

IN THE MATTER OF ARBITRATION)	GRIEVANCE ARBITRATION
)	
between)	
)	
Independent School District)	
No. 111, Watertown-Mayer,)	BMS Case No. 09-TD-3
Minnesota)	
)	
-and-)	
)	
Nicholas Guertin)	April 24, 2009
)))	

APPEARANCES

**For Independent School District No. 111, Watertown-Mayer,
Minnesota**

Patrick J. Flynn, Attorney, Knutson, Flynn & Deans, Mendota Heights, Minnesota
Karsten Anderson, Superintendent of Schools
Catherine Kramer, Retired First Grade Teacher
Scott Isakson, Fourth Grade Teacher
Colleen Kelzer, Fourth Grade Teacher
Tami Kuntz, Fourth Grade Teacher
Jeanne Penney, Sixth Grade Math Teacher
Nancy Schrupp, Paraprofessional, Title I Program
Sharon Tollefson, Lead Teacher, Title I
Scott Alger, Director of Teaching and Learning
Nancy Hokenson, First Grade Teacher
Janice Bouk, Parent and Substitute Teacher
Susan Bjorklund, Parent
Valerie McCain, Parent
Linda Johnson, Former Parent

For Nicholas Guertin

Roger J. Aronson, Attorney, Minneapolis, Minnesota
Lisa Armstrong, Social Worker, Elementary School
Scott Gengler, Principal, High School
Suzanne Busacker, Special Education Supervisor and Primary School Principal
John Anderson, Principal, Middle School
Kristine Erickson, Secretary, Elementary School
Elizabeth Nichols, Parent

Robin Wadde, Parent
Jennifer Fonkert, Former Teacher
Lloyd Styrwoll, Director, Northwest Service Cooperative
Nicholas Guertin, Principal, Elementary School

JURISDICTION OF ARBITRATOR

Nicholas Guertin is employed by Independent School District No. 111, Watertown-Mayer, Minnesota ("School District") as a principal and continuing contract teacher pursuant to Minnesota Statutes Section 122A.40.

At its August 5, 2008 meeting, the School Board of Independent School District No. 111 ("School Board") accepted the recommendation of School District Superintendent of Schools, Karsten Anderson, and passed a Resolution Proposing Immediate Discharge of Nicholas Guertin and Suspension With Pay of Nicholas Guertin ("Resolution") which included a Notice of Proposed Immediate Discharge and Suspension With Pay of Nicholas Guertin ("Notice") dated August 6, 2008. (School District Exhibits #1A, 1B). Mr. Guertin was served with a copy of the Notice and Resolution which proposed to discharge Mr. Guertin on the following grounds:

1. Immoral Conduct;
2. Conduct unbecoming a teacher which requires the immediate removal of the teacher from the classroom or other duties; and
3. Willful neglect of duty.

(School District Exhibits #1A, 1B).

The factual basis upon which Mr. Guertin's discharge was proposed includes the following:

Inappropriate and unacceptable sexual activity with another School District employee during his duty day, including the exchange of unprofessional and sexually suggestive email correspondence.

(School District Exhibit #1B).

On December 4, 2008, the School Board passed a Resolution Amending Proposed Immediate Discharge of Nicholas Guertin and Suspension with Pay of Nicholas Guertin. (School District Exhibit #3). This Resolution contained an Amended Notice of Proposed Immediate Discharge of Nicholas Guertin and Suspension With Pay of Nicholas Guertin ("Amended Notice"). The original Notice and Amended Notice are identical with the exception that two paragraphs were added to the factual basis for the grounds for Mr. Guertin's termination. The additional grounds listed in the Amended Notice are as follows:

In addition, inappropriate, unprofessional and unacceptable social interaction with another School District employee during his duty day, excessive time spent with a certain teacher in either the principal's office or the teacher's classroom, undue familiarity relative to body proximity, inappropriate and unprofessional body contact, and inappropriate contact and social interaction at School District related functions.

The above conduct substantially disrupted other employees, the student body, and the educational program at the school.

(School District Exhibit #3).

Mr. Guertin was served with a copy of both Notices and Resolutions. On August 15, 2008, Mr. Guertin timely requested a closed hearing before an arbitrator pursuant to Minnesota Statutes Section 122A.40, subdivisions 14 and 15. (School District Exhibit #2). Mr. Guertin agreed that the contents of the Amended Notice would be incorporated into the hearing. (Tr. p. 499).

The Arbitrator, Richard J. Miller, was selected by the School District and Roger Aronson, representing Mr. Guertin, on behalf of the Watertown-Mayer Principals' Association (collectively referred to as the "Parties"), from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on November 20, December 9, 10 and 15, 2008, and January 6 and 8, 2009, at the School District Administrative Offices, 1001 Highway 25 Northwest, Watertown, Minnesota. The hearing was transcribed. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file post hearing briefs. Mr. Aronson submitted his post hearing brief on behalf of Mr. Guertin on March 2, 2009. The School District submitted their response brief on March 24, 2009. Mr. Aronson submitted his reply brief on behalf of Mr.

Guertin on April 1, 2009, after which the record was considered closed.

The Parties agreed that the matter is properly before the Arbitrator for review and decision.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Whether a preponderance of the evidence exists to establish that the ground of (1) immoral conduct, (2) conduct unbecoming a teacher which requires his immediate removal from his duties or (3) willful neglect of duties exists for the termination of Mr. Guertin's employment pursuant to Minnesota Statutes Section 122A.40, subdivisions 13(1), 13(2) and 13(5)?
2. If not, what is the alternative discipline?

STATEMENT OF THE FACTS

On July 12, 2002, Mr. Guertin applied for a principal position at Watertown-Mayer Elementary School. (Guertin Exhibit #4, p. 1). He was highly recommended for the position. (Id., pp. 4-11).

Mr. Guertin was hired for the position and has been employed as a full-time elementary principal in the School District at the Watertown-Mayer Elementary School since the 2002-03 school year. (Guertin Exhibit #4, p. 30).

During his first four years of employment with the School District, the District did not have any concerns with respect to Mr. Guertin's work performance as a principal. In fact, Mr. Guertin had excellent performance reviews by his supervisors,

including Superintendent Anderson. (Guertin Exhibit #4, pp. 19-22).

Issues arose, however, in his fifth year of employment during the 2006-07 school year. At that time, the School District hired Jennifer Fonkert as an elementary school teacher. She was assigned to teach at Watertown-Mayer Elementary School as a fourth grade teacher under the direct supervision of Mr. Guertin. Ms. Fonkert wanted a middle school position but settled for the Watertown-Mayer Elementary School position. Mr. Guertin avers that he first met Ms. Fonkert as a result of her employment at the School District. (Tr. p. 694).

In the fall of 2006, by their own admissions, Mr. Guertin and Ms. Fonkert began developing a friendship that lead to a romantic relationship. (Tr. p. 694). In this regard, at the time Ms. Fonkert was hired, both Ms. Fonkert and Mr. Guertin were in the process of ending their marriages but were still living with their spouses. Mr. Guertin lived with his wife until approximately February of 2007. While Ms. Fonkert testified that her marriage had ended earlier, she remained in her home with her spouse until April of 2007 for financial reasons. (Tr. p. 767). The evidence suggests that neither of their spouses initially were aware of the development of this relationship between Mr. Guertin and Ms. Fonkert. (School District Exhibits #5A, 5B, 6).

Ms. Fonkert's husband became very angry and vindictive once he discovered the relationship between Ms. Fonkert and Mr. Guertin.

There were rumors going around school and outside of school in the community that Ms. Fonkert and Mr. Guertin were in a relationship while still being married to their spouses.

In approximately March or April of 2007, Dan Sieling, the School District's technology coordinator, came to Superintendent Anderson and reported that he had concerns about Mr. Guertin. Mr. Sieling reported that he had heard rumors that Mr. Guertin and Ms. Fonkert were having an affair. Mr. Sieling informed Superintendent Anderson that at a staff party, Mr. Guertin and Ms. Fonkert had engaged in suspicious behavior in that they left five minutes apart from each other. Mr. Sieling stated that he had been at the post office and had observed that Mr. Guertin obtained a post office box to which his wife would not have access. Finally, Mr. Sieling reported that Mr. Guertin had contacted him about some problems he had been having accessing information with his Blackberry, and that when Mr. Sieling accessed Mr. Guertin's account he saw some e-mails that led him to believe Mr. Guertin was having an affair. (Tr. pp. 289-93).

Mr. Sieling did not provide copies of any of the e-mails that he felt were suspicious to Superintendent Anderson. Superintendent Anderson testified that at about this same time

other staff members also came forward to him and reported hearing rumors from other people about Ms. Fonkert and Mr. Guertin. (Tr. p. 296).

In response to this complaint, Superintendent Anderson had a conversation with Mr. Guertin. Superintendent Anderson informed Mr. Guertin of the complaint he received. (Tr. pp. 293, 367). In fact, he reviewed all three complaints that had been brought to his attention by Mr. Sieling. In response, Mr. Guertin told Superintendent Anderson that he had done nothing wrong. (Tr. pp. 294, 368). Mr. Guertin explained that he and Ms. Fonkert were both going through a divorce and had marriage issues that spring. Mr. Guertin said that he had spent time talking with Ms. Fonkert about those experiences. (Tr. p. 294). Superintendent Anderson did inform Mr. Guertin that it was not suitable for a supervisor to have conversations with a subordinate regarding the personal aspects of their marriages. (Tr. p. 348). However, Superintendent Anderson took Mr. Guertin at his word that there was nothing more to these rumors and, therefore, took no further action regarding the matter.

Sometime between January and March of 2007, Superintendent Anderson was informed by the School District bookkeeper that Mr. Guertin had been making a large number of calls on his School District cell phone. (Tr. p. 369). Superintendent Anderson

believed that many of these calls were clearly personal as there was extensive usage on weekends and late at night. (School District Exhibit #6). Consequently, Superintendent Anderson spoke with Mr. Guertin about his cell phone usage in March of 2007. (Tr. pp. 341, 369). He discussed with Mr. Guertin that the cell phone was to be used primarily for School District business and it appeared that there were an inordinate number of personal calls. (Tr. p. 341). In response to this conversation, Mr. Guertin agreed to stop making personal calls on the School District cell phone. (Tr. p. 341). In fact, Mr. Guertin did obtain his own personal cell phone at that time. (Id.)

Superintendent Anderson did continue to hear of rumors regarding Mr. Guertin's and Ms. Fonkert's relationship in the spring of 2007. However, he did not take further action or issue any disciplinary action at that time as the only information he received were rumors which had been denied to him by Mr. Guertin. (Tr. p. 504).

Superintendent Anderson met with Mr. Guertin and Middle School Principal Scott Alger in the spring of 2007 to determine staffing assignments for the 2007-08 school year. During these discussions there was a conversation about Ms. Fonkert's teaching assignment. Mr. Guertin and Ms. Fonkert testified that a determination was made to transfer Ms. Fonkert to the middle

school because Ms. Fonkert had wanted to teach at the middle school, and an opening there was a perfect opportunity for her. (Tr. p. 713). In fact, Ms. Fonkert testified that she was never told that she was being transferred due to her relationship with Mr. Guertin. (Tr. p. 757).

Superintendent Anderson did address the issues surrounding Ms. Fonkert with Mr. Guertin later that summer based on the continuation of the rumors in the community. On or about August 11, 2007, Superintendent Anderson met with Mr. Guertin and his Union representative (Scott Gengler, High School Principal) and interviewed Mr. Guertin specifically about his relationship with Ms. Fonkert. Superintendent Anderson first provided Mr. Guertin with a Tennessean Warning and Weingarten Right. (Guertin Exhibit #3). Superintendent Anderson had prepared in advance type written questions. (Guertin Exhibit #1). From these questions, Superintendent Anderson asked Mr. Guertin about his relationship with Ms. Fonkert, whether they have met outside of school hours in a non-professional capacity and whether they had or were engaged in a physical or intimate relationship since Ms. Fonkert has been hired by the School District. (Id.) Superintendent Anderson also asked Mr. Guertin about claims that he spends an inordinate amount of time with Ms. Fonkert in her classroom and his office and whether he has given her preferential treatment.

(Id.) Finally, Superintendent Anderson asked Mr. Guertin whether he has written e-mails or received e-mails from Ms. Fonkert using school e-mail accounts. (Id.) At that time, Mr. Guertin refused to answer any of the questions posed to him. (Guertin Exhibit #2). Superintendent Anderson did not discipline Mr. Guertin for refusing to answer his questions.

The following school year (2007-08), Ms. Fonkert was transferred to the middle school to teach fifth grade. She was no longer being supervised by Mr. Guertin. By the start of the 2007-08 school year, Mr. Guertin and Ms. Fonkert were no longer hiding the fact that they were involved in a relationship. It was reported to Middle School Principal Alger that Mr. Guertin had traveled from the elementary school and visited Ms. Fonkert's classroom during the duty day while students were in class so that he could bring her a cup of coffee. (Tr. p. 211). The event was significant enough that a student who observed this incident informed the student's parents of it and they complained to Mr. Alger. (Id.)

Based on the reports he received, Mr. Alger testified that he felt the incident was unprofessional, enough so that even though he is not Mr. Guertin's supervisor, he felt he had to confront Mr. Guertin as to his behavior. (Tr. p. 215). When Mr. Alger confronted Mr. Guertin with the incident, Mr. Guertin

admitted that his visit had not been a good idea and that he would not do it again. (Tr. p. 211). Mr. Guertin never did it again.

Superintendent Anderson testified that the next time he received any information about the relationship or had any reason to doubt Mr. Guertin's version of the events was in approximately April or May of 2008. At that time, a School Board member came to him with copies of 31 e-mails between Mr. Guertin and Ms. Fonkert from December 31, 2006 through April 3, 2007. (School District Exhibit #5A). Ms. Fonkert testified that the e-mails came from her now ex-husband. (Tr. p. 759). After receiving the e-mails, Superintendent Anderson forwarded them to a law firm (Kennedy and Graven) for legal advice. (Tr. p. 349). The School District then hired another law firm (Knutson, Flynn and Deans) for additional legal advice. The School District ultimately hired Patrick J. Flynn from Knutson, Flynn and Deans to represent the District. (Id.)

Superintendent Anderson concluded that the e-mails did not pertain to mere consolation between Mr. Guertin and Ms. Fonkert as to their respective marriages as Mr. Guertin previously had described to Superintendent Anderson. Superintendent Anderson concluded that the e-mails were personal and flirtatious in nature, they were sent during Mr. Guertin's duty day, they made

reference to sexual activity both on and off school grounds, they spoke disparagingly of Ms. Fonkert's husband and other School District employees and referenced numerous rendezvous between Ms. Fonkert and Mr. Guertin during the school day for no apparent purpose other than the furtherance of a romantic relationship. (Tr. pp. 311-29). Superintendent Anderson determined the e-mails contained inappropriate content and evidenced an inappropriate relationship between a supervisor and subordinate. (Tr. p. 329). At that point, Superintendent Anderson authorized the initiation of an investigation.

During the investigation, Superintendent Anderson examined the telephone bills, and these bills revealed that the large majority of Mr. Guertin's phone calls that had been at issue in March of 2007 were made to Ms. Fonkert. Superintendent Anderson's investigation revealed that between January 18, 2007 and March 21, 2007, there were 44 duty days. (School District Exhibit #7). On these days, Mr. Guertin sent to or received from Ms. Fonkert 75 telephone calls during his duty day, or an average of three calls per day. (School District Exhibit #6). Moreover, the investigation revealed that many of the calls made by Mr. Guertin during his duty day were made to Ms. Fonkert during Ms. Fonkert's duty day as well and utilized a significant amount of both Mr. Guertin's and Ms. Fonkert's time.

For the next few months, the School District continued its investigation. Based on the evidence gathered during the entire investigation, Superintendent Anderson set up a separate meeting with Mr. Guertin and Ms. Fonkert. Mr. Flynn and Superintendent Anderson met with Ms. Fonkert to discuss her relationship with Mr. Guertin. (Tr. p. 350). After the meeting, Ms. Fonkert decided to accept a Reading Specialist position in the Buffalo School District and resigned her position from the School District. (Tr. pp. 350, 761). There was at least one scheduled meeting with Mr. Guertin but he decided not to attend. (Tr. p. 350).

As a result of the evidence gathered by Superintendent Anderson, he recommended to the School Board that they terminate the employment of Mr. Guertin. (Tr. pp. 353-51, 360-65, 577-78, 596). At its August 5, 2008 meeting, the School Board accepted Superintendent Anderson's recommendation and passed a Resolution and provided Mr. Guertin with a Notice of his Proposed Immediate Discharge and Suspension With Pay. Mr. Guertin timely appealed his termination to arbitration.

On December 4, 2008, the School Board passed a Resolution and provided Mr. Guertin with an Amended Notice of Proposed Immediate Discharge and Suspension With Pay. This occurred after the first day of the arbitration hearing held on November 20,

2008. The second day of the arbitration hearing was scheduled for December 9, 2008. The third day was scheduled for December 10, 2008. Prior to the third day of hearing, Superintendent Anderson received additional e-mails from Tom Schmidt, School Board member. (School District Exhibit #5B). Ms. Fonkert testified that the e-mails came from her ex-husband. (Tr. p. 759). Some of the e-mails had been previously disclosed (School District Exhibit #5A) and some were new e-mails (School District Exhibit #5B). In total, between December 31, 2006 and April 4, 2007, Mr. Guertin and Ms. Fonkert exchanged approximately 68 e-mails, ranging from one to ten messages a day on 27 different days. (School District Exhibits #5A, 5B).

SCHOOL DISTRICT POSITION

Mr. Guertin advances two defenses in response to the charge that he engaged in inappropriate behavior during the 2006-07 school year while he acted as principal of the Watertown-Mayer Elementary School. First, Mr. Guertin asserts that the School District did not present evidence and Mr. Guertin denies that he and Ms. Fonkert engaged in overt sexual activities (e.g. fornication) on School District property. Rather, at most, he claims he can only be charged with engaging in inappropriate phone calls and e-mails that is not an offense rising to the level of a discharge.

In respect to the first defense, the School District does not deny that no witness observed Mr. Guertin and Ms. Fonkert engaging in overt sexual activity. The School District has presented numerous e-mails, however, where Mr. Guertin and Ms. Fonkert have referred to having such activity during the school day. While Mr. Guertin asserted that some of the rendezvous discussed in the e-mail did not occur, such as the boiler room incident, he did not deny the veracity of many of the e-mails exchanged during the school day wherein he and Ms. Fonkert expressed their desire for engaging in intimate behavior followed by a directive to "get in here." Moreover, the School District presented substantial evidence that there were numerous times during the school day that Mr. Guertin was in his office with Ms. Fonkert with the door closed and the shades pulled. Certainly, there was no need for such privacy if they were merely discussing School District matters related to a book drive or pilot project. Mr. Guertin's assertion that he did not engage in such behavior, which is clearly contrary to his own statements of intent in the e-mails and behavior observed by others, is simply not credible. Moreover, the School District's basis for termination does not rest merely upon overt sexual activity but rather the formation of Mr. Guertin's relationship with a subordinate and use of his duty day to develop this relationship.

Mr. Guertin's second defense is that the real basis for the School District's proposed discharge of his employment is due to the fact that he and Ms. Fonkert were in love which, again, is an offense Mr. Guertin alleges does not rise to a dischargeable offense. Mr. Guertin then claims that even if his conduct is grounds for discharge, the School District has not shown that his behavior is not remediable as he was never instructed not to engage in this behavior again and his conduct was not repeated.

The School District did not contest the fact that these individuals were in love. In fact, based upon the testimony of Mr. Guertin and Ms. Fonkert, as well as the observations of staff, students and parents during the entire 2006-07 school year, it appears that virtually everyone involved with the Watertown-Mayer Elementary School knew or strongly suspected that they were in love. However, the defense advanced by Mr. Guertin absolutely misses the point of the School District in respect to its proposed termination. First, Mr. Guertin was not a 16-year old teenager in love for the first time overcome by new experiences, change in hormones and the like. Mr. Guertin, a married man with children, engaged in an affair with a subordinate female teacher who was also married. None of the conduct that the School District has alleged relate to what two consenting adults chose to do on their own time. It relates to

Mr. Guertin and Ms. Fonkert bringing their love affair into the Watertown-Mayer Elementary School building. The standard is whether Mr. Guertin's conduct in relating to Ms. Fonkert, his subordinate, was professional. The standard for professionalism is not met by simply abstaining from fornication on School District property. The standard for professionalism is refraining from publicly engaging in adolescent infatuations, flirtations and overt favoritism with one's subordinate in front of staff, students and parents and community members.

For virtually an entire school year, Mr. Guertin engaged in conduct disruptive of the educational process with a negative impact upon staff, students and parents. While the School District does not object to the concept of love, the School District does object when the acts of one's love for another interfere with the duty day. As shown from the evidence, there were numerous e-mails, phone calls and visits between Mr. Guertin and Ms. Fonkert, not to mention the changes in Mr. Guertin's decision making which raised issues of impropriety and favoritism causing distrust, tension and disharmony among staff, parents and the community.

As to Mr. Guertin's claim that his conduct is nonetheless remediable, the record is replete with Mr. Guertin admitting to the excessive use of his School District telephone both during

his and Ms. Fonkert's duty day and during nights and weekends. Remediation requires that an individual recognize the nature of the wrong, accept responsibility and express appropriate contriteness for the wrong. No one can conclude from the evidence that Mr. Guertin acknowledges and accepts responsibility for the nature of his misconduct. If, per chance, there should be a parting of the ways between Mr. Guertin and Ms. Fonkert, on what basis could anyone conclude that Mr. Guertin would not feel free to engage in an love affair at school in the future? Mr. Guertin clearly has asserted that he feels there is no problem with him falling in love with one of his subordinates, as long as its consensual. What good is it to tell Mr. Guertin that he should not engage in such conduct in the future, when he does not acknowledge that what he did was wrong and, in any event, he should have known that he should not have engaged in any such conduct in the first place.

Clearly, the School District has met its burden of proof by a preponderance of the evidence that Mr. Guertin be immediately discharged for immoral conduct, conduct unbecoming a teacher and/or willful neglect of duty as set forth in Minnesota Statutes Section 122A.40, subdivision 13, as a result of his conduct during his duty day. There is no guarantee that his conduct could be remediated in the future.

Based on the evidence the School District respectfully requests that the Arbitrator uphold the School District's proposed immediate termination of Mr. Guertin's employment as principal in the Watertown-Mayer Elementary School.

MR. GUERTIN POSITION

A review of the evidence makes it apparent that this is not a case for immediate discharge. First, the conduct engaged in by Mr. Guertin (the phone calls and e-mails) do not rise to a level of discharge. Superintendent Anderson discussed the matter with Mr. Guertin, instructed him not to engage in the behavior again and the conduct was never repeated.

The real claim of the School District is that Mr. Guertin should be discharged for having a relationship with a teacher under his supervision. The problem for the School District on this claim is threefold. First, the relationship was consensual. While it is somewhat unclear, Ms. Fonkert may very well have initiated it. Second, no claim of sexual harassment of any type is alleged by Ms. Fonkert. Similarly, there is no claim that the School District was somehow exposed to any additional liability (as is often the case in a sexual harassment case). Finally, the School District was unable to articulate any real reason to discipline two employees for falling in love. Discharging a principal or teacher for getting a divorce might have happened 50

years ago but today this is considered arbitrary. Principals and teachers can get divorces and fall in love.

Any allegation against Mr. Guertin was so remote in time from the commencement of these proceedings that discipline was no longer timely. A key claim of the School District was that Mr. Guertin showed Ms. Fonkert favoritism. The remedy, even assuming this to be true, would be to move one of them. Ms. Fonkert was moved at the end of 2006-07 school year to the middle school. Indeed, she left the School District at the end of the 2007-08 school year. After the 2006-07 school year, the potential for any favoritism was nonexistent. In addition, a potential for any other claims arising out of favoritism were nonexistent since Ms. Fonkert ceased to be an employee of the School District.

The School District failed to prove the factual allegations contained in its notice of December 4, 2008. Notwithstanding all of the grandiose language contained in the notice, only one witness testified to any physical contact between Ms. Fonkert and Mr. Guertin. This witness testified that she observed their knees touch under a table during a meeting. There was no testimony that the two of them ever held hands, hugged, kissed, danced or engaged in any physical contact of any type whatsoever. There was no evidence that the two of them acted inappropriately at school gatherings, staff parties, Christmas parties, bowling

events or any other activities. The best the School District had to offer was that they giggled and played with a cart while cleaning up after an event in the gym. The School District simply failed to produce any evidence in this file of inappropriate physical contact.

Are the e-mails and cell phone calls sufficient to support a discharge in this matter? This is really all that the School District is left with in this case. It is so weak that it never should have been brought.

In accessing this question, the Arbitrator should take into consideration whether the conduct is remediable. In other words, can Mr. Guertin cure this conduct when he is given a directive? The answer is unequivocally yes. Indeed, because of the School District's delay in proceeding, Mr. Guertin has a long and established record of curing the alleged misconduct here. There was no evidence of any inappropriate e-mails or cell phone calls after April of 2007.

In the end, Mr. Guertin made an error in judgment in exchanging flirting e-mails with one of his teachers. Absent the discovery and copying of the e-mails by Ms. Fonkert's disgruntled ex-husband, the matter would have been closed. Mr. Guertin admits that he made mistakes but started a new relationship. He, however, always put his students first.

To the extent the Arbitrator would find that any discipline is warranted in this case, Mr. Guertin proposes that his discipline be limited to a simple reprimand for inappropriate e-mail and cell phone use. This is the only fair and equitable remedy based upon the conduct that occurred between Mr. Guertin and Ms. Fonkert.

This case is one of those where immediate discharge is clearly not warranted. Mr. Guertin is a fine young school administrator. The attempt by those in Watertown to destroy his education career should not be allowed to succeed. The action by the School District to immediately discharge Mr. Guertin should be rejected.

ANALYSIS OF THE EVIDENCE

Under Minnesota law a continuing contract teacher (which by definition includes a principal) may be discharged from employment based on certain grounds. These grounds are enumerated in Minnesota Statutes Section 122A.40, subdivision 13. Among other grounds, a school board may discharge a teacher, effective immediately, upon (1) immoral conduct; (2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties; and (3) willful neglect of duty pursuant to Minnesota Statutes Section 122A.40, subdivisions 13(1), 13(2), and 13(5). In fact, the School Board

cited these specific grounds in its Notices to Mr. Guertin dated August 6, 2008 and December 4, 2008, when it proposed the immediate discharge of Mr. Guertin. Thus, pursuant to Minnesota Statutes Section 122A.40, subdivision 15(c) the Arbitrator is charged in this case to determine, by a preponderance of the evidence, whether the grounds for discharge specified in Minnesota Statutes Section 122A.40, subdivisions 13(1), 13(2) and 13(5) exist to support the proposed discharge of Mr. Guertin. Any one of these grounds is sufficient to support termination. Matter of Volz by Indep. Sch. Dist. No. 858, Co. No. C9-89-1474, 1990 WL 45 at *2(Minn. Ct. App. 1990) (unpublished).

The Minnesota Supreme Court defined "fair preponderance of the evidence," as greater weight of the evidence where the facts that have been established are more reasonable, more probable and more credible than any facts existing to the contrary. Netzer v. N. Pac. Ry. Co., 238 Minn. 416, 57 N.W.2d 247 (1953).

The School District proposed Mr. Guertin for immediate discharge under Minnesota Statutes Section 122A.40, subdivision 13(1) for immoral conduct, under Minnesota Statutes Section 122A.40, subdivision 13(2) for conduct unbecoming a teacher which requires the immediate removal of the teacher from the classroom or other duties and under Minnesota Statutes Section 122A.40, subdivision 13(5) for willful neglect of duty.

The factual basis upon which Mr. Guertin's discharge was proposed under Minnesota Statutes Section 122A.40, subdivisions 13(1), 13(2) and 13(5) includes the following:

Inappropriate and unacceptable sexual activity with another School District employee during his duty day, including the exchange of unprofessional and sexually suggestive email correspondence.

In addition, inappropriate, unprofessional and unacceptable social interaction with another School District employee during his duty day, excessive time spent with a certain teacher in either the principal's office or the teacher's classroom, undue familiarity relative to body proximity, inappropriate and unprofessional body contact, and inappropriate contact and social interaction at School District related functions.

The above conduct substantially disrupted other employees, the student body, and the educational program at the school.

The essence of the School District's case is the e-mails that were exchanged between Mr. Guertin and Ms. Fonkert during their duty day using District e-mail accounts and computers. The School District does not have all of the e-mails that were exchanged between them. In an e-mail dated February 12, 2007, Ms. Fonkert states that she deleted some of the e-mails that were not professional. (School District Exhibit #5B, p. 12). The School District did not attempt to recover Mr. Guertin's e-mails until well after Superintendent Anderson raised the issue of personal e-mail communications with Mr. Guertin in the spring of 2007. The School District, however, received approximately 68 e-

mails exchanged between Mr. Guertin and Ms. Fonkert during the time period between December 31, 2006 and April 4, 2007, that were given to the District by Ms. Fonkert's ex-husband.

The first e-mail the School District was able to recover shows that on Sunday, December 31, 2006, a non-duty day, Ms. Fonkert sent an e-mail to Mr. Guertin stating "Hey! Will you please comb out the back of my hair, it's a bit tangled today!" (School District Exhibit #5A, p. 1). She refers to a movie night on January 15, 2007, to raise money for school books and invites Mr. Guertin to "bring your kids and your "PJ's." (Id.)

On Tuesday, January 2, 2007, Ms. Fonkert sent an e-mail to Mr. Guertin entitled "who stole the animal poop." Ms. Fonkert stated:

I couldn't stop laughing after you left and I looked on my desk. The kids thought that I seriously had gone nuts!

I just kind of froze when you walked in. My stomach flipped a few times, hopefully I am over it now.

(School District Exhibit #5A, p. 2).

Similarly, Mr. Guertin sent e-mails to Ms. Fonkert around this same time. On January 2, 2007, Mr. Guertin replied to the above referenced "animal poop" e-mails from Ms. Fonkert stating that "Laughing is good!" He thanked her for a salt and pepper grinder she gave him and questioned whether the salt would stick to a margarita glass. He also mentioned that he would like to

visit some classrooms today and maybe run into her later.

(School District Exhibit #5A, p. 3).

On Thursday, February 1, 2007, at 12:15 p.m., Ms. Fonkert e-mailed Mr. Guertin, asking him if he had his "rod" ready, "hard hat necessary." (School District Exhibit #5A, p. 6). At 1:31 p.m., Ms. Fonkert again e-mailed Mr. Guertin telling him she just went to lunch and got a wax kit. (School District Exhibit #5B, p. 6). At 1:44 p.m., Mr. Guertin responded to the e-mail, saying: "I was about to get up and stretch. Until I opened this. Not happening now." (Id.)

On Tuesday, February 13, 2007, Mr. Guertin and Ms. Fonkert exchanged four e-mails between 10:34 a.m. and 10:49 a.m. related to the subject "Where are you." In these messages, Mr. Guertin told Ms. Fonkert that he was in the boiler room, sweating like a pig, wondering what was taking her so long. Ms. Fonkert replied that if Mr. Guertin was serious, she was on her way. Mr. Guertin then stated that with Ken in the room, there is a crowd and "let's figure out a plan B" and that the "radar is running big time because [he had] been out awhile." Mr. Guertin then mentioned in the e-mail meeting "off campus" at 3:30 p.m. which was within Mr. Guertin's duty day. (School District Exhibit #5A, pp. 7-9). Ms. Fonkert responded in her e-mail to Mr. Guertin telling him that she needed to kiss him right now. Mr. Guertin

replied in his e-mail, "Get in here!" (School District Exhibit #5B, p. 15).

On Wednesday, February 14, 2007, Ms. Fonkert sent an e-mail to Mr. Guertin at 3:04 p.m. with the subject being "My phone" stating: "Battery is dead. Sex drive alive! (School District Exhibit #5B, p. 16).

On Thursday, February 15, 2007, Mr. Guertin e-mailed Ms. Fonkert at 2:51 p.m. and said: "So what does that paper remind you of?????????????..." At 3:11 p.m., Ms. Fonkert responded: "your underwear! Get in here!" (School District Exhibit #5A, pp. 13-14).

On Tuesday, February 20, 2007, Mr. Guertin and Ms. Fonkert engaged in an exchange of ten different e-mails between the hours of 9:42 a.m. and 2:49 p.m. related to "perverted thoughts", Ms. Fonkert's husband, Mr. Guertin wearing Ms. Fonkert's panties and going to dine together in Delano. (School District Exhibit #5A, pp. 15-20; School District Exhibit #5B, pp. 7-8).

On Tuesday, February 27, 2007, at 12:21 p.m. Mr. Guertin e-mailed Ms. Fonkert stating: "I just ate the cheese - reminds me of you - HOT!" (School District Exhibit #5A, p. 22).

On Wednesday, February 28, 2007, at 9:09 a.m. Mr. Guertin e-mailed Ms. Fonkert stating: "All I could think about during the lockdown drill was the two of us, cuffs, and a lot of passion - I

need to focus - help!!!" (School District Exhibit #5A, p. 23). He later at 1:33 p.m. e-mailed her stating: "I can hear those boots - I love you!!!" (Id., p. 24).

On Thursday, March 1, 2007, at 8:31 a.m. Ms. Fonkert stated to Mr. Guertin by e-mail: "I love you so much. Thank you for sharing my life with me. I wake up and celebrate our discovery every day! You rock!" (School District Exhibit #5A, p. 26). Mr. Guertin responded at 8:48 a.m. by stating to Ms. Fonkert: "With you in my life I wake up everyday really feeling like I have been given the ultimate gift. I love you so much Jen - I cannot wait to spend life with you, reminding you of this the rest of our days." (Id., p. 27).

On Tuesday, March 6, 2007, at 9:33 a.m. Mr. Guertin e-mailed Ms. Fonkert and told her that he loved her. (School District Exhibit #5B, p. 6).

On Thursday, March 8, 2007, Mr. Guertin's two e-mails to Ms. Fonkert at 8:22 a.m. and 11:01 a.m. reference trying to find more time to see each other and how much he loves her. (School District Exhibit #5B, p. 6).

On Friday, March 9, 2007, at 9:16 a.m. Ms. Fonkert e-mailed Mr. Guertin telling him that she just wanted to hug and hold him. In response, Mr. Guertin e-mailed Ms. Fonkert at 9:49 a.m. telling her to stop by at 11:00 a.m. Mr. Guertin also told Ms.

Fonkert that he loved her and that she was amazing. (School District Exhibit #5B, pp. 5-6).

On Tuesday, March 13, 2007, Mr. Guertin and Ms. Fonkert exchanged two e-mails between 11:08 a.m. and 11:18 a.m. discussing their plans to have lunch together and the need to cancel those plans due to a conflict in Mr. Guertin's schedule. (School District #5B, p. 5).

On Wednesday, March 14, 2007, Mr. Guertin e-mailed Ms. Fonkert stating that they needed some "us" time and looked for suggestions as to how to make that happen. (School District Exhibit #5B, p. 4).

On Friday, March 23, 2007, at 7:40 a.m. Mr. Guertin e-mailed Ms. Fonkert and told her how much he loved her and when he saw her in the hallway his body went numb. (School District Exhibit #5B, p. 4).

On Thursday, March 29, 2007, at 7:59 a.m. Mr. Guertin e-mailed Ms. Fonkert telling her: "I'm trying to adjust to this continuous state of falling deeper and deeper in love, everyday, with the woman I've been waiting for all my life." (School District Exhibit #5B, p. 3).

On that same day at 12:12 p.m. Mr. Guertin e-mailed Ms. Fonkert. He stated to Ms. Fonkert: "By the way, word on the street is that you're on a mission to find Tami some BALLS! Let

me know if you need a hand with this." (School District Exhibit #5A, p. 28).

On Friday, March 30, 2007, at 7:51 a.m. Ms. Fonkert told Mr. Guertin that she loved him. (School District Exhibit #5A, p. 29). Mr. Guertin responded to her e-mail at 8:41 a.m. by stating: "what we have is so incredible - perfect! I miss you - I want to run away with you somewhere right now!" (Id., p. 30)

On Tuesday, April 3, 2007, at 9:37 a.m. Mr. Guertin e-mailed Ms. Fonkert telling her "that sent me over the edge - I think it's time to shut the blinds, the door, and ... I wasn't expecting that - wow!" (School District Exhibit #5A, p. 31).

On Wednesday, April 4, 2007, at 9:04 a.m. Mr. Guertin e-mailed Fonkert telling her that he was on his way to her classroom to bring her a snack. (School District Exhibit #5B, p. 2). Ms. Fonkert responded at 9:40 a.m. by telling Mr. Guertin that "This is why I love you so much." (Id.)

In an undated e-mail, Mr. Guertin invited Ms. Fonkert to come by his office anytime after 12:30 p.m. if she needed to talk. (School District Exhibit #5B, p. 19).

The above e-mails exchanged between Ms. Fonkert and Mr. Guertin were extremely personal and sexual in nature and establish that a romantic relationship had started between them by the end of December 2006 or the beginning of January 2007,

while they were still living with their spouses. Mr. Guertin was living with his wife until approximately February of 2007 and Ms. Fonkert with her husband until April of 2007. In any event, there is uncontraverted evidence that when their relationship started their marriages to their respective spouses were in the irretrievable stage of separation which ultimately resulted in divorce.

In addition to the e-mails, between January 18, 2007 and March 21, 2007, there were 44 duty days and Mr. Guertin sent to or received from Ms. Fonkert 75 telephone calls during his duty day or an average of three calls per day. (School District Exhibit #6). While some of these calls lasted only a minute or two, some calls lasted as long as 20, 30 or even 60 minutes. (Id.)

There were numerous telephone calls that were made between Mr. Guertin and Ms. Fonkert during many of the same days they exchanged e-mails. For example, on Thursday, February 1, 2007, Mr. Guertin called Ms. Fonkert at 10:58 a.m. and spoke with her for two minutes. Three e-mails were then exchanged between Mr. Guertin and Ms. Fonkert. At 3:10 p.m. Mr. Guertin called Ms. Fonkert and spoke with her for 20 minutes. Ten minutes later, Ms. Fonkert called Mr. Guertin at 3:31 p.m. and spoke with him for 8 minutes. Shortly thereafter, Ms. Fonkert called Mr.

Guertin again and spoke with him for 42 minutes. (School District Exhibit #6).

On Friday, February 9, 2007, Mr. Guertin and Ms. Fonkert exchanged seven phone calls between the duty hours of 10:43 a.m. and 3:28 p.m., for a total of approximately 57 minutes. (School District Exhibit #6).

On Tuesday, February 13, 2007, Mr. Guertin and Ms. Fonkert exchanged four e-mails between 10:34 a.m. and 10:49 a.m. related to the message "Where are you." They then spoke on the phone for two minutes at 3:52 p.m. and then spoke for an additional 60 minutes commencing at 3:57 p.m. (School District Exhibit #6).

On Thursday, February 15, 2007, Mr. Guertin called Ms. Fonkert at 7:06 a.m. Ms. Fonkert then returned Mr. Guertin's call and they spoke for 22 minutes. They later e-mailed each other two times. There were then a series of three calls from 3:38 p.m. to 3:45 p.m. between them ranging from one to five minutes each. (School District Exhibit #6).

On Tuesday, February 20, 2007, Mr. Guertin called Ms. Fonkert at 7:04 a.m. and they spoke for two minutes. He then called her again at 7:20 a.m. and they spoke for two minutes. (School District Exhibit #6). Mr. Guertin and Ms. Fonkert then engaged in ten different e-mails between the hours of 9:42 a.m. and 2:49 p.m.

On Friday, March 2, 2007, Ms. Fonkert and Mr. Guertin engaged in an exchange of fourteen phone calls between 8:00 a.m. and 4:28 p.m., totaling over one hour worth of calls. (School District Exhibit #6).

On Friday, March 9, 2007, at 7:03 a.m. Ms. Fonkert called Mr. Guertin and they spoke for 14 minutes. A couple of hours later, between 9:16 a.m. and 9:49 a.m., Mr. Guertin and Ms. Fonkert exchanged e-mails expressing their affection for each other. Mr. Guertin telephoned Ms. Fonkert two hours later at 1:07 p.m. Ms. Fonkert then called Mr. Guertin at 3:10 p.m. and they conversed for another 16 minutes. (School District Exhibit #6).

On Tuesday, March 13, 2007, there were four phone calls exchanged between Ms. Fonkert and Mr. Guertin: one at 7:04 a.m., for 17 minutes; a second at 12:53 p.m. for two minutes; a third at 3:22 p.m. for 2 minutes; and a fourth at 4:44 p.m. for 6 minutes. (School District Exhibit #6).

While the content of the telephone calls between Mr. Guertin and Ms. Fonkert were not recorded, it can be reasonably concluded from the timing of the telephone calls compared to the content of the above e-mails that surround the telephone calls that at least some of their conversations dealt with their spawning relationship. In fact, on several occasions, Mr. Guertin spent a

good portion of his duty day either on the phone or e-mailing Ms. Fonkert.

The School District alleges that based upon the sexual content of some of the e-mails, the timing of the personal telephone calls and the fact that when Ms. Fonkert would go to Mr. Guertin's office they would be in the office together with the door closed for long periods of time while talking and giggling, Mr. Guertin and Ms. Fonkert must have been engaging in "sexual activity" during their duty day. While the e-mails and telephone calls establish that a romantic relationship had started and grew between Mr. Guertin and Ms. Fonkert, there is no evidence whatsoever that they engaged in any "inappropriate and unacceptable sexual activity" during their duty day even behind closed doors. There is no evidence that they engaged in any form of sex, kissed, hugged or held hands during their duty day. The School District's argument is based on pure speculation and not on any evidence in the record.

As with many relationships, Mr. Guertin and Ms. Fonkert sent e-mails. To the extent the e-mails were sent on School District computers during the duty day and some contained personal, sexual themes they were appropriately called to the attention of Mr. Guertin by Superintendent Anderson. In addition, Mr. Guertin made many calls to Ms. Fonkert using a cell phone provided by the

School District. The use of the cell phone by Mr. Guertin for personal calls to Ms. Fonkert was also appropriately brought to the attention of Mr. Guertin by Superintendent Anderson.

The use of School District computers and telephones are governed by School Board Policy 524, Acceptable Use of Technology Resources (Policy") and the 2006-07 Employee Handbook ("Handbook"). (School District Exhibits #8, 9). In a nutshell, Employees are not allowed to use their School District e-mail accounts and District cell phones during work time for personal use. (Id.) Clearly, Mr. Guertin violated this Policy and Handbook by using School District equipment for his use in contacting Ms. Fonkert for personal communications. Mr. Guertin's inappropriate use of his School District e-mail account and District cell phone warrant some discipline but certainly not immediate termination.

The only evidence of any physical contact between Mr. Guertin and Ms. Fonkert during their duty day is that a classroom teacher (Tami Kuntz) saw them sitting at a table with their knees touching while they were discussing curriculum. (Tr. p. 138). The touching of their knees while discussing curriculum on one occasion does not constitute "inappropriate and unacceptable sexual activity", albeit it represents "inappropriate and unprofessional body contact and undue familiarity relative to

body proximity." However, the touching was consensual between Mr. Guertin and Ms. Fonkert and only occurred on one occasion. Most certainly, this isolated incident is not grounds for the immediate termination of Mr. Guertin.

In addition to the extensive contacts Mr. Guertin had with Ms. Fonkert during the school day via cell phone and e-mail, witnesses also testified that Mr. Guertin spent a lot of time in Ms. Fonkert's classroom and Ms. Fonkert spent a lot of time in Mr. Guertin's office. (Tr. pp. 58, 128). Mr. Guertin even admits that he spent a lot of time with Ms. Fonkert during his duty day during the 2006-07 school year, much more than any of the other six teachers who were new to the elementary school that year. (Tr. p. 791).

The evidence establishes that part of the reason that Mr. Guertin spent more time with Ms. Fonkert is that she was a first year probationary teacher in the School District that was involved in the additional activities such as the language arts pilot project and the book drive which required his supervision and attention. While some of the teachers claim that there was favoritism shown by Mr. Guertin toward Ms. Fonkert involving the arts pilot project, it is clear that Ms. Fonkert had previous experience in this area in other school districts that was beneficial to the School District. (Tr. p. 750-751). In

addition, she volunteered many of her off-duty hours to not only this literacy program but she also raised money for the book drive which generated between \$10,000-\$15,000 in books. (Tr. p. 754-755). It is clear that with her experience and her high energy level she contributed to the success of these programs. Thus, whatever favoritism that might have been shown toward Ms. Fonkert by Mr. Guertin was justifiable based upon the success of these programs. There is no convincing evidence that the relationship between Ms. Fonkert and Mr. Guertin during their duty day resulted in impropriety or favoritism.

Superintendent Anderson testified that the relationship between Mr. Guertin and Ms. Fonkert "destroyed the level of trust between many staff members and Guertin." (Tr. p. 356). This, however, is contrary to the testimony of many of the staff members. The witnesses generally testified about "concerns" with the relationship between Mr. Guertin and Ms. Fonkert rather than "destruction of trust." (Tr. pp. 117, 173, 219, 240, 262). In any event, the evidence establishes that Mr. Guertin and his staff successfully opened and operated the new elementary school for the 2007-08 school year without incident.

While some teachers and community members may not have liked the relationship between Mr. Guertin and Ms. Fonkert, it was consensual and within the law. It must be remembered that Mr.

Guertin did not hire Ms. Fonkert to start an affair. In fact, the evidence shows at numerous times Ms. Fonkert was the aggressor in the relationship. They did not know each other until she was hired and placed in the elementary school under the supervision of Mr. Guertin. Both of their marriages were failing and ending before they commenced their relationship. The two of them were attracted to one another and that a loving relationship developed between them. In fact, their relationship still exists as their blended families have recently spent time together. This is significantly different than the carrying on of a secretive extramarital affair or a one night stand.

The School District's main argument is that Mr. Guertin should be terminated for engaging in a relationship with a teacher under his supervision. The School District's case fails for several reasons. First, the relationship between Mr. Guertin and Ms. Fonkert was consensual. Second, no claim of sexual harassment of any type is alleged by Ms. Fonkert. Thus, the School District is not exposed to any possible liability. Third, neither Mr. Guertin nor Ms. Fonkert are guilty of "willful neglect of duty." There is no evidence that the time spent developing their relationship adversely impacted the work performance of Mr. Guertin, Ms. Fonkert or other teachers. It is clear that in spite of the time spent developing their

relationship their work production was excellent during the 2006-07 school year. Their excellent work production also continued into 2007-08 when Ms. Fonkert was transferred to the middle school and no longer worked under the supervision of Mr. Guertin.

Finally, the School District was unable to articulate any real reason to terminate Mr. Guertin for falling in love with someone he supervised for one year. It is not "immoral" or "conduct unbecoming a teacher" for consenting adults to engage in a loving relationship, especially one where both of their marriages were ending which was the case with both Ms. Fonkert and Mr. Guertin. Their marriages ended in divorce and this upset some teachers and some people in the community. Unfortunately, divorce is commonplace in our society and so are relationships before a marriage ends. However, those individuals who engage in these activities do not automatically forfeit their right to be public school teachers and principals. Discharging a principal or teacher for getting a divorce might have happened long ago but in modern times this would be considered arbitrary. Principals and teachers, like all other consenting adults, can get divorces and fall in love, even at work, and still keep their jobs.

In Kroll v. Independent School District No. 593, 304 N.W.2d 338 (Minn. 1981) the issue determined by the Minnesota Supreme Court involved the limitations on the school board's discretion

when proceeding to the immediate termination of a continuing contract teacher. The Court determined that "remediability" standard must be applied before a school board could proceed to immediate discharge (under then Minnesota Statutes Section 122A.40, subdivision 8, now Minnesota Statutes Section 122A.40, subdivision 13). The Court determined that:

the remediability analysis corresponds more closely to the balance we have stated should exist between the administrative discretion of local school boards and the prevention of arbitrary dismissals of teachers with proven fitness. Additionally, the remediability analysis best serves the purpose of the legislature in creating two termination procedures. *Id.*

Mr. Guertin asserts that his conduct is remediable. In determining whether conduct is remediable, arbitrators consider the following factors: (1) the prior record of the teacher; (2) the severity of the conduct in light of the teacher's record; (3) whether the conduct resulted in actual or threatened harm, either physical or psychological; and (4) whether the conduct could have been corrected had the teacher been warned. Downie v. Independent School District No. 141, 367 N.W.2d 913, 917 (Minn. App. 1985).

This remediability standard must be applied in determining the appropriateness of the immediate discharge of Mr. Guertin in the present case. Based upon these standards, the School District's position of immediate discharge does not survive the

remediability analysis. First, Mr. Guertin's work record is excellent. He has no prior discipline and his performance evaluations are excellent. In fact, Mr. Guertin had excellent performance reviews by his supervisors, including Superintendent Anderson, who proposed to the School Board to terminate Mr. Guertin. Second, Mr. Guertin's conduct was not severe. He sent private e-mails that never would have been seen discovered but for Ms. Fonkert's disgruntled ex-husband. While the e-mails were inappropriate due to their sexual content, they do not constitute severe misconduct on the part of Mr. Guertin or Ms. Fonkert. The same is true of the cell phone usage and the knee touch. These events are simply not severe in light of Mr. Guertin's record.

The next element is whether the conduct causes any real or threatened harm. The evidence did not establish that anyone suffered any harm from the e-mails or phone calls. The School District attempted to prove that parents did not enroll their students because of Mr. Guertin. This testimony was effectively refuted by attendance records. (Guertin Exhibit #5).

The last question is whether a warning to a teacher would make a difference. Typically, the question is not one of past tense. In other words, in typical cases the question would be whether Mr. Guertin could refrain from the sending e-mails to Ms.

Fonkert during his duty day, telephone use and time spent with Ms. Fonkert in the future. In this case, all speculation as to the effect of a warning has been reached. Mr. Guertin was given a directive by Superintendent Anderson and the e-mails and phone calls to Ms. Fonkert stopped immediately. Indeed, the only evidence of alleged misconduct in the 2007-08 school year was Mr. Guertin's dropping off a cup of coffee at Ms. Fonkert's classroom. Once Mr. Guertin was warned by Middle School Principal Alger of the inappropriateness of bringing her coffee at the middle school, Mr. Guertin obeyed that directive.

Clearly, Mr. Guertin's remediation has already occurred in this case. Ms. Fonkert was transferred during her second year (2007-08) to the Watertown-Mayer Middle School and then left the School District the following year to take a position in the Buffalo School District. As a result, Mr. Guertin had no supervisory responsibilities over Ms. Fonkert during the 2007-08 school year and will have none in the future.

In the final analysis, the School District has not proved by a preponderance of the evidence that it has grounds under Minnesota Statutes Section 122A.40, subdivisions 13(1), 13(2) and/or 13(5) to immediately terminate the employment of Mr. Guertin. Mr. Guertin, however, is not completely innocent of the

charges against him. The appropriate penalty for Mr. Guertin's inappropriate e-mail and cell phone use for personal reasons and the touching of knees on one occasion during duty hours between Mr. Guertin and Ms. Fonkert is a five work day suspension without pay. The degree of penalty assessed by the Arbitrator in the instant case is commensurate with the seriousness of the offenses committed by Mr. Guertin in light of the entire record.

AWARD

Based upon the foregoing and the entire record, a preponderance of the evidence establishes that the statutory grounds of immoral conduct, conduct unbecoming a teacher which requires his immediate removal from his duties, and/or willful neglect of duties do not exist for the termination of Mr. Guertin's employment pursuant to Minnesota Statutes Section 122A.40, subdivision 13(1), 13(2) and/or 13(5). The School District's proposed immediate discharge of Mr. Guertin is hereby denied. The proper remedy is a five work day suspension without pay.



Richard John Miller

Dated April 24, 2009, at Maple Grove, Minnesota.