

STATE OF MINNESOTA BUREAU OF MEDIATION SERVICES

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IN THE MATTER OF:  
Proposed Termination of  
Dan Anderson,

Principal,

BMS Case No. 09-TD-14

-by-

Independent School District No. 742,  
St. Cloud, Minnesota

School District

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ARBITRATOR:

Christine D. Ver Ploeg

DATE AND PLACE OF HEARING:

June 28 and 30, 2009  
ISD No. 742 Offices  
Saint Cloud, Minnesota

DATE OF RECEIPT OF POST-HEARING BRIEFS: July 7, 2009

DATE OF AWARD:

August 12, 2009

ADVOCATES

Attorney for Principal

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ISSUE:

Did the District have just cause to immediately discharge the Principal from his continuing contract under Minnesota Statutes § 122A.40, subdivision 13, for (1) immoral conduct, insubordination, (2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties; (3) failure without justifiable cause to teach without first securing the written release of the school board; and (4) willful neglect of duty?

## **BACKGROUND / FINDINGS OF FACT**

Independent School District No. 191 (hereinafter “District”) is seeking to immediately discharge a continuing contract principal, Mr. Dan Anderson, for (1) immoral conduct, insubordination, (2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties; (3) failure without justifiable cause to teach without first securing the written release of the school board; and (4) willful neglect of duty, pursuant to Minn. Stat. § 122A.40, Subd. 13. Mr. Anderson 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.

When the District placed Mr. Anderson 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 Madison Elementary School, and his formal employment record with the District was largely a good one.

The District’s proposal to immediately discharge Mr. Anderson was triggered by the discovery that on the morning of Friday, February 13, 2009, he called in sick before boarding a 7:05 AM flight to Acapulco, Mexico. The following Monday was a holiday and Mr. Anderson had previously arranged to be gone Tuesday February 17 through Friday, February 20, 2009. It is undisputed that Mr. Anderson was not sick that Friday, February 13, but was instead using sick leave to extend his vacation.

Mr. Anderson acknowledges that he had the right under the Master Contract to take February 13 as a non-duty day but he instead chose to “burn sick leave.” Treating the 13<sup>th</sup> as a non-duty day would have required him to work another day, whereas he did not have to make-up sick leave days.

With this discovery the District began a broader investigation into Mr. Anderson’s possible abuse of sick leave during the 2008-2009 school year and discovered that he had also called in sick on Friday, November 21, 2008. That had been his last duty day before he began a Thanksgiving week vacation. Further investigation revealed that Mr. Anderson had approved pay for a part-time counselor to work that day as “coverage for Dan A.” When questioned about

this extra work, the Counselor told District officials that about two weeks beforehand Mr. Anderson had asked her to cover for him on November 21 because he was “going to be gone” at that time.

With this evidence of two false attendance reports, the District decided to investigate whether Mr. Anderson had actually worked the weekend days that he had claimed as “duty days” during the school year thus far. The principals’ Master Contract defines a “duty day” to require that a principal be performing official functions at a work site in the District. Thus, for Mr. Anderson to claim a weekend day as a duty day he had to be in his school building working for the number of hours claimed.

District officials reviewed the security records for Madison Elementary for all of the weekend days Mr. Anderson claimed as duty days for the 2008-2009 school year and found that he had either not been at the school or had greatly exaggerated the amount of time he worked on the following dates: August 17, September 14 and 28, and January 17 and 25.<sup>i</sup>

Mr. Anderson was interviewed regarding his attendance issues and acknowledged he acted inappropriately. On March 27, 2009, the District issued a letter to him that states:

At a meeting of the School Board of Independent School District No, 742, St. Cloud ("School District"), held on March 26, 2009, consideration was given to proposing your immediate discharge pursuant to Minn. Stat. § 122A.40 (2008).

A Resolution was adopted by majority roll call vote of the School Board, proposing to discharge you effective immediately pursuant to Minn. Stat. § 122A.40, subd. 13. Your proposed immediate discharge is based on the following statutory grounds: (1) immoral conduct, insubordination, (2) conduct unbecoming a teacher which requires the

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<sup>i</sup> Subsequent investigation reveals that on October 18, 2008, Mr. Anderson was attending a conference. Thus the District is no longer charging that date against him. Security records reveal the following reported and actual hours of duty time for the following weekend dates:

August 17, 2008: 4 hours reported. :55 hours actual time.  
 September 14, 2008: 8 hours reported. 1:25 hours actual time.  
 September 28, 2008: 4 hours reported. :36 hours actual time.  
 January 17, 2009: 4 hours reported. 0 hours actual time.  
 January 25, 2009: 4 hours reported. 1:15 hours actual time.

immediate removal of the teacher from classroom or other duties; (3) failure without justifiable cause to teach without first securing the written release of the school board; and (5) willful neglect of duty. A copy of this Resolution is enclosed.

The specific factual grounds for your proposed immediate discharge include, but are not limited to, the following:

1. Falsifying School District Attendance Records,
2. Fraudulent claims for paid leave due to personal illness on November 21, 2008, and February 13, 2009, when you were on vacation.
3. False and/or grossly inaccurate reporting for duty days allegedly worked on, including, but not limited to, the following dates: August 17, 2008; September 14, 2008; September 28, 2008; October 18, 2008; January 17, 2009; and January 25, 2009.

In addition, your conduct is in violation of the Code of Ethics for School Administrators. The Code of Ethics states that "A school administrator shall not engage in conduct involving dishonesty, fraud, or misrepresentation in the performance of professional duties." Minn. R. 3512.5200, Subpart 2. K.

Your fraudulent claims for paid sick leave and false and/or grossly inaccurate reporting of duty days worked constitute immoral conduct, insubordination, conduct unbecoming a principal which requires your immediate removal from your administrative duties, failure without justifiable cause to teach without first securing the written release of the school board, and willful neglect of duty within the meaning of Minn. Stat. § 122A.40. subd. 13.

The March 27, 2009, letter also advised the Mr. Anderson 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 June 28 and 30, 2009. The parties submitted post-hearings briefs which were received on August 7, 2009.

## **RELEVANT POLICIES**

**Job Summary:** The Elementary School Principal is responsible for the overall operation of his/her building . . .

### **Duties and Responsibilities:**

#### **H. District and Professional Responsibilities.**

1. Adheres to unit/district/state/federal policies, rules, mandates, procedures, and assignments.
2. Upholds the ethical standards of the profession.

School Board Policy No. 306, Administrator Code of Ethics, provides in part:

The educational administrator:

2. Fulfills professional responsibilities with honesty and integrity.

The Minnesota Code of Ethics for School Administrators provides in part:

#### **Subpart 2. Standards of Professional Conduct. . . .**

K. A school administrator shall not engage in conduct involving dishonesty, fraud, or misrepresentation in the performance of his professional duties.

Minn. Rule 3512.5200

Elementary principal positions have been classified as being in Job Class 16 (D6-3) and worth 6,333 points in the School District's Comparable Worth Job classification Study based on the skills, effort and responsibility required for the position. Only secondary principal, director and the superintendent positions have a higher comparable worth ranking.

## **RELEVANT CONTRACT LANGUAGE**

The parties' collective bargaining agreement provides in relevant part:

### **ARTICLE VI LEAVES OF ABSENCE - SHORT TERM**

### **Section 6.4 Leaves with Accumulated Leave Deduction**

- A. One day of accumulated leave shall be deducted for each day of absence in accordance with Subdivisions 6.41 and 6.42 of this Section.

#### **Subd. 6.41 Illness and Bereavement Leave**

1. An employee may be absent from contractual duties for bereavement or serious illness of a member of the immediate family or for personal illness.
3. The maximum number of days that may be used for such absences are:
  - c. Personal Illness--up to the total number of unused accumulated leave days. . .

## **ARTICLE IX VACATIONS AND HOLIDAYS**

### **Section 9.1 General Provisions**

- A. Employees employed in this unit will follow a duty schedule. Employees may carry over a maximum of five (5) duty days from one (1) work year to the next. Written notification shall occur no later than June 1st. Carry over days will not be paid off, if not used, nor may they be used to enhance any other benefit.
- B. Vacation or nonduty days not noted on the duty calendar may be used by any employee, and shall be flexible, and can be taken during the school term with prior written notice to the Superintendent.
- C. Guidelines regarding administrative “duty days” will be mutually agreed to and reviewed bi-annually by the Association and the District. Deviations from the guidelines will also be mutually agreed to. See Appendix A for guidelines.

Master Contract 2007-2009

### **Appendix A**

#### **Duty Days may include:**

1. Any day during the school calendar to include student instructional days, weekends, holidays designated for other employee groups, and scheduled school breaks.
2. Two unscheduled Parent Conference Days (four ½ parent conference days outside the school day equals two duty days).

3. A full day of inservice, scheduled or unscheduled, is considered a duty day. Partial days (i.e., 4:00-8:00 p.m.) which have been scheduled in advance by the Administrative Inservice Committee will not be counted as additional duty time . .
5. Weekend conference attendance will be recorded as Section 14.5 in the contract.

To be considered in “duty” status, an administrator must be performing official functions of the position at a work site in the District or an approved work site out of the District (i.e., presenting at workshops, conferences, etc.)

Working at evening events excluding Parent Conferences or required administrative inservice sessions does not constitute extra duty time, but is a part of the daily duty expectations

### **RELEVANT STATUTORY LANGUAGE**

Minnesota Statutes, Section 122A.40 governs the proposed discharge of a continuing contract teacher in Minnesota, and Mr. Anderson falls within its provisions.<sup>ii</sup> 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;

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<sup>ii</sup> 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 School District has the burden of proof in a discharge case. For the following reasons I find that the District did have just cause to immediately discharge the Principal from his continuing contract under Minnesota Statutes § 122A.40, subdivision 13.

### **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. Anderson’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 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*,<sup>iii</sup> the Supreme Court significantly expanded the statute by adopting a “remediability standard.” The District agrees that under this standard Mr. Anderson 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. Anderson by a preponderance of the evidence. Those charges are: (1) immoral conduct, insubordination, (2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties; (3) failure without justifiable cause to teach without first securing the written release of the school board; and (4) willful neglect of duty.

In this case Mr. Anderson's admitted falsification of his attendance records falls within all four of the stated charges.

With this determination, the second—and crucial--question is whether Mr. Anderson's conduct warrants his 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.<sup>iv</sup>

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

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<sup>iii</sup> 304 N.W.2d 338, (Minn. 1981).

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

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

The District has charged Mr. Anderson with: (1) immoral conduct, insubordination, (2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties; (3) failure without justifiable cause to teach without first securing the written release of the school board; and (4) willful neglect of duty. Mr. Anderson's admitted falsification of his attendance records falls within all four of the stated charges.

**4. *Does Mr. Anderson's conduct warrant immediate discharge or is it remediable?***

With the above finding that the District has proven its charges against Mr. Anderson by a preponderance of the evidence, the next question is whether that 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*<sup>v</sup>, 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...."<sup>vi</sup>

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<sup>v</sup> 304 N.W.2d 338 (Minn. 1981).

<sup>vi</sup> *Id.* at 344.

In *Kroll*, the court rejected the detrimental impact analysis in favor of the remediability approach, concluding that the latter “best serves the purpose of the legislature in creating two termination procedures.”<sup>vii</sup> 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.’”<sup>viii</sup> *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.”<sup>ix</sup>

The only previous discipline in Mr. Anderson’s record has been a written reprimand issued to him in 2003 for using public funds to purchase alcohol for a staff party in May 2002. The evidence is persuasive that at that time Mr. Anderson had not knowingly violated state and district policies regarding “sunshine funds,” and he did not repeat this violation. The Union notes that other than this one event Mr. Anderson has never received a bad recommendation, a notice of deficiency nor even a complaint. On the contrary, witnesses spoke highly of his skills, practices, and leadership.

By contrast, the District submits that while it is plausible that Mr. Anderson did not know what the law was regarding spending public funds for alcohol, and thus a warning may have been warranted, falsifying attendance records is so obviously wrong that the absence of earlier

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vii. *Id.* at 345.

viii. *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)).

ix. *Id.* at 345.

discipline regarding such conduct is beside the point. Dishonesty does not require a warning. I agree.

Moreover, it is relevant that although Mr. Anderson's formal disciplinary record is good, he was nevertheless singled out for special comment concerning the District's concerns and expectations regarding his duty time. Former Superintendent Bruce Watkins testified that in 2005 he verbally warned Mr. Anderson to be sure he worked the duty days he reported. Also in 2005 the then-HR Director, Hugh Skaja, sent a letter to Mr. Anderson questioning the accuracy of his reporting of duty time. Mr. Anderson would certainly have known from this discussion with Superintendent Watkins and the letter from Mr. Skaja that the District was concerned about his attendance reports and the need to ensure their accuracy.

***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."<sup>x</sup> 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."<sup>xi</sup>

The Union and Mr. Anderson acknowledge that the misconduct now at issue is significant. However, the Union also submits that severity is a relative concept and that Mr. Anderson's offense pales when compared with other forms and qualities of misconduct. The Union notes that this conduct did not expose the District to potential claims or liability, did not harm co-employees or others, did not physically damage District property, and was not angry, mean spirited, harsh or done with evil motive. In short, the Union submits that this misconduct was not particularly severe; it was simple and naive.

By contrast, the District submits that Mr. Anderson's dishonest conduct was severe. It was intentional, premeditated, and deceptive and so obviously wrong that a warning is not necessary. Ordinary standards of morality not only require honesty, honesty is also expressly required of principals under District and Minnesota Codes of Ethics for School Administrators.

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x. *Id.* at 346.

xi. *Id.*

I agree that a principal's "position as a high ranking supervisor imposes special obligations."<sup>xii</sup> One of a principal's duties is to administer the collective bargaining agreements of the employees he or she supervises. It should be never be necessary to direct a principal to comply with the terms of his own collective bargaining agreement and not claim sick leave when he is on vacation and not ill, nor claim duty days when he has not worked the required number of hours.

In this respect it is noteworthy that the collective bargaining agreement that covers District principals is highly unusual in that it requires principals to work a certain number of "duty days" during the school year, but does not specify when those days are to be worked. Former Superintendent Bruce Watkins testified that when he arrived in the District in November of 2004 he was startled by these provisions for they technically would permit a principal to fulfill the contractually required duty day minimum during the summer, weekends, and "even Christmas". This would enable a principal to potentially avoid many student contact days—the more demanding times when a principal is most needed and normally expected to be on the job.

When Superintendent Watkins and the School Board sought to change this language during the parties' fall 2005 negotiations, bargaining unit members were highly offended at this apparent distrust of their professionalism. Despite lengthy negotiations on this subject, this language was not changed. Instead, the principals' bargaining unit agreed to form its own subcommittee to examine the duty day issue. There is no evidence that this was ever done.

When viewed in the context of this bargaining history, Mr. Anderson's falsification of his attendance records is all the more egregious. The District had sought to change unique contract language which on its face suggests a troubling potential for abuse. The principals resisted any change to the current language on the grounds that they could be trusted to behave professionally. By his actions Mr. Anderson betrayed the trust of not only the District but also his colleagues.

In summary, the District had good reason to conclude that Mr. Anderson's misconduct was severe.

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<sup>xii</sup> *Independent School District No. 192 and Burgina*, BMS Case No. 05-TD-5 (February 25, 2005).

**Harm:** Third, did the conduct result in actual harm or threatened harm?<sup>xiii</sup>

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.<sup>xiv</sup>

The Union asserts that the District has failed to demonstrate that harm resulted from Mr. Anderson’s failure to maintain proper attendance records. By “harm,” the Union asserts that the remediation analysis asks whether physical harm to a student—real or threatened—is present in a case. The Union cites assault, sexual harassment, bullying, and intimidation as examples of the types of harm contemplated by *Kroll*, and notes that there is no evidence of any such “physical or psychological harm” in this case. From this the Union submits that this element must be resolved in Mr. Anderson’s favor.

I do not agree that “harm” is so narrowly defined as the Union asserts. Previous arbitration<sup>xv</sup> and court decisions<sup>xvi</sup> have not limited the harm addressed in the remediation analysis to actual or threatened physical harm to a student. In this case, the District has

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xiii. *Id.*

xiv. *Id.*

<sup>xv</sup> Arbitrator Gallagher’s comments in *Doe and Independent School District No. 317*, BMS Case No. 98-TD-11 (December 16, 1998) are instructive on this issue:

I note that, throughout my consideration of this case, in applying the *Kroll* standard, I adjust it to fit the circumstance here that a Principal is proposed for discharge rather than a classroom teacher, as in *Kroll*. Accordingly, with respect to the part of the standard that requires consideration of any threat of harm to students, the relevant threat when a Principal is proposed for discharge is not the same as when a classroom Teacher is proposed for discharge. The concern of the court in *Kroll* was about the threat of physical or psychological harm to students from their direct contact with the Teacher in the classroom, if her discharge had been postponed for attempted remediation. When a Principal is proposed for discharge, however, the comparable concern that is relevant to the test of remediability is whether continued employment would pose a threat to the Principal’s school or to his School District as he continues to carry out administrative duties, with the attendant threat of less direct harm to students that may arise from possible repetition of administrative misconduct.

<sup>xvi</sup> The District has cited the following decisions in which courts and arbitrators have upheld immediate discharges under Minnesota Statutes section 122A.40, subdivision 13, for misconduct where there was no actual or threatened physical harm to students. See *Doe and Independent School District No. 317*, BMS Case No. 98-TD-11 (December 16, 1998) (Upholding immediate discharge of principal for conduct including use of school district funds to purchase computers for his own personal use); citing *Matter of Shelton*, 408 N.W.2d 594 (Minn. App. 1987) (Upholding immediate discharge where teacher committed theft by swindle from corporation owned by the teacher and to co-workers).

presented credible evidence that Mr. Anderson's falsification of records proximately caused the following harm:

#### Financial Harm

Mr. Anderson's claims for sick leave and duty time not worked resulted in a direct financial loss to the School District of more than \$2,600 in salary and benefits paid that he had not earned. This is a substantial sum.

The District may also suffer additional financial loss if voters continue to defeat excess levies or building bonds because of lack of confidence stemming in part from these events. The Chair of the School Board testified that the School District recently lost two excess levies because of public concerns about the District's governance. Public confidence in the District's fiscal integrity and stewardship is crucial to its success.

Finally, student enrollment directly impacts the District's revenue; enrollment declines mean reduced revenue. This District faces significant educational competition—perhaps more so than any other District in Minnesota—because of open enrollment, a strong Catholic school system, charter school and home schools. Parents who question the District's integrity have many other options. The District must create and maintain a positive reputation to meet these competitive challenges.

#### Damaged Trust

Mr. Anderson is one of twenty-three principals in the School District. He is responsible for supervising forty-three licensed teachers and thirty-one additional employees at Madison Elementary School. As building administrator, Mr. Anderson is responsible for administering those employees' collective bargaining agreements.

The Superintendent of the Edina Public Schools credibly testified that a principal cannot effectively enforce rules that he or she does not follow; role modeling is an important part of a principal's job. In upholding the immediate discharge of a principal for engaging in theft in spite of the absence of any prior warnings, Arbitrator Gallagher noted that "trust and moral leadership are qualities even more important to continued services for a school principal than for a

classroom teacher because of the school principal's position as chief authority in the school."<sup>xvii</sup> By his actions Mr. Anderson impaired his ability to work with the staff under his leadership.

In addition, Mr. Anderson also undermined the District's trust in him to run one of its schools. District witnesses have persuasively explained that the District must have total confidence in its principals; they are the most trusted managers in the School District. It is not possible to closely supervise building principals; they essentially function independently. Not only do building principals manage a large staff, they also manage hundreds of thousands of District dollars. Mr. Anderson's false reporting of duty days and sick leave has destroyed the District's ability to trust him to properly fulfill his duties as a principal.

***Remediability of conduct:*** Finally, the fourth factor is "whether the conduct... could have been corrected had the Principal been warned by superiors."<sup>xviii</sup>

The Union submits that the misconduct now at issue is easily remedied. The District can require a doctor's statement regarding illness if feels the need to do so. Similarly, the District can limit Mr. Anderson's ability to work on weekends and can easily monitor his work hours. This is not a case where the employee lacks the skills or intelligence to conform his conduct to the District's expectations. The Union argues that Mr. Anderson made a significant embarrassing professional mistake which he should now be permitted to correct.

I have considered the Union's argument but cannot agree. 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 Minnesota Court of Appeals has noted:

*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.<sup>xix</sup>

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<sup>xvii</sup> *Doe and Independent School District No. 317*, BMS Case No. 98-TD-11 (December 16, 1998).

<sup>xviii</sup> *Id.* at 345.

<sup>xix</sup> *Downie v. Independent School District No. 141*, 367 N.W.2d 913, 918 (Minn. Ct. App. 1985).

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. Anderson instruction and a second chance to demonstrate that he can act honestly. As Arbitrator Gallagher has stated:

[I]t would be anomalous to require a warning before discharge for the fraudulent conversion of property because, presumably, a warning is not needed to inform employees that such conduct is prohibited. A warning is unnecessary for this kind of conduct, because its prohibition is obvious under ordinary standards of morality. <sup>xx</sup>

I also agree with Arbitrator Vernon’s observation that “to suggest it is determinative that a covered employee could benefit from a warning assumes that it is reasonable to believe the employee would not necessarily have understood that the particular misconduct would put his or her job in jeopardy.” <sup>xxi</sup> This is especially true of a principal, whose “position as a high ranking supervisor imposes special obligations.”<sup>xxii</sup>

In summary, no warning was required because Mr. Anderson’s intentional conduct was so clearly inappropriate. Moreover, it is highly relevant that the District *had* warned Mr. Anderson about concerns and expectations regarding his duty time. Former Superintendent Bruce Watkins testified that in 2005 he verbally warned Mr. Anderson to be sure he worked the duty days he reported. Also in 2005 the then-HR Director, Hugh Skaja, sent a letter to Mr. Anderson questioning the accuracy of his reporting of duty time. Mr. Anderson would certainly have known from this discussion with Superintendent Watkins and the letter from Mr. Skaja that the District was concerned about his attendance reports and the need to ensure their accuracy.

For these reasons I find that the District is not now required to give Mr. Anderson an opportunity to remedy his behavior.

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<sup>xx</sup> *Doe and Independent School District No. 317*, BMS Case No. 98-TD-11 (Arbitrator Tom Gallagher, December 16, 1998).

<sup>xxi</sup> *Rockers and Independent School District No. 276*, BMS Case No. 03-TD-3 (Arbitrator Gil Vernon March 19, 2003).

<sup>xxii</sup> *Independent School District No. 192 and Burgina*, BMS Case No. 05-TD-5 (Arbitrator Stephen Befort, February 25, 2005).

### ***5. Is there evidence of disparate treatment?***

The Union offered evidence which it claims demonstrates a District practice of giving teachers, principals, paraprofessionals, custodians, and others a second chance before proposing discharge. The Union argues that Mr. Anderson is entitled to the same treatment as those other employees, and that the District's decision to proceed to immediate discharge constitutes disparate treatment. The Union also suggests that while there has been no direct evidence of discrimination based upon Mr. Anderson's sexual orientation, comparing his case with other disciplinary cases does raise the question of differential treatment.

I have considered the evidence concerning possible disparate treatment and find that it does not support the Union's position. The District has never had a high ranking employee who has engaged in the admitted serious and repeated misconduct now at issue. The case most similar to Mr. Anderson's involved a former Assistant Principal who was proposed for discharged for, among other things, falsifying duty time. This case was distinguishable in that although the Assistant Principal was issued progressive discipline before he was proposed for discharge, the discipline was administered for failure to follow procedures for calling in sick and for excessive use of sick leave. This was less serious than Mr. Anderson's repeated intentional abuse of sick leave and falsification of attendance records.

In the only other case involving a bargaining unit member, an elementary principal was issued a Notice of Deficiency in 2002 for taking teachers to a local pub prior to the close of the teacher duty day. This case is distinguishable in that this misconduct involved a single incident and, although that principal exercised poor judgment, unlike Mr. Anderson she did not personally gain from her actions.

The lesser discipline the School District gave to other employees also fails to prove disparate treatment. First, none of the other employees occupied comparable high ranking executive positions. The District has every right to hold principals to a higher standard than other staff--staff which, in fact, a principal supervises: e.g., assistant principals, custodians, paraprofessionals, and teachers.

Second, none of those employees committed misconduct that was as serious as Mr. Anderson's. Cases cited include a custodian who left work early and took extended breaks, a

custodian who failed to notify his supervisor of his absences, a custodial supervisor disciplined for exercising poor supervisory control over an employee with regard to time worked, a teacher with health problems related to alcoholism who failed to return to work after health leave expired and failed to report an absence, paraprofessionals who had excessive absenteeism and who were required to provide medical verification for absences (there was no claim that they abused sick leave), a safety director who took long lunches, a custodian who had issues working the entire duration of his shift, a chief custodian disciplined for exercising poor supervisory control over that custodian, and a teacher suspended for once leaving school during the duty day.

Finally, there is no evidence whatsoever that the sexual orientation has played any factor in the discipline of Mr. Anderson.

#### **AWARD**

The District did have just cause to immediately discharge the Principal from his continuing contract under Minnesota Statutes § 122A.40, subdivision 13.

August 12, 2009

A handwritten signature in black ink, appearing to read "Christine K. Koenig". The signature is written in a cursive, flowing style.