

**IN THE MATTER OF ARBITRATION BETWEEN**

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<b>MINNEAPOLIS FEDERATION OF</b>	)	
<b>TEACHERS,</b>	)	
	)	
<b>Union,</b>	)	<b>ARBITRATION</b>
	)	<b>AWARD</b>
<b>and</b>	)	
	)	<b>POLING UNPAID</b>
	)	<b>LEAVE GRIEVANCE</b>
<b>SPECIAL SCHOOL DISTRICT NO. 1,</b>	)	
<b>MINNEAPOLIS,</b>	)	
	)	
<b>Employer.</b>	)	<b>BMS CASE No. 10-PA-1634</b>
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Arbitrator: Stephen F. Befort

Hearing Date: N/A

Record Closed: December 10, 2010

Date of decision: December 29, 2010

**APPEARANCES**

For the Union: Debra M. Corhouse

For the School District: JaPaul J. Harris

**INTRODUCTION**

The Minneapolis Federation of Teachers (“Union”) is the exclusive representative of a unit of teachers employed by Special School District No. 1, Minneapolis (“School District”). The Union contends that the School District violated the Minnesota Teacher Tenure Act and the parties’ collective bargaining agreement (“CBA”) by placing Damien Poling on unpaid administrative leave prior to the time it proposed him for discharge.

The parties agreed to submit this matter to arbitration on written briefs without an evidentiary hearing.

### **ISSUE**

Did the School District violate the Teacher Tenure Act and the parties' collective bargaining agreement by placing the grievant on unpaid administrative leave prior to the time at which it proposed his discharge?

### **RELEVANT STATUTORY AND CONTRACT LANGUAGE**

#### **Minn. Stat. § 122A.41, subd. 6**

(a) Except as otherwise provided in paragraph (b), causes for the discharge or demotion of a teacher either during or after the probationary period must be:

- (1) immoral character, conduct unbecoming a teacher, or insubordination;
- (2) failure without justifiable cause to teach without first securing the written release of the school board having the care, management, or control of the school in which the teacher is employed;
- (3) inefficiency in teaching or in the management of a school;
- (4) affliction with active tuberculosis or other communicable disease must be considered as cause for removal or suspension while the teacher is suffering from such disability; or
- (5) discontinuance of position or lack of pupils.

#### **Minn. Stat. § 122A.41, subd. 12**

After charges are filed against a teacher, the school board may suspend the teacher from regular duty. If the teacher is suspended or removed after the final decision, the board may in its discretion determine the teacher's salary or compensation as of the time of filing the charges. If the final decision is favorable to the teacher, the board must not abate the teacher's salary or compensation.

## Collective Bargaining Agreement

### Article VII

Section E. Salary Administration: Teacher personnel . . . may select a 21 or 26 payday option. If the teacher does not select an option, the teacher shall be paid on the 26 day option. . . . Such payments will normally coincide with the biweekly payment cycle. . . .

### Article XI

Subd. 1.D. Any employee of the District who is indicted shall be automatically suspended from service from the date of indictment. In case of acquittal, the employee shall be paid in full for the time lost by reason of such suspension.

## FACTUAL BACKGROUND

The grievant, Damien Poling, was hired as a teacher by the School District in 1997, and he has earned tenure under Minnesota's Teacher Tenure Act. During the 2009-10 school year, Mr. Poling worked as a Teacher on Special Assignment in the role of Dean of Students for Roosevelt High School.

Criminal charges were filed against Mr. Poling on November 25, 2009. The School District responded by placing Mr. Poling on unpaid administrative leave and, several months later, by proposing him for discharge. The time line of pertinent events is set out below:

**November 25, 2009** – The grievant was charged with two counts of Third Degree Assault under Minn. Stat. 609.223 subsections (1) and (3).

**December 1, 2010** – The School District placed the grievant on unpaid administrative leave pending investigation, relying upon School Policy 4027 which provides as follows:

Employees of Special School District No. 1 may be suspended with or without pay from the date when charged with a criminal violation or from the time the District or the police initiate an investigation of alleged misconduct. The determination as to whether the suspension will be with or without pay shall be made on a case by case basis. Such a determination will consider, but not be limited to, factors including the seriousness of the charge and whether the matter is job related or non-job related. Nothing in this policy precludes the Board of

Education authority to suspend, with or without pay, based on conduct unbecoming an employee. An employee suspended without pay pursuant to this policy who is subsequently acquitted, shall be made whole for the wages lost by reason of the suspension, unless the employee has also been suspended for conduct unbecoming an employee.

**December 8, 2009** – The Minneapolis Public Schools Board of Education approved the recommendation to place the grievant on administrative leave without pay.

**January 13, 2010** – The Union filed a grievance alleging that the School District’s placement of the grievant on administrative leave without pay violated his contractual rights to salary and benefits.

**January 28, 2010** – The School District responded by denying the Union’s grievance.

**March 2, 2010** – The grievant pled guilty to both counts of Third Degree Assault.

**March 15, 2010** – The School District provided the grievant with an opportunity to respond to the District’s concerns regarding the alleged criminal misconduct at a due process (*Loudermill*) meeting.

**March 15, 2010** – The School District informed the grievant that it would be proposing that he be discharged at the next school board meeting.

**April 13, 2010** – The Board of Education approved the School District’s proposal to discharge the grievant for conduct unbecoming a teacher.

Mr. Poling acquiesced to the proposed discharge, and he does not challenge that determination in this grievance. Instead, the sole issue raised by the Union is the School District’s failure to pay Mr. Poling while on administrative leave through the date on which the School District proposed his discharge.

The parties have entered into a stipulation to submit this grievance on the written briefs and appended attachments. The parties further agreed that the “arbitrator can adjudicate issues of statutory and constitutional law that may or may not be covered by the parties’ collective bargaining agreement.”

## **POSITIONS OF THE PARTIES**

### **Union:**

The Union does not challenge the Employer's termination of Mr. Poling. Instead, the Union's sole contention is that the School District violated the Teacher Tenure Act and the parties' collective bargaining agreement by failing to pay Mr. Poling during the period during which he was placed on administrative leave before the School District proposed his discharge. The Union bases this claim on the terms of the Teacher Tenure Act which expressly provides a school district with discretion to determine pay status for an administrative suspension only "as of the time of filing the charges" for discharge or demotion. The Union argues that prior to this point in time, the School District must continue to pay the teacher's salary pursuant to the teacher's continuing contract. Any other interpretation, the Union maintains, permits a School District to place a teacher on a suspension of indefinite length without any recourse to an evidentiary hearing. Finally, the Union contends that the terms of a collective bargaining agreement cannot constitute a waiver of this statutory right, since rights provided by the Teacher Tenure Act are personal to individual teachers and may be waived only by the teacher in question.

### **School District**

The School District asserts that Policy 4027, which is referenced in the parties' collective bargaining agreement, authorizes it to suspend an employee when charged with a criminal violation "with or without pay." The School District maintains that it has a longstanding practice of placing criminally charged employees, including teachers, on unpaid administrative leave pending the outcome of a criminal case. The School District argues that the Teacher Tenure Act does not override this past practice since nothing in

the act requires a school district to pay a suspended teacher prior to being proposed for discharge. Alternatively, even if section 122A.41, subd. 12 is applicable to this situation, that provision authorizes a school district to determine pay status after charges have been filed subject only to an obligation to fully compensate the teacher in the event that the charge ultimately is resolved in the teacher's favor.

## **DISCUSSION AND OPINION**

### **The Teacher Tenure Act**

By virtue of being situated in a city of the first class, teachers in the Minneapolis School District are covered by Minnesota's Teacher Tenure Act. This statute provides that teachers earn tenure after three years of service, Minn. Stat. § 122A.41, subd. 4, and may be discharged thereafter only for cause. Minn. Stat. § 122A.41, subd.6. The only mention of a suspension in the Act is in section 122A.41, subd. 12 which states:

After charges are filed against a teacher, the school board may suspend the teacher from regular duty. If the teacher is suspended or removed after the final decision, the board may in its discretion determine the teacher's salary or compensation as of the time of filing the charges. If the final decision is favorable to the teacher, the board must not abate the teacher's salary or compensation.

This provision stands in contrast to that of the Continuing Contract Law applicable to other school districts, Minn. Stat. 122A.40, subd. 13, that permits a school district to suspend a teacher only *with pay* after filing charges alleging grounds for discharge.

Both parties contend that subdivision 12 is inapplicable in the present context. Both parties claim that the "charges" referred to in that provision relate to the statutory grounds for termination set out in Minn. Stat. § 122A.41, subd. 6, rather than to charges relating to an alleged criminal law violation. Since the School Board did not allege

charges for dismissal until April 13, 2010, the parties agree that subdivision 12 does not govern the compensation question at issue.

The School District asserts, as an alternative position, that if the “charges” referred to in subdivision 12 include charges of criminal conduct, subdivision 6 provides the School District with “discretion [to] determine the teacher's salary or compensation.” In support of this position, the School District points to two arbitration decisions that interpret the subdivision 6 language to authorize a school district to suspend a teacher with or without pay once “charges” have been filed. Minneapolis Special School District No. 1 and Education Minnesota, BMS Case No. 05-PA-532 (Toenges, January 31, 2008); United Technical College Educators Association and Minnesota State Colleges and Universities (Ver Ploeg, August 29, 1997).

I agree with the parties that the language of Minn. Stat. 122A.41, subd. 12 most plausibly refers to charges asserting grounds for dismissal rather than to criminal charges filed by a prosecuting authority. A basic thrust of the Teacher Tenure Act is to lay out grounds and procedures for the removal of a tenured teacher. Some of the statutory grounds warranting removal involve potentially criminal conduct, but several do not. Thus, I conclude that section 122A.41, subd. 12 is applicable only once a school district asserts charges to support the dismissal of a tenured teacher. Accordingly, that provision is inapplicable in the instant matter.

### **The Parties’ Contract**

The parties’ collective bargaining agreement does not expressly address the matter at issue. The parties, however, glean meaning from provisions that bear circumstantially on the suspension with pay question. The Union points to the pay

schedule language in Article VII, Section E (“Teacher personnel . . . may select a 21 or 26 payday option”), which, when read together with the continuing contract authorized by the Teacher Tenure Act, suggests that a tenured teacher is entitled to continued pay until a proposed discharge is sustained. The School District, on the other hand, relies on the language of Article XI, subd. 1.D. which states:

Any employee of the District who is indicted shall be automatically suspended from service from the date of indictment. In case of acquittal, the employee shall be paid in full for the time lost by reason of such suspension.

The School District argues that a suspension following a criminal charge is similar in nature and effect to a suspension upon indictment, and that similar policy concerns support an interpretation that a suspended teacher should be entitled to pay only if the teacher’s challenge to a proposed termination is sustained.

The School District also asserts a past practice argument. The School District suspended the grievant without pay pursuant to School Policy 4027 which provides that a teacher “may be suspended with or without pay from the date when charged with a criminal violation or from the time the District or the police initiate an investigation of alleged misconduct.” The School District claims that since 1998 it has suspended 25 employees charged with a criminal offense without pay pursuant to this policy pending the outcome of their criminal cases, including five teachers who were members of the Union’s bargaining unit.

In the end, the language of the contract does not clearly address the question under consideration. Given these circumstances, considerable weight is owed to the School District’s past practice evidence. It is well recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the

terms of a collective bargaining agreement. A “past practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties.

Richard Mittenhal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 606-10 (6th ed. 2003). The longstanding practice of the School District with respect to suspensions pending criminal charges appears to constitute such a binding past practice.

The Union argues that the right to continuing compensation is an individual right arising from the Teacher Tenure Act that cannot be waived by past practice or Union inaction. That contention might be valid if the right in question was clearly established by statute. But where, as here, the right to continued compensation is unclear under both statute and contract, the parties’ past course of conduct provides the best available evidence as to the parties’ contractual understanding.

Finally, this conclusion also serves fundamental policy interests. When a teacher is suspended due to criminal charges that eventually are proven to be groundless, the teacher deserves to recover the pay and benefits wrongfully withheld. But, when a suspension is due to criminal charges that eventually are substantiated, an award of pay for the suspension period amounts to an unwarranted windfall. School District Policy 4027 embodies these respective policy interests.

**AWARD**

The grievance is denied.

Dated: December 29, 2010

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Stephen F. Befort  
Arbitrator