by the Article II language of the contract. It is evident that the severity of the problem was well known to the District prior to the August 16, 1994 meeting. The work place condition had been documented, the report from MEI had been received, and some documentation developed by District representatives was available. Prior to rendering a decision however the District properly addressed the matter with Mr. Wichlacz and sought an explanation. When the Grievant's response was less than satisfactory, the Administration decided that he should be relieved of his duties because of the potential safety hazards his "business as usual" attitude posed. These reasons are consistent with the language in Article II, D(1) which states:

> . . . Nothing in this agreement shall preclude suspension with pay by administration action, where deemed necessary by the administration, in the best interest of the School District and the students enrolled. (Emphasis added)

While the District identified that the investigation was continuing, the record supports that a significant portion had been completed and that some degree of discipline would be recommended to the Board of Education. Even if the investigation was only in its early stages and the Administration concluded that the Grievant should be relieved of all duties, Article II, D(1) would be applicable. Clearly a suspension with pay may not always result in disciplinary action. A subsequent investigation may exonerate an employe. However, in such instances when the District concludes that an individual should be relieved of duties, the District is obligated to have a Board hearing within 72 hours of the suspension.

Clearly the parties have bargained over this matter. Without challenge John Polzin testified that during negotiations in the late 1970's, the time frame to schedule a hearing was increased from 48 hours to 72 hours. This change was made so that in the event a suspension action took place on a Friday, the Board would not be obligated to conduct a hearing until Monday. The right to suspend with pay when the Administration deems it necessary is tempered by the obligation to have the matter heard by the Board of Education promptly.

The Association persuasively argues that the Board hearing could be similar to a preliminary hearing rather than a full evidentiary proceeding. This preliminary hearing not only serves as a check on the Administration, but ensures that the employe is aware of the charges or potential concerns. If the administrative leave argument of the District was accepted, the

suspension with pay language and the Board of Education hearing obligation could be rendered meaningless. In similar matters the Administration could maintain that investigations were still "ongoing" and that the employe was not being suspended with pay. Quite simply if the District wishes to exercise its right to remove an employe from the work place, an obligation for the prompt 72-hour hearing with the Board of Education exists.

The District argues that administrative leave with pay is a non-disciplinary action. The District cites Northwestern United Educators v. Shell Lake School District, WERC Decision No. 20024 (Crowley, 1983) in support of this premise. While the undersigned agrees that a suspension with pay pending an employer's investigation of misconduct is not necessarily disciplinary in nature and not necessarily a prelude to a finding of misconduct, it is important to note that the parties in Shell Lake did not have contractual language regarding suspensions with pay. As noted above the existing contractual language here identifies the right of management to suspend with pay but also imposes the noted Board of Education hearing obligations.

Remedy

The Grievant was not procedurally disadvantaged nor suffered an economic loss as a result of the violation. Therefore, the undersigned concludes the appropriate remedy is to issue a cease and desist order.

AWARD

For the foregoing reasons and based upon the record as a whole, it is the decision of the undersigned Arbitrator that:

1. The Deerfield School District violated Article II - Management Board Duties D(1) by failing to conduct a hearing with the School Board within 72 hours of the suspension with pay.

2. The Deerfield School District is ordered to cease and desist from such violations in the future.

Dated at Madison, Wisconsin this 25th day of September, 1995.

By William K. Strycker /s/
William K. Strycker, Arbitrator