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Arbitration in the Schools

By Robert Coulson, *President*
American Arbitration Association

- WORKING CONDITIONS
- DISCIPLINE
- DRUGS & ALCOHOL
- SEXUAL MISCONDUCT
- FREEDOM OF SPEECH
- BREAKING THE RULES

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An Analysis of Fifty-Nine Grievance Arbitration Cases

By Robert Coulson

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AMERICAN ARBITRATION ASSOCIATION

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Introduction

This book is about public school teachers and the disputes they have with their schools. It describes fifty-nine cases, most involving grievance arbitration, that challenge a school's right to discipline a teacher or that determine whether a teacher has a right to a particular benefit. These cases raise intriguing questions about how public schools are organized and operated. How do schools relate to their faculty? How are students affected by that relationship?

According to the U.S. Department of Education, almost three million people work as classroom teachers in the United States. They are responsible for about fifty million students. Public schools represent a national financial investment of about $250 billion each year. Obviously, the education of children is important in this country. What happens today in our schools will quite possibly determine the course of tomorrow's events. For good or for evil, schools are the major public institutions that shape the future.

In spite of this, public schools are slow to change. Such a system develops a momentum of its own. Public schools are controlled by elected boards of education and regulated by the state and, to some extent, the federal government. School administrators usually enter the field as classroom teachers. Once promoted, they must pay attention to costs and the efficient operation of the school: management problems. Administrators must deal with many constituen-

cies: the school board, other supervisors, parents, students, government agencies, and the teachers' elected organization. They must set goals, try to run a smooth operation, and make decisions quickly under pressure.

In school systems, the rights of the teacher are sometimes pitted directly against the goals of the administrator, making for tenuous relationships and bitter disputes. Traditionally, regulations are issued by the central school administration, with little input from either principals or teachers. And playing the central role in this drama is the student, who frequently adds an unpredictable, and often uncontrolled, element to this fragile structure.

With such a delicate balance, it is not surprising that disagreements arise. The primary question in most of these controversies is: Who was at fault, the teacher or the school?

Other questions raised by the cases in this book include:

- How should a teacher handle a student who is misbehaving?
- Is it ever appropriate for a teacher to use physical force?
- How should a teacher respond to a threatening student?
- How should schools deal with situations involving drugs?
- How should schools treat the alcoholic teacher or the teacher who misbehaves while drunk?
- Must teachers abide by unfair rules?
- How important is "academic freedom"? What does that term mean? Does it include freedom of speech?
- How should public schools respond to religious demands?
- When should teachers stand up for their rights?

Disputes in the public schools may seem petty. The stakes can be surprisingly small. But job security is

important to teachers, many of whom are employed by the same district for their entire working lives. Without a way to challenge the policies or practices of their school, teachers would feel trapped.

During recent decades, public school teachers have been organized for collective bargaining. Through the National Education Association (representing 1.8 million teachers) and the American Federation of Teachers (with 600,000 members), most teachers are protected by collective bargaining contracts that guarantee their working rights. If those rights are violated, a grievance procedure is available under which the teachers' organization will discuss and try to settle grievances with the school administration. If that fails, disputes can be submitted to an impartial arbitrator or panel of arbitrators.

Most of the cases in this book are based on that process. The parties, unable to agree, submit their dispute to arbitration. They exchange testimony and present legal arguments. The arbitrator then issues an award, explaining the reasons for the decision. (For an explanation of how arbitration works, see the Voluntary Labor Arbitration Rules of the American Arbitration Association, printed at the end of this book.)

In the cases presented here, I have eliminated the teachers' names to protect their privacy. In most situations, I have identified the arbitrators, many of whom are well-known labor arbitrators in private industry. Their average age is well over fifty. Most are men. The youngest arbitrator in this sample was thirty-five. The oldest was eighty-four.

Disputes involving salary levels are not included in this book for several reasons. Usually, wage disagreements are settled through bargaining, before they reach arbitration. Unlike the cases that follow, wage disputes seldom involve individual teachers. They tend to be collective disagreements between the union and the school board. In addition, teachers are compensated on the basis of job classification,

receiving annual increases within a fixed range. Most contracts restrict the school board's discretion.

Grievances concerning misbehavior of teachers are usually filed only after the incident has precipitated some action by the school administration. Most such grievances are resolved through negotiations, which allow for a quiet, private solution. Schools hesitate to terminate teachers, and the teachers themselves are not eager to publicize such incidents. When cases cannot be settled through negotiations, however, they can be submitted to an impartial arbitrator.

Public school teachers are unique in the amount of protection they have against being fired. Tenure laws and restrictions contained in collective bargaining contracts make it extremely difficult to terminate a teacher. In many cases, arbitrators, when faced with teacher misconduct, try to find some solution other than termination.

It is not easy for an arbitrator to discover what happened in such cases, particularly when the incident occurred months earlier. Even in arbitration, where proceedings are not publicized as they would be in court, the recollection of witnesses will have percolated through the school administration and the teachers' organization. Pressure may have been applied. Loyalties and career expectations may color the testimony, particularly when community debate has been generated by the incident.

Grievances about teachers' employment benefits may be somewhat less emotional than disputes about misbehavior, but similar pressures often occur. The managerial desires of the administration may clash with the teacher's educational concerns. In some cases, the dispute directly challenges the school's relationship to its faculty. Even when the case hinges on an interpretation of the teachers' collective bargaining contract, it may be difficult to predict the outcome.

The cases in this book have been selected from thousands of recent arbitration awards. Many appeared in the American Arbitration Association's monthly publication *Arbitration in the Schools*. They have been chosen because of their intrinsic interest and because they highlight some of the problems in public education. The human concerns of the participants are always close to the surface. As you read these cases, put yourself in the place of the arbitrator. Did the arbitrator make a correct decision? How would you have decided the case?

CHAPTER 1

Discipline and Violence

Schools reflect society. When students misbehave, they disrupt the school community and, as would be expected, the system reacts. Discipline demands punishment. What are the options facing a teacher who must take action?

Traditionally, students have been sent home for misconduct. There are more than two million children out of school on suspension during the school year. Many are suspended for disciplinary reasons. Students are sent home for truancy, for tardiness, for smoking, for violations of the dress code, or for failure to abide by some other school rule. Some are disciplined for having head lice, for not being able to afford school supplies, or for showing anger. One-third of the cases involve fighting. Other suspensions are for vandalism, for the use of drugs, or for delinquency.

Enlightened principals are trying to keep children in school, rather than passing the problem on to the community. This places an additional burden on teachers, who must cope with misbehavior but still maintain discipline. Often,

the teacher has to make a decision on the spot, without knowing all the facts. That decision must be made under pressure. The teacher may be worried about losing control of the classroom or may be diverted by other problems. Nevertheless, the decision must be made. The teacher takes a risk, knowing that such a judgment may be scrutinized by parents and administrators to decide whether the discipline was appropriate.

In the discipline cases presented in this chapter, the arbitrator's decision may revolve around the question of whether the teacher's treatment of a misbehaving student constituted corporal punishment. In schools where such punishment is allowed, the question becomes one of the reasonableness of the discipline imposed. But arbitration in the schools is difficult because there are no universal standards to apply. These cases involve specific situations that teachers face. They raise questions about the policies and practices of the school. Some schools, for instance, do permit corporal punishment, allowing teachers to use their own discretion, while others strictly forbid it.

Other issues also enter into an arbitrator's decision. A teacher with seniority and a clean record may be given the benefit of the doubt. One whose record includes earlier incidents of questionable behavior usually will be treated more severely. Other factors an arbitrator may consider are the behavior of the student and whether the teacher could have avoided physical force. Needless to say, there are few clear-cut cases. As the following examples demonstrate, decisions about whether a teacher acted reasonably or should be disciplined are difficult to forecast.

A MERE TAP WITH A RULER

Is a teacher inflicting corporal punishment or simply trying to get a student's attention? In a case in Philadelphia,

an art teacher tapped a girl on her side with a ruler to make her stop talking. She did not know that the girl had recently had an appendectomy.

The girl's mother complained to the principal. A conference was held in the principal's office with the student, her mother, and the teacher. The teacher apologized. The girl's mother said that she was satisfied. Yet on the following morning, the teacher was told to come to the principal's office with a representative of her union. A report had been sent to the district superintendent, recommending her transfer to another school.

Thirty of her fellow teachers filed a petition, pointing out that it was common for corporal punishment to be administered at the school without anyone being reprimanded. They felt that punishing this teacher was unfair, that she was being singled out as a scapegoat.

Professor Howard M. Teaf from Haverford College heard the case and supported the principal. In his opinion, the degree of violence made no difference; corporal punishment was prohibited by the rules of the school, even if teachers' practices suggested otherwise. He upheld the transfer.

This decision brings up many issues. There was no indication that the teacher was dangerous, so why transfer her? What was the message to the students? The teacher had apologized, and there was no reason to believe that the mother wanted the teacher punished further by being transferred.

How should such an incident be handled? If corporal punishment was accepted in the school, as the other teachers alleged, this relatively harmless incident could have been used as an opportunity to discuss the practice and to reaffirm a policy concerning corporal punishment. In fact, the incident was tailor-made for such a dialogue.

But did this case involve "corporal punishment"? Is a tap with a ruler more damaging than a harsh word? In this case, the arbitrator interpreted "corporal punishment"

in a broad sense. In other cases, it is defined more narrowly. The following case is an example.

BY THE SCRUFF OF THE NECK

A teacher working in the New York City public school system for more than sixteen years was substituting in a seventh-grade math class. One morning in May, he lost control of his classroom. He found himself standing at the door, trying to keep a disruptive student from entering the room. The class was shouting in chorus behind him in the room. Turning, he discovered that one of the students was leading the disturbance.

The teacher pulled the ringleader from his seat by the scruff of his neck, shoving him toward the back of the room. Finally, he regained some control of the class, so that the students were sitting quietly in their seats.

On the following day, the boy's mother visited the principal's office, complaining that her son had been physically attacked. There were bruises and scratches on his neck and back. The principal took photographs of the student's injuries. Then, he talked to the teacher. Later, he and the teacher met with the student, his mother, and the deputy superintendent of the district. A representative of the union also attended.

Several days later, the principal notified the teacher that he was being charged with having inflicted corporal punishment on a student, a serious accusation. The case was referred to the school superintendent, who recommended dismissing the teacher. Pending a hearing, the teacher was assigned to office work and ordered to have no contact with students.

The case was heard by a tripartite panel, chaired by Mario A. Procopio, a former mediator with the New York State Mediation Board. The arbitrators reviewed the evi-

dence, including the testimony of five students. They concluded that the teacher had been responsible for the student's injuries, but noted that the injuries were not serious. The boy had returned to his seat without distress. The teacher had not realized that the boy was injured until the following day. He had used force because he felt that he had no choice.

The arbitrators found that the teacher had not imposed corporal punishment and that the student's injuries were accidental. Dismissal was too severe. The panel ordered that the teacher be suspended for three months without pay.

Teachers act at their peril, subject to review by the school administration or by an arbitrator months after the incident. The teacher arbitration system in New York City is notoriously slow. Consider the effect on this teacher's career. The incident took place in May 1981. Hearings were not held until October and December of that year. The award itself was not issued until September of 1982. The teacher's career was in jeopardy for more than a year and a half.

These, by the way, are unusually lengthy delays in labor arbitration. There is no reason why the grievance discussions between the union and the school board cannot be held within a few weeks so that, if no settlement is reached, the case can be presented to an arbitrator. Then, when a hearing has been held, the arbitrator is required, at least under the procedures of the American Arbitration Association, to issue an award within thirty days.

PADDLING A BOY FOR CHEWING GUM

A teacher in a Pennsylvania high school was suspended without pay for paddling a fourteen-year-old boy for chewing gum.

The incident took place in a study hall. The boy's

mother, who worked as a secretary in the principal's office, visited the room to give her son a message. When the boy came up to the desk, the teacher saw that he was chewing gum. When he admitted it, she told him to bend over. Then she smacked him with a paddle.

A short time later, the teacher was called to the principal's office. The principal told her that the punishment was improper, and that she owed the student and his mother an apology. She apologized.

The incident was reported to the superintendent of schools. After an investigation, the superintendent suspended the teacher for five days. He cited a code of student discipline, adopted by the board of education several years earlier.

The teachers' association filed a grievance on the teacher's behalf, claiming that the penalty did not follow past practice. The teacher had been told to "clamp down" on gum chewers. She had warned her students that they would be paddled if they chewed gum. Furthermore, the teacher claimed that she had requested a copy of the code of discipline but had not received it.

The school district argued that although corporal punishment was not strictly forbidden, paddling was excessive for gum chewing. In any case, the paddling should not have been done in front of other students.

The arbitrator, John J. Dunn, a former solicitor for the city of Scranton, agreed that the teacher was obliged to comply with the code of student discipline, but cancelled her suspension because the Pennsylvania School Code did not authorize suspension except in anticipation of a hearing to terminate the employee. The decision in this case turned on a technicality; the outcome illustrates that decisions in these cases are influenced by individual factors and are very difficult to predict.

Discussing this case later, John Dunn said that he did not think that the boy had been embarrassed. "The students

paid little attention to the whole incident. The boy was an excellent student. When it's somebody like that, it's not noticed much. It's the kind of thing where the kids laugh and joke for a while and then it's forgotten." Perhaps. But that incident may have been the most important lesson learned that day.

LOSING PATIENCE WITH A DEAF BOY

A physical education teacher at the Lexington School for the Deaf in New York City ordered a twelve-year-old child who had forgotten his gym shoes to sit by the wall in the locker room. As the boy slid slowly into a sitting position, the teacher allegedly "held his arm and touched his leg with his foot, causing him to flip down and hit his head." Sobbing and angry, the boy tried to get up. The teacher pushed him, causing him to hit the wall again and fall down.

Hearing a commotion, the supervisor of the upper school rushed to the scene. She found the student crying and ordered the teacher to take the other children to lunch. The student said that the teacher had "flipped him and he hit the floor and hurt himself." He was sent home with his older brother.

At a subsequent arbitration hearing before David C. Randles, an Episcopal minister on the New York State Public Employment Relations Board, several students testified that the teacher had kicked the student's leg, causing him to fall. He had then pushed and shoved the boy. The teacher denied having any physical contact.

Written statements had been taken from the teacher and from the students who saw the incident. As Randles pointed out, a careful investigation is fundamental to due process, ensuring that employers will not take unfair action

against employees. In this case, the school had conducted an appropriate investigation and had a reasonable basis to discipline the grievant.

The case turned on credibility. The teacher was accused of causing the student to fall and pushing him against the wall. The student's testimony was corroborated by three other students. There was no indication that they had been coached.

It was admitted that the student was a "defiant and unmanageable child who refused to comply with the teacher's direction and who yelled and screamed." As Randles explained, "Oftentimes, highly qualified and respected teachers with long unblemished work records are so harassed by defiant students that they unwittingly resort to improper methods of controlling student behavior. Most probably, that is the case here."

The school wanted to suspend the teacher for one week without pay. Randles noted that, in similar cases, arbitrators had upheld suspension for three months for using physical force on a student and for ten days for slapping a student's face when told to shut up. A suspension for one week seemed appropriate. He dismissed the grievance.

A grievance procedure itself can be of some educational value. Often, in arbitration, the complaining person is as much on trial as the grievant. A supervisor who fires a worker is being tested as well as the person who was terminated. A student's misbehavior is examined as well as the teacher's method of discipline.

KEPT IN A CLOSET FOR NOT PLAYING SOCCER

A case from the Granville Central School District in New York State involved a handicapped nine-year-old girl with a severe learning disability. She was small for her age,

weighing fifty pounds and standing less than four-feet tall. The child was disruptive and a constant complainer. Her physical and social skills were equivalent to kindergarten level. About half of her time was spent in classes with non-handicapped children on the theory that she would benefit from that experience.

The teacher was a physical education specialist with thirty years' seniority. At the time of the incident, he was responsible for a group of twenty-two children. After lunch, he had taken them outside to play soccer.

This child never liked soccer. It was too rough. When she asked why she had to play, the teacher told her to be quiet. When she continued to protest in a whining voice, the other students began to laugh at her. The teacher took her inside so that the other children would not see her. "I don't want to hear anything out of you," he said.

He put the little girl in an equipment room. It was six-feet wide and sixteen-feet long, basically a large closet. It was dark, with only a sliver of light between the doors that closed behind her. Still, she was not quiet. She continued to complain about the dark. Soon afterward, the teacher came back and took her to his office. He then sent her to the principal's office.

The principal was shocked that the teacher had put the child in a dark room. He wanted to discharge him, but the union fought this action. The case went up for review under Section 3020-a of the New York State Education Law. This is essentially an arbitration procedure before a three-person panel, one arbitrator provided by the school board and one by the union, with a chairperson appointed from a list supplied by the American Arbitration Association. Unlike most arbitration awards, a 3020-a decision can be appealed to the commissioner of education.

The chairman in this case, Jonas Silver, was also shocked by the teacher's action. "A severely disabled child with impaired physical agility and emotional stability hardly warrants quieting her protest by resort to the discipline

undertaken." Even though the confinement was brief, it only ended because the child complained. He wondered what damage this treatment might inflict upon the child. Silver said, "The respondent's conduct exhibited more than the exercise of bad judgment, and was certainly not an acceptable way to deal with a disruptive child."

Furthermore, the teacher had confined students in the same room in at least two previous instances. He had been warned not to. The review panel concluded that the teacher was guilty of conduct unbecoming a teacher. But based on his lengthy service and a recent commendation for running a well-rounded physical education program, the chairman and the union member recommended that the penalty be reduced to a suspension.

The employer panel member wrote a dissenting opinion. He said that he could not in good conscience concur with a lesser penalty than discharge. The teacher's persistent disregard for the self-esteem of students and his refusal to view his behavior as a problem indicated a continuing pattern of horrendous treatment of students whenever they challenged his authority. "His students are in danger," the dissent stated. His treatment of students was "tantamount to preliminary eruptions of a volcano in advance of the main eruption. Can we, in all good conscience, return him to the classroom after a brief suspension? If we do that, we can but wait for a serious criminal act to occur. It would not be fair to the students, to the school district or to the teacher."

The decision of the majority was upheld by the commissioner of education, who stressed the teacher's good work record and the disruptive behavior of the child. The teacher's penalty was reduced to a suspension.

COOLING OFF IN A QUIET PLACE

In a somewhat similar case, a teacher was charged with professional misconduct, neglect of duty, and insubordina-

tion for confining a mentally retarded student in a closed, unlighted workroom in the North County Learning Center in New York State.

Approximately twelve students from the lowest functional level had been assigned to the teacher. The particular student had a chronological age of fifteen, but a mental age of four. He was small, about five-feet tall. He was frequently disruptive, yelling and hitting other children. Such behavior is not unusual at that level. While being moved with his class from the homeroom to a music room at the end of a long hall, this student was being difficult, running around, yelling, and splashing water on the others. As the children walked down the hall in a line, the teacher took this child by the hand and tried to calm him. As they reached the music room, the student broke away from the teacher, laughing, and ran into a small darkened room where copying equipment was kept. Apparently, he often did that. He liked to play hide-and-seek. She followed him into the room, asking him to come out and join the line of students. When he continued to giggle, she closed the door, intending to give him time to calm down. She told him to come out when he was ready to join the class.

The testimony was not clear as to how long the boy remained in the room. The teacher had to go back to her homeroom to get another child's record and gather up some papers for duplication. When she returned to the copying room, she found a teacher's aide and a few students making copies. The teacher's aide asked her whether she knew the boy was lying on the floor. When the teacher asked the boy to come join the music class, he did so.

The Board of Cooperative Educational Services (BOCES) claimed that the teacher's behavior violated a rule that teachers maintain constant supervision of students. Her conduct was "a depraved act, constituting professional misconduct, conduct unbecoming a teacher, and conduct abusive of a handicapped student." They wanted to terminate her.

Dr. Elizabeth B. Croft, director of the Department of

Criminal Justice at Rochester Institute of Technology, chaired the review panel. After hearing the testimony, Croft concluded that the teacher had not forced the child into the room as a form of punishment. She had left the child in the room to calm him down. Croft and the union member upheld the teacher. They felt that a reprimand would be an appropriate penalty. The BOCES panel member dissented.

Here, the arbitrators' decision turned on the reasonableness of the punishment. Although the teacher had clearly violated a school rule—that of maintaining constant supervision—the majority decided that the circumstances of the situation demanded the action that was taken, and that no great harm was done. In fact, they saw no indication that the child minded being left in the copying room.

SHOULD A TEACHER SEND FOR HELP?

A teacher has a particularly difficult choice when deciding how to cope with a physically threatening situation. The choice must be made instantaneously, but will be reviewed at leisure by the administration.

For example, at the Ring Lardner Junior High School in Michigan, a teacher encountered a fistfight between two seventh-grade students. When the fight started, she told the boys to stop. But other students in the classroom encouraged them to continue. The teacher sent one of her students to get help. Soon afterward, the principal came to the classroom and stopped the fight.

On the following schoolday, the principal told the teacher that he was not happy with the way she had handled the incident. He placed a reprimand in her personnel file. The principal felt that the teacher should have been more aggressive. She had abdicated her responsibility to control the classroom. He was afraid that the incident might create

a negative precedent in the school.

The teachers' union filed a grievance, demanding that the reprimand be removed. The teacher had taught for thirty years, thirteen in the same school system, and her record was unblemished.

The testimony was not in dispute. The question was whether the teacher's action was appropriate. Neither of the boys had been punished. The arbitrator, William J. McBrearty, former chairman of the Michigan Employment Security Appeal Board, decided that the teacher was entitled to act in accordance with her best judgment. In view of her excellent record, she should not be censured. He upheld the grievance.

If a teacher is sensitive to the feelings of students, the administration will usually respect the teacher's decision in matters of discipline. In this case, the arbitrator concluded that the administration's reaction had been unreasonable.

In the following case, on the other hand, an arbitrator supported the school's decision, finding that the teacher's action showed poor judgment.

OR SHOULD A TEACHER TAKE ACTION?

At the Council Bluffs Community School District in Iowa, an eighth-grade art teacher, who also coached wrestling and football, received a reprimand for the way he broke up a fight between two ninth-graders, both of whom were part of a special education disability program. The boys were pushing and slapping at each other. Neither weighed more than 125 pounds. The teacher was 6'4" and weighed 280 pounds. He was accused of using excessive force.

When the teacher saw the fight, he pushed between two secretaries standing in the hall, grabbed one of the

students by his shoulder, and pulled him away from the other student. As he did so, the boy fell against the concrete wall, hitting his head. He slumped to the floor. The teacher then grabbed the other student, put his arm around the boy's chest, and dragged him off to the principal's office. Another teacher helped the first student to his feet and took him there as well.

The school principal took written statements from several witnesses. The two secretaries described the incident as "disgusting." The principal also interviewed the students. He decided to reprimand the teacher.

At an arbitration hearing before Richard L. Ross, an attorney from St. Louis, the secretaries testified that the teacher had grabbed one of the boys around the neck with both hands, lifted him off the floor, and thrown him against the cement wall, that the boy's head hit the wall, and that he slumped to the floor. After throwing the first boy, the teacher grabbed the other boy and dragged him away.

The union introduced three teachers who also had seen the incident. Although testifying that the teacher had not used excessive force, they corroborated the facts. One teacher admitted that "the grievant came on a little strong" and that he would have handled it differently.

The teacher had used excessive force on two prior occasions. In one, he had broken a cross that a student wore around his neck. After this incident, the principal had warned the teacher to keep his hands off the students. On another occasion, the teacher had stopped a fight by grabbing one of the boys. He and the boy both fell to the floor. The principal told him that there "must be a better way."

The arbitrator had to decide whether the school had just cause to discipline the teacher. He cited Elkouri and Elkouri's *How Arbitration Works*, the leading textbook on grievance arbitration: "An employer must be permitted the right to discipline employees in order to maintain its effective management rights and responsibilities." The teachers

at this school had been warned that use of excessive physical force against students would constitute just cause for discipline.

The arbitrator concluded that excessive force had been used. The fight was between two small boys who were only pushing and slapping. They were not a threat to anyone else. It probably could have been stopped by a warning or by nonviolent intervention. The arbitrator concluded that a reprimand was a reasonable penalty, particularly since the teacher had been warned on two prior occasions. The grievance was denied.

SHOULD A TEACHER BACK DOWN?

A teacher is not expected to back down from confrontations with students. In a Pittsburgh case, a teacher of cabinetmaking noticed several older students throwing sawdust at each other. He sent them to the vice-principal's office. After being admonished, they returned to the carpentry shop and were told to go to the balcony and do written assignments for the remainder of the period. Two of the students obeyed and started up the stairs toward the balcony.

One student stayed in the shop. After the vice-principal left the room, he engaged in a noisy argument with the teacher, who later testified that the student "started to get mouthy and threatened to push my face in. I approached him about a foot away and told him he'd better not try. . . . I moved six inches away from him and he pushed me. At this moment, I grabbed him by the neck and put him down on the floor. I thought I had to defend myself because I didn't know what he would do next."

The student told a different story: The teacher bumped against him so he pushed back. Then the teacher grabbed his throat and threw him on the ground. Later, the student

admitted that he had initiated the first physical contact when he pushed the teacher.

A school security guard saw the incident. According to his recollection, the teacher had told the student to "keep his hands off him and not to touch him." He saw the teacher restrain the boy until others intervened.

The teacher testified that he had visited the boy's home after the incident. No one had complained about his actions. The boy's father wanted the matter dropped. The boy's mother admitted that her son had a bad temper. There was no indication that the student had been injured.

The incident was reported to the vice-principal. After an investigation, a disciplinary suspension of twenty workdays was imposed. The teacher also received an unsatisfactory rating for "personality deficiencies."

The arbitrator noted that corporal punishment had been prohibited in the district for some years. However, the contract obliged the school administration to support teachers when they disciplined students, even when physical restraint was necessary. The crucial question, according to the arbitrator, was whether this teacher's actions were reasonable.

The teacher was fifty-four years of age. He had worked ten years as a cabinetmaker. After receiving his bachelor's degree, he served twenty-one years as a teacher in the Pittsburgh school district. During his entire teaching career, he had never had a similar encounter with a student.

In this incident, he had faced a threatening student. According to the testimony, he placed both hands on the boy's shoulders and exerted downward pressure which pushed him to the floor. He restrained the student but did not place his weight on top of him. The security guard testified that the teacher did not attempt to injure the student.

The school claimed that the teacher should have asked the guard for help. The arbitrator disagreed: "It is fundamental that order in shop or class is the responsibility of

the assigned teacher, not of a security guard. If the instructor in charge retreats from an impetuous student who launches an unprovoked physical attack on him and does not personally impose physical restraint, he may compromise his position of leadership and lose the respect of other students who witness the encounter and interpret his capitulation as a lack of courage." He added: "Hindsight is not a just test of the teacher's actions, because an aggressor by his resistance to being subdued determines the counterforce necessary to accomplish his restraint."

The arbitrator felt that the force used by this teacher was appropriate under the circumstances. The student's family "prudently decided that no further action was necessary" and did not even allow their son to testify at the arbitration hearing. These facts suggested to the arbitrator that the student knew that he was guilty of a rash act and had benefited from the firmness of the teacher, making similar infractions unlikely. This was not a situation where a teacher, in a moment of anger, lost his self-control. The arbitrator upheld the grievance. The teacher's service record remained unblemished.

CAN A TEACHER DEFEND HIMSELF?

A teacher can never feel completely secure in school. In a somewhat similar case, a teacher at Father Flanagan's Boys' Town in Nebraska faced an agitated student who wanted to leave the classroom. The teacher told him to stay. When the boy refused, the teacher told him to go to his desk until the class ended. The boy pushed past the teacher and opened the door into the hallway. The teacher followed him.

The boy swung around, facing the teacher, doubling up his fist. The teacher put his arm around the boy, holding

one of his arms, and forced the boy to the floor. When the boy relaxed, the teacher let him up. The teacher pulled him back into the classroom. When the student agreed to sit down, the teacher released his hold.

That evening, the teacher discussed the incident with the principal and filed a written report. On the following Friday, the teacher received notice that his conduct had been unprofessional. He was charged with using excessive physical force and placed on suspension for ten contract days without pay. The teacher was told not to discuss the matter with students and not to try to get even with any of the students who had testified against him. The ten-day suspension was later reduced to five.

The five-day suspension was the basis of a grievance. The teacher argued that his actions were appropriate since he had been threatened by the student. When the boy clenched his fist, the teacher felt that restraint was necessary.

The arbitrator, Professor Richard M. Bourne of the University of Nebraska, supported the school. The teacher had violated the school's policy against using physical force. Thus, according to Bourne, suspension was an appropriate disciplinary action, and the grievance was denied.

SLAPPING A CHILD IN ANGER

A teacher in Pittsburgh was trying to quiet his biology class. A fifteen-year-old student blurted out, "Why don't you shut up?" The teacher reacted by slapping her face, taking the question as a challenge to his authority in front of the other students.

That action triggered a disciplinary suspension. The grievant had been warned after two previous incidents; this time, the school superintendent received a complaint from the girl's father. The school policy was that corporal punish-

ment should be administered only when all else failed, and then only in the presence of the principal. Furthermore, the teacher had failed to report the incident, as required by school policy. He was suspended without pay for ten days and told that any repetition would result in more severe penalties.

The arbitrator, James C. Duff of Pittsburgh, recognized that corporal punishment was a delicate matter: "The suggestion was made at the arbitration hearing, in the presence of the student whose conduct initiated the whole chain of events culminating herein, that the student was somehow right and the grievant was wrong. The student was emphatically wrong, but the grievant overreacted to what occurred."

In analyzing the situation, Duff concluded that it was not the "proper function of this forum to disturb the good faith exercise of judgment which the district administrator made in suspending the grievant for ten days." The grievance was denied.

WHEN A TEACHER IS A BULLY

At a high school in the Canisteo Central School District in upstate New York, while some high school seniors were eating lunch in the school cafeteria, they waved to one of the teachers. He motioned for them to come to his table. When they refused, the teacher walked over and slapped one of the girls in the face, knocking her glasses off. He told her to come with him to the principal's office. When she refused, he slapped her again. He pushed her out of her chair and took her to the principal.

In a second incident about a year and a half later, the same teacher, while chaperoning the junior class prom, got into an argument with a boy who came looking for his

brother. According to testimony, the teacher held the boy by the throat, hitting his head against the wall. When the boy tried to explain why he was there, the teacher told him to shut up and slapped his face back and forth. Then he grabbed the boy by the back of the neck, walked him down the hall, and pushed him out the door. That incident was observed by several students. The student suffered cut and swollen lips and a headache from a bump on the head, which lasted for some time. Shortly afterward, the teacher called the boy's father. According to the father, he "ranted and raved." He told the father to "take his son out in the front yard, bust his teeth, scar him up, get blood on him, etc., etc."

Almost a year later, the same teacher was again accused of striking a student after yelling at her in class for being disruptive. After the incident, the teacher was too upset to teach class. The student went to the principal's office and complained.

In a lengthy opinion, a review panel analyzed all three incidents. After five days of hearings, a majority of the panel concluded that the incidents were serious enough to warrant the teacher's termination. The attacks were extreme and unprovoked. The force used was excessive. The majority concluded that he should be removed from an educational environment.

The panel member appointed by the union disagreed, stating that the penalty was excessive. A three-month suspension would be appropriate. She felt that the grievant had been a good employee. Terminating him would "further erode the ability of teachers to deal with disruptive students in the only manner left, and that is to verbally challenge them." She deplored the fact that a tenured employee was being terminated based on the testimony of students, with no testimony from adults.

The union cited some state court decisions in the teacher's defense. In *People v. Baldini*, 4 Misc. 2d 913 (1957),

the board charged a teacher with picking up a student by the neck, throwing him against the wall, and striking him several times. Medical records showed a bloody nose and cuts on the back and on the right eyelid. The court sustained the teacher, saying that there was no criminal intent and that the law permits a teacher to correct a student. "The court is appreciative of the fact that the statute permits punishment and that the Bible sanctions the same."

In *People v. Mummert*, 183 Misc. 243 (1944), a principal who placed a child over a chair and spanked him with a ruler was acquitted of assault, despite the fact that the child's buttocks were black-and-blue for several days.

Nevertheless, in the above case, the teacher's termination was upheld.

STUDENTS CAN BE FRIGHTENING

The cases discussed thus far have involved situations where the teacher's behavior was questioned by school authorities. Other kinds of grievances involve teachers' complaints of harassment, often violence, perpetrated against them by students. As the following cases illustrate, the arbitral process can often help a teacher secure certain benefits or relief after being harmed or threatened by a student.

A teacher in the Post Middle School in Detroit, Michigan, encountered a particularly abusive student. The teacher was a small, middle-aged woman; the girl was unusually tall and heavy. The student pulled at the teacher's coat, screaming, "Bitch, I'm going to kill you. Then I'm going to whip your motherfucking ass."

The teacher was ill all the following weekend. She returned to school on Monday and began to teach. Then, she was told that a former student had painted "red dog" on her white car. She left school that afternoon in great

distress, never to return. On Wednesday, she had her first session with a psychiatrist, under whose care she remained up to the time of the arbitration.

The arbitrator had to decide whether the initial threat, accompanied by physical contact (the child pulled at the teacher's coat), amounted to an "assault" under the terms of the collective bargaining contract in the Detroit schools. If it was an assault, the teacher could have her salary paid during her disability.

The union claimed that the teacher had experienced severe psychological damage. Her trauma continued to prevent her from teaching. The union asked that she be compensated with "assault pay" under the contract. Numerous witnesses and documents were examined, including correspondence between the parties and the transcript of the teacher's workers' disability claim. Depositions had been taken from three psychiatrists. The medical history of the grievant was also a part of the record. Awards in similar cases between the parties were cited to show past practice.

The school board said that no assault pay was due, because the term did not cover verbal attacks. The board questioned whether the teacher's disability had in fact resulted from the incident. The board suspected that the grievant had become fed up with teaching and had turned to a new career. She was active and healthy, caring for her husband and three growing children. At the time of the arbitration, she was a full-time law student at Wayne State Law School.

On one prior occasion, assault pay had been granted by this school board for verbal assaults. A student turned on a teacher and screamed, "I'll cut your fucking heart out." Frightened and upset, the teacher immediately threw up. During her absence, she received assault pay.

The board also claimed that an award in this case might lead to abuse: "Nasty and disrespectful words thrown at teachers, are, regretfully, commonplace in our schools. There are hundreds of such verbal outbursts every week."

The arbitrator wrote a thirty-page opinion. After analyzing the evidence, the contract language, and past practice, he concluded that the term *assault* did not require physical contact. When a verbal attack destroys a teacher's health, it can be considered an assault. This incident was an assault because it included a threat, coupled with the possibility that it would be carried out.

The student in this case, although only twelve years old, was just under six-feet tall and weighed almost 200 pounds. This enormous child was wearing a pacifier around her neck that she sucked during the day. The arbitrator felt that it was reasonable for the teacher to conclude that there was "something dreadfully wrong about the huge person threatening her. If ever a threat in school was credible, this one was."

The arbitrator conceded that in order to receive compensation, it would require a threat of real injury, one that a normal teacher would find upsetting and frightening. Such situations are unusual. Mere angry words do not qualify. The arbitrator concluded that, in this case, the teacher was "profoundly hurt and upset and unable to go on teaching that term because of the trauma." She had taught for many years and had been commended by her superiors. Before the incident, she enjoyed her work. But her ability to teach fell apart after the assault. He awarded her assault pay, up to the date that she became a full-time law student.

IS THE TEACHER MALINGERING?

Sometimes a school board claims that a teacher who has been assaulted is simply trying to obtain a settlement. A teacher was assaulted twice at the Betsy Ross School in New Haven, Connecticut. She had been teaching there for ten years. In September 1980, she damaged her left shoulder when a student was pushed against her. At first,

the board refused to pay her. Later, she was paid on the theory that she was the victim of an "indirect assault."

In November of the following year, she attempted to separate two sixth-grade male students who were engaging in horseplay. Another student, wanting her attention, struck her on the left shoulder from behind. The teacher reported the incident to the school administration, but did not press charges against the girl, although she suffered pain and swelling in her shoulder. She did not return to school.

The teacher claimed that her injury resulted from an intentional blow on the shoulder by a student. Her principal argued that the incident was not an assault. The assistant superintendent decided that the teacher did not qualify for assault pay.

An arbitration was held before Peter R. Blum, former chairman of the Connecticut Board of Mediation and Arbitration. The assault-pay provision of the contract provided up to one year's salary during any absence from school resulting from an injury due to an assault.

When the school questioned her reaction to the incident, the teacher explained why she had not pressed charges against the student, "not because she did not consider the striking an assault, but on the basis that she had been warned that officially pressing charges would involve a long drawn-out matter in the courts."

Blum upheld the grievance. He ruled that the incident aggravated an existing physical problem. Since the striking was intentional, the injury resulted from an assault. The grievant was awarded her contractual benefits.

VIOLENCE IN THE POWDER ROOM

In an assault case in Flint, Michigan, an elementary school teacher in her early thirties confronted a large and angry boy. He was swinging a chair in a threatening way.

She managed to get the boy out of the classroom, but he hit her twice across her body with the chair. Other teachers came to her aid. She left the school and went to her physician for treatment and was absent for about two weeks.

Two months later, she encountered a fight in the girls' bathroom. When she tried to break it up, she was hit in the eye and scratched. She took both girls to the principal and reported her injury. For several weeks, she continued working but began suffering from headaches, hives, and pain in her teeth. She had crying spells, sleeplessness, and fatigue. Later, she coughed blood. Her physician told her to stop working, gave her tranquilizers, and referred her to a psychiatrist.

School administrators sometimes reject claims from teachers who contend that their disabilities are due to psychological pressure from students. They suspect that the teacher has already decided to quit and is looking for a "going-away" present.

In this case, the board contested the teacher's right to benefits during the period of her absence. The case came to arbitration before Ruth E. Kahn, an attorney and former teacher, who said that the board should not have ignored the teacher's emotional state. "The residual anxiety from the earlier incident became stirred up and aggravated into a full-blown and disabling state of anxiety with accompanying physical symptoms." Kahn was convinced that the emotional disability resulted from the two assaults. The grievant had become disabled. "She reacted in panic to the notion of returning to the classroom." The arbitrator found that she was entitled to benefits.

BAD LUCK WITH A LOCK

A combination lock was thrown by one student at another, but hit a teacher on her shinbone. She notified

the principal, filled out an accident report, and went to the hospital for treatment. She was fifty-two years old and had been teaching in the school for more than fifteen years. When she returned to the school two months later following therapy, her leg became swollen. She complained of pain. Later, she consulted an osteopathic physician who sent her to the hospital. For the rest of the winter, she was unable to work.

A battle between physicians commenced, with each giving different explanations of her condition. Finally, the board's medical examiner certified that she was ready to work. The teacher's doctor said that she was not.

The arbitrator appointed by the parties, Theodore St. Antoine, dean of the University of Michigan Law School, wrote a lengthy opinion analyzing the conflicting medical opinions. He pointed out that in Detroit, assaults on teachers had become a sensitive issue. He wrote: "Conceivably, a teacher so terrorized by student behavior that she absented herself for a reasonable fear for her safety might be eligible for assault pay until the situation could be remedied, even though she never suffered any disability in the conventional sense of the word."

St. Antoine found no indication that this teacher was malingering. He had observed the grievant and was convinced that she was in pain. "She is a large, heavy woman, who moves with obvious difficulty. This must place considerable pressure on her legs. Pain and exhaustion are subtle, somewhat subjective factors, which are not wholly susceptible to qualification. Whether or not a more stoic person with the same symptoms might have responded differently, the grievant, as I view her, acted reasonably and in good faith, and had at least some objective justification in declining to resume teaching duties involving substantial amounts of standing, walking, climbing and other stress upon her legs." He concluded that she had been a victim of assault.

The processing of this arbitration dragged on for many years. The arbitrator noted that both parties had accepted the delay. The grievance was filed long after the teacher was injured, but the school never objected. The arbitrator continued the benefit payments.

CONCLUSION

In a recent article in *The Village Voice*, Joel Dinerstein, a former Brooklyn public school teacher, described the predicament that teachers in his school faced dealing with violence and endless turmoil. Many of the new teachers in his district resigned after a week or two. He held out for six months. According to Dinerstein, both teachers and students feared for their own safety. Anything from mugging to murder could result from ordering a student to sit down. Beyond the threat of bodily harm is battle fatigue.

To the extent that violence is present in their school, teachers will be at risk. Where violence is chronic, they are faced with disciplinary problems and may have to resort to physical restraint. They are expected to break up fights and to defend themselves. If they overreact, they may be disciplined themselves. Then they may have to file a grievance in order to protect their rights.

When teachers themselves are injured, the collective bargaining contract may provide compensation, but the teacher may have to file a grievance in order to collect. This may cause further problems in the relationship between the teacher and the school administration. In such emotionally charged situations, arbitration can provide an objective analysis of what occurred and who is to blame. Of course, it helps when the school has a clear-cut policy on that issue, giving the teacher concrete guidelines for making decisions.

CITATIONS

A Mere Tap with a Ruler: Philadelphia Federation of Teachers *and* School District of Philadelphia, *Arbitration in the Schools* (AIS), 128–16.

By the Scruff of the Neck: Community School District No. 22 *and* Individual Respondent, AIS, 153–17.

Paddling a Boy for Chewing Gum: Mount Carmel Area School District *and* Mount Carmel Area Education Association, *Government Employee Relations Report* (GERR), vol. 22, p. 741.

Losing Patience with a Deaf Boy: Lexington School for the Deaf *and* Teachers' Association of the Lexington School, Local 3552, AIS, 150–12.

Kept in a Closet for Not Playing Soccer: Granville Central School District *and* Individual Respondent, AIS, 164–11.

Cooling Off in a Quiet Place: The Board of Cooperative Educational Services, Second Supervisory District, Suffolk County, New York, *and* Individual Respondent, AIS, 152–16.

Should a Teacher Send for Help?: Niles District Education Association *and* Niles Community Schools, AIS, 157–5.

Or Should a Teacher Take Action?: Council Bluffs Community School District *and* Council Bluffs Education Association, AIS, 153–10.

Should a Teacher Back Down?: Pittsburgh Federation of Teachers, Local 400, *and* Pittsburgh Board of Public Education, AIS, 139–8.

Can a Teacher Defend Himself?: Father Flanagan's Boys' Home *and* Boys' Town Education Association, AIS, 128–14.

Slapping a Child in Anger: Center Area School District *and* Center Area Education Association, AIS, 131–13.

When a Teacher Is a Bully: Canisteo Central School District *and* Individual Respondent, AIS, 140–14. Also in this section, Poughkeepsie City School District *and* Individual Respondent, AIS, 134–18.

Students Can Be Frightening: Detroit Board of Education *and* Detroit Federation of Teachers, AIS, 151–11.

Is the Teacher Malingering?: New Haven Board of Education *and* New Haven Federation of Teachers, AIS, 154–13.

Violence in the Powder Room: Flint Board of Education *and* United Teachers of Flint, Inc., AIS, 119–11.

Bad Luck with a Lock: Detroit Federation of Teachers, Local 231, *and* Board of Education of the School District of the City of Detroit, AIS, 152–5.

CHAPTER 2

Sex, Drugs, Drinking, and Criminal Behavior

As Chapter 1 showed, student misbehavior can challenge a teacher's ability to control the classroom and raise questions about school policies concerning discipline and punishment. A teacher's behavior in other, more private matters is also subject to close scrutiny and raises questions about school policy.

As in other jobs, sexual tensions exist and drugs and alcohol may be part of the school environment. Often, the school has a written policy about such behavior when it occurs inside the school.

In other work settings, questions about the morality of an employee's outside behavior are not at issue unless they reflect upon work-related duties. But the special role

that teachers are expected to fill in school and in the community combine to create an environment extremely sensitive to criticism. For this reason, it is difficult to separate a teacher's private life from the individual's function as a role model. Arbitrators have to decide where to draw that line.

The cases in this chapter involve teacher behavior, both inside and outside the school. Sometimes, the behavior is criminal—such as dealing drugs or molesting a student. More often, the behavior is wrong but not illegal, making the arbitrator's task even more difficult.

A CASE OF INTERCOURSE

A New York City teacher invited a female student to go for a drive after a tutoring session. According to her, they went to his home and had intercourse. Later, he dropped her off at a bus stop on Eastern Parkway. The teacher denied the accusation, saying that he had driven the girl directly to her bus stop. Nevertheless, he was charged, and the case came before a review panel.

The chairperson was Tia Schneider Denenberg, former supervisor of the American Arbitration Association labor tribunal in New York City, now a labor arbitrator. The case turned on credibility: the teacher's word against the student's. The panel believed the student. Her description of the incident was corroborated by circumstantial evidence. Although she described herself as a willing participant and said that she had not been subjected to any threat of physical force, the panel recognized that, in such a situation, there was an element of compulsion.

As the panel stated: "It seemed perfectly likely that a seventeen-year-old in such a position would be at a loss as

to what to do about this sudden turn in a normal student-teacher relationship. Since the teacher had done the unexpected, why should she not believe that almost anything might happen, including the use of force if she did not comply? She was alone and unfamiliar with the surroundings. Her story was supported by the fact that she gave a fairly accurate description of the inside of his house even though he claimed that he did not take her there."

The panel decided that the teacher was not telling the truth. A majority felt that he should be discharged. The member of the panel appointed by the union dissented without opinion. (Party-appointed arbitrators often find it difficult to take positions against their own organization.)

The so-called party-appointed arbitration procedure is gradually being eliminated, except in those areas where it is still incorporated in laws or regulations, such as New York State. In theory, party-appointed arbitrators educate the neutral chairperson about the particular school. Since neutral arbitrators come from outside the school system, that could be helpful. But since both parties are represented by advocates, the neutral arbitrator can learn about the case at the hearing.

Outside of New York State, where the statutory procedure must be followed, most arbitration cases are heard by a single arbitrator. This procedure is less complicated and less costly to the parties. Also, most systems provide that the award of the arbitrator will be final and binding. As we have seen, the losing party in New York State can appeal an award to the commissioner of education, an additional source of expense and delay.

A party-appointed arbitrator who believes that it would not be politic to join the majority, as was true in the above case, can dissent without an opinion. If the award is likely to be appealed to the commissioner, a dissenting arbitrator can write an opinion to encourage the commissioner to over-

turn the award. The commissioner is more likely to take action when arbitrators are "soft" on teachers. While few awards are overturned, the possibility of such a reversal in New York may inhibit some arbitrators, diluting the impartiality of the process.

DRIVING A STUDENT TO DISTRACTION

A driver education teacher in Illinois made sexual advances toward a fifteen-year-old student while out on a driving lesson. The teacher had asked the girl to pull off to the side of the road. He then began to touch her arms and her chest. Then he forced her to kiss him. After allowing her to continue driving, he removed one of her hands from the wheel and placed it on his crotch. He did this again after he exposed himself. Masturbation may have occurred. The student was emotionally shaken by the incident, but she could not decide what to do. One of her close friends convinced her to tell a student counselor.

The teacher's record indicated that this was the eighth such incident, although the most blatant. The teacher had upset many female students. Five of them testified about somewhat similar experiences where he would stare at them, make sexually provocative remarks, or put his hands on a girl while she was driving.

Here, the issue was whether the arbitrator would believe the teacher who claimed innocence or the students. The arbitrator concluded that the students' testimony showed by a preponderance of the evidence that the teacher engaged in improper and immoral conduct and that dismissal was justified.

Often, in such cases, the school is reluctant to have such a situation come to light. Why was this situation allowed to continue as long as it did?

IS THERE AN OBLIGATION TO REHABILITATE?

In a case in Michigan, a tenured teacher was discharged for having "fondled the private parts of a twelve-year-old, mentally impaired, male student" several times over a period of six months. The teacher admitted to the act, and was fired by the school board.

The union filed a grievance on behalf of the teacher. It argued that no harm to the student had resulted and that there was little likelihood of repetition, according to psychiatric testimony. Furthermore, the teacher claimed that he was suffering from a mental illness and therefore should be rehabilitated rather than punished. The union felt that discharge was too severe.

The arbitrator, Professor Marvin Kotch of the Detroit College of Law, explained that homosexuality was not the issue. The question to be decided was whether the discharge was justified. This case directly affected the student and the educational environment. According to the grievant's own testimony, the student's attitude toward him had changed after the incidents. Kotch felt that this showed that some harm had resulted, although the degree of harm need not be determined.

Kotch noted that, although other, less severe penalties might also have been appropriate, the school board's decision to discharge was not inappropriate. He denied the grievance.

JUST A FEW OBSCENE LETTERS

A teacher in New York City was sent love poems by one of his female students. (He was teaching an "equiva-

lency class," consisting mainly of students from eighteen to twenty years old.) He concluded that she had a crush on him. He decided to send her obscene letters to make her realize that her behavior was unacceptable. He later claimed that he had not intended his letters to spark a sexual relationship, although he admitted that the use of obscene language by a teacher was inappropriate and "absolutely wrong."

The chairman of the review panel, Lawrence I. Hammer, acknowledged that the teacher was at fault, but believed that he was sincere and should not be terminated for his ill-advised action. He and the union member of the panel said that a lesser penalty would be enough and recommended suspension.

In this case, the commissioner of education overturned the recommendation. As the commissioner pointed out in his opinion, the teacher's letters were "lewd, lascivious and obscene." He insisted that the man was unfit to be a teacher and that the majority of the arbitration panel had been "so lenient as to shock the conscience." He wrote: "Regardless of whether there was any illicit motivation for the correspondence, the content of respondent's letters to the student are grossly improper and constitute a substantial basis for termination of respondent's teaching services. The board of education should not be required to continue to employ a teacher who has thus demonstrated his unfitness to serve."

When issues of morality are involved, it is difficult to say whether an arbitrator or state official or a judge will be more lenient. As I noted earlier, the procedure in New York State is unusual. Most labor arbitration awards are final and binding, enforced by courts without further review on the merits. When a system provides for appeal to a state official, political considerations may control. The opinion of a state commissioner is likely to reflect conventional standards of the community.

IS HAVING A CHILD OUT OF WEDLOCK GROUNDS FOR DISCHARGE?

A teacher's private conduct may become the subject of a grievance when the administration believes it casts doubt on the teacher's character. A teacher whose personal rights are prejudiced may have a remedy in court as well as in arbitration.

A thirty-eight-year-old junior high school English teacher in a rural school district in Illinois was terminated for "immorality" after having a child out of wedlock. A state arbitrator found that she was fired without just cause and put her back to work, but a few months later she was furloughed as a result of budget cuts.

She sued the school district in federal court. At the trial, she claimed that her pregnancy resulted from having been raped in a motel while returning from a religious retreat in Nebraska. She had not reported the incident to the police. Her attorney, however, said that rape had nothing to do with the case. According to him, the case involved a decision by the school board that unwed mothers are immoral.

After a trial of more than three weeks, a six-person jury ordered the school to pay the woman $2 million in compensatory damages and $1.3 million in punitive damages. Presumably, the case stands for the principle that immorality is not a valid ground for discipline unless it affects the students.

The school board had alleged additional grounds for termination, including insubordination and cruelty to students, but the jury based its decision on the immorality issue.

SELLING PEP PILLS IN BUFFALO

An English teacher in Buffalo was assigned to Lafayette High School. At the end of the school year, he was com-

mended by the principal for his work and for his participation in special programs at the school. "Students loved to attend his reading classes. He has entirely changed the image of taking reading. He was very active in the community as well. He works well with other teachers and cooperates fully with the administration. He established immediate rapport with every student. He is sincere, dedicated and professional. He is an outstanding educator and it is a pleasure to have him at Lafayette." On the basis of that commendation, the teacher received tenure.

Two years later, he was arrested by an undercover narcotics agent for selling pep pills for $15 at the Buffalo Athletic Club. He had obtained the pills from his father, a doctor, who often gave them to patients who required stimulation. His father prescribed them as medication.

In court, the teacher was allowed to plead guilty to the crime of "possession of a controlled substance in the sixth degree," a class of felony. He was sentenced to five years' probation. The school wanted to terminate him. Pending the arbitrators' decision, the teacher was assigned to a nonteaching position.

Robert E. Stevens, a lawyer from Rochester, served as chairman of the review panel. He showed sympathy for the teacher. As he pointed out, pep pills are frequently prescribed by physicians. The grievant knew this because he had assisted his father in his medical practice. Furthermore, the arbitrator was impressed by the grievant, who had spent three years teaching in a one-room schoolhouse in Kentucky. His experience there had been the subject of a newspaper feature story. The teacher's subsequent record in Buffalo had been good. His qualifications and competence were outstanding. His record showed motivation, dedication, and idealism. "It would appear unfortunate to deprive students of such a teacher on the grounds that he committed a non-school-related offense, unlikely ever

to recur," Stevens wrote. He believed that dismissal was too harsh a punishment.

The panel concluded that it would be unfair to dismiss the teacher. He had already been punished by the loss of many friends. Rather than termination, the panel recommended a formal reprimand, with the requirement that he continue psychiatric treatment (an attempt to "treat" the motivation for the act). All three members of the panel concurred.

COCAINE IN NASSAU COUNTY

When a member of the faculty becomes involved with both using and selling drugs, the administration reacts sharply, often with a sense of having been betrayed. This may explain the harsh penalties that are imposed by schools in such situations.

A mathematics teacher in Long Island, New York, pleaded guilty to "criminal possession of cocaine," a Class-D felony. She was sentenced to 60 days in the Nassau County Correctional Center, followed by five years of probation. While incarcerated, she failed to notify her school that she would be absent. She had been taking drugs regularly for four years. Although her colleagues said that she was a good teacher, the school district wanted to terminate her.

Professor George S. Roukis, chairman of the review panel, noted the numerous charges brought against this teacher. He concluded that there were no extenuating circumstances and that discharge was appropriate because the teacher had been convicted of a serious felony.

The union member of the review panel dissented, claiming that punishment should have been tempered by an understanding of the individual. This teacher, she said,

had no criminal intent. Her act was not for profit. According to her testimony, she had been talked into selling drugs by an informer who turned out to be a narcotics agent. When she was offered a chance to become an informer in return for having the charges dropped, she refused. Afterward, she entered a drug program. Her conduct was unrelated to the classroom. The school had not been harmed in any way.

The union panel member continued: "As a teacher advocate, I strongly recommend an alternative to termination. I recommend a suspension, the length of which would be commensurate with the days she was absent from her position. Any additional punishment would serve no one."

GUILTY UNTIL PROVEN INNOCENT

It is understandable that a school would want to discharge a teacher who was guilty of a felony. Convicted criminals usually do not make good role models. But what about a teacher who is accused of a crime but is later found innocent?

Such a case occurred in a Philadelphia school. In February 1983, a teacher was arrested on charges of bookmaking and lottery violations. A newscast reported his arrest, identifying the teacher and his school. The telecast was heard by one of the school's vice-principals. The board determined that the teacher should be suspended without pay.

The teacher was notified of the suspension on the following schoolday. Over the weekend, there was more publicity in the Philadelphia newspapers. Both the *Inquirer* and the *Daily News* ran articles, using the term "loansharking operation" and identifying the teacher as being from Bishop Neumann High School in South Philadelphia.

The teacher claimed that his suspension was without

just cause, and arbitration was postponed pending the outcome of the criminal charges. When the criminal case was dropped in October 1983, the teacher was reinstated in his regular teaching position, but he was not given back pay for the period of his suspension. The school system justified its decision by stating that if the teacher had been found guilty, he would have been terminated.

The teacher demanded back pay from the date of his suspension to the date of reinstatement. Arbitrator S. Harry Galfand, a lawyer from Philadelphia, believed that it was "reasonable to conclude that the official accusation, broadcast into the community, unless patently false, impairs the ability of the teacher to command the required respect of his high school students and their parents. Suspension is justified under such circumstances." Galfand felt that the teacher could not teach until the charges were dismissed. Therefore, back pay should be paid only from the date the charges were dropped to the day of reinstatement.

FIRST LET'S KILL THE PRINCIPAL

Soon after school opened in the fall, the principal of South Shore High School in Chicago was told by the president of the parent-teacher association that a tenured physical education teacher had solicited her son, a student in the school, to kill the principal and two assistant principals. That allegation was confirmed by her son on the following day. On that evidence, the teacher was arrested and charged with solicitation to commit murder. The school board immediately suspended him, pending a court trial.

More than two years later, the teacher was tried before a judge in the Circuit Court of Cooke County. The judge ruled that the evidence, based on the PTA president's accusation, fell short of proving the defendant guilty beyond

a reasonable doubt. He was found not guilty. Afterward, the State Board of Education appointed a hearing officer to decide whether the teacher should be dismissed. That procedure is much like arbitration.

Professor Julius Rezler of Loyola University, the hearing officer, frequently serves as a labor arbitrator. The first hearing was scheduled a few months after the court decision, but the school board was given additional time to prepare its case.

The attorneys for the teacher filed a motion to dismiss the case, based on the criminal court acquittal. The board contested that motion, arguing that the facts disclosed at the criminal trial indicated conduct unbecoming a teacher.

A preliminary skirmish took place over whether information obtained after the original disciplinary charges were filed could be considered as a reason for discharge. On that, Professor Rezler held for the teacher: "Arbitrators are in general agreement that discharge or dismissal of an employee must stand or fall on the reasons given at the time when the decision to discharge was made." He quoted a number of authorities, including Owen Fairweather's *Practice and Procedure in Labor Arbitration* and Elkouri and Elkouri's *How Arbitration Works*.

After that issue was resolved, several hearings were held. The hearing officer identified four issues: (1) did the teacher offer the student money to kill the principal and two assistant principals? (2) did he witness the sale of cocaine and fail to report that transaction to proper authorities? (3) did he solicit another student to commit a crime? and (4) if he committed any of the above offenses, was his conduct properly punishable by termination?

The case was based on the PTA president's accusation. On that charge, the teacher had been found not guilty. But the finding of the court did not resolve the question of whether the man had engaged in conduct unbecoming a teacher.

The original charge depended primarily on the testimony of the student. Rezler noted significant inconsistencies in the student's story between the trial and the hearing: "He contradicted himself on almost all aspects and circumstances underlying his involvement with respondent's alleged scheme." Rezler listed several areas in which the evidence was inconsistent, including the number of meetings the boy claimed he had had with the teacher, the location of the meetings, the amount of money offered, the number of occasions that he was shown money, and whether the teacher had displayed a gun.

At one point, the boy said that the teacher offered him $500. Later, at the hearing, he said that "the teacher gave me $1,000 to start killing those three men." For killing all three, he first said that he was offered $1,500 for each. At the hearing, he said that he was offered $500 for each. As to almost every detail, the boy changed his story.

As Rezler pointed out, the teacher had no reason to believe that his career was being prejudiced by any of the officials mentioned. The teacher had received a satisfactory or excellent rating during his years with the school. According to Rezler, the teacher "did not have any rational motive to take extreme measures against the principals of the school. In the absence of such reason, irrationality of mind remains the only other explanation for the alleged murder plot. Only a paranoid psychopath, suffering from a persecution complex, would commit a mass murder to eliminate his assumed competitors from the field."

The evidence did not show that this teacher suffered from any mental disorder. He had been a member of the public school faculty for twenty years. No witness recalled any incident that would have indicated abnormal behavior. A medical examination found the teacher physically and mentally fit to teach.

Rezler then considered whether the mother and her son had any reason to accuse the teacher of a murder plot.

The evidence disclosed that the PTA president and the teacher had enjoyed a close personal relationship during the time that they were working to establish the PTA. The relationship had soured during the summer.

In addition, according to the teacher, the woman had borrowed $500 from him. Upon returning from a vacation, he went to her house to collect the money, but she refused to pay. At that time, he noticed some aluminum foil with white powder in it, next to a scale in her kitchen. He testified that a man came into the kitchen, put his finger in the powder and then to his mouth. The man gave the woman some money and took away the aluminum-foil package.

Their falling out came to the surface at a PTA meeting that same evening. Several teachers testified that a heated argument broke out, during which the teacher told everyone that the PTA president was refusing to repay a loan, and he accused her of engaging in drug activities.

Rezler concluded that these events may have given the woman a possible motive to retaliate by making a false accusation against the teacher. Based on that scenario, Rezler denied the original charge. He did credit the teacher's testimony that he has seen the woman engaged in a drug sale, however. The teacher had repeated that story to PTA board members, including several other teachers. He had said that "her nose was red and disfigured and she looked like she snorted coke." The teacher had not reported the incident to the proper authorities.

The teacher was also accused of asking a former student to kill the boy who had testified against him. According to the testimony, the teacher gave that person $500 as a downpayment, for a total price of $3,000. The teacher's version was that he gave him money to buy cocaine from the complainant, which the teacher planned to turn over to the police. Rezler did not believe the former student. He found the teacher's story more credible. But the teacher's action was nevertheless illegal. He knew it was illegal to

purchase cocaine. Based on his own testimony, he took the law into his own hands instead of cooperating with the police in securing the evidence.

Based on the teacher's own testimony, Rezler upheld the dismissal. In witnessing the sale of cocaine and failing to report it to the authorities and in giving a former student $500 to purchase cocaine, the teacher set a poor example for students. Since the original charge had been dismissed, the teacher was entitled to back pay up to the date that the second set of charges were adopted by the board. As of that date, the teacher was terminated.

THE PISTOL-PACKING TEACHER

A teacher in New York City was arrested for accosting a woman on the street while carrying a gun. When arraigned, he pleaded guilty to criminal possession of a weapon in the second degree. He was sentenced by the court to probation for five years, with psychiatric care.

The teacher was suspended from school, pending a hearing. The school administration concluded that the teacher should not be in charge of an elementary school classroom because he was not a proper role model for students. Local newspapers had covered the incident. The principal testified that news of the teacher's arrest had circulated throughout the school system and that having him return to the classroom would be bad for the school.

Dr. Fred Goldberg, the district superintendent, testified that "as a role model, a teacher at the very least should not be involved in a felony crime. . . . The public school system is not a rehabilitative agency for convicted felons."

At the hearing, the teacher admitted that he had been drinking and had been carrying a gun. After the incident,

he had taken the pistol to the local police precinct; the administration, however, did not feel that this was a mitigating factor.

Counsel for the teacher argued that the grievant's guilty plea should not disqualify him from teaching. The court had concluded that the man's conduct was merely an aberration, not something that would prohibit him from working.

The arbitrators agreed that a criminal conviction would not always result in discharge, but felt that the evidence in this case demonstrated that the respondent was not a suitable role model for students. The panel expressed particular concern about the violent nature of the teacher's action. Finding him unfit to be a teacher, the panel ordered him suspended for one year, with the requirement that, at the year's end, he would submit to a psychological examination to determine whether he was rehabilitated so that he could return to the classroom. He would have up to three years to produce such documentation. If after three years he was still not certified, he should be dismissed from employment.

The panel pointed out that, although teachers are not expected to be perfect, "the community has a right to expect its teachers to be unburdened by problems so severe as to lead to feloneous conduct of the type involved here." If the issue is the *problem* behind the conduct and not its *criminality*, the arbitrator is given the difficult task of interpreting the motivations for a teacher's illegal conduct and determining whether the teacher is an improper role model. Should a teacher who is convicted of drunk driving be terminated? Should one convicted of tax fraud be dismissed? What if a teacher is arrested and given a jail term for picketing a nuclear power plant or a missile base? These are difficult questions, and, again, it is up to the arbitrator to draw the line.

DRUNK AGAIN

Coming to work drunk is a serious offense for any employee. For a teacher, it is particularly serious. Most teachers do their drinking on their own time. Nevertheless, a teacher with a drinking problem may be chronically absent. That and other typical behavior patterns put the school on notice that it is dealing with an alcoholic.

Such a situation arose in Community School District No. 26 in New York City. The teacher had been teaching for more than fifteen years. She was charged with eight incidents of absenteeism and lateness.

She did not contest the facts. She admitted that she was an alcoholic. She felt that her alcoholism was an incurable disease. She admitted being absent, saying, "Yes, I guess I was hung over a few too many times and I'm sorry. I'm not that way now, but I was then."

The school board had encouraged the teacher to join an Alcoholics Anonymous program. She testified that she was trying to overcome her problem. At the hearing, the teacher's own witness, the Reverend Peter Sweisgood, executive director of the Long Island Council on Alcoholism, explained that "the alcoholic has to face the consequences of his or her actions. We all have to do that."

The opinion of the review panel was written by George H. Fowler, a former member of the New York State Public Employment Relations Board: "The panel sympathized with the teacher and her effort to resolve her problem with alcohol but felt that the best interests of the school children should be given priority over her interest." In view of her long service, the panel agreed to give her one last chance. She was suspended for four months. If she again violated her responsibilities because of alcoholism, she should be terminated.

CONCLUSION

Alcoholism is so widespread in our society that it is sometimes not even considered to be a serious moral breach. Instead, it is regarded as a medical problem and, when it interferes with an employee's work, employers are expected to encourage employees to get treatment. Only when an employer has demonstrated willingness to help an alcoholic employee will an arbitrator uphold a discharge for persistent behavior. Yet, arbitrators often give alcoholic employees another chance. The panel in the previous case agreed with Reverend Sweisgood that alcoholics must face the consequences of their actions.

In industrial cases, alcoholism may surface during some outrageous incident when the worker was drunk—for instance, an employee riding his motorcycle down the production line, fighting with a security guard outside the factory, or becoming ill at his machine. These kinds of incidents occur less frequently in the relatively socialized world of the teacher. Teachers usually come to school sober, reserving their drinking for later.

Nevertheless, there are many cases where arbitrators must consider the effects of alcoholism. In deciding such cases, an arbitrator will consider whether the teacher's drinking has impaired job performance. Was the teacher drunk in class? Or did the drinking occur only in private, becoming a problem through chronic absenteeism? Always, the interests of the children are carefully weighed. That is also true of situations where teachers are charged with breaking other behavior rules. How did the violation impinge upon the education of the students? Was the school program disrupted?

Drugs are treated somewhat differently. The mere possession or use of marijuana or cocaine or heroin may be a crime. Teachers who use such drugs tend to do so in

private. But in recent years, communities have become more concerned about the drug problem in their schools. Reflecting this concern, public schools treat teachers harshly if convicted of using or trading in drugs. Often, a teacher will be suspended until the criminal process has run its course. Then, appropriate discipline will be meted out.

The cases in this chapter were almost all decided in favor of the school system rather than the individual teacher. In contrast, the first chapter's cases, on discipline and violence, show no such tendency. Are school systems and arbitrators more willing to tolerate a teacher who has problems in the area of discipline and violence than one who has problems with drugs and alcohol? Or are the problems in this chapter so serious that, by the time they come to the surface, there are no other options?

In the next chapter, a different kind of grievance will be described—direct confrontations between teachers and the school administration. Here, too, with bad luck or poor judgment, teachers can find themselves in serious trouble. These cases are particularly interesting for what they say about the ethos of the institution and the role that teachers play in determining the institution's policies.

CITATIONS

A Case of Intercourse: Board of Education of the City of New York *and* Individual Respondent, *Arbitration in the Schools* (AIS), 144–15.

Driving a Student to Distraction: School District No. 86, Hinsdale, Illinois, *and* Individual Respondent, AIS, 159–13.

Is There an Obligation to Rehabilitate?: United Teachers of Flint *and* Board of Education of the City of Flint, AIS, 143–2.

Just a Few Obscene Letters: Board of Education of the City School District of New York *and* Individual Respondent, AIS, 137–16. Also, commissioner's decision on appeal, AIS, 142–14.

Is Having a Child Out of Wedlock Grounds for Discharge?: Echmann *v.* Board of Education of Hawthorn School District, No. 17, 82-C-20101, *National Law Journal* (July 22, 1985).

Selling Pep Pills in Buffalo: Board of Education of the City of Buffalo *and* Individual Respondent, AIS, 136–17.

Cocaine in Nassau County: Community School District No. 21 *and* Individual Respondent, AIS, 156–16.

Guilty Until Proven Innocent: Association of Catholic Teachers Local Union No. 1776 *and* Archdiocese of Philadelphia Secondary School System, AIS, 178–10.

First Let's Kill the Principal: Board of Education of the City of Chicago *and* Individual Respondent, AIS, 161–15.

The Pistol-Packing Teacher: Community School District No. 10 *and* Individual Respondent, AIS, 168–1.

Drunk Again: Community School District No. 26 *and* Individual Respondent, AIS, 165–4.

CHAPTER 3

Challenging the School Administration

The issue of teachers' rights is a sensitive one in the public schools. Teachers are on particularly dangerous ground when they directly challenge school policy and the administrators who enforce it. Often, teachers may feel that a certain policy inhibits their ability to teach well; other times, they are unhappy with teaching conditions in the school. Such cases clearly pit the teacher's interests against those of the principal.

The cases that are the subject of this chapter describe situations where relationships between teachers and administrators have deteriorated so severely that positive communication is no longer possible. The issues could not be resolved by the internal grievance procedure. When an arbitrator is called in, the situation is often already out of control.

Conduct unbecoming a teacher is a charge often found

in dismissal proceedings. It appears in many collective bargaining contracts. It is a broad, flexible definition, applied to extreme misbehavior as well as to insubordination and more modest breaches. Often, such proceedings are initiated because of disagreements with administrators, and sometimes because of complaints made by parents or students, as the following case demonstrates.

A CHRONIC COMPLAINER

A grievant in Providence, Rhode Island, employed as an English teacher at Classical High School, had filed numerous complaints against the school board about the conditions of her employment. Sometimes she won. But because of her persistence, the administration classified her as a chronic complainer.

At the end of the school year, she was transferred to another school. In the letter of transfer, the superintendent stated that the move was "necessitated by the numerous complaints of students, parents and the administration at Classical High School." The grievant requested copies of these "numerous complaints" and received them in late August. They had not been placed in her personnel file.

Her union claimed that the transfer was improper because copies of the complaints were not supplied to her until several months after she was transferred. It alleged that the transfer was actually due to union activities, particularly a dispute over lesson plans that the grievant had taken to arbitration. In response, the administration said that the transfer was not a disciplinary action, simply a managerial response to the letters of complaint.

Arbitrator Peter Blum of Connecticut reviewed the collective bargaining contract, which said, "No teacher shall be involuntarily transferred except at the discretion of the

superintendent." He agreed with the union that the superintendent's discretion could not be arbitrary or discriminatory, but he believed that the superintendent had justified the transfer as based on the numerous complaints. Blum also insisted that there was no requirement in the contract that such complaints be placed in a teacher's personnel file.

The arbitrator pointed out that the teacher knew that concern had been expressed about her behavior. The record showed numerous complaints from the administration about her lack of rapport with students. Those problems had been discussed with her. The arbitrator concluded that the transfer was not disciplinary, but rather was justified by the complaints. The right to transfer teachers is a management prerogative, confirmed in the collective bargaining contract. The grievance was denied.

The arbitrator appointed by the teachers' union dissented. The complaint letters should have been placed in the grievant's file. Since they were not, they should not have been considered. Another provision in the contract stated, "There shall be no other official personnel file on a teacher except his designated file." From this, the union arbitrator inferred an obligation to place all relevant material in the official file. But the majority decision—denying the grievance—carried the day.

THE CASE OF THE CONSTANT VISITOR

As the previous case demonstrated, complaints by parents can be damaging to a teacher's career, especially because a collective bargaining contract does not protect teachers from criticism. One way teachers react to this exposure to criticism is to try to protect their privacy in the classroom, making them extremely sensitive about being

observed by parents and administrators while teaching. In this, they are no different than most other employees who do not like to be observed or criticized while carrying out their work.

Walter Gellhorn, a former professor of administrative law at Columbia Law School, heard such a case involving the Roosevelt Union Free School District. A teacher filed a grievance because a member of the board of education had visited her class six times in the fall and fifteen times during the winter. The board member's niece was a student in that teacher's class. The teacher claimed that these frequent observations "distracted students, disturbed the instructor and diminished the effectiveness of instructional plans." On some occasions, the board member made brief comments or asked questions that the teacher perceived as critical of her methods.

Professor Gellhorn pointed out that he could "readily conclude that the board member's frequent attendance did not help [the teacher] fulfill her responsibility of teaching fourth-grade children, which must in any event be one of the most difficult assignments in all of American education." On the other hand, he found the board member's intentions to be "altogether admirable." She was concerned about her niece, who had reading difficulties and had not been completing her homework. She wanted to understand her problems so that she could emphasize the importance of education. In this, she functioned as a concerned parent, not as a board member.

Professor Gellhorn noted that the school district had a stated policy that "visits to our schools by parents, other adult residents and interested educators are welcomed and encouraged." At the same time, he suggested that the board member moderate her zeal and be "mindful of every teacher's sensitivities and of the teacher's need to be perceived by the children as the person fully in charge during class hours."

There was nothing critical in this teacher's personnel file. Gellhorn decided that there had been no violation of the contract. "It is simply one of the tiffs that, unfortunately, are occupational hazards which both parents and teachers occasionally encounter." He denied the grievance.

INSULTING THE PRESIDENT OF THE BOARD OF EDUCATION

A case arose in the Auburn City School District in New York State. A teacher with almost twenty years' tenure approached the president of the board of education and his wife at a party given by the social studies department at a local country club. In a loud voice, he berated the president: "I had two of your kids in school, and I can't believe they were your issue. I can't understand how such nice kids could have a father who is such a no-good son of a bitch. For years you have been cranking out that literature on your printing press, but you never had the nerve to sign it."

There were numerous witnesses. The facts were not in dispute. The teacher was referring to the fact that the president had published material attacking Vietnam protestors.

Afterward, the school board filed charges against the teacher. The union defended him on the basis that the dinner was a private affair. Whatever was said had no adverse effect on the education of school children. At the time, the president had not indicated that he was offended. In any case, the union said, a teacher has a right to express his views. No penalty should be imposed.

Irving R. Markowitz, the panel chairman, did not agree. Most of the guests at the dinner were from the school. Markowitz felt that the grievant's accusation was not pro-

tected by the First Amendment. In support of this view, he cited *Chaplinsky v. The State of New Hampshire*, 315 U.S. 568 (1942), in which the U.S. Supreme Court upheld the conviction of a Jehovah's Witness who called a police officer a "Goddamn racketeer" and "a damned Fascist." The Court in that case concluded that: "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

According to Markowitz, the language used by the respondent was intended to embarrass the president. Teachers must refrain from using that kind of language to elected officials because it erodes morale and disrupts relationships within the school.

Markowitz and the employer member of the panel agreed that the incident constituted unbecoming conduct. But since only a few people heard the grievant and his performance as a teacher was not impaired as a result of the incident, a written reprimand would be sufficient.

The union member of the panel dissented, explaining that the teacher used "common, everyday language." Modern conversation embraces coarse words, used by parents and by students. The teacher was expressing his point of view about the John Birch Society. His comments were not directed at the president's role in the educational community. "Furthermore," the union member said, "I find it inappropriate for a school district to be more concerned about soothing the ego of the president of the board of education than educating the children of the district." The panel chairman did not agree.

Teachers can express themselves on political issues, exercising their constitutional right of free speech. If the grievant had adopted a less adversarial tone, he might not

have been disciplined. But when a teacher directly attacks a school official, intending to offend, some punishment is likely. Then school relationships are affected and the interests of the school are directly involved. Teachers, like other employees, are expected to be loyal to their employers.

IT DOES NOT PAY TO LOSE YOUR TEMPER

Sometimes, principals irritate teachers by monitoring their classrooms too closely. A tenured teacher assigned to the sixth grade at the Norwood Elementary School in New York State was charged with conduct unbecoming a teacher and insubordination. The charges arose because of an argument between the teacher and the principal. The principal had told the teacher that he would like to observe his class. The teacher replied that his door was always open. When he recalled afterward that this would be the third such visit during the school year, he became angry.

When he met the principal in the lobby on the following morning, he told him that he was "pissed off." He felt that he was being harassed and he questioned why he was the only teacher observed more than twice a year. The principal told him to go to his classroom. This response made the teacher even more angry; he felt as if he were being sent away like a child. He told the principal that he would go when he felt like it. When he offered to settle the matter with the superintendent, the principal turned away without replying. The teacher began to walk up the stairway to his class. Then he turned and said to the principal in a loud voice, "You are nothing but an asshole. Write that up." His remark was heard by several students in the area.

All of this became part of the testimony at the subsequent arbitration. The principal recommended a thirty-day suspension. This was the first disciplinary action

against the teacher, who had been teaching there for twenty-seven years. The teacher conceded that his conduct was improper and that his choice of language was unwise. But his union argued that a reprimand would have been sufficient.

Teachers are likely to be disciplined for making inflammatory remarks to supervisors. That conduct is viewed as insubordination, which cannot be allowed. In theory, condoning such language breeds disrespect for supervision and threatens the administrator's ability to control the faculty. Of course, language used by a teacher cannot be considered in a vacuum. Words must be appraised in the "totality of surrounding circumstances." Was there provocation? Were others present when the incident took place? Much depends upon the tone of voice, the setting, and the effect of the language used.

The panel concluded that not only was the teacher's language inappropriate, but he knew that others were present and he intended to insult the principal. Thus, the panel found him guilty of conduct unbecoming a teacher and of insubordination.

The panel decided that a thirty-day suspension was excessive. This was the first infraction in an otherwise excellent career. The teacher admitted that he had been wrong and had apologized. Furthermore, the principal should have explained the purpose of his visit. The panel recommended that $250 be deducted from the teacher's salary. The tripartite panel unanimously agreed.

TAPE RECORDING THE PRINCIPAL

Professor Robert F. Barlow of the University of New Hampshire wrote a thirteen-page opinion about a similar case in Vermont, also involving a direct confrontation be-

tween a teacher and a school official. In this case, the grievant had received a four-day suspension for conduct unbecoming a teacher—namely, for making an unauthorized tape recording of a telephone conversation with the school superintendent and subsequently playing the unauthorized tape. A disciplinary committee decided that two of the four days of suspension should be without pay.

The teacher made the recording because he felt that he had been placed in a difficult position. Previously, he had been rewarded by the school administration for his work in oceanography. Recently, he had been told that no further support would be forthcoming. In his opinion, the superintendent was telling him one thing, while the chairman of the department was telling him another. He felt that it was necessary to obtain the tape recording of the superintendent's words to demonstrate that fact to the chairman.

The facts were not in dispute. The teacher had made a tape recording of a telephone conversation with the superintendent and played it back to the chairman of his department, without the knowledge of the superintendent. The administration decided that the action was unprofessional because it interfered with communications within the school system. The action was also viewed as insulting to the superintendent. Professor Barlow pointed out, however, that the taping did not violate any rule or regulation. Nor did the grievant realize that taping a telephone conversation would be considered a serious offense.

The issue before the arbitrator was whether the suspension was for just cause. Professor Barlow criticized the procedures followed by the school superintendent. The grievant wanted to apologize to the superintendent and explain why he had taped the conversation, but he was not given an opportunity to be heard. Nor was he told that a committee was meeting to take disciplinary action.

The arbitrator felt that the school had not been fair. In his view, making the recording was ill-advised, but it

was not a major offense. The superintendent had acted in anger and the disciplinary committee had voted solely on the basis of the information that he gave them. The committee was never told why the recording was made. And no investigation had been conducted by either the superintendent or the committee. In short, the teacher had been denied due process. Thus, the arbitrator decided that the suspension was without just cause. Barlow ordered the teacher "to fulfill his original intent by apologizing, both orally and in writing, to the superintendent for the tape recording incident."

Such an award is unusual. Labor arbitrators do not usually fashion this sort of remedy. They are more likely to decide the dispute based on the collective bargaining agreement, either supporting or denying the grievance.

A FEUD OVER ABSENTEEISM

In some cases, disputes between teachers and the administration survive for years. At Stuyvesant High School in New York City, a teacher was charged with "excessive absence," regarded as a neglect of duty and conduct unbecoming a teacher. The record showed chronic absenteeism. The absences often occurred before and after weekends or holidays. The teacher, who taught freshman and sophomore English, had been warned many times and had received unsatisfactory performance ratings for years. There were numerous complaints from parents and students about his repeated absences.

The teacher claimed that his absences were caused by illness, sometimes the result of tension from the difficulties he was having with the principal. For almost three years, these two had exchanged communications in which the principal complained about absences and the teacher, in

turn, accused the principal of lack of courtesy and of taking even more time away from his job.

The panel found that the teacher was excessively absent, as charged. The teacher had argued that English students at Stuyvesant were so self-motivated that they could learn English without his regular presence. The panel chairman, Professor Steven J. Goldsmith of Pace University, and the management representative did not agree. They felt that students need daily contact with their teacher. This teacher's chronic absence had destroyed the continuity of the class. Rather than trying to improve his attendance record, he had "maintained a running battle. . . a furious no-holds-barred battle in which he attacked the principal at every turn." His contentious responses contributed to the neglect of his duties.

The panel concluded that the teacher should be disciplined. Accordingly, they recommended that the teacher be suspended from employment without pay for one semester. His misconduct had been continuous for three school years. Excessive absenteeism alone is grounds for discipline. When absenteeism is compounded by insults and threats toward superiors, what might have been mere incompetence became gross misconduct.

PROVOKED TO VIOLENCE

The Washington Teachers' Union in the District of Columbia filed a grievance on behalf of a music teacher who had physically attacked a principal. He had been transferred to a junior high school but for three months had not been given a teaching assignment. He was told to introduce a music program into the school but was not given the resources to do so. In fact, he was placed in a virtual cubbyhole and told to stay there. Occasionally, he was

invited to play in a school program.

One day when it was hot in his office, he left the door open as he played the piano. The principal came by and told him to close the door. In response, the teacher complained about the heat. The principal threatened to send him home, and the teacher began to swear at the principal. An argument broke out. Other teachers came between them. Soon afterward, a police officer appeared and directed the music teacher to leave the building. He was placed on administrative leave, and a grievance was filed on his behalf.

The late Howard G. Gamser, a highly respected arbitrator, was asked to decide whether the grievant had assaulted the principal. According to Gamser, a physical assault would justify immediate termination. "Emotionally, temperamentally and professionally, a teacher must be able to restrain himself and not to initiate a physical encounter on school premises."

Based on the testimony, it was not clear that an assault had occurred. The principal testified that he had been hit in the arm as he attempted to ward off a blow to his head. The grievant denied that he had swung at the principal. Three witnesses said that they had not seen any blows. One of them, an art teacher, testified that he had heard "vulgar" language, but had not seen any contact. Another witness, the librarian, came into the hall when she heard loud voices. She saw the art teacher restraining the grievant. She did not witness any blows. Nor did the assistant principal see a blow struck, although she testified that the principal's arm appeared bruised on the following day.

There was no testimony other than the principal's to confirm that an assault took place. Gamser was reluctant to sustain a discharge based on circumstantial evidence. On the other hand, the teacher had used obscene language. Gamser considered this unprofessional. He ordered the board to reinstate the teacher without back pay for the period that he had been off the payroll. Since his award

was issued in November and the teacher had been terminated in April, this was a substantial penalty.

CONCLUSION

A school is a self-contained community with its own lines of authority and internal relationships among the many individuals who participate in the work. Schools should encourage association among children and adults, making the educational institution a place with respect, integrity, and affection.

The teachers lost in five out of these seven cases. In another case, the teacher received a severe penalty. The grievants were directly challenging the school administration, so their lack of success may not be surprising. Nevertheless, arbitration gave them an opportunity to test the fairness of the system.

An element that has been present in several of the cases in this chapter is provocation. A school principal pushes a teacher too far. The teacher reacts. Then, the teacher is disciplined. Whether the case involves a music teacher placed in isolation, an experienced classroom teacher subjected to periodic observation by the principal, or some other form of harassment, a teacher who attacks the school authorities is asking for trouble.

CITATIONS

A Chronic Complainer: Providence Teachers Union *and* Providence School Committee, *Arbitration in the Schools* (AIS), 146–7.

The Case of the Constant Visitor: Roosevelt Teachers Association (New York State United Teachers) *and* Roosevelt Union Free School District, AIS, 152–10.

Insulting the President of the Board of Education: Auburn Enlarged City School District *and* Individual Respondent, AIS, 157–14.

It Does Not Pay to Lose Your Temper: Norwood–Norfolk Central School District *and* Individual Respondent, AIS, 154–17.

Tape Recording the Principal: Essex Junction Education Association *and* Essex Junction Prudential Committee, AIS, 144–4.

A Feud over Absenteeism: Board of Education of the City School District of New York *and* Individual Respondent, AIS, 158–15.

Provoked to Violence: Washington Teachers' Union *and* Public Schools of the District of Columbia, AIS, 156–12.

CHAPTER 4

Breaking the Rules of Behavior

Some teacher grievances arise when school rules are broken. These disputes sometimes seem trivial—dress code violations, for instance. Other times, however, they may involve important personal rights. How would you classify smoking regulations? Or the obligation of a teacher to keep a classroom door closed? These issues may not be of major importance to the educational structure, yet they result in arbitration cases.

Each school adopts its own rules of behavior. Sometimes, these rules are imposed by the school board or by the superintendent; other times, they reflect the personal views of the school principal. Increasingly, these codes of behavior are negotiated as part of the collective bargaining process. Rules may seem unimportant to an outsider, but in a school community, behavioral regulations take on an immense importance.

SARTORIAL STANDARDS IN CINCINNATI

A case involving a dress code arose in the Mt. Healthy city school system outside of Cincinnati, Ohio. Three teachers had been told that if they wore jeans, they would violate the dress code. On the following day, all three wore jeans. They were called to the principal's office for an informal conference, after which each teacher received a memorandum noting that they had worn blue jeans in school and had been told that "blue jeans are inappropriate attire for professional educators to wear in the classroom."

The collective bargaining contract contained a dress code provision, included in 1981, covering members of the bargaining unit. "Inappropriate" was defined as anything that would create a health violation or disrupt the classroom. "Appropriate" was defined as that which is acceptable in public in the immediate geographical area.

The arbitrator was Professor Hyman Cohen, a lawyer from University Heights who teaches at Cleveland State College of Law. The grievance filed by the teachers' association asked him to decide whether the school could prohibit teachers from wearing blue jeans in school.

This seemingly trivial case required an eighteen-page opinion from the arbitrator, in which he analyzed the dress code. According to Cohen, the board has the burden of showing that the wearing of blue jeans was prohibited. The principal had tried unsuccessfully to persuade the arbitrator that wearing blue jeans would impair the teachers' ability to maintain discipline.

The arbitrator found no evidence that blue jeans constituted a health or safety hazard. Nor did the board demonstrate that blue jeans were not acceptable in public in Mt. Healthy. In fact, one of the teachers explained that he often wore blue jeans in public. Mt. Healthy is a working community where blue jeans seem to be acceptable. Based

on the evidence, the arbitrator concluded that such attire was appropriate.

When there is a clash between behavioral rules and the teachers' individual lifestyles, arbitrators are often willing to defer to the individual grievant. In recent years, a liberalization of social conduct in the United States has coincided with a more liberal interpretation of individual rights by both courts and arbitrators.

AN OPEN-AND-SHUT CASE

A teacher in Imlay City, Michigan, was reprimanded for leaving his door open while conducting class. Arbitrator Leon J. Herman made short work of that grievance.

During an earlier energy crisis, the superintendent of the school had sent a memo to school personnel encouraging them to conserve energy. High school teachers were asked to keep their doors closed. Three years later, there was no longer an economic reason to ask teachers to keep their classroom doors closed. But the rule stayed in place.

Teachers found that keeping classroom doors closed was not easy. Hundreds of students in the school changed classes every fifty minutes. Students frequently moved from one room to another.

The assistant superintendent was given responsibility for energy conservation. At the arbitration hearing, he testified that whenever he noticed a teacher's door open, he would close it and continue down the hall. After several such incidents with one particular teacher, he had warned the teacher about the problem and had then issued a reprimand stating, "If you fail to comply with the above directives, further disciplinary action will be taken up to and including dismissal."

The grievant responded with his own memorandum.

He said that he tried to keep the door closed. He had an average of 36 students in his class and his total class load was 154 students. Usually, he would close the door a few minutes after the period started to comply with the directive. On the day in question, several students had been called out and had recently returned. He was giving a quiz and had not noticed that the door was open. He felt that the education of students should be the primary concern of the school, not whether a door was open or closed.

Counsel for the school board argued that a reprimand was appropriate. The door had been observed open several times. Counsel insisted that "it must not be forgotten that energy conservation is a serious business."

The union claimed that a reprimand was equivalent to hitting a fly with a sledgehammer. The threat to terminate this teacher was overkill. He had been teaching for more than twenty years, with an excellent record.

The arbitrator agreed with the union. Since the door was not in the teacher's normal field of vision, its being left open was not proof of insubordination or negligence. The arbitrator concluded that the reprimand should be removed from the teacher's work record. In addition, the arbitrator made a practical suggestion: doors in the high school should be equipped with automatic door closers. He said, "Teachers could then devote their full classroom time to student instruction rather than to keeping a door under observation for fifty minutes in each hour."

TO SMOKE OR NOT TO SMOKE

In a rural high school in Enosburg Falls, Vermont, law school professor John Sands was asked to determine whether the school board violated the contract by banning smoking in school buildings.

For at least ten years, smoking had been permitted.

Teachers smoked in their faculty room, in the conference rooms, and in the office of the principal, himself a smoker. During 1975, the school board became alarmed about fire safety. From that time on, smoking was not allowed anywhere in the old high school building. That ban met no faculty opposition. It was a matter of common sense. The building was a fire trap.

In 1982, a major renovation of the building was completed so that it became a modern, fireproof structure. The faculty grievance committee requested a resumption of smoking privileges in the faculty room. The request was denied. In 1983, the association filed a grievance on the question. The school district denied that the issue was arbitrable.

Arbitrator Sands held that the grievance was arbitrable, but that he had no authority to modify the agreement. There was nothing in the agreement about smoking. Nor did the contract place any limitation on the board's power to regulate smoking. Thus, the board did not violate the agreement by banning smoking in school buildings. He denied the grievance.

With current concern about the health effects of smoking, both upon the smoker and on those who breathe smoke, grievances on this subject may increase. Most public schools prohibit students from smoking on the premises. Although the rules are more flexible as to the faculty, smoking may be restricted to certain areas. Some courts have held that employees have a right to a smoke-free environment. This concept could expand into grievances arbitrated in the schools.

NOBODY HERE BUT US BRIDGE PLAYERS

A case arose in the Bethlehem-Center School District in Pennsylvania concerning another aspect of teachers'

personal rights. In this case, Professor William J. Hannan of the University of Pittsburgh was asked to decide whether teachers have the right to play cards during their lunch break in the teachers' lounge.

Prior to 1978, the elementary schools in that community were housed in separate buildings spread throughout the district. Supervision in each building was provided by a "head teacher." It was customary for the teachers to play cards during lunch. The roving principal knew that teachers played cards, and he often took part in the games himself.

In 1978, a new consolidated school building opened, as did a new position—director of elementary education. The practice of playing cards continued. After being appointed, the director told several teachers that he disapproved of the practice. In the fall, when he discovered some teachers playing cards, he expressed his displeasure. The playing ceased, and no disciplinary action was taken.

The issue came up again when the chairman of the school board announced at a public meeting that he had heard that teachers were playing cards when they should have been performing their duties. The director denied that card-playing was taking place. A few weeks later, the director found four teachers with cards in their hands in the faculty room, about to start a game. He told them that card-playing was not permitted and issued a letter of reprimand to each of them. A grievance was filed.

At the arbitration, the facts were not in dispute. The question was whether teachers had a right to play cards during their preparation period. The school district argued that teachers were supposed to work during their preparation periods, although a cigarette or cup of coffee was permissible. The teachers' association based its case on past practice. Preparation time was primarily for paperwork, but the teachers should be allowed to socialize as they had done in the past.

Professor Hannan decided that since card-playing had been allowed in the past, the school district was obligated

to negotiate any change. There was no rule prohibiting card-playing during preparation time. Therefore, the district could not reprimand teachers for playing cards. In fact, in its staff manual, the district said that socializing could take place during preparation time. As the arbitrator pointed out, card-playing is a common form of socializing. The grievance was upheld.

Although the issue in this case might seem trivial, perhaps the explanation for why it had to be arbitrated is that the issue had been raised in public by the chairman of the school board. Questions discussed at school board meetings take on an additional importance because they involve the reputations of school administrators. Then, they become difficult to resolve in grievance discussions.

When arbitrations occur in a small community, the school board may be represented by a local attorney, whose fee is a cost against the rate payers. In recent years, education associations have become increasingly cost conscious. This teachers' association presented its case through a UniServ representative. These people are trained, nonlegal representatives used by the teachers' unions to appear as advocates in teacher grievances. These advocates, most of whom are not attorneys, are trained to handle arbitration cases. They are familiar with the school environment and with the politics of the bargaining unit. Teachers' associations that use UniServ representatives obtain an efficient and economical service. They may even have an advantage over school boards that are represented by outside attorneys not familiar with public school arbitration.

"BULLSHIT" AT CENTRAL HIGH

A case that arose in the Saugerties Central School District involved a squabble between a high school teacher and his principal. On the day of the incident, a unique

aspect of the school environment was evident—the euphoria that infects everyone on the last day of school.

The teacher decided to leave the building for lunch, together with three other teachers, shortly before the official 1 P.M. closing. According to the principal, the teacher had been told to stay in the building. By leaving early, he violated the rule. On the way out, the teacher noticed the principal sitting in his office. Talking in a loud voice, the teacher said that he was tired of "all the crap" and that "it was all bullshit."

The principal felt that the teacher's behavior was insubordination and grounds for discipline. The teacher claimed that he did not know that he could not go out for lunch on the last day of school. He had completed his work. Although he admitted that he had used profanity, he said that his remarks were not directed at the principal.

The school district was represented by Melvin H. Osterman, Jr., an experienced trial attorney. He was accompanied at the hearing by the superintendent of schools, the assistant principal, the high school principal, and his secretary. The union was represented by its attorney. Also participating in the hearing were four teachers and a guidance counselor.

Based on the testimony, the panel found that the teacher did act in an insubordinate manner that was unbecoming to a teacher. The teacher knew that he was not supposed to leave before one o'clock. By leaving early, he acted with insubordination. The majority also found that his remarks were heard by at least two supervisors, three other teachers, and a secretary. His language was inappropriate. His words might be considered "shop talk" in some settings, but not in a public school.

Rodney E. Dennis, the panel chairman and a labor relations expert, admitted that four-letter words are commonly used in public schools by students, teachers, and some parents. The words "crap" and "bullshit" are common

currency, but not when used by a teacher within earshot of the principal's office.

The union's panel member filed a thoughtful dissenting opinion. He said that it was not clear that teachers had been forbidden to go out for lunch before one o'clock. As to the language, he said that the words used are "commonplace in schools and in the rest of the society." He added: "There is no evidence that this is any more than a one-time incident at the end of the school year when all parties are tired and interested in the end of school. I cannot find any allegation worthy of being dignified by any action other than dismissal of the charges."

The majority, however, upheld the penalty of a written reprimand.

A MATTER OF GENDER

Teachers sometimes face seemingly arbitrary administrative decisions. For example, a kindergarten teacher in Liverpool Central School District in New York was suspended because she refused to be examined by the school physician. The incident launched many years of litigation. I will describe the case here because it could have arisen before an arbitrator.

The teacher had taken an extended leave of absence in the fall to recover from a back problem. In February, the school superintendent told her to report to the district physician, a man. Instead, she submitted a statement from her personal physician certifying that she would be able to return to work in May. She explained that it was against her beliefs to be examined by a male physician.

She was suspended for insubordination. Later, a hearing panel recommended that she be dismissed, based on unfavorable performance reports and complaints from

parents. The school board ultimately terminated her.

She filed suit in state court. The court upheld her dismissal for incompetence, but did not address her constitutional claims. She then filed a lawsuit in the U.S. District Court for the Northern District of New York, seeking reinstatement and back pay. The trial court dismissed her claims. On appeal, the Second Circuit found that she was barred from relitigating the termination, but that the constitutionality of her suspension was still open. "In view of [the teacher's] offer to go at her own expense to any female physician selected by the board [rather than be examined by the school's male physician], the Board's actions must be considered arbitrary."

In a concurring opinion, Judge Oakes said that the right to bodily integrity in a doctor's office is part of a constitutional right to privacy. "[T]his is not, of course, to say that a teacher has a right to examination by a physician of choice, only an option to examination by a physician who is of the same sex as the teacher and who is otherwise competent."

The cost of this litigation in state and federal courts must have been substantial, both to the school board and to the teacher. It would have been far better for all concerned to have had the issue resolved in one proceeding before an impartial arbitrator.

Like other public employees, teachers have personal rights that can only be taken from them for just cause. They have a right to due process. Sometimes such rights are found in the collective bargaining contract. Other rights are fundamental, embedded in the Constitution.

COMBATTING RACISM IN THE BRONX

A teacher may decide to challenge the entire school system. Such a case arose at Morris High School in the

Bronx, where the grievant taught mathematics. This teacher felt strongly about conditions in the schools. He had become outraged at what he regarded as racism in the New York public schools. He felt that it was important to teach students to resist injustice, and so he and another teacher led the Morris High students in a walkout, demonstrating against overcrowded classes, a deteriorating building, and police brutality. He claimed that he was part of a movement called the International Committee Against Racism.

The principal at Morris High tried to persuade students to stay in their classes. She pleaded over the loudspeaker: "Anyone who is telling you to walk out is not doing you a favor." But at about 10:45 A.M. on October 15, 1982, the grievant and another teacher, followed by more than 50 students, walked out of the school. At first they demonstrated in front of the school, chanting, "Walk out. More teachers, less cops." Then the grievant led the students to Bronx Regional High School, where they urged students to walk out. They later continued on to Jane Adams High School. A police car followed the marchers. The march was peaceful, and there were no arrests. No student was disciplined for participating in the walkout.

As the teacher admitted to the panel of arbitrators, he knew that he was risking his job. "But," he said, "I felt it important to make a protest over what had happened." As a result of the protest, the entire neighborhood learned about the issues. And it turned out that his allegations about the school were correct. Morris High School was in severe disrepair. As the chairman Steven J. Goldsmith pointed out: "The auditorium is characterized by falling plaster, and rather needed paint and repair throughout. The same was true of the classrooms that we saw, falling plaster, peeling paint, areas of disrepair, rotting wood on window frames and so forth and so on. There were some newer areas in the school where the walls and ceilings are in better repair." He felt that conditions in the school were "abominable and revolting."

The grievant testified that most students at Morris High School were from minority groups. In 1980 and the spring of 1981, the building was extremely cold. The principal had failed to correct that situation. The teacher also complained of overcrowding in the classrooms—up to 49 students in a room. He saw this as a racist situation.

The grievant was a dedicated teacher. He had received excellent performance reviews for many years. He was consistently well prepared, patient, understanding, and had good rapport with his students. The teacher claimed that the First Amendment gave him the right to try to correct a social wrong. He cited two U.S. Supreme Court cases—*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), and *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Tinker*, the students wore black armbands to protest the Vietnam War. The Court said that unless student conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," that conduct is protected by the First Amendment. The teacher argued, quoting *Tinker*, that "teachers and students do not leave their constitutional rights at the schoolhouse door."

In *Pickering*, an Illinois public school teacher was dismissed for writing a letter to a local newspaper criticizing the school board's handling of a proposed tax increase. The Court held that his letter was not grounds for dismissal. Teachers have the same rights to comment on matters of public interest that other citizens enjoy.

The arbitration panel found that neither case was applicable. Here, the teacher had gone beyond wearing an armband or writing a critical letter to a newspaper. He had led 50 students out of the school in protest. He distributed leaflets and demonstrated at three high schools. He did it deliberately, after he had been ordered not to do so by his principal. Knowing that he might lose his job, he persisted in making a public protest. Furthermore, he expressed no remorse. In his opinion, "The walkout benefitted students'

education and safety and is a proper weapon against racism."

The arbitration panel concluded that the teacher was defiant and that he was likely to break the rules again, leading another walkout whenever the situation seemed warranted. The panel found that the grievant had committed gross misconduct and that severe discipline was merited.

On the other hand, in view of his thirteen years of excellent service, the panel recommended that the teacher be suspended without pay until the end of the fall semester of the 1983-84 school year. Any similar future conduct on his part would result in termination.

While it is clear that this militant math teacher went far beyond what most public schools would permit, one must wonder whether the students were actually harmed by having participated in the event that he created. The issue was real. These children were being treated unfairly, being educated in schools that were literally falling apart around them. Although the issue was important, the technique that the teacher chose—open confrontation—was explicitly forbidden by school policy and put the teacher on a collision course with school authorities.

THE BATTLE OF THE BULLETIN BOARD

The union's right to post announcements on the school bulletin board is sometimes an issue. In a small Michigan community, the teachers' association had been trying to negotiate a contract for more than a year, with no success. Various unfair labor practice charges were pending. The teachers went on strike in October and came back only after the board threatened to discharge them if they did not return.

On the following day, the school board issued a notice that teachers could no longer "wear, post or distribute any material in school buildings that is derogatory or political in nature. This position is being taken so that in absolutely no way will students become part of the present negotiating conflict." Apparently, some caricatures of the school administrators had been posted.

Arbitrator Mario Chiesa was asked to decide whether the school board had the right to prohibit such postings. The teachers' association claimed that the order violated their rights under the First Amendment. The board explained that the order was intended to prevent material being posted that would disrupt the students. The arbitrator pointed out that there was no indication that such material disrupted the school's operation. The board had the right to prevent students from being involved in the labor dispute and could take reasonable steps to accomplish that purpose. But the contract said that the bulletin board could be used for association announcements. He analyzed the various documents and concluded that the school board did not have the right to prohibit their being posted. The arbitrator encouraged the parties to use his opinion as a guideline for the future.

FREEDOM OF SPEECH

Many schools try to keep controversial subjects, such as contract or policy disputes, out of their classrooms. For example, a French and Latin teacher in the Lancaster city schools in Ohio was involved in a disagreement over school policy. He felt that the teaching of foreign languages was deficient. His criticism of the school had been publicized in the local newspaper and on the local radio. The school board told him not to involve his students. When students

questioned him about the dispute, he kept his responses short, referring them to articles in the newspaper. Nevertheless, he was criticized by the school principal. Later, he received a letter of reprimand and was reminded not to discuss the situation with students.

On the following day, he asked a student whether she had complained to the principal. The student denied that she had. That afternoon, the teacher was reprimanded again because he had talked to the girl after he had been ordered not to discuss his case with students. The principal claimed that he had been insubordinate.

The Lancaster Education Association argued that the teacher was merely exercising his right of academic freedom, guaranteed under the contract. A teacher should never be disciplined for discussing a question raised by a student. It is only natural for students to ask questions about a subject reported in the media. Once made public, the subject is no longer a personal matter. And, in any case, this issue involved matters of educational policy. The board denied that the dispute concerned academic freedom and claimed that it was merely a personal grievance of the individual teacher.

Arbitrator David C. Randles found that the original reprimand was not acceptable. The board based its action on statements from unnamed students. The teacher had testified that he tried to avoid discussing the subject with his students. Randles concluded that the second reprimand was valid, however. Even though the teacher had been told not to discuss the matter, he asked a student whether she had reported him to the administration. The grievant could have disputed management's right to forbid such conversations. But when the teacher relied on "self-help," questioning the student after being warned, he was insubordinate. Randles ordered the board to take the first letter of reprimand out of the personnel file. The second letter would remain.

THE RIGHT TO TEACH THE BIBLE

In another freedom of speech case, a high school English teacher requested permission to use the Bible for a remedial reading course. After several conferences about his request, a ruling was issued by the principal: "In no course in our curriculum is the Bible one of our texts. Therefore, it is not to be used." This was confirmed in a directive from the school board.

When the teacher nevertheless began to use the Bible in his classes, he was warned that his action might constitute insubordination. He continued to ask the board for approval. In addition, the union filed a grievance on his behalf, claiming that the board was denying the teacher academic freedom.

When the dispute was submitted to arbitration, arbitrator Harvey A. Nathan, a Chicago lawyer, pointed out that state law authorized school boards to establish which textbooks would be used. The board had refused to approve a course entitled "The Bible as Literature." Thus, the principal was acting in accordance with board policy when he told the grievant not to use the Bible in a course on remedial reading.

The teacher had been instructed not to teach a Bible course. Even so, he persisted in preparing a lesson plan that featured the Bible. He did not notify his principal in advance, as he should have done. When he began to teach his course, he knew, according to his own testimony, that the Bible was not to be used. The arbitrator found that there was no justification for his action. He had been given a direct order. Even after a warning, he continued to use the Bible as a text.

The arbitrator wrote: "I see no great constitutional issues, no encroachment on the Bill of Rights, no misuse by the administration of its supervisory authority. What

I do see is a recalcitrant teacher who, upon finding his students' knowledge of scripture to be less than to his satisfaction, set out to remedy this perceived shortcoming under the guise of a literature course."

In arbitrator Nathan's opinion, there seemed to be more to the case than a recalcitrant teacher. He felt that the grievant had been dishonest. The teacher described his course as comparative literature, but the content was a fundamentalist Christian view of biblical material. None of the references was literary. Religious "kits" were used to teach the New Testament. In his award, the arbitrator dismissed the teacher's grievance, apparently concluding that the teacher, in a dishonest way, had attempted to inject fundamentalist dogma into the public schools, conduct not protected by the concept of academic freedom.

CAN THEY BAN "THE EXORCIST"?

Generally, teachers have the right to select teaching materials for their classes. They may be criticized if the material is controversial, and material may be prohibited if it violates a specific school policy, as in the preceding case.

A teacher at the Wilmot Union High School District in Wisconsin showed edited versions of "The Exorcist" to his students. After the second showing, his supervisor told him that certain school board members had questioned the appropriateness of the film. He encouraged the teacher to stop showing the movie. Nothing further might have happened if the teacher had not subsequently run the complete, R-rated version of the film, which included a statement that children under 17 should be accompanied by an adult.

When the school board learned that an uncut version of "The Exorcist" had been shown, the teacher was told that charges would be filed against him. Showing an R-rated

film against the advice of the supervisor was considered behavior "unfit for a professional educator." The teacher was represented by counsel at the hearing, and afterward he was placed on probation.

Subsequently, the case came before the Wisconsin Employment Relations Commission. A local college professor testified for the teacher, explaining that the film was a prime example of horror films of the 1970s. It contained unusual amounts of violence, but this was important in studying its shock value. He admitted that the film could be disturbing to adolescents.

The union made an additional claim that one school board member was secretly acting for a student's father, whose corporation was the board member's legal client. The trial examiner rejected that theory.

The school board insisted that the teacher knew that he would be disciplined if he showed the unedited version. The union argued that no one had told him not to show the film.

The teacher had been informed of the charges in advance and was represented at the hearing. The hearing was carried out in an orderly fashion. The school board had deliberated and made its decision. The trial examiner upheld the charge but ruled that probation was too harsh a penalty. He reinstated the teacher, with a reduction of one annual increment in his salary. Such a compromise is rare in arbitration. In general, arbitrators are restricted to approving or denying the grievance, putting the teacher back at the same salary or not at all.

MUCH ADO ABOUT A DIRTY WORD

A similar case—this one involving obscenity—was heard by Professor Tim Bornstein of the University of

Massachusetts at Amherst. The grievant, a teacher in the Boston public schools, had been suspended without pay for five days because she had distributed a controversial one-page document to her advanced English class.

The facts were not in dispute. On February 6, 1980, a student had given the disputed document to the teacher. During her free period, the teacher made 15 copies, and later in the day she distributed copies to her advanced English class. She told them that the document was an illustration of satire and that it related to a common word that had lost its original meaning. There was no discussion of the document. After five minutes, she asked the students to return the copies. One student did not do so. Instead, after the class, he gave his copy to another teacher who, in turn, informed the acting headmaster.

The text of the disputed document follows:

"FUCK YOU"

Perhaps one of the most interesting words in the English Language today is the word "Fuck." It is the one magical word. Just by its sound, it can describe pain, pleasure, hate, and love.

In language, fuck falls into many grammatical categories. It can be used as a verb, both transitive (John fucked Mary) and intransitive (Mary was fucked by John) and as a noun (Mary is a fine fuck). It can be used as an adjective (Mary is fucking beautiful). As you can see, there are not many words with the versatility of fuck.

Besides the sexual meaning, there are also the following uses:

Fraud...I got fucked at the used car lot.
Ignorance...Fucked if I know.
Trouble...I guess I'm fucked now.
Aggression...Fuck you!
Displeasure...What the fuck is going on here?

Difficulty. . . I can't understand this fucking job.
Incompetence. . . He's a fuck off.
Suspicious. . . What the fuck are you doing?
Enjoyment. . . I had a fucking time.
Request. . . Get the fuck out of here.
Hostility. . . I'm going to knock your fucking head off!

I know you can think of many more uses, but with all these uses, how can anyone be offended when you say fuck?

You should use this unique word more often in your daily speech. It adds to your prestige. Say it loud and clear. . . . Fuck You!

Later, the teacher testified that she decided to distribute the document on the spur of the moment to confront her students with an offensive word. She explained that this word was written everywhere at Boston Trade High School—on the walls, in the restrooms, everywhere. Students commonly used the word with one another and with teachers. She viewed her action as a counterattack against verbal impoverishment.

The reaction of the school administration was galvanic. The acting headmaster took the offensive. He interviewed two students about the handout and then interviewed the teacher. She explained what she had been trying to do. He criticized her poor judgment. There might be repercussions, he warned her, particularly since this was a coeducational class. He reported the incident to the area superintendent and delivered a copy of the document to him by hand that same afternoon.

The area superintendent came to the school on the following day to hold an emergency meeting with the acting headmaster and the teacher and a representative of her union. He asked the teacher for an explanation. She again explained that the paper was a satire on street language. She used it because obscene language was so common at the school. This was her way to call attention to the prob-

lem. The supervisor became upset and warned her that the document was improper. He reported the matter to the deputy superintendent.

The deputy superintendent had already heard about the document. He too held a meeting. The same ground was covered. At the end of the meeting, he said that he would have to refer the matter to the superintendent of schools.

As it happened, on the previous day, the Boston Home and School Association had already written an angry letter about the document to the members of the Boston School Committee and to various top-level administrators. In part, the letter stated: "It is unconscionable to think that such a highly controversial word would be eulogized to such an extent. . . . The school department has a responsibility to the students and the parents of our students to see that suitable action be taken forthwith to insure that this type of lesson will never again be allowed in any classroom in the Boston Public School."

The Boston School Committee met and discussed the matter at length. One member wanted the teacher to be dismissed. Other members were equally upset. Several had received complaints from parents' groups. The committee asked the superintendent to suspend the teacher.

On the following day, the teacher was suspended for five days. She was escorted from her classroom by a security guard. As a result of media attention given the incident, she received threatening and obscene phone calls. Several of her callers used the same offensive word that was contained in the memo.

At the subsequent arbitration hearing, the school committee contended that a five-day suspension without pay was a reasonable punishment for her exceedingly bad judgment. The committee believed that the handout was offensive and pointed out that it had not been approved in advance by her superiors. If she had been concerned

about the use of obscene language by students, she could have found better methods to express this concern.

The union argued that a warning would have been sufficient. The committee was reacting to pressure from the Home and School Association. The union did not defend the handout, but cited a decision by Judge Wyzanski in *Mailloux v. Kiley*, 323 F. Supp. 1387 (1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971), which reversed the suspension and dismissal of a teacher who used the word "fuck" in an English class where taboo words were being discussed.

The union pointed out that the school committee had not provided guidance about the use of such taboo words. Penalizing the teacher for using the word was a denial of due process. Five days of suspension was excessive, particularly in view of the harassment that the teacher had already suffered. The union wanted all reference to the case removed from her records.

In arbitrator Tim Bornstein's opinion, the teacher's use of the handout was not relevant to anything taking place in her classroom. Her class was discussing satire. Bornstein said that the document was not satirical, but was crude and offensive; no teacher could think that it would serve "any legitimate purpose." Bornstein was particularly upset by the exhortation at the end to say the word with pride because it would add to the speaker's prestige. In his opinion, the method this teacher chose to emphasize the foolishness of using this obscene word was ill-suited. The grievant had "used such extraordinarily bad judgment in distributing this document to her students that the Committee was entitled to impose significant discipline."

Bornstein then considered the appropriateness of the punishment. The teacher had an excellent record. She was a well-educated person who had served the Boston system for seven years without criticism. She had volunteered to undertake numerous time-consuming, additional tasks. Bornstein saw her as a "decent, concerned teacher who was

overcome by bad judgment on one occasion." There was no reason to think that she was using the provocative handout as a "radical" teaching technique. The committee had not given sufficient weight to her fine record. Accordingly, Bornstein rescinded the five-day suspension but ordered that the reprimand remain in her file. The teacher was on notice that any similar misconduct might jeopardize her job.

Questions of morality pose a difficult challenge for public schools. When students are exposed to questionable material, conservative groups within the community can impose strong pressure upon a school administration, which in turn puts pressure on the teacher. As a result of community pressure, school boards may be tempted to overreact and impose harsh penalties. In this case, the word in question, though vulgar, is quite common and used often by students and teachers in daily conversation. The offense was in the teacher focusing on, and seeming to promote, the use of such language.

FIGHTING THE FEDS

In a Vermont case, a teacher with many years' experience was given the task of instructing mentally retarded students at a vocational high school. In his previous assignments, he had enjoyed independence. Now, he was expected to comply with the Federal Behavioral Modification Regulations under the Education for All Handicapped Children Act (Public Law 94-141). The teacher did not approve of that system and soon found himself at odds with the school administration.

In March 1981, he was suspended for five schooldays because of inadequate performance, insubordination, and excessive absenteeism. At his request, the school board

conducted hearings on his case. The board confirmed his suspension and extended it through December 1981. He filed a grievance.

In February 1982, the case was heard before arbitrator David Randles. The school charged that the teacher had refused to follow federal regulations, he did not prepare progress reports or budgets, and he was absent from staff meetings about half the time. The teacher claimed that he refused to comply because he objected to the educational philosophy of the program. He cared about his students. One parent at the hearing praised the progress his child was making in the grievant's class. The teacher explained: "One of the reasons I took off, was not only for myself, but I felt I was better out of a classroom than having the kids subjected to me in the kinds of moods I was in at the time." He felt that he was being harassed.

Most damaging was the teacher's own testimony: "I doubt that it is constitutional for the federal government to tell me or any teacher how he's supposed to teach in the classroom. I'd much rather have a parent tell me what she wants than a bureaucrat in Washington. . . . I think, even if I come back, . . . I would still push for what I am pushing for right now. It doesn't sound reconciling, but that's how I feel."

David Randles explained that insubordinate employees can be discharged. To conclude otherwise would erode management's ability to direct the workforce. The school board could have discharged the grievant. Instead, it imposed a disciplinary suspension. The arbitrator denied the grievance.

"CATCH-22" IN OREGON

In Lakeview, Oregon, a school counselor received a written reprimand for failing to inform her principal when

she filed a report about possible abuse or medical neglect of a student.

On May 14, 1985, a mathematics teacher noticed that one of his students was having difficulty holding a pencil in class because of an injury. The child's hand was swollen and wrapped in an elastic bandage. The wrist was stiff and painful. He examined the child's arm and suggested that it be x-rayed. The girl stated that she could not have her wrist x-rayed because "my dad says we have to pray for it." The father's religion spoke against medical treatment.

At the end of the class, the teacher attempted to see the principal and others in the administration. They were all busy. By the end of the schoolday, he still had not reached the principal. He then explained the situation to one of the student counselors. She had dealt with the student previously and decided to notify Children's Services Department (CSD) to make sure that the student received proper medical attention. Before calling CSD, she also attempted to talk with her building principal. She even waited until after school, but to no avail. He had been in conference with the business department all day. She then phoned CSD. Later that evening, she left a message at the principal's home. When he called back, he advised her that he had noticed the girl's hand earlier in the day but felt that there had been no need to contact CSD.

In the meantime, the student had gone home. The CSD caseworker felt that there was no urgency about the matter. On the following morning, however, the student did not come to school. The caseworker then contacted a deputy sheriff to visit the student's home. The family was told that the girl would have to be examined by a county health nurse. The presence of the deputy upset the family. The parents felt that CSD should not have been involved.

As it turned out, the county health nurse, after examining the girl's wrist, decided that no x-ray was necessary. Subsequently, the student's parents complained to the school board about the incident. The board apologized. The

counselor was given a reprimand for failure to inform her building principal before going to CSD.

The counselor filed a grievance. She felt that she had no choice but to do what she had done. In fact, the school's teachers' handbook required her to report student abuse or neglect and to notify her principal when she made such a report. There were really only three options: The teacher could have acted as she did, by making the call to CSD and then telling the principal when his meeting was over. Or she might have gone into the principal's conference to inform him of her intentions. Her third choice would have been to wait until the next day when she could have spoken to the principal and then called CSD. From hindsight, that might have been best, although the student could have been in need of prompt medical attention.

The district argued that the rule—requiring teachers to notify their principal before involving CSD—was clear and that the counselor was aware of it and in fact had agreed to abide by the rule following a former incident. The district explained that adherence to the rule was important in order to ensure the school authorities' reasonable response to community complaints and questions. The teachers' association, on the other hand, argued that the counselor had complied with the rule as best she could and that, when unable to locate the principal, she had shown good judgment by taking action.

Howell Lankford, a lawyer from Salem, Oregon, had been appointed as the arbitrator. He asked a significant question: "Would the teacher have been reprimanded for not informing the principal if the student had later lost much of the use of her arm? Or if the cause of the injury had turned out to be child abuse, whether by the parents or by someone else?" Lankford upheld the grievance.

The grievant had violated a school rule against involving people outside the school without the principal's permission. She acted according to her own judgment. Why was

this teacher successful in arbitration when the teacher in the previous case was not? Is questioning whether there is child abuse more understandable than challenging an entire educational philosophy? Underlying both teachers' actions was a genuine interest in students. But the difference in these cases is important and shows a core problem in the public schools' attitude toward teachers.

The views of society affect the institutions that work within it. The teacher who breaks a rule trying to protect a student against possible child abuse should not be reprimanded, because, although a violation has occurred, there is general consensus that children must be protected from that danger. Indeed, the arbitrator in this case emphasized the strong state policy in Oregon requiring teachers and others to report to CSD whenever possible neglect or abuse was suspected.

But when a teacher chooses not to comply with a federal rule regulating the teaching of handicapped children (Federal Behavioral Modification Regulations), the situation is more ambiguous. When there is no clear right or wrong on an issue, a teacher must follow the regulations even though they may reduce the motivation to teach because they destroy faith in the system. A teacher can challenge the system but is more likely to be punished and to lose in arbitration.

CONCLUSION

The cases in this chapter have described situations in which teachers broke the school's rules of behavior. Sometimes, teachers did this deliberately because they were asserting individual rights. Or a teacher might have violated a rule by mistake, but then concluded that the action was justified. Whether such an incident involves religion,

politics, or educational policy, those teachers, by asserting their rights, were challenging the school and thus treading on dangerous ground.

The right to express conflicting points of view is protected in our society, to a certain point. What the limitations to this right should be is much debated. Thus, it would be surprising if these kinds of controversies did not occur in public schools.

Arbitrators must decide whether the school can impose its beliefs upon the individual teacher. This often involves balancing opposing interests. The disagreement may simply be a squabble between individuals, but sometimes important constitutional rights are involved.

CITATIONS

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A Matter of Gender: Gargiul *v.* Tompkins, *Government Employee Relations Report* (GERR), vol. 21, pp. 1150-1151.

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CHAPTER 5

Rights Under the Collective Bargaining Agreement

A collective bargaining contract defines the terms and conditions of employment for each member of the bargaining unit represented by a union. When the employees are teachers, contract provisions may be somewhat different than those found in an industrial agreement. Teachers are compensated in special ways. They are given more days off than industrial workers. And in many other ways, the conditions under which they work and the benefits that they receive are different than those of other workers. In addition, tenure is a special circumstance, a form of job security almost unique to the academic world. In some states, tenure is a matter for state law, providing a special, secure status beyond that enjoyed by other workers.

The teachers' employment arrangement is described in the contract, subject to certain mandatory conditions

contained in state law. When a disagreement arises between a teachers' organization and a school board as to contract provisions, an arbitrator may have to be called in to decide the dispute.

Compared to other unionized elements in society, collective bargaining in the schools is limited. The parties negotiate for their own version of contract amendments. Teachers are primarily concerned with protecting their job security and their time off while enhancing a salary scale designed to reward seniority and academic credentials. The school board wants to restrain cost increases in the overall contract and maintain administrative control over the operation of the schools.

The agreement between the parties fixes the conditions under which teachers provide their services. The arbitrator must act within the contract language because, once agreed upon, the contract also binds the arbitrator. The arbitrator's task is to determine whether the school board's action violates the agreement. Courts will defer to an arbitrator's decision, but only if it is grounded in the contract. An arbitrator is not authorized to modify the agreement or to decide whether a particular provision is wise or undesirable. The task is to apply the language as written. The contract itself is the final authority. Only when that document is ambiguous may an arbitrator provide an interpretation. Seen in this light, grievance arbitration is merely an extension of collective bargaining. Any victory can be bargained away. Any defeat can be reclaimed. The ever-shifting relationship between the teachers and the school board is subject to change through bargaining.

QUESTIONING A TEACHER'S COMPETENCE

It is never easy to fire a teacher, certainly not for incompetence. This was dramatically demonstrated in a

case from Needham, Massachusetts. A seventh-grade social studies teacher with 19 years of service was terminated by a five-to-two vote of the school committee for "inadequate teaching performance." He was accused of lacking clarity and continuity in his teaching and of inconsistent and ineffective management of class time. The reader can imagine how difficult it is to prove such a charge.

The grievant had an interesting background. After graduating from college with a B.S. degree in Education, he taught for three years at a private preparatory school. Later, while teaching at Needham, he obtained a masters degree and took courses on East Africa and, during a half-year sabbatical in Europe, he studied the Roman Wall.

In 1981, the Needham public school instituted an evaluation program under the collective bargaining agreement. The aim was to improve the quality of teaching. It provided for goal setting, classroom visits, and progress reviews. Complex recordkeeping was required, with reports being sent to the personnel office.

For teachers who received poor evaluations, a second evaluation review was required, called the "summative process." This involved three individuals: the teacher, the supervisor, and a third party. It was the latter's duty to make a final recommendation on the case.

According to the program, a teacher was expected to demonstrate the following skills: to give clear and precise explanations; to frame questions so as to encourage discussions; to make the goals of learning clear to students; and to serve as an example of clear oral and written communication.

Some parents had complained about this teacher, so his supervisor recommended evaluation. The director of social studies was assigned the task. Goals were agreed upon. Class visits were carried out and recorded. During this period, additional complaints were received from parents. The director of social studies recommended that the "summative process" be applied. That procedure was

carried out, involving meeting after meeting and review after review, and resulting in a decision to terminate the teacher.

A grievance was filed. The arbitrator was Professor Archibald Cox of Harvard, well known for his role as a Watergate prosecutor. In a 61-page opinion, Cox reviewed the facts presented during four days of hearings. Although Cox denied the grievant's request for back pay, he ordered the committee to reinstate the teacher because the school could not demonstrate that its subjective judgment was justifiable. Cox was not convinced that the teacher's performance was inadequate. "When a teacher's performance has been accepted for 19 years and he has dedicated those 19 years to one school system, compassion is part of justice and justice requires special care and deliberation before imposing the most onerous of academic sentences," Cox wrote.

Even with the most elaborate performance-review procedure, it proved impossible to terminate the teacher. Most school principals do not even attempt to dismiss tenured teachers. Instead, they try to persuade them to move to another school or into another career. Among the thousands of arbitration cases in the schools, there are very few that deal squarely with termination for failure to perform.

According to a recent report from the Institute for Research on Educational Finance and Governance at Stanford University, teachers are rarely discharged for incompetence. In New York State, only two dozen teachers were terminated for incompetence in 1982. In all of New Jersey, sixteen terminations were processed. Many of those teachers defended themselves and, ultimately, held onto their jobs. The Stanford study indicates that only eighty-six cases involving terminations for teacher competence were decided by federal courts between 1939 and 1982. Most school boards do not even attempt to fire teachers they believe are incompetent.

In industrial employment, grievances often involve workers who have been terminated for being incapable of doing the work. When an employee is fired, the union may claim that the termination was not for just cause. That would be a common grievance in private industry.

Not so in the public schools. Teachers are difficult to terminate. Job security is guaranteed under state tenure laws and under union contracts. Rather than terminate a teacher, the school board must find some other way to deal with the problem. Only in the most blatant case will a school risk litigation by firing a tenured teacher.

NONFACULTY NEED NOT APPLY

Teachers who are members of the bargaining unit are protected by their contract against being fired except for just cause. Also, they often receive preferential treatment in filling vacancies.

The Poland Board of Education in New York State appointed a male teacher to coach the girls' junior varsity basketball team for the 1982–83 season. In September, that teacher resigned. At the time, the grievant, a male teacher, was coaching the boys' soccer team.

In October, the vacancy was posted in a memorandum to the staff. The grievant applied for the position. No other teacher applied. The superintendent of schools presented the grievant's application to the board for consideration at its November meeting. The athletic director and the school principal recommended his appointment.

The board expressed concern that the coaches had become a clique. The grievant already had several coaching assignments. The board decided to appoint a female coach for the girls' team. The superintendent was instructed to find a woman to fill the vacancy.

The superintendent tried to find one among the staff,

but no female teachers wanted to coach the team. He decided to advertise the position. The notice appeared in newspapers in two local communities. An outside female applicant was appointed to the position. She was not a certified teacher but had coached a girls' softball team in 1982 as a nonfaculty coach.

On behalf of the male coach who had applied, a grievance was filed and submitted to arbitration. The teachers' association argued that the board had violated the agreement by denying the coaching position to the grievant. The vacancy was a contract position with a negotiated stipend. In the past, coaching positions had been filled by staff teachers. They were filled from the outside only when no applications were received from within the unit. The association argued that the grievant should have been awarded the position. The board maintained that the contract did not apply. Selecting a female coach was reasonable. An arbitrator's judgment should not be substituted for that of the board.

Arbitrator Fred L. Denson agreed that the contract did not preclude the board from hiring an outsider, but pointed out that the person appointed was not certified as a teacher. Under the contract, the bargaining unit was limited to "certified personnel." The grievant was fully qualified for the assignment. During his eight years with the district, he had coached numerous teams. In addition to being a teacher, he was certified as a coach. The board's refusal to select the grievant as coach was improper and inconsistent with past practice. Even without such past practice, the arbitrator would have sustained the grievance. The board was obligated by the contract to fill vacancies without regard to sex.

Since the basketball season ended some months before the arbitration was completed, the grievant could no longer be appointed. The arbitrator awarded him the $456 he would have earned had he coached the team.

ONE STRIKE AND YOU'RE OUT

Being a member of a union can provide extra protection. It can also place a teacher's job in jeopardy.

A fifth-grade teacher at Lake Local School District had taught in an elementary school for four years. From January 3 until February 14, 1983, her local education association was on strike. The schools continued to operate, but she was one of the teachers who actively participated in the strike.

On February 15, all of the teachers returned to work. Over the loudspeaker that morning, the principal announced that no classroom parties were to be held because the students already had celebrated St. Valentine's Day on February 14. Shortly after that announcement, the grievant left her classroom to coordinate her schedule with another teacher. When she returned, her students were having punch and cookies, celebrating the holiday. She let them finish their refreshments while she went ahead with the lesson.

That same morning, the faculty received a memo from the school superintendent saying, among other things, that there should be no discussion of the strike in any classroom. During the morning, the grievant was asked questions about the strike by her fifth graders. For example, they asked whether their grades would be lowered because they did not attend school during the strike. Would they be required to make up work? She testified later that she answered questions as they arose. She did not give any opinion as to the strike. As to those questions, she told the students to ask their parents.

That evening, the parent of a child in the grievant's class called the principal, upset because the strike had been discussed in class. During that conversation, the parent also mentioned the "party." On the following morning, another parent complained to the principal. Both parents requested

that their names be kept confidential. They said that they were afraid the grievant might retaliate against their children.

Having received complaints, the school superintendent initiated the parent-complaint procedure that was specified in the negotiated agreement. This required that complaints be brought to the attention of the teacher involved. The complainants were to be identified so that the teacher would have an opportunity to rebut the charges. The names of the complaining parents were to be made available to the teacher before any action could be taken.

During the following week, an evaluation conference was held with the grievant. The principal worked from a checklist. In four areas, where this teacher had previously received marks of "excellent," she now received marks of "good." Particularly disconcerting to the grievant was an ominous sentence that appeared in the summary: "I would suggest you be more cognizant of following directions."

When she asked what that meant, the principal told her about the complaints. When she asked who had complained, the principal refused to disclose the names.

The grievant explained what had happened on February 15 and asked that the sentence be deleted from the evaluation. The principal agreed to rewrite the statement. But after several subsequent drafts, the grievant was not satisfied and filed a demand for arbitration.

The arbitrator, Roger I. Abrams, a professor at Case Western Reserve Law School, found for the grievant. The principal had failed to tell the teacher about the complaints in a timely fashion. He concluded, "Were it not for the parent complaints, it is most unlikely that the teacher's evaluation would have contained the negative comments concerning following instructions." The arbitrator ordered the school board to delete any reference to the grievant's failure to follow instructions.

EVEN PARENTS PICKET

Not only can teachers' picketing create grievances, but so can picketing by the parents. Teachers in Mingo County, West Virginia, lost four days' pay because parents picketed their school.

The dispute started when two local schools merged to become the Marrowbone Grade School. Because of the merger, school buses were forced to operate on two shifts. Some students had to leave school early, while others had to wait for the second run.

The parents were upset. They attempted to stop the buses by picketing in front of the school. Because of the picketing, the school was closed. The school board then obtained an injunction limiting the number of pickets so that the teachers could go back to work.

The teachers were not paid for the four days the school was closed. Since the teachers were not working under a collective agreement, they could not take advantage of an arbitration clause. Nor was there anything in their individual employment contracts that gave them a right to go to arbitration. When a group of teachers protested in court, the trial judge decided that the board had no obligation to pay them. Their suit was dismissed. They appealed to the West Virginia Supreme Court of Appeals. The case turned on a provision in the state law which said: "Any schools may be closed by proper authorities on account of any calamitous cause over which the Board has no control. Personnel shall receive pay the same as if school were in session."

The court held that the parents' picketing was a "calamitous cause over which the board has no control." On that basis, the court ruled that the teachers should be paid for the days the school was closed. It is doubtful that, after the cost of litigation, they received any significant recovery.

THE SNOW JOB

Sometimes, as in the previous case, teachers find that they cannot work, through no fault of their own. Following a spring blizzard in Minneapolis, fourteen teachers had their pay docked for half a day. They had been unable to get to work through seventeen inches of snow.

School District No. 11 covers a large area. There are 35 schools, serving more than 30,000 students. By 7:00 A.M. on April 14, 1983, the blizzard was well under way. Cars were already caught in the snow. Many places of business closed that day. The International Airport closed. The president of the Anoka-Hennepin Education Association received numerous calls from teachers, upset because they were unable to get through to the district office.

No announcements had been made about school closings. The schools were officially open. But during the morning a decision was made to close at 12:30 P.M. This was announced by radio at about 10:00 A.M. Where arrangements could be made for bus service, some schools closed earlier.

Fifteen teachers did not report to work that morning. One called in sick. The other fourteen were docked for failure to report. Four teachers testified at a subsequent arbitration hearing that they tried to get to school, but were unable to do so because of the weather conditions.

The association, which represents about 1,800 teachers, charged that the district's action violated Section 10 of the contract, which stated: "Teachers shall not be disciplined, reprimanded, reduced in rank or compensation without just cause." It was not fair, they said, to deduct a half day of pay.

The district argued that the controlling provision was the emergency leave clause, which stated: "Situations not approved for personal leave with pay under this provision

include inclement weather and its effect on commuter transportation."

Arnold A. Karlins, the arbitrator, agreed with the school district. He relied on the contract, which stated that the only circumstances under which a teacher was excused from reporting was when student attendance was not required. In this case, the schools were open until 12:30 P.M. Karlins reasoned that when teachers informed their schools that they could not get to school because of the weather conditions, they were "making an oral request for a paid personal leave of absence due to an emergency. . . ." Clearly, the contract did not provide for personal leave with pay for inclement weather. Their absence in this situation was not covered. The district was authorized to deduct half a day's pay from each of the absent teachers. Whether or not it was fair was not the issue. The question for the arbitrator was whether this incident was covered by the contract, and the contract language was clear.

THE RELIGIOUS HOLIDAY LOOPHOLE

Disputes involving religion often raise a conflict about whether a school's rules or interpretation of the contract violates the constitutional rights of an individual teacher. These can be difficult cases for an arbitrator, whose authority is limited to interpreting the contract but who must sometimes also determine the relevance of external law. Since 1964, Title VII of the Education Law has provided protection for "all aspects of religious observance and practice, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or to a prospective employee's religious observances or practices without due hardship on the conduct of the employer's business."

Employers have become sensitive to the religious concerns of employees. This has tended to protect employees' right not to work on religious holidays, and has also spawned some interesting reverse discrimination claims. For example, arbitrator Robert L. Mitrani heard a case involving the Washington Township Board of Education, where six Catholic teachers requested a day of paid leave for the Feast of the Immaculate Conception. For two prior years, they had been paid for that day because a secretary had assumed that since Jewish teachers were granted days off for religious holidays, Catholics could also have days off.

Arbitrator Mitrani noticed that the contract had originally provided that "personal days may be utilized for attendance at any type of judicial proceedings or in connection with religious holidays." In 1979, a further sentence was added: "The term 'personal business' connotes a serious personal situation that cannot be handled outside of school hours." Mitrani felt that the addition was important. Mitrani reasoned that, considering the number of obligation days observed by Catholics, there was clear evidence that their religious obligations could be met outside of school hours. On that basis, Mitrani agreed with the board that it could deny pay for absences during Catholic holy days.

On the other hand, payment for six of the teachers had already been approved, even if by error. As to them, Mitrani decided that it was only fair to pay them for the day. The other eight requests, which had not been approved, were denied.

THE FIVE-DAY FUNERAL

In a similar case from Montana, arbitrator Alan R. Krebs of Seattle interpreted the funeral-leave provisions of a contract involving the Anaconda School District.

In the fall of 1982, the grievant missed nine days of teaching in the high school. His absences were caused by the illness and subsequent death of his stepmother. Two days were spent visiting her when she was critically ill. After she died, he was absent for another five-day period for funeral leave. His application for paid time off was partially denied.

He filed a grievance. The contract stated that no deduction would be made for absence on account of the death in the immediate family of the teacher. "Guardian" was specifically included in the definition of immediate family, and since the grievant had lived with his stepmother during his childhood, the arbitrator held that she qualified as a guardian, a member of his "immediate family." It was customary for the school district to grant three days for funerals in the district and up to five days for funerals elsewhere. But the practice was not uniform; sometimes those limits were extended. Krebs decided that the test was reasonableness. He found that it was not unreasonable for the grievant to be absent from work for the period he designated as funeral leave. On that basis, he upheld the grievance.

A CASE OF FAMILY LOYALTY

Personal leave, of course, is a common problem. In another case, a teacher in Mentor, Ohio, asked for five days of personal leave without pay. As she explained: "The reason for this request is that my husband has been awarded special recognition as a salesman and the company has made special provisions for winners of these awards and their spouses to attend a company-sponsored program."

The director of personnel decided that the teacher's request did not comply with the school's personal leave

policy. He appreciated the importance of the trip to the teacher's husband's career, but denied the request, stating that the teacher's classroom obligations were more important to the school.

The teacher had to choose between her loyalty to her husband and serving her students. She decided in favor of her husband and was absent for five days. As a result, she received a letter of censure for disregarding the directive.

A grievance was filed on her behalf. The Mentor teachers' association argued that this trip was more like attending a graduation. It was "a major event within the family."

The arbitrator noted that the school's personal leave policy was quite clear: "Personal leave shall not be used in place of professional leave, to extend holidays or recesses, to provide vacations for recreation, for social or fraternal functions, or to engage in or to seek other employment, or to attend business trips with a spouse." The arbitrator concluded that the trip constituted a "business trip with a spouse," specifically excluded by the policy. The language of the contract, being very specific, was not open to interpretation. He denied the grievance.

SICKNESS AND HEALTH

Maternity leave is usually granted to teachers, sometimes up to an entire school year. But schools seldom provide paid leave for a parent who wants to be with a daughter when she has a child.

A fifth-grade teacher in Michigan had been employed for twelve years. Her daughter gave birth to a child prematurely in California. On the following day, the teacher told her school that she would be away for a week. Since Monday was not a schoolday, she missed, in all, four days of teaching. When she returned, she was advised that sick

leave did not cover her trip to California. A grievance was filed on her behalf.

The contract said that an immediate family member must be "seriously ill, requiring the presence of the employee," before paid sick leave would be granted. The school board claimed that the teacher's daughter was not seriously ill because she had been discharged from the hospital. Almost one year later, the issue came to arbitration.

The union had won an earlier case involving another teacher, who had taken her daughter to Taiwan for acupuncture treatment to correct the daughter's vision. The mother had been granted paid leave. The school superintendent testified that his decision in that case had been based on his belief that the child needed treatment and that her mother had to accompany her.

In this subsequent case, the union introduced letters from an attending physician practicing in La Mesa, California. He wrote that the grievant was needed "to assist in the care of my patient [her daughter] and child." In another letter, he said that the daughter needed help after delivery: "Her mother, being the only one available, was called to assist her." The grievant testified that her daughter and the newborn child had suffered complications soon after leaving the hospital. It was the hospital's policy to release patients shortly after a baby was born.

The union pointed out that there were no written criteria for determining whether a member of an employee's immediate family was seriously ill. Instead, the superintendent had used his own judgment. According to the union, this teacher's daughter was "seriously ill" after her release from the hospital.

Arbitrator Daniel Kruger, a professor of industrial relations at Michigan State University, expressed sympathy for the district's concern for controlling the cost of paid sick leave, which could become an expensive fringe benefit since it required paying the teacher as well as paying for a substitute teacher to replace her. But, again, the decision

relied on the contract language—in this case, whether a member of an employee's family was "seriously ill." Since the school superintendent had no medical training, Kruger placed more weight on the opinion of the physician who stated that the daughter required the presence of her mother. He ordered the district to pay the teacher four days of sick leave.

STANDING IN LINE WITH STUDENTS

Another type of dispute concerns faculty privileges. In Kings Park Central School District on Long Island, the contract required the schools to provide private dining facilities for the faculty. At the senior high school, a grievance was filed protesting the closing of a separate serving window for faculty in the student cafeteria. To reduce costs, the administration had merged the luncheon facilities. The union claimed that the change amounted to a reduction in benefits. The district should have negotiated the change.

The school admitted that it was required to provide separate dining facilities, but noted that nothing was said about a separate serving window. The redesigned facility would be less expensive to operate.

The arbitrator, Susan T. Mackenzie of New York City, agreed with the school district. A separate room for faculty dining was enough to satisfy the contract. She denied the grievance.

PROTECTION IN THE PARKING LOT

Another privilege of concern to faculty members involves parking and the security of their automobiles. In

a case from Niagara Falls, New York, the union complained that the school district had refused to pay for damages to faculty automobiles left in the parking lot. The contract required that teachers have safe conditions in school buildings and parking lots. The district claimed that it was only obliged to cover losses incurred in the performance of the teacher's duty.

The arbitrator was Dr. Irving R. Markowitz, professor emeritus of industrial relations at Lemoyne College in Syracuse. Curiously enough, a previous case on a similar issue had been decided by his son, who had held that theft of property from a faculty automobile in the school parking lot was not the school's responsibility. His father wrote that, although he held "the previous arbitrator in highest personal regard and esteem, not merely because he is my son, but also because of his known capabilities in the field of labor relations," the instant case involved damage to property, rather than theft. Therefore, the previous award was not binding.

The chief issue was whether the damage occurred "in the performance of teachers' duties." The meaning of that phrase was not clear. But since the school district was obligated to provide safe parking lots, Dr. Markowitz felt that it would be "a tortuous semantic path that confines the definition of the term to only the property worn by or in the vicinity of employees."

In the arbitrator's opinion, the contract provision was intended to cover the parking lot. "There can be little doubt that the parking lots were important to the proper discharge of the teachers' duties. The geographical nature of the District and its many neighborhood schools would make it extremely difficult for teachers to attend their teaching stations without using automobile transportation and have adequate facilities in which to park their vehicles." Therefore, Dr. Markowitz held in favor of the teachers.

CONCLUSION

Interpreting contract language concerning teacher benefits and privileges is important to both schools and teachers. As the cases in this chapter show, each side is determined to protect its rights in this important area. And, as is also demonstrated, when these cases go to arbitration, arbitrators often support the teacher's interpretation: nine out of the eleven cases in this chapter were decided in favor of teachers.

This should not be surprising, since the school board can protect itself in collective bargaining by insisting that the language in the contract be clear and unambiguous. In the cases where the union was successful, the contractual provision was vague or defective, allowing the arbitrator to interpret it in favor of the teachers.

CITATIONS

Questioning a Teacher's Competence: Needham Education Association *and* Needham School Committee, AAA Case No. 1139-2023-83 (unpublished). See, also, Nina McCain, "Fired Teacher Ordered Reinstated," *The Boston Globe* (August 10, 1985), p. 23.

Nonfaculty Need Not Apply: Poland Central School District *and* Poland Teachers Association, AAA Case No. 15-39-0047-83 (unpublished).

One Strike and You're Out: Lake Local School District *and* Lake Local Education Association, *Government Employee Relations Report* (GERR), vol. 22, p. 703.

Even Parents Picket: Linda Lou Dillon et al. *v.* Board of Education of the County of Mingo, GERR, vol. 21, p. 1012.

The Snow Job: Anoka-Hennepin Education Association *and* Anoka-Hennepin Independent School District No. 11, GERR, vol. 21, p. 2317.

The Religious Holiday Loophole: Washington Township Board of Education *and* Washington Township Education Association, *Arbitration in the Schools* (AIS), 164–4.

The Five-Day Funeral: Anaconda School District No. 10 *and* Anaconda Teachers' Union Local 502, AIS, 164–3.

A Case of Family Loyalty: Mentor Board of Education *and* Mentor Teachers Association, GERR, vol. 21, p. 954.

Sickness and Health: Monroe County Education Association *and* Mason Consolidated Schools, AIS, 173–9.

Standing in Line with Students: Kings Park Central School District *and* Kings Park Classroom Teachers Association, AIS, 165–10.

Protection in the Parking Lot: Niagara Falls Teachers Association *and* Niagara Falls Board of Education, AIS, 124–13.

CHAPTER 6

Commentary

The cases in this book show one example after another of public school teachers and their schools disagreeing over discipline, rights, and contract language, and presenting their disagreements to arbitrators to be resolved. But they should not be taken as typical of relationships in the public schools. In fact, they are exceptional. Arbitrated grievances in the schools are unusual. Most public schools can operate without a single grievance going to arbitration. Instead, disputes are handled through bilateral negotiations under the contract.

Still, one can learn from exceptions. The cases described here are informative. The parties turned to an outsider to resolve their controversies. Why? What was there about these cases that made them difficult to settle through internal resolution procedures?

Sometimes, the issues were so emotionally heated that compromise was impossible. Conflicting personalities may have impeded successful negotiations. In other cases, political considerations may have foreclosed any settlement. Parental and community pressures may also have been involved, having a negative impact on teacher/administrator relationships. In every situation, some such reason must have been present.

Collective bargaining between teachers and school boards provides a workable system for regulating the relationship between faculty and administration. It was never intended to be the primary mechanism for improving the educational product. Bargaining, grievance processing, and arbitration are primarily adversarial procedures. In order for the contractual parties to address the essentially nonadversarial educational needs of their school, it is necessary for them to emphasize less confrontational relationships.

An individual teacher's right to process a grievance and to be represented by an organization is, nevertheless, crucial to the public school atmosphere. Grievance arbitration provides equity and justice for teachers. Having the right to present issues to an impartial arbitrator provides an important safeguard. Without arbitration, the personal rights of teachers would be less secure in the public schools. Obviously, teachers are being protected.

Arbitration protects both sides. Arbitrators hold the school faculty to the bargain that was made by their union. If a teacher violates the agreement or the working rules, an arbitrator will confirm the punishment imposed by the school. Thus, arbitrators impose discipline on both parties to the contract, upon teachers and administration alike.

The bargaining process found in most American public schools relegates adversarial activity to periodic collective bargaining, with well-understood procedures for grievance processing. That system has virtually eliminated strikes or work stoppages during the term of the bargaining agreement. The task of representing teachers in an adversarial capacity is delegated to a few elected officials. This relieves other members of the faculty from having to confront the school administration and allows them more time for teaching.

Somehow, a school administration must take advan-

tage of each individual teacher's willingness to improve the learning experience. How this can be done, while still maintaining a bargaining relationship, will vary from school to school. For example, task force committees may be appropriate in some schools. Informal meetings between the principal and selected faculty members may prove useful in others. This kind of effort is not inconsistent with collective bargaining.

There is no essential conflict between a teacher's wish to receive a better salary and better working conditions, with the help of a labor organization, and that teacher's willingness to improve the education of students. Most teachers are eager to succeed as educators. At the same time, they demand fair treatment from their employers.

In the overall operation of the school, it is natural and normal that disputes should arise. Some disagreements concern matters covered by the teachers' collective bargaining agreement and can be resolved through arbitration. Others involve policy questions. In these cases, it may be appropriate for the school to have supplementary methods for reconciling its differences.

Controversies between the school and its teachers or between teachers and students present issues that can be discussed, considered, and resolved with involvement by others in the school community. It is not necessary to rely entirely upon the channels created by collective bargaining. Many of the cases in this book involve disputes that could have been compromised. But the union and the administration had taken firm positions, refusing to budge. Seemingly, communications came to an end while the arbitration was pending.

In these kinds of situations, it might have been useful for the parties to have had access to a trained mediator who could help them communicate, serving as a catalyst toward some solution. The mediator does not make a decision for

the parties, as does an arbitrator, but simply helps them to better understand their mutual problem and work toward a resolution.

One of the areas in which mediation in the schools has become common involves the Education for All Handicapped Children Act, which provides enhanced educational services for handicapped children. Parents who think that their child's school is not providing appropriate services have the right to demand an impartial due-process hearing.

The Act does not require mediation of disputes, but Department of Education regulations encourage schools to use mediation prior to conducting a formal hearing. Often, mediators are state employees or members of the school administration who have not been involved in the case. A majority of the states now authorize mediation prior to hearings.

Mediation could be equally applicable to other disputes within the schools—not only grievances between teachers and school boards but other disagreements as well. People in schools develop long-term relationships. Their disputes involve various interests and concerns for the future. They arise in a structured setting. The alternative to settlement is often unpleasant. Litigation is disruptive. Everything points toward the benefits of a consensual agreement. In such a setting, the notion of bringing interested individuals together with a trained mediator makes sense.

Mediation, of course, is only one method for encouraging better communication and facilitating settlements. Indeed, there may be no need to involve a neutral in the grievance process. If the union and the school administration can concentrate upon problem solving and share their perceptions, a high percentage of grievances will be resolved.

Implementing new methods may require a change in some teachers' attitudes and in school policy. For example, teachers have to be encouraged to participate in settlement

discussions when issues are identified. In recent years, dispute resolution has become a recognized science. Teachers can be trained in negotiation and in mediation.

There is an analogy to business. Most modern corporations encourage communication between the executives and employees. Various innovative techniques have been used to accomplish that goal. Information is an important ingredient to a productive operation.

Skills in advocacy and in mediation, acquired as part of the educational process, could be included in the curriculum at almost any level. Those skills have an obvious practical value. People always need to negotiate, for their own interests and for others. They need to understand how disputes are resolved. Everyone has many opportunities to act as a mediator or as a decision maker. Students should acquire these skills in school. They must learn how to explain and adjust to differences among themselves. This is a key to maturity.

How can this be accomplished? These kinds of skills are seldom learned through lectures. They must be transmitted through role playing and through participation in real-life disputes. If teachers use these techniques themselves, they will have no difficulty injecting them into the curriculum.

As disagreements arise in the school or erupt in the local community, faculty members can introduce their classes to dispute resolution. Students can be encouraged to investigate the facts, to discuss and analyze the issues, to debate them, to seek a consensus, to attempt to mediate, and to create guidelines for avoiding future controversies of the same kind. An important aspect of teaching might be to share such skills with students. Public schools could make the teaching of such skills an essential part of their mission. Training young people in dispute resolution would supplement and enrich every aspect of learning.

A new movement, making itself felt in the public

schools, may have an impact on how teachers deal with questions of policy. It is called school mediation. The technique was described in an article by Albie Davis and Kit Porter in the Winter 1985 issue of *Update*, an American Bar Association publication on law-related education.

The authors describe three school mediation programs: one in Hawaii, where the local culture has always been sympathetic to such methods; another in San Francisco, where community mediation has established strong roots; and one in New York City, under the auspices of the Victim Services Agency. In New York, the program is called SMART, an acronym for School Mediators' Alternative Resolution Team. These programs are now a permanent part of the school systems and are being adopted in other communities as well. They are intended to bring students into the dispute resolution process and to encourage communication between students and faculty. The programs are being used as models because they have reduced disciplinary problems and contributed to children's education. They provide an alternative to the punitive response of suspension, expulsion, or court intervention. Under these programs, vandalism, student violence, and absenteeism have decreased. The responsibility for keeping order is shifted to the student body. Teachers are relieved of "warden" duties and can concentrate on teaching. Mediation training, coupled with a chance to practice mediation skills, encourages personal growth. Both students and faculty learn how to live and work in a contentious world.

The process of school mediation is relatively simple. Children with leadership potential assume responsibility for helping other students settle their disagreements amicably. Mediation usually begins with the mediator offering to provide services, explaining the process, and encouraging the disputants to describe their problem. Sometimes a mediator will meet separately with each side. In other situations, all parties are involved in the entire discussion.

A mediator may work alone or as part of a team. The purpose is to help the parties understand their dispute and to assist them in reaching an agreement. The program director makes sure that the settlement does not violate school policies and is fair to both sides.

This kind of mediation tends to reduce conflict. It improves the atmosphere of the school and encourages students to verbalize their disagreements. Once involved as parties, many students want to participate as mediators, which becomes a position of prestige.

Controversy and the resolution of disputes can be an exciting and educational school experience. Dealing with conflict offers an opportunity for student participation that should not be overlooked.

Wherever controversy can be found—in school activities, in the community, in national affairs—it could be injected into the intellectual life of the school, to expand student awareness. Students should be invited to participate in our exciting world. Dispute resolution can be an important experience in education. It can help children become adults.

Even disputes involving collective bargaining or student discipline can be utilized for such a purpose. Rather than banning student discussion of a pending impasse in negotiations between teachers and the school board, the administration could encourage students to form study groups so that they gain an informed opinion as to the issues. Rather than treat a complaint about corporal punishment as a secret that must be handled privately by the administration, students could be encouraged to investigate the incident and make recommendations to the administration as to how similar situations might be avoided in the future. When an issue arises about the curriculum, students might participate in its resolution. Should a course be given on "The Bible as Literature"? What do the students think? Should a tenth-grade class be shown a horror movie? Ask

the students. What is so dangerous about involving children with their own education?

Students could be involved in every aspect of the school operation. Is the lunchroom messy? Is the library quiet? Shouldn't students be encouraged to make such issues the subject of discussion? A good school might welcome that kind of involvement.

Working relationships between school board, administration, faculty, and students should be positive, expressing a mutual commitment to maintaining an effective educational environment. When those conditions exist, unresolved teacher grievances are rare indeed. Many of the cases described in this book would not have arisen in such an atmosphere.

The cases in this book, unfortunately, generally represent relationships that have broken down. The individual grievants are teachers in trouble. Often, the union and the school board are at war. These disputes had to be resolved through arbitration, or sometimes in the courts.

Arbitration resolves those relatively few, stubborn grievances that cannot be settled internally. Arbitration should not be an arena for creating continual hostility between the parties. It should not be used too often. Far better for the parties to resolve their grievances amicably, relying primarily upon the earlier steps of the grievance procedure, working cooperatively to eliminate misunderstandings or ambiguities that might otherwise generate disputes.

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Voluntary Labor Arbitration Rules of the American Arbitration Association

As Amended and in Effect March 1, 1986

1. Agreement of Parties
The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Rules. These Rules shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal
Any Tribunal constituted by the parties under these Rules shall be called the Voluntary Labor Arbitration Tribunal.

3. Administrator
When parties agree to arbitrate under these Rules and an arbitration is instituted thereunder, they thereby authorize the AAA to administer the arbitration. The authority and obligations of the Administrator are as provided in the agreement of the parties and in these Rules.

4. Delegation of Duties
The duties of the AAA may be carried out through such representatives or committees as the AAA may direct.

5. National Panel of Labor Arbitrators
The AAA shall establish and maintain a National Panel of Labor Arbitrators and shall appoint arbitrators therefrom, as hereinafter provided.

6. Office of Tribunal

The general office of the Labor Arbitration Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

7. Initiation under an Arbitration Clause in a Collective Bargaining Agreement

Arbitration under an arbitration clause in a collective bargaining agreement under these Rules may be initiated by either party in the following manner:

(a) By giving written notice to the other party of intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute and the remedy sought, and

(b) By filing at any Regional Office of the AAA three copies of said notice, together with a copy of the collective bargaining agreement, or such parts thereof as relate to the dispute, including the arbitration provisions. After the Arbitrator is appointed, no new or different claim may be submitted except with the consent of the Arbitrator and all other parties.

8. Answer

The party upon whom the Demand for Arbitration is made may file an answering statement with the AAA within seven days after notice from the AAA, simultaneously sending a copy to the other party. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

9. Initiation under a Submission

Parties to any collective bargaining agreement may initiate an arbitration under these Rules by filing at any Regional Office of the AAA two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties and setting forth the nature of the dispute and the remedy sought.

10. Fixing of Locale

The parties may mutually agree upon the locale where the arbitration is to be held. If the locale is not designated in the collective bargaining agreement or Submission, and if there is a dispute as to the appropriate locale, the AAA shall have the power to determine the locale and its decision shall be binding.

11. Qualifications of Arbitrator

No person shall serve as a neutral Arbitrator in any arbitration in which he or she has any financial personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

12. Appointment from Panel

If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party an identical list of names of persons chosen from the Labor Panel. Each party shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names indicating the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

13. Direct Appointment by Parties

If the agreement of the parties names an Arbitrator or specifies a method of appointing an Arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of such Arbitrator, shall be filed with the AAA by the appointing party.

If the agreement specifies a period of time within which an Arbitrator shall be appointed and any party fails to make such appointment within that period, the AAA may make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed,

the AAA shall make the appointment.

14. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators

If the parties have appointed their Arbitrators, or if either or both of them have been appointed as provided in Section 13, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA may appoint a neutral Arbitrator, who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the AAA shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that the Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 12, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

15. Number of Arbitrators

If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the parties otherwise agree.

16. Notice to Arbitrator of Appointment

Notice of the appointment of the neutral Arbitrator shall be mailed to the Arbitrator by the AAA and the signed acceptance of the Arbitrator shall be filed with the AAA prior to the opening of the first hearing.

17. Disclosure by Arbitrator of Disqualification

Prior to accepting the appointment, the prospective neutral Arbitrator shall disclose any circumstances likely to create a presumption of bias or which the Arbitrator believes might disqualify him or her as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

18. Vacancies

If any Arbitrator should resign, die, withdraw, refuse, or be unable or disqualified to perform the duties of office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in the same manner as that governing the making of the original appointment, and the matter shall be reheard by the new Arbitrator.

19. Time and Place of Hearing

The Arbitrator shall fix the time and place for each hearing. At least five days prior thereto, the AAA shall mail notice of the time and place of hearing to each party, unless the parties otherwise agree.

20. Representation by Counsel

Any party may be represented at the hearing by counsel or by other authorized representative.

21. Stenographic Record

Any party wishing a stenographic record shall make such arrangements directly with the stenographer and shall notify the other parties of such arrangements in advance of the hearing. The requesting party or parties shall pay the cost of such record. If such transcript is agreed by the parties to be, or in appropriate cases determined by the Arbitrator to be, the official record of the proceeding, it must be made available to the Arbitrator and to the other party for inspection, at a time and place determined by the Arbitrator.

22. Attendance at Hearings

Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

23. Adjournments

The Arbitrator for good cause shown may adjourn the hearing upon the request of a party or upon his or her own initiative, and shall adjourn when all the parties agree thereto.

24. Oaths

Before proceeding with the first hearing, each Arbitrator may

take an Oath of Office, and if required by law, shall do so. The Arbitrator may require witnesses to testify under oath administered by any duly qualified person, and if required by law or requested by either party, shall do so.

25. Majority Decision

Whenever there is more than one Arbitrator, all decisions of the Arbitrators shall be by majority vote. The award shall also be made by majority vote unless the concurrence of all is expressly required.

26. Order of Proceedings

A hearing shall be opened by the filing of the Oath of the Arbitrator, where required, and by the recording of the place, time, and date of hearing, the presence of the Arbitrator and parties, and counsel, if any, and the receipt by the Arbitrator of the Demand and answer, if any, or the Submission.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator. The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

The Arbitrator may vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs.

27. Arbitration in the Absence of a Party

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

28. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. An Arbitrator authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The Arbitrator shall be the judge of the relevancy and

materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and all of the parties except where any of the parties is absent in default or has waived its right to be present.

29. Evidence by Affidavit and Filing of Documents

The Arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing, but which are arranged at the hearing or subsequently by agreement of the parties to be submitted, shall be filed with the AAA for transmission to the Arbitrator. All parties shall be afforded opportunity to examine such documents.

30. Inspection

Whenever the Arbitrator deems it necessary, he or she may make an inspection in connection with the subject matter of the dispute after written notice to the parties who may, if they so desire, be present at such inspection.

31. Closing of Hearings

The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for filing with the AAA. The time limit within which the Arbitrator is required to make an award shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

32. Reopening of Hearings

The hearings may be reopened by the Arbitrator at will or on the motion of either party, for good cause shown, at any time before the award is made, but if the reopening of the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless both parties agree upon the extension of such time limit. When

no specific date is fixed in the contract, the Arbitrator may reopen the hearings, and the Arbitrator shall have 30 days from the closing of the reopened hearings within which to make an award.

33. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with, and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

34. Waiver of Oral Hearings

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

35. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

36. Serving of Notices

Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or the entry of judgment on an award made thereunder, may be served upon such party (a) by mail addressed to such party or its attorney at the last known address, or (b) by personal service, within or without the state wherein the arbitration is to be held.

37. Time of Award

The award shall be rendered promptly by the Arbitrator and, unless otherwise agreed by the parties or specified by the law, not later than 30 days from the date of closing the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the Arbitrator.

38. Form of Award

The award shall be in writing and shall be signed either by the neutral Arbitrator or by a concurring majority if there be more

than one Arbitrator. The parties shall advise the AAA whenever they do not require the Arbitrator to accompany the award with an opinion.

39. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

40. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

41. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

42. Judicial Proceedings

The AAA is not a necessary party in judicial proceedings relating to the arbitration.

43. Administrative Fee

As a not-for-profit organization, the AAA shall prescribe an administrative fee schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing shall be applicable.

44. Expenses

The expense of witnesses for either side shall be paid by the party producing such witnesses.

Expenses of the arbitration, other than the cost of the stenographic record, including required traveling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witnesses or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties unless they agree otherwise, or unless the Arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

45. Communication with Arbitrator

There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

46. Interpretation and Application of Rules

The Arbitrator shall interpret and apply these Rules insofar as they relate to the Arbitrator's powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by majority vote. If that is unobtainable, either Arbitrator or party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

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