
In the Matter of the Proposed Discharge of
Doug Steele,

Principal

BMS Case No. 09-TL-12

and

Independent School District No. 191,
Burnsville, Minnesota

School District

ARBITRATOR: Christine D. Ver Ploeg

DATE AND PLACE OF HEARING: May 21, 22, 26, 2009
ISD No. 191 Offices
Burnsville, Minnesota

DATE OF RECEIPT OF FINAL POST-HEARING BRIEFS: July 8, 2009

DATE OF AWARD: August 6, 2009

ADVOCATES

Attorney for Principal

Roger J. Aronson
PO Box 19350
Diamond Lake Station
Minneapolis, MN 55419

Attorney for the District

Paul C. Ratwik
730 Second Avenue South, Suite 300
Minneapolis, MN 55402

ISSUE:

Did the District have just cause to immediately discharge the Principal from his continuing contract under Minnesota Statutes § 122A.40, subdivision 13, for willful neglect of duty, gross inefficiency or conduct unbecoming a Principal which requires his immediate removal as a principal?

BACKGROUND / FINDINGS OF FACT

Independent School District No. 191 (hereinafter “District”) is seeking to immediately discharge a continuing contract principal, Mr. Doug Steele, for conduct unbecoming a principal, willful neglect of duty and gross inefficiency, pursuant to Minn. Stat. § 122A.40, Subd. 13. Mr. Steele now challenges that action.

The facts in this case are largely undisputed, and the following will serve as the Findings of Fact in this case.

In the summer of 1996 the District hired Doug Steele to serve as an elementary school principal. At that time he had nine years of experience as an elementary school principal in another school district and nine years experience as an elementary school teacher. When the District placed Mr. Steele placed on administrative leave on December 15, 2008, he had served as a principal in the District for more than twelve years. His most recent assignment had been as principal of Rahn Elementary School.

The District’s proposal to immediately discharge Mr. Steele arises out of an incident that occurred early afternoon of Friday, December 12, 2008. That afternoon a kindergarten teacher had discovered that paper towels were clogging the toilet in the small bathroom located at the back of the classroom. The teacher asked her students about this, and one student admitted he was responsible. For several reasons the teacher believed the toilet plugging had been intentional, not accidental. Because the teacher had her hands full dealing with the class, she contacted her principal, Mr. Steele, for assistance. This was not unusual.

When Mr. Steele arrived at the classroom the teacher briefly explained the situation to him. Mr. Steele thereupon took the student into the bathroom, closed the door, and asked the student if he “had put the brown paper in the toilet.” When the student admitted that he had, Mr. Steele said: “I think it would be important that we pick it up and take care of it” and directed the student to “reach in and remove the paper.” The student did so while Mr. Steele held a waste paper basket into which the student placed the wet paper towels. Mr. Steele then had the student thoroughly wash his hands twice “for sanitation reasons.”

He has testified:

There is [a sink in the bathroom], and it's immediately next to the toilet. I had him go over – I asked him to pump and to take a fair amount of liquid soap, and then I asked him to rub his hands really well, talking about, you know, rubbing your fingers between your fingers, rubbing your fingernails, and then I had him rinse it. Then I had him wash his hand in similar fashion a second time.

Mr. Steele testified that this entire event took a couple of minutes.

A core issue that has brought this matter to immediate discharge has been whether feces were present in the toilet at this time. Both Mr. Steele and, more importantly, the teacher have testified that the water was clear at this time. At the hearing the teacher responded as follows:

Q: When you say clean water, that means that you looked at it and there wasn't any evidence of feces or urine or anything else?

A: Yes. Nor was there a smell in the room, you know. Sometimes that would happen with kindergartners.

The teacher described Mr. Steele's demeanor as "very calm, matter of fact" while he was in her classroom.

Following the events in the bathroom, Mr. Steele brought the student to his office for a brief additional discussion of this event. He then left the student to sit at a desk, apparently to give him an opportunity to reflect upon his actions. It appears the student was in Mr. Steele's office for approximately thirty minutes.

At some point Mr. Steele informed the kindergarten teacher that he had directed the student to remove the paper towels from the toilet. Whether this information was provided to the teacher at that time or in a later conversation is not clear. However, it is undisputed that by the end of the school day Mr. Steele had not only informed the teacher of the disciplinary action he had taken, but he had also suggested to the teacher that she should inform the student's parents of this matter. Although the teacher unequivocally testified that she told Mr. Steele that she did not wish to call the parents and that he should do so, Mr. Steele has testified that he was confused as to who would place that call. It is undisputed that such a call should have been made that same day, and that under these circumstances the principal would normally be the person expected to follow-up with parents.

The student's mother testified that when she picked up her six-year old son following his after-school program, he told her that he'd had to go to the principal's office that day because "he had clogged the toilet." He also brought home his daily report from his teacher which stated: "let's make better choices." That evening, en route to a Christmas program in which he participated, the student told his mother that Mr. Steele had made him clean out the toilet. The mother was concerned about this and sent a text message to her husband. She also noted that her son was hesitant and nervous about using the bathroom that night but that she reassured him.

The student's parents were understandably very upset concerning their son's report and the father left several angry messages on Mr. Steele's home voicemail seeking to discuss the matter. Mr. Steele did not discover the messages until Sunday evening, December 14, at which time he returned the father's calls. Despite a thirty minute conversation, in which Mr. Steele apologized, the father remained angry. Prior to this time the student's parents had had a good relationship with school personnel regarding not only this child, but also their two older children who attend Rahn Elementary.

Thus it was that the father and the student met with Mr. Steele early the next morning, Monday December 15, to further discuss the events of the previous Friday. During that meeting Mr. Steele apologized to both the son and the father, and also accepted responsibility for failing to have contacted the parents about this incident. Nevertheless the father remained angry.

That morning Mr. Steele also advised central office of this situation. According to the kindergarten teacher, the student attended school without incident that day and thereafter.

As time went on, the student's father became more threatening to his son's teacher and the school took measures to limit his contact with her. The District added additional building security and required the father to notify the principal before coming to school. Although the teacher reported that during the following months she continued to have a good relationship with the student and that he made progress as did the other children, the District ultimately moved the student to another kindergarten class so that the teacher could avoid contact with the father. The teacher has testified that she observed no evidence that the student suffered "emotional harm" during the two-and-a-half-months he remained in her class.

It is undisputed that the student never experienced any health issues as a result of taking the paper towels out of the toilet. Although an unidentified nurse called the student's mother on the

District's behalf and suggested testing for hepatitis, the student's pediatrician said "it wasn't necessary." At the time of this hearing the student had not seen a physician for any reason, and his mother describes him as a normal, typical, healthy six year old who plans to play baseball in the summer and will attend first grade next year.

The Minnesota Department of Education investigated this matter in order to determine whether any abuse or neglect had occurred, as defined by Minnesota Statutes Section 626.556, and ultimately concluded it had not. As part of that investigation Department staff contacted the Department of Health and obtained information from the supervisor of environmental health division. Finding #52 from the Department's report states:

...the Minnesota Health Department's supervisor for the environmental health division who is an epidemiologist reported to the MDE investigator that the potential risk to the student when he stuck his hand in the water depended upon if the water was clear or had feces in it and how good the student washed his hands after putting them in the water."

Finding #54 states:

...the health professional reported that if the water was clear when the student put his hands in it and he washed his hands two times afterwards, he would likely be fine.

There is no evidence in the record that the water was anything but clear. However, the District does note that the Department's Findings, #53, do support a conclusion that Mr. Steele's conduct on that day placed the student "at risk for contracting a 'noro' virus which causes the stomach flu or other pathogens that might cause the Student to have diarrhea, E-coli, hepatitis, or salmonella."

On February 6, 2009, the District issued a letter to the Principal that informed him:

At the February 5, 2009 regularly scheduled meeting of the School Board of Independent School District No. 191, consideration was given to proposing your immediate discharge from employment with the School District.

A Resolution was adopted by a majority roll call vote of the School Board proposing to discharge you effectively immediately

pursuant to Minnesota Statute Section 122A.40, subdivision 13 on the following statutory grounds:

- conduct unbecoming a teacher which requires the immediate removal of the teacher from the classroom or other duties;
- gross inefficiency which the teacher has failed to correct after reasonable written notice; and,
- willful neglect of duty.

The letter then listed the following specific factual bases for the Board's proposal:

The specific factual grounds for your proposed discharge arise out of the grossly inappropriate discipline you imposed upon a kindergarten student on Friday, December 12, 2008 when you required the student to reach into a toilet and remove paper towels the student admitted having placed in the toilet.

Your conduct was unreasonable for the following reasons:

- The form of discipline you chose was degrading, humiliating and demonstrated a lack of interpersonal sensitivity. You failed to give consideration to the risk of negative emotional impact to the child likely to result from your choice of discipline.
- You failed to consider alternative disciplinary measures which could have provided the student a positive learning opportunity, guidance and support.
- You exposed the student to a significant health risk.
- You failed to recognize or give consideration to the impact of your decision upon the community, your teaching staff, the students of your school or the parents of your students.
- You failed to set a proper example for your staff on appropriate forms of student discipline.

In addition, your conduct violated the Code of Ethics for Minnesota Administrators. That Code (Minnesota Rules Part 3512.5200) states, in part:

A school administrator shall take reasonable action to protect students and staff from conditions harmful to health and safety.

A school administrator shall take reasonable action to provide an atmosphere conducive to learning.

The February 6, 2009, letter also advised the Mr. Steele of his statutory right to a hearing before the Board or an arbitrator, and his exercise of that right has brought the parties to this hearing. This hearing was held on May 21, 22, 26, 2009. The parties submitted post-hearings briefs, the last of which was received on July 8, 2009.

RELEVANT STATUTORY LANGUAGE

Minnesota Statutes, Section 122A.40 governs the proposed discharge of a continuing contract teacher in Minnesota, and Mr. Steele falls within its provisions.ⁱ The statute establishes two forms of discharge. The first, set out in Minn. Stat. §122A.40 subd. 9, provides for termination at the end of the school year after written notice of deficiency and the failure to correct deficiencies after an opportunity to cure.

In the present case, the District relies on the second--more demanding—form of discharge. Minnesota Statutes §122A.40 subd.13, provides for *immediate* discharge, with no opportunity to cure “deficient” behavior. The immediate discharge standards address more egregious misconduct than do the standards contained in Minn.Stat. §122A.40 subd.9.

Subd. 9. Grounds for termination. A continuing contract may be terminated, effective at the close of the school year, upon any of the following grounds:

(a) Inefficiency;

(b) Neglect of duty, or persistent violation of school laws, rules, regulations, or directives;

ⁱ Minnesota Statutes §122A.40 applies to both teachers and principals.

(c) Conduct unbecoming a Principal which materially impairs the Principal's educational effectiveness;

(d) Other good and sufficient grounds rendering the Principal unfit to perform the Principal's duties.

A contract must not be terminated upon one of the grounds specified in clause (a), (b), (c), or (d), unless the Principal fails to correct the deficiency after being given written notice of the specific items of complaint and reasonable time within which to remedy them.

Subd. 13. Immediate discharge. (a) Except as otherwise provided in paragraph (b), a board may discharge a continuing-contract Principal, effective immediately, upon any of the following grounds:

(1) immoral conduct, insubordination, or conviction of a felony;

(2) conduct unbecoming a Principal which requires the immediate removal of the Principal from classroom or other duties;

(3) failure without justifiable cause to teach without first securing the written release of the school board;

(4) gross inefficiency which the Principal has failed to correct after reasonable written notice;

(5) willful neglect of duty; or

(6) continuing physical or mental disability subsequent to a 12 months leave of absence and inability to qualify for reinstatement in accordance with subdivision 12.

Subd. 15. Hearing and determination by arbitrator. A Principal whose termination is proposed under subdivision 7 on grounds specified in subdivision 9, or whose discharge is proposed under subdivision 13, may elect a hearing before an arbitrator instead of the school board. The hearing is governed by this subdivision.

(c) The arbitrator shall determine, by a preponderance of the evidence, whether the grounds for termination or discharge specified in subdivision 9 or 13 exist to support the proposed termination or discharge. A lesser penalty than termination or discharge may be imposed by the arbitrator only to the extent that either party proposes such lesser penalty in the proceeding. In making the determination,

the arbitration proceeding is governed by sections 572.11 to 572.17 and by the collective bargaining agreement applicable to the Principal.

DISCUSSION AND DECISION

The February 6, 2009, letter that the District sent to Mr. Steele proposing his immediate discharge pursuant to Minn. Stat. § 122A.40, Subd. 13, sets forth numerous specific allegations. For the following reasons I find that the District did not have just cause to immediately discharge the Principal from his continuing contract under Minnesota Statutes § 122A.40, subdivision 13. However, it did have just cause to issue a 15-day suspension without pay to him.ⁱⁱ

1. Findings of Fact concerning events in question

There is little dispute concerning the facts that underlie the proposed immediate discharge now at issue, and the preceding “Background” section serves as the Findings of Fact in this case.

2. Statutory Framework

Minnesota Statutes section 122A.40 identifies two processes for discharging a continuing contract teacher or principal for cause. A district governed by this statute can elect one of two paths upon which to proceed. One path, described in subdivision 9, requires a district to first notify a Principal of his or his deficiencies and give that Principal a reasonable opportunity to correct them. In essence, this subdivision specifically focuses on the remediability of a Principal’s conduct. The District has chosen not to proceed under subdivision 9.

Rather, the District has proposed Mr. Steele’s *immediate* discharge pursuant to Minnesota Statutes §122A.40, subd. 13. Subdivision 13 grounds generally parallel those in subdivision 9, but they address more serious forms of that conduct. For example, subdivision 9’s reference to inefficiency becomes “gross” inefficiency under subdivision 13. Similarly, neglect of duty provides the basis for a section 13 immediate discharge only if it is “willful.” Other conduct that warrants immediate discharge includes immoral conduct, serious insubordination, a felony

ⁱⁱ For purposes of this analysis I have found that analysis of the statutory standards parallels a just cause analysis and leads to the same conclusion.

conviction, unbecoming conduct that requires immediate removal from the classroom, failure to teach, and a twelve-month disability.

A school district that proposes a Principal's immediate discharge under subdivision 13—the provision applicable to this case—is not required to give the Principal notice or an opportunity to remedy his or her deficient conduct. For this reason a district that chooses the latter course assumes a heavier burden of proof if the action is challenged.

In addition to the stated provisions of Minnesota Statutes section 122A.40, the Minnesota Supreme Court has considered the interaction between subdivisions 9 and 13. In *Kroll v. Independent School District No. 593*, 304 N.W.2d 338, (Minn. 1981), the Supreme Court significantly expanded the statute by adopting a “remediability standard.” The District agrees that under this standard Mr. Steele would not be subject to immediate discharge if he could remedy his work performance.

Thus, analysis in this case is two-fold:

The first question is whether the District has proven its charges against Mr. Steele by a preponderance of the evidence. Those charges are that he:

- engaged in conduct unbecoming a principal which requires his immediate removal from his principal duties;
- engaged in willful neglect of duty and
- engaged in gross inefficiency which he has failed to correct after reasonable written notice.

If the District meets this burden, the second question is whether Mr. Steele's conduct warrants immediate discharge or whether it is remediable. To consider this question the factors set forth in *Kroll* are applicable: the severity of the conduct; the principal's record; whether the conduct resulted in harm and whether a warning would have made a difference.ⁱⁱⁱ

In this respect it is noteworthy that Mr. Steele does acknowledge that his conduct was inappropriate and that some discipline—he proposes a fifteen-day suspension without pay—is warranted. However, he strongly urges that the evidence does not support his immediate discharge.

ⁱⁱⁱ See also *Downie v. Independent School District 141*, 367 N.W.2d 913 (Minn. App. 1985) rev. den.

3. *Has the District has proven its charges against Mr. Steele by a preponderance of the evidence?*

The first question is whether the District has proven the following charges against Mr. Steele by a preponderance of the evidence: that he engaged in conduct unbecoming a principal which requires his immediate removal for his principal duties; engaged in willful neglect of duty and engaged in gross inefficiency which he has failed to correct after reasonable written notice.

Conduct unbecoming a principal which requires his immediate removal for his principal duties

The District asserts that proof of this charge is found in the evidence that Mr. Steele knowingly and intentionally subjected a student to demeaning, humiliating and unwarranted punishment which exposed that student to the risk of physical harm and has caused the student to experience emotional harm. Specifically, the District asserts the following:

i. The act of being required to reach into a toilet and to remove wet paper towels was humiliating, demeaning and disrespectful to the student.

Several District witnesses testified concerning this allegation, which is simply a matter of common sense. Mr. Steele's directive to the student was entirely inappropriate, and Mr. Steele acknowledges it as such. He has testified that he acted spontaneously, he wishes he had not done so, and he has apologized to the student and others for this mistake.

ii. Mr. Steele exposed the student to and caused the student to suffer emotional harm.

The student's mother has testified that on the evening following the bathroom incident with Mr. Steele her six year old son told her he "was hesitant and nervous about using the bathroom, because it's like in a classroom." The student didn't want to use toilet paper that evening for fear of clogging the toilet, and his mother had to reassure him that she would help him to flush the toilet. Several weeks later the student was unwilling to use a toilet at a YMCA that had paper in the toilet bowl, and his mother concluded that he was afraid that he would be blamed for clogging the toilet. She flushed the toilet and then stayed in the bathroom with him while he used it. The mother testified that recently her son commented that:

He doesn't like—he still doesn't like using the bathroom in his classroom. We announced to the children that we're moving after the school year is over and he made a comment last week that he's excited to go to a new school where “we won't have to use that bathroom anymore.”

This evidence supports a finding that Mr. Steele's actions exposed the student to and caused the student to suffer emotional harm. The fact that the student has not required professional mental health therapy does not negate this finding.

Nevertheless it also remains relevant that the student's teacher testified that on the day in question, and during the following two and on-half months when the student was in her classroom, she observed no evidence of “emotional harm.” The student's mother has described her son as a normal, typical, healthy six year old who plans to play baseball in the summer and will attend first grade next year. This evidence is relevant to the severity of the emotional harm the student can be found to have suffered.

iii. Mr. Steele exposed the student to a significant health hazard and the risk of infection and illness.

The District offered evidence that the Minnesota Department of Education determined that Mr. Steele's conduct exposed the student to a health risk. In connection with its investigation into whether Mr. Steele's conduct constituted child abuse, the Department of Education consulted with a Minnesota Department of Health Supervisor who is reported to have stated: “(I)f the water was clear when the Student put his hands in it, the Student could have been at risk for contracting a ‘noro’ virus which causes the stomach flu or other pathogens that might cause the student to have diarrhea, E-coli, hepatitis, or salmonella.” Finding #53.

To put this finding into perspective Mr. Steele notes that the student never experienced any health issues as a result of taking the paper towels out of the toilet, and that although an unidentified nurse called the student's mother on the District's behalf and suggested testing for hepatitis, the student's pediatrician said “it wasn't necessary.” Moreover, Mr. Steele cites Finding #52 from the Department's report:

...the Minnesota Health Department's supervisor for the environmental health division who is an epidemiologist reported to the MDE investigator that the potential risk to the student when he

stuck his hand in the water depended upon if the water was clear or had feces in it and how good the student washed his hands after putting them in the water.

Finding #54 states:

...the health professional reported that if the water was clear when the student put his hands in it and he washed his hands two times afterwards, he would likely be fine.

A central question in the case has been whether the water was, indeed, clear when the student put his hands into the toilet. The only evidence on this question is found in the testimony of the teacher and of Mr. Steele, both of whom offered their opinions that the water in the toilet bowl was “clear.” Mr. Steele’s testimony is, of course, self serving. However, the teacher’s was not. The teacher’s testimony, which was credible, is accepted on this very important question.

First, the teacher’s testimony is significant in establishing that the student appears to have intentionally misbehaved when he placed the paper towels in the toilet; this was not an accident. The teacher explained why “I thought that it was intentional...I felt that it was a disciplinary issue:”

I thought this was strange because...the toilet is...kind of far across from the paper towel dispenser. And I have never had paper towel in a toilet before in my years of teaching, so it was a little suspect to me.

And I said...what happened, did you put the paper towel in the toilet. Yes. Do you know that the toilet isn’t working now. Yes. Then I said did you want the toilet to not work...by every indication and words...it seemed that...it had been done intentionally. He was sad, he was remorseful, and he didn’t share anything about having a problem in the bathroom or...having an accident...He said yes, that that’s what he had wanted. And I said was that a good choice and he said no. And I said I think I’m going to have to call the principal now, and he nodded.

...this boy shares a lot with me. We (had) a good relationship. So I do feel that he would have shared anything else—you know, any kind of problem that he had had.

Evidence that the water was clear, not dirty, is also found in the teacher’s testimony that:

Question: “If the child had had some...accident in the bathroom, would you have expected that he would have reported that to you?” Answer: “Yes.”

Question: “Did it occur to you that the child may have wiped himself with these?” Answer: “No.”

The teacher confirmed the accuracy of the following statements reported by the Department of Education investigator:

The teacher reported that she looked at the toilet and saw clean water and brown paper towels in the toilet. The teacher stated that the towels looked “pretty flat” like “five or six sheets had been laid in the water.” The teacher stated that she flushed the toilet and nothing happened.” (Finding 22).

The teacher reported that she saw paper towels in the toilet that were rectangular in shape, the same shape that they came out of the paper towel holder. (Finding 32).

The teacher reported that the Student did not say he had a bowel movement when she asked him if he put the paper towel in the toilet. (Finding 33)

Despite this conclusion that the water was clear, the fact remains that directing a child to put his hand in a toilet filled with clear water is, in and of itself, not hygienic. Mr. Steele recognized this when he directed the student to thoroughly wash his hands immediately afterwards. Reducing the risk of danger by requiring a thorough hand washing after first exposing the student to the risk did not make the teacher’s conduct acceptable and does not negate the fact that he knowingly exposed the student to a health hazard. There is no justification for such conduct.

iv. Mr. Steele’s choice of discipline and the manner in which it was imposed was inconsistent with District policies and violated District Standards.

The District offered evidence that Mr. Steele violated several District standards and policies in that his conduct on December 12, and in the following days, was deficient in terms of the quality of his decision making, in failing to provide student guidance and support by failing to consider alternative forms of discipline and by not being sensitive to the student’s dignity. The District submits that Mr. Steele also failed to demonstrate adequate interpersonal skills and he

failed to recognize and apply knowledge of multicultural differences when he belatedly discussed his actions with the student's parents.

All of this is true.

v. Characterizing the choice of discipline as a “logical consequence” or “restitution” did not make the choice appropriate.

Mr. Steele has attempted to explain his choice of disciplinary consequences by stating “I think at the time I was thinking that there was some logical consequences...I think within the bathroom at the time I was thinking it was a form of restitution, a way of him taking responsibility (because) he intentionally put the papers in there, for him to pick them out.”

Regardless of Mr. Steele's characterization of his actions, they were not appropriate and he does not claim that they were.

vi. Mr. Steele was aware that his conduct was inappropriate and unbecoming a teacher.

The District submits that Mr. Steele's attempt to delegate to the kindergarten teacher the responsibility to contact the student's parents to tell them what had happened is additional evidence of his belated awareness that he had acted inappropriately. He acknowledges that it was important to call the parents and that “it was the responsibility of someone within the school to contact (the parents).” He also acknowledged that he does typically call parents under circumstances as these and that he had done so with this family on previous occasions. Doing so was consistent with long standing District practice, and Mr. Steele admits, in retrospect, that he should have called the parents: “I think this one (instance) merited me calling and I did not call.”

Mr. Steele's explanation, that he was confused concerning who would make the call, was not credible. The most reasonable interpretation of his conversation with the teacher is that he sought to avoid what was sure to be an uncomfortable conversation with the student's parents. Mr. Steele's failure to call the parents in a timely fashion represented a failure of leadership.

Gross inefficiency which Mr. Steele has failed to correct after reasonable written notice

The District asserts that prior to December 12, 2008, Mr. Steele was given reasonable written notice of expectations with which he failed to comply and that this failure constitutes gross inefficiency.

The written notice upon which the District relies is a Memorandum of Concern that the District provided to Mr. Steele on January 14, 2005. That Memo states:

MEMORANDUM OF CONCERN

Your leadership as a principal is not viewed positively by your staff at this time. Perceptions are as follow:

1. You are not prepared for meetings; particularly faculty senate. You do not have prepared agendas for meetings. You seem to do things "off the cuff."
2. You are late to many meetings.
3. You are out of the building a lot for non-district reasons such as dental appointments, doctor appointments, traffic, taking children to school, etc.
4. When you leave the building, you do not always let the appropriate staff know that you will be gone.
5. Upon returning, you do not always check in with appropriate staff about what has transpired while you were gone.
6. You are unpredictable; your reactions are not proportional to the event that occurred. You don't seem to be in control of your emotions. You are perceived as angry, red in the face, shaking, and using short, fragmented sentences. These actions are perceived as intimidating to female staff.
7. You take calls on your cell phone during meetings. This is perceived to be disrespectful to the teacher who might be talking at the time.
8. You are perceived not to value educational assistants.

Recommendations:

It is imperative that you address the above perceptions in order to be successful at Rahn. The following concrete actions are recommended:

1. Come to work on time or even a little early.
2. Be prepared for every meeting. Have an agenda ready.
3. Schedule appointments outside of the workday whenever

- possible.
4. If you have to be gone, notify the appropriate staff of your absence; secretary, administrative assistant, special education lead, etc.
 5. Upon returning, check in with your building secretary and whoever covered for you while you were gone.
 6. If you are expecting an EMERGENCY phone call during a staff meeting, let the staff know that you are expecting a call and may have to take it at the start of the meeting.
 7. Think before you act; take the time to process and plan an appropriate response. The response should be proportional to the event. Maintain control of your emotions; volume, tone of voice, facial expressions, choice of words, location for the discussion. Take into consideration what is needed to make your point. Ask about what is going on before you speak.
 8. Demonstrate respect for educational assistants by listening to their job-related concerns and "working with them."

The above addendum was difficult to write. Yet, I sincerely want you to be successful at Rahn. You can't address an issue if you don't know what it is. Please let me know if I can help in any way.

The Union notes that Mr. Steele was involved in hundreds of student discipline issues during his tenure in Burnsville and the discipline of December 12, 2008, is the only discipline that has ever been called into question.

The District acknowledges that it has never disciplined or reprimanded Mr. Steele for reasons that involve student discipline. However, the District does argue that the January 14, 2005, Memorandum of Concern directly addressed the very performance deficiencies that Mr. Steele exhibited on December 12, 2008. Specifically, the District cites the following statements of concern: "You are unpredictable; your reactions are not proportional to the event that occurred. You don't seem to be in control of your emotions." The District submits that Mr. Steele's actions on December 12, 2008, directly contravened the Memo's Recommendations that he "Think before you act; take time to process and plan an appropriate response. The response should be proportional to the event. Maintain control of your emotions...Take into consideration what is needed to make your point. Ask about what is going on before you speak."

The District is correct that Mr. Steele's conduct on December 12, 2008, did not comport with the guidance provided to him in the January, 2005 Memorandum of Concern. Mr. Steele has acknowledged as much. He has testified: "I did not do a good job of thinking it through prior to taking the action of having him pick them out.... I could have made better choices...I did not have control of my emotions to the degree that I wished I had." When asked if there was any justification for his action he replied: "No."

Therefore, the District is correct that Mr. Steele did not abide by the Memorandum of Concern's Recommendations when he disciplined the student on December 12, 2008. The question is whether that failure provides grounds to immediately discharge him. When viewed in the context of that question, the following observations concerning the Memorandum of Concern are relevant.

First, the Union argues that the Memorandum was not disciplinary in nature, and as such it does not constitute the "reasonable written notice" required to immediately discharge. The District has responded by arguing that although the Memorandum of Concern is not characterized as "discipline," both the District and Mr. Steele nevertheless viewed it as such when it was issued and it should now be treated accordingly.

I have considered the Memorandum of Concern in the context of these arguments and agree with the Union that it does not constitute discipline in the accepted sense of the term. The only discipline in Mr. Steele's file prior to this occasion was one oral reprimand for inappropriate comments to teachers, issued in 2005. He has never received a Notice of Deficiency nor has he ever been formally directed to change his behavior. A memo that indicates the District's desire that Mr. Steele improve his performance is significantly different from one that places him on a disciplinary track. The fact remains that Mr. Steele's formal record is largely good. It contains positive evaluations and records of performance pay stipends. He was not on a discharge track.

Second, the District asserts that the statute does not require that "reasonable written notice" be issued in a particular format or that it be labeled in a particular manner, to support a finding of gross inefficiency. I agree. The question is whether an employee has received written notice of a performance deficiency and has been advised that there is an expectation that the deficiency will be addressed. Mr. Steele admitted on cross examination that the Memo constituted an expression of the District's expectations for his performance, and that its concerns

and recommendations were in effect on December 12, 2008. As such, although it does not constitute formal discipline *per se*, the Memorandum of Concern remains relevant to the question of immediate discharge.

Finally, in determining the appropriate weight to give to this Memo it is also noteworthy that its statements are relatively general. Notices of Deficiency typically identify factual bases for claimed deficiencies and a specific plan to correct them. The Memorandum of Concern is more general than Notices of Deficiency and as such it is accorded some, but not decisive, weight.

Willful neglect of duty

There is no question that as a principal Mr. Steele has been subject to the District's rules, regulations, directives and orders as well as state and federal laws, rules and regulations.

The District asserts that on December 12, 2008, Mr. Steele violated many directives, including the Minnesota Department of Education's Code of Ethics For School Administrators, Minn. Rules 3512.5200, Mr. Steele's job description as a District Principal, District Policy GBH, Staff Student Relations, the District's Elementary Student/Parent Handbook, and District Policy JBB/ACB, Respectful Behavior.

The District's assertions are correct. Mr. Steele's actions of December 12, 2008, did not comport with the guidelines set forth in those policies, and Mr. Steele does not argue that they did. He has acknowledged throughout these proceedings that his discipline of the student on that day was not appropriate and he wishes he had dealt with the situation differently.

Despite this admission of fault, the Union argues that a violation of general policies is not a proper ground for imposing the ultimate penalty of immediate discharge. The Union notes that the District has proceeded against Mr. Steele under the harshest of the two options from which it could choose: immediate discharge.

The immediate discharge subdivision provides for immediate discharge for *willful neglect* of duty or gross inefficiency. Minn.Stat.122A.40 subd.13. The parallel statute, which the District is not utilizing, authorizes discharge for "*neglect* of duty, or persistent violation of school laws, rules, regulations or directives" after the issuance of a notice of deficiency and the failure to comply with it. (Emphasis added) Minn.Stat.122A.40 subd.9.

I agree with the Union that “willful neglect of duty” contemplates more than a volitional act that violates school laws, rules, regulations or directives. In this case Mr. Steele’s conduct involved a serious error in judgment, not the *willful* neglect of a job duty. The fact that Mr. Steele did also violate policies could have provided grounds to issue a Notice of Deficiency and discipline. However, the failure to act consistently with general policy directives cannot alone—at least not under these circumstances-- sustain an immediate discharge. As such, the cited policies are factors—but not decisive factors—in assessing whether the District has demonstrated sufficient grounds to support immediately discharging Mr. Steele.

4. Does Mr. Steele’s conduct warrant immediate discharge or is it remediable?

With the above finding that the District has proven several charges against Mr. Steele by a preponderance of the evidence, the next question is whether Mr. Steele’s conduct warrants immediate discharge or whether is it remediable. The Minnesota Supreme Court has provided guidance in considering this question.

In 1981, the Minnesota Supreme Court provided the most definitive statement to date concerning a district’s ability to immediately discharge a teacher without first affording the teacher an opportunity to remedy performance or behavior. In *Kroll v. Independent School District No. 593*^{iv}, the school board found an elementary school teacher’s disciplinary methods to be “cruel, excessive, and contrary to the standard of professional conduct established for certified classroom teachers” and voted for her immediate discharge.

The central issue the Court faced in *Kroll* was how to decide which termination procedure to follow. In this case of first impression, the Court considered the difference between focusing on the “remediability” of a teacher’s conduct versus focusing on its “detrimental impact” on the school district. Specifically, a remediability analysis stresses giving a teacher (or principal) notice of and a reasonable time to correct deficient conduct, while a detrimental impact analysis gives greater weight to the “severity of the conduct’s impact upon the class and the teacher’s ability to teach....”^v

In *Kroll*, the court rejected the detrimental impact analysis in favor of the remediability

^{iv} 304 N.W.2d 338 (Minn. 1981).

^v *Id.* at 344.

approach, concluding that the latter “best serves the purpose of the legislature in creating two termination procedures.”^{vi} The Court found that the legislature had intended to balance a school board’s need to make discretionary administrative decisions with a teacher’s need to be protected from arbitrary dismissals, and concluded that the remediability analysis achieved the best balance. Therefore, the final decision concerning a teacher’s discharge depends a great deal upon whether or not the offensive conduct is remediable.

In considering the standards by which to judge whether conduct is remediable, the Minnesota Supreme Court favorably cited a test announced in an Illinois Supreme Court case: “[T]he test... ‘is whether damage has been done to the students, faculty or school, and whether the conduct resulting in that damage could have been corrected had the teacher’s superiors warned her.’”^{vii} *Kroll* then built upon that test by identifying additional factors that must be considered during any termination proceeding. Those factors, as applied to this case, are:

Prior Record: First, “[t]he prior record of a teacher ... must always be considered under either termination procedure.”^{viii}

The parties introduced a significant amount of evidence regarding Mr. Steele’s prior record. The Union submitted evidence that his overall employment record includes positive evaluations, and no negative evaluations. The only formal discipline in Mr. Steele’s entire career has been a formal oral reprimand issued January 14, 2005, which was accompanied by the previously discussed Memorandum of Concern. The Human Resources director admitted that the Memo itself was not disciplinary, and it does not contain nor even use the term “directive.”

More recently, Mr. Steele’s performance review of July 15, 2008, was positive and includes the comment that “for school year ’07-08 you have much to be proud.” The record also indicates that Mr. Steele received performance pay stipends along with other principals for the 2005-06 and the 2006-07 school years.

However, despite the positive comments in Mr. Steele’s most recent evaluation, it is also noteworthy that the evaluation also indicates that the District has created a “leadership action plan” for Mr. Steele. Leadership Action Plans are not a positive, nor even a neutral, action for a

vi. *Id.* at 345.

vii. *Id.* at 345 (quoting *Gilliland v. Bd. of Educ. of Pleasant View Consol. Sch. Dist. No. 622*, 365 N.E.2d 322, 326 (Ill. 1977)).

viii. *Id.* at 345.

school district to take with respect to a teacher or a principal. They are not common, they are designed to address matters of greater than passing concern, and no other principal in the District was under such a plan at that time. Although such plans fall short of Notices of Deficiency, they identify areas of concern in which a principal is expected to improve. As such Mr. Steele understood, or should have understood, that the District remained concerned about his perform and that a failure to improve would very likely lead to a Notice of Deficiency.

In summary, although Mr. Steele's formal employment record is largely positive, the District had serious concerns and Mr. Steele knew of those concerns. This is a mixed record upon which to determine whether the District now has cause to immediately discharge him.

Severity of conduct: Next, the finder of fact must consider the severity of the conduct "in light of the teacher's record as a whole."^{ix} This requires considering whether a teacher's misconduct has been ongoing or whether—as was the question in *Kroll*—a single incident "is so outrageous that it cannot be remedied in light of the danger the Principal's presence in the classroom would present."^x

As noted in the previous discussion of the District's allegation of "unbecoming conduct", everything was wrong and nothing was right about Mr. Steele's discipline of the student on December 12, 2008, and Mr. Steele does not disagree with this conclusion. The severity of Mr. Steele's misconduct is found in the student's age and experience (he was in kindergarten) and the nature of the object used to implement that discipline: the toilet. These simple facts provoke dismay coupled with amazement at Mr. Steele's poor judgment.

Nevertheless, it is also relevant that this event occurred within a very short time, it was done in private, and Mr. Steele did not display a loud voice or a mean attitude. While ill advised and inappropriate, Mr. Steele's statement that "we need to get the paper towels out of there" was not said with anger or malice.

In reviewing cases that have previously supported a teacher's or a principal's immediate discharge it is important to note that such cases typically involve repeated misconduct, or dishonesty or even criminal conduct, e.g., theft of money, assault students, viewing child pornography, falsifying records, making sexual bets with students or engaging in patterns of

ix. *Id.* at 346.

x. *Id.*

deception and deceit. Such is not the case here. Mr. Steele’s choice of discipline represented an extremely poor choice. However, it was not of such an extreme and outrageous nature that it mandates his immediate discharge and removal from his profession.^{xi}

Harm: Third, did the conduct result in actual harm or threatened harm?^{xii}

Although districts need not wait for harm—either physical or psychological harm—to come to students before dismissing a principal, absence of harm must be considered in determining whether conduct is remediable.^{xiii}

As noted in the previous discussion concerning “unbecoming conduct”, there is evidence that the student did suffer harm as a result of the events of December 12, 2008. He has been uneasy about public restrooms in general and the restrooms at Rahn Elementary in particular, and is pleased that his family is moving to a new school this coming school year.

Nevertheless the testimony provided by the student’s mother and his kindergarten teacher also demonstrates that the student is a normal, healthy happy six-year-old going into first grade. There has been no objective evidence that suggests the student has sustained any significant emotional harm or the threat of such harm.

The District has asserted that the student was exposed to a significant health hazard. In this respect it is informative that the Department of Education investigated the matter and did not cite Steele for his behavior here. Although this finding is not determinative in the instant case, the evidence suggests that the water was clear and that the child washed his hands. Under these circumstances the state’s epidemiologist has concluded that there was basically no health risk. This finding is helpful in the instant case.

In short, I find that the harm suffered, or threatened, under these circumstances was not of the sort and character that should result in Mr. Steele’s expulsion from the ranks of public educators.

Remediability of conduct: Finally, the fourth factor is “whether the conduct... could have been corrected had the Principal been warned by superiors.”^{xiv}

^{xi} The parties agree that if Mr. Steele’s immediate discharge is upheld, it is highly unlikely that he will be able to continue his career as a principal.

xii. *Id.*

xiii. *Id.*

xiv. *Id.* at 345.

Minnesota courts have differentiated between conduct that requires a written warning from conduct that is so clearly inappropriate that it will support immediate discharge. The District cites the Minnesota Court of Appeals' eminently sensible observation:

Downie's argument that he was entitled to a warning as to the deficiencies in his performance and that he should be afforded an opportunity to remediate his behavior is without merit. It should not be necessary to tell a counselor that his conduct is inappropriate when the conduct clearly violates the Code of Ethics which binds the counselor.^{xv}

The District argues that just as the Court found in *Downie* that it "...should not be necessary to tell a counselor that his conduct is inappropriate when the conduct clearly violates the Code of Ethics," it should not be necessary to give Mr. Steele yet another chance to demonstrate whether he can act in a professional manner. Mr. Steele had already been directed to think before he acted; to exercise good judgment. The District asserts that the time has come to recognize that there is little reason to hope that Mr. Steele can or will improve his performance, and that the evidence provides ample justification to support his immediate discharge.

I have considered the District's evidence and argument on this question but find that, on balance, this one instance of the inappropriate discipline of a student does not outweigh his relatively positive formal employment record. In addition, the concerns and recommendations the District has communicated to Mr. Steele have largely concerned his dealings with the professional staff. While the larger question is whether Mr. Steele can go forward in a professional manner, it is relevant to note that there has been no criticism of his dealings with students, the reason for which he has now been proposed for immediate discharge.

CONCLUSION

Immediate discharge has been upheld where a teacher or principal has engaged in egregious misconduct. The cases in which immediate discharge has been upheld have typically included evidence of such things as physical abuse of students, criminal theft; theft of school district funds; indecent conduct; the discharge of a weapon on school property; inappropriate

^{xv} *Downie v. Independent School District No. 141*, 367 N.W.2d 913, 918 (Minn. Ct. App. 1985).

relationship with a student; viewing pornography at work; exposing oneself to an undercover officer; sexual bets with students; and the physical assault of a student.

By contrast, Mr. Steele's actions on December 12, 2008, did not involve evidence of moral turpitude, self-dealing, or other deviant behaviors requiring the immediate discharge of a teacher or principal. I agree with the Union that the events of December 12, 2008 represented an error in judgment that warrants disciplining Mr. Steele, but they do not support his immediate discharge.

Absent direction from the parties, an arbitrator who hears a teacher or principal discharge case must elect between discharge as proposed by a school district, or full reinstatement without penalty. However, Minnesota law does permit an arbitrator to issue something other than an all-or-nothing award by providing that "A lesser penalty than termination or discharge may be imposed by the arbitrator only to the extent that either party proposes such lesser penalty in the proceeding."^{xvi}

Acting upon this invitation, the Union on behalf of Mr. Steele has proposed an alternative penalty: a 15-day suspension without pay. Such a penalty is significant and severe; a 15-day suspension represents a significant professional, public and economic penalty for Mr. Steele. In addition, this penalty and these proceedings serve as notice that any additional inappropriate behavior can expose Mr. Steele to discharge proceedings.

AWARD

Mr. Steele shall be reinstated and issued a 15-day suspension without pay. This penalty and these proceedings shall serve as notice that any additional inappropriate behavior can expose Mr. Steele to discharge proceedings.

August 6, 2009



Christine Ver Ploeg, Arbitrator

^{xvi} Minnesota Statutes §122A.40, subd. 15.