

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

MINNEAPOLIS SPECIAL SCHOOL

DISTRICT NO. 1,

EMPLOYER,

ARBITRATOR'S AWARD

and,

BMS CASE NO. 09-TD-16

(TEACHER DISCHARGE)

MINNEAPOLIS FEDERATION OF

TEACHERS,

UNION.

ARBITRATOR:

Rolland C. Toenges

DATE OF GRIEVANCE:

Not in evidence

DATE OF ARBITRATOR SELECTION:

May 29, 2009

DATES OF HEARING:

August 21, 25 & 26, 2009

DATE POST HEARING BRIEFS FILED:

September 16, 2009

HEARING CLOSED:

November 16, 2009

DATE OF AWARD:

January 16, 2009

ADVOCATES

FOR THE EMPLOYER:

FOR THE UNION:

JaPaul J. Harris, Esq.

Debra M. Corhouse, Attorney

Minneapolis Schools

Education Minnesota

GRIEVANT

Thomas Cross, Teacher

WITNESSES**FOR THE EMPLOYER:**

Greg Beyer, Principal (retired)

Rosalynn Lockett, Employee Relations Asst.

M. Emma Hixson, Exec. Dir., Emp. Rel. (retired)

Dawn Reilley, Assistant Principal

Kathy Alvig, Principal

FOR THE UNION:

Mike Leiter, Bus. Agent, MFT

Ron Case, Teacher, Eden Prairie

Thomas Cross, Teacher/Grievant

ALSO PRESENT

Betsy Thompson, Attorney, Education Minnesota

Rob Plunkett, Attorney, Education Minnesota

Bonita Jones, Business Agent, Minneapolis Federation of Teachers

COURT REPORTER

Nancy L. Tollefsrud, Tollefsrud Reporting, LLC

ISSUE

Was the discharge of Tom Cross (Grievant) for cause as provided in Minnesota Statutes 122A/41. Subd. 6 (1)?¹

¹ The issue statement provided by the Employer is: "Whether the District has proved by a preponderance of the evidence that it had cause to discharge Thomas Cross for conduct unbecoming a teacher pursuant to Minn. Stat. 122A.41, Subd. 6 (1)?"

It is noted that the hearing record shows the Employer included the statutory reasons of "inefficiency In Teaching" and "Insubordination" in its recommendation for discharge to the Board of Education, but narrowed its basis for discharge in the instant proceeding to "Conduct Unbecoming a Teacher."

The issue statement provided by the Union is: "Whether the District has just cause to immediately discharge Mr. Cross from his tenured contract under Minnesota Statutes 122A.41, Subd. 6(a)(1) (2008), for his conduct unbecoming a teacher?"

JURISDICTION

The matter at issue, regarding the discharge of Tom Cross (Grievant), came on for hearing pursuant to the statutory grounds and procedures for termination of a tenured teacher, MS 122A.41, Subdivisions 6 through 13.

Under the provisions of MS 122A.41, Subdivisions 7 and 13, the Grievant elected that an arbitrator rather than the School Board conduct a hearing and render a decision on the charges.

The Parties selected Rolland C. Toenges as the arbitrator from a list of arbitrators provided by the Minnesota Bureau of Mediation Services.

Minneapolis Public Schools, Special School District No. 1, being a City of the first class, is subject to Minnesota Statutes No. 122A.41, "Teacher Tenure Act; cities of the first class." Under this Act the grounds for discharge of a tenured teacher, relevant to the instant matter, is as follows:²

"Subd. 6 (1) Immoral character, conduct unbecoming a teacher, or insubordination;"

"Subd. 6 (3) Inefficiency in teaching or in the management of a school;"

A hearing on the discharge matter was conducted on August 21, 25 & 26, 2009. The Parties filed post-hearing briefs on September 16, 2009. The record was held open for 60 days pending further submissions by the Parties. Being none, the record was closed on November 16, 2009.

² The specific charges are: inefficiency in teaching, insubordination, or conduct unbecoming a teacher. (Employer Exhibit #7)

The Arbitration hearing was conducted in accordance with applicable statutes and the Collective Bargaining Agreement (CBA) between the Parties. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter at issue. Witnesses were sworn under oath and subject to cross-examination.

The applicable statute in the instant matter (MS 122A.41, Subd. 12, Para. C) provides that the arbitrator shall determine, by a “preponderance of the evidence,” whether cause specified for discharge exists. It also provides that a lesser penalty, than discharge, may be imposed by the arbitrator only to the extent that either party proposes such lesser penalty in the proceeding. The Parties to the instant matter stipulated that the arbitrator has authority to make an award other than that proposed by the Parties.

The Parties stipulated that the matter was properly before the Arbitrator and there were no procedural or substantive objections pending.

A stenographic record was made of the hearing and copies supplied to the Parties and to the Arbitrator.

BACKGROUND

Minneapolis Public Schools is a large urban school district with some 33,000 students and more than 6,000 employees. There are some 91-school locations serving 84 neighborhoods.

Teachers in Minneapolis Public Schools are in a collective bargaining unit represented by the Minneapolis Federation of Teachers.

Thomas Cross (Grievant) began teaching in Minneapolis Public Schools (District) in August of 1991. He has a bachelor of arts in music from Sonoma State University

and is licensed to teach K-12 music in Minnesota. His teaching license authorizes him to teach instrumental band and vocal music to any class in Minnesota.

The Grievant has taken training in conflict resolution and various workshops provided by the District to aid him in classroom management and student learning.

The Grievant began his teaching career with the District at Anderson Elementary School and taught there for about two years before leaving the District. The Grievant returned in the 1994-95 school year and taught music at several schools including Folwell Middle School, Howe Middle School, Northrup Urban Environmental School, Afro Centric School, and North High School. School. The Grievant moved to Sullivan School for the 2008-2009 school year, where he taught general music and band full time on a full-time basis.

The District administered a number of disciplinary actions against the Grievant:

- In June of 2005 the Grievant was issued a “Notice of Deficiency” and a two-day suspension for “conduct unbecoming a teacher.”
- In October of 2007, the Grievant was issued another “Notice of Deficiency” and “Written Reprimand” for “inefficiency in teaching and insubordination.”³
- In June of 2008, the Grievant was issued a three-day suspension for “conduct unbecoming a teacher” and “insufficiency in teaching.”⁴
- In September 2008, the Grievant was again disciplined with a three-day suspension for “conduct unbecoming a teacher” in retaliating against a student.⁵
- In February 2009, the Grievant was subject to disciplined again for intimidating a student in a manner unbecoming a teacher.⁶

³ Employer Exhibit #20.

⁴ Employer Exhibit #13.

⁵ Employer Exhibit #17.

⁶ Employer Exhibit #3.

On February 4, 2009, District Administration informed the grievant that it would be recommending his discharge to the School Board and placed him on administrative leave with pay, pending School Board action.⁷

On April 15, 2009, the District notified the Grievant that the School Board recommended his discharge effective April 14, 2009. The Grievant was notified of his right to a hearing either before the School Board or before an Arbitrator.

In accordance with Minn. Stat. 122A.41, subd. 12(a), the Minneapolis Federation of Teachers (Union) submitted a written request for a hearing on behalf of the Grievant before an arbitrator. Accordingly, the matter is before the instant proceeding.

EXHIBITS

JOINT EXHIBITS:

J-1. Collective Bargaining Agreement.

EMPLOYER EXHIBITS:

E-1. Memo – Beyer to Lockett, RE; Personnel Incident of 01/29/09.

E-2. Confidential Fax – Lockett to Leiter & Beyer, RE: Loudermill Meeting 02/05/09.

E-3. Memo – Green to Stewart, RE: Charges & Suspension of Grievant, 02/24/2009.

Letter – Cook to Cross, RE: Suspension of Grievant approved, 02/25/09.

E-4. Loudermill/Due Process Meeting – RE: Grievant with notes, 02/05/09.s

E-5. Letter – Lockett to Grievant, RE: Administrative Leave, 02/04/09.⁸

E-6. Blank.

E-7. Memo. Green to Lee, RE: Charges & Recommendation of Discharge, 04/14/09.

Letter – Bowerman to Grievant, RE: Notice of Termination & Appeal, 04/15/09.

⁷ Employer Exhibit #5.

⁸ This document appears to be misdated and should probably be dated 02/05/2009.

- E-8. Sullivan Staff Handbook, 2008-2009, updated 08/20/09.
- E-9. Blank.
- E-10. Personal Notes of Greg Beyer, RE: Incident involving Grievant, 01/29/09.
- E-11. Memo – Reilley to Hixson, RE: Incident involving Grievant, 04/25, 08.
- E-12. Personal Notes of Emma Hixson, RE: Loudermill meeting, 06/04/08.
- E-13. Memo – Green to Henry-Blythe, RE: Charges & Suspension, 06/10/2008.
Letter – Hixson to Grievant, RE: Suspension Without Pay, 06/11/08.
- E-14. Memo – Noble to Hixson, RE: Conduct of Grievant, 06/10/08.
- E-15. Personal Notes of Emma Hixson, RE: Suspension of Grievant, 08/27/08.
- E-16. Memo – Green to Henry-Blythe, RE: Suspension of Grievant, 09/09/08.
Letter – Hixson to Grievant, RE: Suspension Without Pay, 09/10/08.
- E-17. Notice of Deficiency and Suspension – Hixson to Grievant, 09/02/08.
- E-18. E-mail - RE Dismissal of Students by Grievant, 04/14-16/08.
- E-19. E-mail - RE: Unauthorized Showing of Movie & Missing Lesson Plans.
- E-20. Notice of Deficiency and Written Reprimand, 10/25/07.
- E-21. Confidential Fax , RE: Loudermill meeting scheduled for 06/14/05.⁹
- E-22. Personal Notes of Kathy Alvig, and witness statements RE: Incident involving Grievant of May 2005.
- E-23. Notice of Deficiency and Suspension, RE: Grievant Behavior, 06/14/05.
- E-24. Memo – Peebles to Board, RE: Suspension of Grievant, 06/28/05.
- E-25. Letter – Hixson to Grievant, RE: Suspension Without Pay, 06/29/05.

UNION EXHIBITS:

- U-1. Dissertation by Ronald A. Case, PhD, RE: “A Mixed-Method Study of Teacher-Student Rapport From The Perspective of Fifth Graders.”
- U-2. Periodical – “A Qualitative View of Humor In Nursing Classrooms,” by Joan Kay Ulloth.

⁹ Exhibit not accepted into evidence for lack of foundation.

U-3. "Humor, Learning and Socialization in Middle Level Classrooms," by Judy P. Pollak & Paul D. Freda.

U-4. Minneapolis Public Schools Board Policy #6411F, "Learning/Instruction, 06/04/08.

U-5. Greg Beyer permission for Grievant to show movie on 09/22/08.

U-6. Letter of Recommendation by Dawn Allan, Retired Principal, 05/08/08.

U-7. Letter of Recommendation by Faye Blakely Washington, retired, 08/19/09.

U-8. Appreciation Essay to Grievant by Student, Henry Stark, 04/30/02

POSITION OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- In January 2009, parents raised concerns regarding the conduct of the Grievant.
- The Grievant was reported to have stated that he would "cut off a student's head and pour orange juice down his throat."
- The Grievant was reported to have attempted to tape a student to a chair in band class.
- The "Preponderance of Evidence" supports the Employer's position – that it is more likely than not that the charges made against the Grievant are true.
- The Employer's action in discharging the Grievant meets the standard of being "fair and reasonable."
- The Grievant is not entitled to an opportunity to correct any deficiencies before discharge. Nevertheless the Employer believes that any remedial measures would be futile and was a factor in the decision to discharge him.
- The Grievant engaged in "Conduct Unbecoming a Teacher" by using threatening actions, which is in violation of school policy and ethical standards for teachers.
- An investigation substantiated the allegations that the Grievant threatened to "cut off a student's head and pour orange juice down his throat."
- An investigation also substantiated the allegations that the Grievant threatened to "tape a student to the chair and went to obtain tape for that purpose."

- Although the Grievant may have meant his statements to be humorous, the students were uncomfortable and reported the incidents to their parents.
- In an investigation of the allegations, with the Union Representative present, the Grievant acknowledged having made the alleged statements.
- The Grievant's effort to cloud his actions with discussion of using jokes as a productive teaching tool is unconvincing. It is important to note that humor is in the eye of the beholder and it is clear that it had a detrimental effect on the students.
- The testimony of Dr. Case (Union Exhibit #3) does not support the Grievant's contention as it describes negative humor as the antithesis of learning.
- It is noteworthy that the Grievant perceived the students to be the inappropriate party and failed to comprehend or take responsibility for his actions.
- It is clear that the Grievant has issues with confronting students.
- The Grievant has been given numerous notices that his conduct was inappropriate and has disregarded them.
- The Grievant has demonstrated "Conduct Unbecoming a Teacher and there is just cause for his discharge.
- The Grievant has a long history of inappropriate conduct:
 1. Dr. Kathy Alvig, Principal of Northrop Urban Environmental School had problems with the Grievant and had counseled him on his use of inappropriate language. The Grievant received a suspension for inappropriate conduct in confronting a student at his neighborhood bus stop and the manner in which the confrontation was conducted.
 2. Dawn Reilly, Assistant Principal at North High School had numerous concerns regarding the Grievant's classroom management. The Grievant was given a Notice of Deficiency and a three-day suspension for "Conduct Unbecoming a Teacher, Inefficiency in Teaching and Insubordination." Thereafter, the Grievant threatened the student he believed was responsible for his discipline and was given further discipline of a five-day suspension.¹⁰

¹⁰ The record shows that the five-day suspension was later reduced to a three-day suspension.

- It is important to note that, with the consultation of his Union, the Grievant did not grieve any of the disciplinary sanctions administered and cannot now attempt to rehash these issues.¹¹
- In sum, all of the traditionally cited elements of just cause have been satisfied to support the discharge of the Grievant.
 1. The Employer's expectation that the Grievant would not use hostile language toward students and threaten them is reasonable.
 2. The Employer's expectation that the Grievant would follow rules on disciplining students and the ethical standards/responsibilities in his union contract is reasonable.
 3. The rules and expectations were constantly, consistently and clearly communicated to the Grievant as testified by Witnesses, Hixson, Alvig, Reilly and Beyer.
 4. The Grievant was clearly on notice that his conduct would result in discipline. He was given multiple "Notices of Deficiencies" and four Due Process meetings. Employer Exhibits #17, 20 and 23 advise the Grievant that, "Further action of this nature could result in further disciplinary action."
 5. Teacher responsibilities outlined in the Union Contract also put the Grievant on notice that he would be subject to discipline for his conduct.
 6. Further, any employee would reasonably know that engaging in threatening actions toward students and offensive language would be grounds for discipline. The Employer's investigation was prompt, thorough, fair and objective. Beyer interviewed 10 of the 19 students. The Grievant was given full opportunity to respond to the allegations during the investigation and later at his due process meeting. He was afforded Union representation.
 7. Numerous witnesses, including students, supported the allegations against the Grievant. The evidence is overwhelming that the Grievant engaged in misconduct, violated school rules and violated ethical rules codified in the Union Contract.
 8. The Grievant had a history of confronting students in a threatening manner, leaving the Employer with discharge as the only appropriate option.

¹¹ The CBA contains in-depth provisions providing for the filing of and redress of grievances arising from disciplinary actions.

9. The Employer administers progressive discipline in a uniform and consistent manner. Witnesses, Emma Hixson and Rosalyn Lockett of the Employee Relations Department testified that any other teacher, with the same history as that of the Grievant, would likewise be discharged.
 10. The level of discipline administered to the Grievant is consistent with his level of misconduct. His misconduct was gross. It was serious and repeated.
- The Employer has met its statutory obligation by demonstrating, via a preponderance of evidence, that the Grievant committed "Conduct Unbecoming a Teacher" and there is cause for his discharge.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Grievant is a very effective educator.
- The discipline administered is excessive and inappropriate.
- When assigned at Sullivan School during the 2008-2009 school year, the Grievant had never been given a written warning by Mr. Beyer, except for the allegation that he had threatened to tape a student to a chair.
 1. The Union raised objection to Beyer's personal notes from interviews with ten of the 18 students as hearsay. There was no direct testimony from the students.
 2. The only direct testimony concerning the matter was provided by the Grievant, who made it clear that his comments were intended as a joke to aide in classroom management.
 3. The Grievant did not touch the student and never had any intention of actually taping the student to the chair.
 4. The Grievant believed his use of humor, as a management strategy, was more effective than threatening the student with a referral out of the classroom.
 5. The Employer's characterization of the comments by the Grievant as "intimidation" is unsupported. There is absolutely no evidence that the Grievant's comments were intimidation. Beyer did not testify that it was intimidation – he simply said he thought the Grievant should have removed the student instead of acting as he did.
 6. It was both reasonable and professional for the Grievant to address the matter through use of humor, which is supported by research.

7. Dr. Ron Case's doctoral research with fifth graders is directly applicable to the Grievant's work with seventh graders at Sullivan.
8. Dr. Case testified that humor is inextricably intertwined with rapport, and rapport is a "critical attribute of the successful classroom." Dr. Case further testified that, "There's a lot of research out there that says, yes absolutely, that the level of a student's connectedness to the teacher connects to the learning and obviously make achievement scores better."
9. The Grievant's action to address the student behavior matter in the classroom is in keeping with School Policy, which emphasizes the teacher's responsibility for keeping students in the classroom environment ("Reducing the amount of time students spend out of the classroom due to behavior is clearly one way to impact our academic success.").
10. Further, the student statements contained in Beyer's notes are contradictory and unreliable.
11. Clearly, there was not majority of students who viewed the Grievant's comments to be inappropriate.
12. Two of the students interviewed by Beyer thought the Grievant was joking. A third student acknowledged that the Grievant was laughing. A fourth student thought the Grievant was both serious and joking.
13. Four of the ten students interviewed trumped up exaggerated allegations and should have no creditability. One student did not remember the incident.
14. The Grievant's statements given during the investigation and at the hearing are consistent. "You have to sit down and I probably should tape you to the chair." "You know what? You've got to sit down or I'll probably have to tape you to that chair."
15. The student who was the subject of the Grievant's comment did not even allege that the Grievant actually taped him to the chair. The Grievant testified that the student subject of his comments knew he was joking because the student was laughing.
16. What Beyer was describing in his testimony is simply that the kids did not think a teacher should do it because they cannot do it. This surely cannot be the standard for discharge.
17. The taping matter did not arise as a complaint, but via rumor from a student who had it in for the Grievant, a student that had the most discipline referrals of any of the students in that class.

18. Clearly, the Employer did not believe that there was an actual threat to harm the student, or there would have been testimony about meeting the obligation under the maltreatment of minors act to report, “threatened injury.”
19. The Grievant’s comments here do not rise to the level of conduct unbecoming a teacher, and he should not be discharged from his employment.
- The Employer’s action to discharge the Grievant is inconsistent with the principles of “Just Cause.”¹²
 - The Employer gave the Grievant no warning that use of this humor would result in discipline.
 - Prior warnings given the Grievant were:
 1. Not to meet students at their bus stop or at their homes do deal with issues (2005).
 2. You may not yell at students or berate them, even if they are engaged in misconduct (2005).
 3. If concerned about theft, you must handle the situation appropriately (2005).
 4. If students need to be confronted, it should be done objectively, privately and respectfully (2005).
 5. If encountering a serious issue of misconduct, seek guidance from your Principal prior to taking action (2005).

¹² Referenced here is the seven tests of “Just Cause” as cited by Arbitrator Carroll Daugherty in Grief Bros. Cooperage, 42 LA555, 558 (1964): (1) Did the company give to the employee forewarning or foreknowledge of the possible consequences of the employee’s conduct? (2) Was the company’s rule or managerial order reasonably related to the orderly, efficient and safe operation of the company’s business? (3) Did the company, before administering the discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? (4) Was the company’s investigation fair and objective? (5) At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged? (6) Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees? (7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employer in his service with the Company?

6. You must respect student confidentiality regardless of whether you think someone has done something wrong or not. You may not publicly discuss confidential information about students (2005).
 7. You are expected to follow the Professional Standards laid out in Article 5 of the MFT Contract. (1) Your interactions with families must be “appropriate in frequency and focus on building trust and creating positive relationships.” (2) You should use a successful parent communication process that involves students, displays sensitivity for families and involves families in solving problems.” (3) You must consistently adhere “to standards for professional conduct and overall performance requirements and help the members of [sic] school community to understand and adhere to these obligations.” (4) You must create “a classroom environment that is respectful, emotionally secure and physically safe for students and adhere to” [sic] the requirements of the Minnesota Data Practices Act” (particularly with regard to student confidentiality) [citation omitted] (2005).
 8. The day after a performance, you and your class will reflect on the previous day’s performance. You will discuss and write about successes as well as areas for improvement. You will not cancel class, show a movie or give students [sic] (2007).
 9. “If you plan to show a movie in the future, you need to get prior written permission from an administrator” (2007).
 10. “The expectation is that you will consistently maintain professional standards of conduct” (2008).
- None of these warnings or expectations provided the Grievant with a fair warning that he would be subject to discharge for his actions in the tape incident.
 - The grievant was absolutely attempting to create a respectful classroom environment by first teasing the student and then attempting to talk to him privately about behaving appropriately as opposed to just referring him out of the classroom.
 - Based on the research regarding effectiveness of humor in the classroom, it is not reasonable to expect the Grievant to have known that his comments were inappropriate. The Employer can choose to make a rule prohibiting certain humor, but it should apply only prospectively.
 - The hearsay notes introduced into evidence regarding the investigation of the taping incident provided little or no information about the method used and makes it pretty clear that there was no consistency in questions posed. Student responses included a wide range of allegations. The most reliable

information in these notes supports the Grievant's testimony that the comments were simply a joke.

- The Employer's discipline of the Grievant in the instant matter is inconsistent with its treatment of other teachers. The history shows that the Employer is acting inconsistently with prior cases of discipline.¹³
- Compared to the discipline of other teachers in Minneapolis, the facts in this case do not justify discharge.
- It is inappropriate to discharge a teacher based solely on hearsay testimony, with no direct testimony on the allegations. Under Minnesota Supreme Court precedent and awards in other arbitration cases, the Grievant should not be subject to discharge on hearsay evidence alone.¹⁴
- The Employer should know from its experience in its other arbitrated cases that direct testimony is necessary and hearsay evidence alone is not sufficient to support discharge.
- In the instant case, the Principal's notes and second-hand-testimony are insufficient evidence to support discharge of the Grievant.
- The existence of previous discipline does not change the obligation of the Employer to prove just cause to discharge the Grievant.

¹³ Cited as Attachment #1: In the matter of Arbitration Between Minneapolis Spec. Sch. Dist. No. 1 and Minneapolis Fed. Of Teachers, BMS #06-PA-492, Feb.23, 2007).

Cited as Attachment #2: In the Matter of Arbitration Between Minneapolis Fed. Of Teachers v. Minneapolis Spec. Sch. Dist. No. 1, BMS #06-PA-971, July 10, 2007 at pp. 20-22).

Cited as Attachment #3: In the Matter of Arbitration Between Minneapolis Spec. Sch. Dist. No. 1 and Minneapolis Federation of Teachers, BMS #06-PA-972, July 31, 2007).

Also referenced: In the Matter of the Proposed Discharge of Thomas Muehbauer by Special Sch. Dist. No. 1, Minneapolis, BMS #05-TD-2, Nov. 28, 2005).

¹⁴ Cited is: Morey v. School Bd. Of Indep. Sch. Dist. No. 492, Austin Pub. Sch., 136 N.W. 2d 105 108 (Minn.1965) (emphasis added).

Cited is: In the Matter of Arbitration Between Faribault Education Association and Independent School District No. 656, 92-PP-42B, at pp. 6-7)

Attachment #1: In the matter of Arbitration Between Minneapolis Special School District No. 1 & Minneapolis Federation of Teachers, BMS #06-PA-492, Feb. 23, 2007).

Also referenced: Elkouri & Elkouri, How Arbitration Works, 5th Ed. 1997 at p. 440.

- At issue is not whether all of the discipline administered to the Grievant rises to the level of discharge, but rather, does the Grievant's comments in the tape matter rise to the level of discharge.
- The Grievant acknowledges that he did not challenge disciplinary actions prior to the tape incident. However, since the Employer presents them to support its discharge action, he wants to present his side of the facts:
 1. His motivation in the incident to recover musical equipment at the student's bus stop was to insure it would be available for the use of other students and for the student to learn a life lesson that stealing is inappropriate. The Grievant understood how the family could be defensive about the matter.
 2. Regarding the allegation that he improperly dismissed seniors, he simply reported that they had been dismissed and did not explain that given his bad toothache, he was not the one who dismissed them. Due to the Grievant's teaching schedule, he would not have been able to attend any meeting where the issue of expectations for senior attendance was discussed.
 3. The Grievant admitted that he intentionally left a movie for the substitute teacher for which only he had verbal permission to show. The Grievant assumed that permission was permission and didn't distinguish between verbal and written permission. The second movie shown by the substitute teacher just happened to be in his classroom because he had rented it for his son and accidentally left it there. Although this was an unfortunate situation, it should not serve to inflate any discipline in the instant matter.
 4. Regarding the encounter with a student who he feared would get him into trouble, the Grievant acknowledges his error and takes responsibility for his conduct. This encounter differed from the tape incident where the Grievant was not angry but joking. The Grievant complied with the Employer's directive to participate in counseling and learned to use tools to temper his responses in difficult situations.
- Employer Witness, Emma Hixson's opinion on discharge of the Grievant is irrelevant as she was not employed at the time of the Grievant was recommended for discharge.
- The Grievant's testimony was uncontroverted by any direct testimony and he is a creditable witness.
- The Grievant understands the concern about his comments with respect to the tape incident and would not make such a statement again.

- The Grievant has demonstrated that he has not repeated incidents for which he has been disciplined.
- The Grievant has support from others experienced in his field. Retired Principal Dawn Allan and retired Music Instructor Faye Washington provided written testimony to the teaching qualities of the Grievant. The Grievant also introduced a letter of from a student's family praising his commitment to their son's education.
- It is noteworthy that only one of the Employer's administrative witnesses provided any evidence that they had concerns about anything they saw in the Grievant's classroom.
- The Employer has not met its burden of showing the Grievant 's "conduct unbecoming a teacher."
- The Grievant respectfully requests he be retained as a teacher in the Minneapolis Public School District and that his pay and benefits be restored.

DISCUSSION

The issues to be addresses are as follows:

- What can be deduced from the record regarding the Grievant's conduct in the tape incident of January 29, 2009?
- Does the Grievant's conduct in the January 29, 2009 tape incident constitute "conduct unbecoming a teacher," as alleged by the Employer?
- If the Grievant's conduct in the January 29, 2009 tape incident constitutes "conduct unbecoming a teacher," what is the appropriate discipline?
- What, if any, effect should the Grievant's prior disciplinary record have on any discipline warranted in the January 29, 2009 tape incident?

The record shows that the Grievant was employed during the 2008-2009 school year at the Anne Sullivan School, where he taught general music to kindergarten through eighth grade and band to sixth, seventh and eighth grade students. The Grievant's supervisor was Principal, Greg Beyer.

The matter of the tape incident came to Beyer's attention via a parent, who had heard about it from a student. Beyer followed up with the student and learned that

the alleged incident had occurred in the Grievant's seventh grade band classroom on January 29, 2009.

Beyer then made an investigation of the alleged incident. He interviewed ten of the 19 students, who were in the Grievant's classroom, and scheduled a meeting with the Grievant and his Union representative.

Although the students gave varying accounts of what had happened, Beyer concluded that the Grievant had commented to a student who would not sit down that he would tape him to the chair. The Grievant acknowledged that some students interpreted the comment as a joke while others took it as a serious threat.¹⁵

In the meeting involving Beyer, the Grievant and his Union Representative, the Grievant acknowledged to Beyer that he probably did make that statement, but it was kind of a joke. The Grievant also acknowledged that "Yes, I got tape-here I have some."¹⁶

In his testimony at the hearing, the Grievant said his comment was: "You've got to sit down, or I'll probably have to tape you to that chair." The Grievant further testified that, "The second time he [student] was not paying attention, and so I had to – I grabbed the roll of masking tape and I showed the students . . . the first time was a joke." "The first time is humor, the second time is very serious, because then you're gone after that. There is no more."

The Union objects to any reliance on the statements from students as hearsay, as they were not subject to cross-examination. As noted earlier, the students gave varying interpretations of what had happened, but confirmed what the Grievant has acknowledged himself, that he threatened to tape the student to the chair and had tape in his hands.

¹⁵ Grievant's testimony at pp. 149.

¹⁶ Employer Exhibit #1, 5th paragraph.

The investigation into the tape incident also brought to Beyer's attention to other issues involving the Grievant's conduct.

- Not following site procedures when students are misbehaving.
- Concerns regarding judgment and communicating with students; ie. Inappropriate joking and yelling at students.
- Not following lesson Plan – creates plan and doesn't go over it with students.

The "Sullivan Staff Handbook 2008-2009" contains a section titled "Student Support/Classroom Management." This section contains the "School Wide Behavior Plan," "Citywide Discipline Policy," "Mandatory Reporting" and "Tips for Avoiding Power Struggles with Students."¹⁷ The provisions of the Handbook are reviewed with teachers in staff meetings at the beginning of the school year. The Grievant testified that he was present for this review, was given the Handbook .

The Handbook contains a matrix of behaviors and teachers are required to provide Beyer with a Behavior Plan identifying how they [teacher] will address student behavior issues. The Grievant provided a plan, which Beyer approved.¹⁸

The Grievant's handling of the student's behavior in the tape incident was not in compliance with the behavior plan in the Handbook and was not in compliance with the Behavior Plan submitted to Beyer by the Grievant.¹⁹

The investigation Beyer conducted revealed information regarding the Grievant's general conduct in the classroom that concerned Beyer. Beyer found that the Grievant at times shouted/yelled at students rather than issue a normal verbal warning before taking further action. ²⁰ The Grievant in his testimony acknowledged yelling when he thought a safety issue was involved. The Grievant

¹⁷ Employer Exhibit #8.

¹⁸ Testimony of Beyer at pp.18-20 & 146.

¹⁹ Testimony of Beyer art PP. 21-22.

²⁰ Employer Exhibit #1.

also acknowledged that he had been talked to on three occasions regarding his classroom management.²¹

Beyer also found that the Grievant's demeanor (yelling/joking) in the classroom was a concern to students.²²

The Grievant's own statements provide some insight into his classroom demeanor:

- "Expectation that do class work is mine – is about hearing and listening – rehearse. I want prepare kids for H.S. Raise my voice – I do not like my behavior. One of the things I am in the classroom. I am larger than life. If I am firm the principal is yelling inappropriate." [Emphasis added]²³
- "I tell them, Kids, I'm the king of the class, and that's the way it is and there's a door. I 'm going to tell you that right now. And we're going to have fun and you're going to learn. Any questions?"²⁴

FINDINGS

The Arbitrator finds the preponderance of evidence supports the charge that the Grievant threatened to tape a student to his chair and repeated the threat a second time, after locating tape and displaying it to the student. The Arbitrator finds this conduct constitutes "conduct unbecoming a teacher." Although the Grievant may have intended the first threat as a joke, the Grievant's own testimony reveals that the second threat was not a joke.

"... As I went over to talk to him for my second intervention, saying, that, you know, the first time was a joke."²⁵

²¹ Grievant's testimony at pp. 149-150.

²² Testimony of Lockett at pp. 43.

²³ Employer Exhibit #4, pp.2.

²⁴ Grievant testimony at pp. 49.

²⁵ Grievant's testimony at pp. 53.

In addition to the taping incident, the record shows the Grievant making intimidating comments to students by exalting himself in the classroom. i.e. “I am king of the Class” and “I am larger than life.”

Although the Arbitrator finds the January 29, 2009 tape incident “conduct unbecoming a teacher” and warranting discipline, the Arbitrator does not find it to be, in and of itself, sufficient cause for discharge. However, other mitigating factors are to be considered.

In determining the appropriate discipline, is the tape incident a one-time occurrence of “conduct unbecoming a teacher,” or are there mitigating circumstances that indicate a pattern of such conduct, which is likely to be repeated?

Mitigating for the Grievant is his length of employment with Minneapolis Schools. The record shows that he has about seventeen years, counting part time, full time and previous employment.

Mitigating against the Grievant is his previous record of discipline. The record shows the following discipline administered to the Grievant, none of which was appealed/grieved.²⁶

- June 2005 – two-day suspension for “conduct unbecoming a teacher.”
- October 2007 – “Notice of Deficiency and Written Reprimand” for “inefficiency in teaching and insubordination.”
- June 2008 – three-day suspension for “conduct unbecoming a teacher.”
- September 2008 – three-day suspension for “conduct unbecoming a teacher.”

The Grievant’s record of conduct indicates that the tape incident is not an isolated occurrence of “conduct unbecoming a teacher, but a repeat of a pattern of “conduct unbecoming a teacher.”

²⁶ On cross-examination, the Grievant acknowledged that he had Union representation at all of the Loudermill hearings and chose not to appeal the discipline.

The Grievant testified that he was on notice from previous discipline that continued “conduct unbecoming a teacher” would cause him to lose his job.

“Because I had just received a suspension for something, and it is – suspensions are serious, and at that suspension meeting I was told that We don’t want to see you again or else you’re going to lose your job.”²⁷

The Arbitrator finds that, although the tape incident is not sufficient in and of itself to constitute cause for discharge, the Grievant’s record of discipline, when considered with the tape incident constitutes cause for discharge. The Grievant’s employment history indicates that corrective discipline has not been effective in forestalling his tendency to exhibit “conduct unbecoming a teacher.”

AWARD

The grievance is denied.

The preponderance of evidence shows that cause exists to discharge the Grievant for “conduct unbecoming a teacher,” in accordance with Minnesota Statutes 122A.41,

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 16th day of January 2010 at Edina, Minnesota.

Rolland C. Toenges, Arbitrator

²⁷ Grievant’s testimony at pp. 97 & 98.