BEFORE THE ARBITRATOR

In the Matter of the
Arbitration between

Independent School District No. 279,
Osseo School District

And

Janice Iverson
Grievance
BMS Case No. 09-PA-1139

Education Minnesota-Osseo Educational
Support Paraprofessionals

Appearances:

Attorneys Stephen M. Knutson, Knutson Flynn & Deans P.A., on behalf of Independent School District No. 279.

Attorney Rebecca H. Hamblin, Education Minnesota, on behalf of the Osseo Educational Support Paraprofessionals.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the District and the Association respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in Osseo, Minnesota on December 14, 15, and 16, 2009 and on March 10, 2010. A stenographic transcript was received on March 18, 2010. Briefs were filed and the hearing was declared closed on April 5, 2010 All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

ISSUE:

The parties framed the issue as follows:

Did the District have just cause to terminate Janice Iverson? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE VI
GENERAL EMPLOYMENT CONDITIONS

Section 9. Probation and Regular Status:

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Subd. 2. Regular Status: When an employee achieves regular status, the employee will have seniority privileges and may not be discharged without just cause.

Subd. 3. Classification Change – Probation: An employee changing classification will be considered probationary in the new assignment for a period of ninety (90) days. In the event an employee does not satisfactorily complete the probationary period, they will be placed on the School District's recall list according to their previous classification and job assignment.

FACTS:

The grievant, Janice Iverson, hereinafter referred as Iverson, has been an employee of the District for approximately 23 years. She is a high school graduate who commenced employment with the District in 1985 as an Educational Support Professional, hereinafter referred to as an ESP. She has held many different school year ESP positions in the course of her employment with the District. There is no dispute that from the 1985-86 school year through the 1999-2000 school year, she was a Library/Media ESP at Fair Oaks Elementary School. Iverson indicated at the hearing that of all the positions she has held with the District, she felt the most competent in this position. However, of the five evaluations on file with respect to her employment as a Library/Media ESP two of these evaluations indicate areas needing improvement.

At the beginning of the 2000-01 school year, Iverson voluntarily transferred to a Resource Manager position at Fair Oaks. After two months, she received a written evaluation where out of eight criteria, she was found to have met only one. In February or March of 2001, at the request of Dean Reiners, then principal at Fair Oaks, Iverson agreed to be transferred to a position as a special education ESP in the Strategies Program at Fair Oaks working under EBD Special Education teacher, Stephanie Stimac. The Strategies program at Fair Oaks was comprised of two classrooms with one Strategies special education teacher and typically two special education ESPs assigned to each classroom providing support to six to eight students with emotional behavioral disorders, hereinafter referred to as EBD, who attended both special education and mainstream classes.

In addition to moving to the new position as a Strategies ESP, Iverson moved from a Classification I to a Classification II position, which involved more direct contact and responsibility working with students at a higher rate of pay. No higher education

than a high school diploma was required to perform as an ESP in the Strategies Program. The primary role of the ESP is to support the teachers and students in all settings throughout the school day by closely monitoring and proactively intervening and redirecting the EBD students under their charge. The ESP is also expected to de-escalate any inappropriate behavior and to assist the students in their academic studies. Special education ESPs are expected to know or have a general understanding of the material covered by the elementary school mainstream teachers. ESPs have access to teacher's manuals should they need further information to support the students. Typically, an ESP in the Strategies Program is assigned to two or three students at any particular point in time.

Because Iverson agreed to be transferred to a new job position and a new job classification, her employment as an ESP in the Strategies Program was probationary and the District could have returned her to her previous job classification and position within the first 90 days. Although Stimac testified that she began observing problems with Iverson's performance almost immediately in that she was not proactively intervening with students, the District did not return her to her previous position and she achieved regular employee status in that position. Stimac credibly testified that almost from the start of her employment in Stimac's classroom, serious performance issues in the areas of acting proactively, being punctual in escorting students to their mainstream classrooms, lunch, or recess, and performing simple administrative tasks around the classroom such as grading papers arose. Stimac sought to address these problems directly and repeatedly going so far as to provide a written schedule for Iverson and to modify her assignments to tasks that she could perform. In October of 2001, Iverson attended a workshop entitled "Paraprofessional Workshop on Proactive Strategies to Reduce Inappropriate Behavior." It specifically addressed one of Iverson's main problems, the proactive monitoring of students.

Approximately one and one half months later, Iverson received her first evaluation as a special education ESP wherein she was listed as satisfactorily performing five of seven criteria. There were written comments on the need for improvement with respect to punctuality, initiative and following directions.

During the 2001-2002 school year, Iverson attended a second workshop on January 29, 2002 entitled "Professionalizing the Para Role" which covered such topics as effective problem solving, appropriate conflict management techniques, and serving as a positive role model for students including those with exceptional learning needs.

The Strategies program was transferred from Fair Oaks to Woodland Elementary School beginning with the 2002-2003 school year. Based on her credible testimony, it is evident that Stimac continued to have serious concerns about Iverson's competence, although she showed some slight improvement after the move to Woodland which lasted three or four months after which she slid back into the same performance problems. In spite of these performance concerns, Stimac did not indicate to Woodland Principal Linda Perdaems any areas in which Iverson needed improvement because she wanted to focus on the positive and view the move as a fresh start. Stimac testified that based upon

the slight improvement, she would get hopeful for a short period of time. Based upon this optimism, she did not communicate her many concerns to Perdaems; and the evaluation in April of 2003 did not reflect Iverson's genuine performance problems. Consequently Iverson's evaluation from Perdaems dated April 22, 2003, noted that "Iverson has done a nice job transitioning to Woodland."

According to Stimac after the move to Woodland, additional performance problems surfaced as well as those previously noted. She was having increasing problems in assisting students with their academic subjects because the classroom consisted of students from slightly higher grade levels. Stimac talked to Iverson about these problems and suggested that she use the teachers' manuals available in the classroom. When her performance problems with academic assistance did not improve, Stimac modified Iverson's assignment by assigning her the younger students to work with academically. She also provided a detailed written schedule for Iverson which she did not provide for other ESPs working in her room.

Based upon Stimac's testimony, it is clear that she attempted to help Iverson by verbal correction and reassigning her to easier and younger students to circumvent the problems that Iverson's performance problems were causing. It is, however, fair to conclude that very little documentation of these deficiencies in the form of written corrective memos or e-mail communications to Iverson or Perdaems existed prior to January of 2004.

By January 20, 2004, Stimac was receiving complaints from a mainstream teacher regarding Iverson's performance in the mainstream classroom. She conducted a meeting with Iverson in which she went over the many concerns and problems including not following instructions, not being able to deal with schedule changes, and not focusing on and monitoring the students in the Strategies classroom. Stimac testified that she sent a copy of her notes from the meeting to both Iverson and Perdaems, although Iverson denied receiving this memo. Stimac and Perdaems agreed that at this point, Stimac would handle the problems without Perdaems' intervention.

Two months later another meeting was held where Perdaems was also present. Continuing performance problems were discussed and Perdaems left a memorandum confirming the discussion in Iverson's mailbox which Iverson maintained that she did not receive. When Iverson did not improve mainstream teachers began to request that Iverson not be sent to their classrooms. As a result Stimac modified Iverson's assignment so that she would not go to mainstream classrooms as often.

In the 2004-2005 school year, a new model of interacting with the students was introduced, the Boys Town Instructional Model. Stimac and the other special education teacher, Simu Sikka, reviewed the material with the Strategy ESPs. Stimac continued to try to instruct Iverson regarding her classroom behavior, putting some of these expectations in writing, but was becoming increasingly frustrated with her.

In Iverson's June 2, 2005 evaluation, only her second at Woodland Elementary, the District made it clear that Iverson needed improvement in three areas, general competence, punctuality, and pride in work. After discussing the continuing performance problems with then District Director of Human Relations, Rod Barnes, Perdaems placed Iverson on an Improvement Plan. The Improvement Plan addressed three general performance areas: (1) on time arrival to assigned duties; (2) holding students accountable for their behavior choices; and (3) completing routine duties and assignments. The Plan also referred to certain assistance to be provided such as developing a schedule for Iverson and giving her more thorough directions. Iverson responded to the evaluation angrily necessitating another meeting between Stimac and Perdaems.

Stimac testified that Iverson did not improve and that all of her performance issues continued through the end of the 2007-2008 school year. She did not, however, document these ongoing concerns during the 2005-2006 school year, or the 2006-2007 school year, or during the first part of the 2007-2008 school year. As an explanation, Stimac maintained that in part this was because of Iverson's angry outburst in June of 2005 and in part it was due to her continuing frustration. Stimac did, however, continue to frequently discuss the specific performance issues as they arose and to modify Iverson's work assignments in an attempt to make the job easier for Iverson.

Perdaems, in 2007-2008, also heard from Christine Voigtlander, the Behavior Intervention teacher about Iverson's improper monitoring of students during recess. Perdaems at the end of 2007-2008 prepared a third evaluation. After receiving input from Stimac that the problems were still continuing without improvement, Perdaems again contacted Barnes, who came to the school to meet with Stimac, Sikka, and Perdaems. Barnes and Perdaems, after receiving the information from the special education teachers, decided to couple the evaluation with a Letter of Expectation of Unsatisfactory Performance. On the last day of school, the District gave Iverson the evaluation for the 2007-2008 school year that noted multiple areas that needed improvement along with the Letter of Expectation.

Iverson received the evaluation and Letter of Expectation in a meeting on June 5, 2008. Barnes, Perdaems, and Anita Kerfeld, an Association representative, were present. Barnes testified that at the June 5 meeting, he identified a number of ways in which Iverson could choose to improve her skills over the course of the summer. He offered to allow her take home textbooks and teacher's manuals, to permit her to check out ParaPro study materials from the District's resource center, and offered to hire a math tutor for her and any other ESPs who might desire to brush up on their math skills. Barnes did not require Iverson to pursue any specific course of action, but left it to Iverson to decide what she would need to correct her deficiencies. Iverson never requested or suggested any other type of assistance from the District. She did not take advantage of any of Barnes' offers during the summer of 2008. Iverson testified that she did not have time to do any of these things because she was employed by the District during the summer as an EBD ESP in the extended school year program and because she was also on call for jury duty.

Perdaems decided to move Iverson from Stimac's classroom of younger EBD students to Sikka's classroom of older students for the fall of 2008 to replace Katie Kimsey, an ESP out on a short-term maternity leave. Perdaems testified that she thought that assigning Iverson to work with a different teacher, with older students, and at least observe and model from a long-time highly-successful Strategies ESP in that classroom might increase her likelihood of success. The District reinforced the expectations set out for Iverson on the first day of school by holding a meeting with Iverson, Sikka, and Perdaems where the Letter of Expectation was reviewed. Sikka also presented Iverson with a schedule to follow.

Sikka also began to document issues regarding Iverson's job performance from the beginning of the school year. Iverson failed to monitor students and to redirect them appropriately and as a consequence was struggling with gaining respect from the students. She needed constant reinforcement from both mainstream and Strategies teachers. She also continued to have difficulty with following instructions even with simple tasks such as grading papers. An even more glaring performance issue was Iverson's failure to exercise proper judgment during a crisis situation. On October 15, she brought students back into the vicinity of a crisis to get their coats for recess after having been instructed to remove the students from the area in the first place by taking them to lunch.

On or around October 20, 2008, Kimsey returned to Sikka's classroom from her leave. The District decided to continue Iverson's assignment in Sikka's classroom although there would then be three ESPs in Sikka's class. Perdaems also met with Iverson on the same day to review some specific concerns that had been brought to Perdaems' attention and to issue a verbal warning and to again outline expectations. After this meeting, she prepared a document entitled "Written Documentation of Verbal Warning and Expectations" and placed it in Iverson's mailbox. Iverson maintained that she never received this document.

Paerdaems prepared a new evaluation and a written warning of unsatisfactory performance. This document was prepared from information provided by Sikka but contained much of the same content as the documents Iverson had received on June 5, 2008 as well. It contained only three expectations out of the seven previously set forth but in the District's view these were the most important and encompassed some of the others previously set forth. The written warning noted that the enumerated performance issues were "a continuation of a pattern of conduct for which Iverson had previously been warned… and in spite of effort to assist... with this problem the conduct has continued." A meeting was held on October 24 with Kristine Argue, an Association representative, and Barnes also present. Iverson was given the evaluation and the written warning. She never challenged or contested the contents of the evaluation nor did she submit a written response.

Sikka met with Iverson on November 3 and presented her with a new schedule which was even more detailed than her previous schedule because Iverson needed the

extra support. On November 4, Perdaems observed Iverson in a mainstream classroom merely standing in the back of the classroom and failing to inter-act with the students. Perdaems talked with Iverson and presented her with a Teacher Feedback form in which she recommended that Iverson move throughout the classroom and monitor students' work. The next day, Perdaems again observed Iverson in a mainstream class. Despite the recommendation given in writing the day before, Iverson was once again just standing in the back of the classroom and not inter-acting with the students. By mid-November, the other ESPs in Sikka's classroom were voicing complaints to Sikka about Iverson and she was receiving complaints from mainstream teachers.

On November 14, 2008, Sikka was absent and left a detailed schedule for Iverson. Iverson observed what she believed to be a fight in a hallway between two students and was late getting her two students to a mainstream classroom where a spelling test was being administered. As a result, one of the students was not able to complete the spelling test in class and Iverson was instructed to give him the test later. Perdaems observed Iverson administering the test. Perdaems saw that Iverson was not utilizing the established protocol for administering the test. Perdaems testified that Iverson did not know how to properly administer a spelling test. She testified that Iverson did not appear to know the words on the test in question and could not even pronounce the words correctly. Iverson credibly testified that she was rattled by having taken the two students to class late and by Perdaems observing her. She acknowledged doing a poor job of administering the spelling test to the student.

Iverson went to Perdaems office later in the day and told Perdaems that she knew she did not do a good job of administering the test. According to Iverson, she had learned an alternative method of giving a spelling test in Stimac's class described as "chunking words" which she was attempting to follow. Perdaems testified that while discussing the administration of the test, at no time did Iverson mention "chunking" words or this alternate technique. Perdaems asked Iverson to spell one of the words on the test "decent" and to use it in a sentence. Iverson was unable to do this.

Perdaems contacted Barnes over the events occurring on November 14. At the same time, she received e-mails from Sikka and Kimsey expressing other concerns about Iverson's behavior with the students. She forwarded these e-mails to Barnes. On the following Monday on November 17, Perdaems received yet another e-mail, from Voigtlander noting other specific discrepancies. She forwarded this to Barnes on November 17.

Iverson was home sick on November 17. Barnes called her at home to advise that she was suspended for three days based upon her taking the students to the mainstream class late. This suspension is not before the undersigned for consideration.

Iverson never returned to her position after being suspended. On or around November 20, Barnes met with Argue, Iverson's Association representative. He informed Argue that he did not believe that Iverson could suitably perform any other paraprofessional position based upon her inability to understand and follow directions.

He called Iverson on the evening of November 20 and told her not to report to work on Friday, November 21, and arranged a meeting with her and Argue for Monday, November 24.

On November 24, Barnes gave Iverson the choice of resigning or being fired. Iverson asked if she would qualify for unemployment benefits if she resigned and Barnes told her that she would not. Iverson then told Barnes he would have to fire her since it was important that she qualify for unemployment benefits. Barnes then verbally fired her on November 24 and the School Board formally acted on December 2, 2008. The District sent Iverson a formal Notice of Termination dated December 5 confirming her termination effective November 24, 2008.

The termination is the subject of the instant grievance.

With respect to training opportunities and coordination with the special education and classroom teachers**,** Association President Hespen testified that training opportunities for paraprofessionals were inadequate and that special education ESPs never get a meaningful opportunity to participate in meetings with the special education and mainstream teachers with whom they work. This is the case because there is no opportunity to hold the meetings during the school day; and ESPs are not paid to stay before or after the school day when the students are not present. She also indicated that on a scale of 0 to 10, the level of training provided to ESPs was around 1.

According to Hespen, every now and then, the Special Education Department would provide a class which was not well-publicized, depending on the teacher or building administrator to get the information out to the ESPs. She stressed that the parties have a memo of understanding on developing a professional development plan for ESPs providing specific training and making the training mandatory for all ESPs so that they will all have at least a basic understanding of behavior management, cultural competencies, the role of the ESP, and nuts and bolts information regarding the computers, filling out forms, etc. At this point in time, most training that is offered is completely voluntary for the ESPs. Hespen indicated that at best the District provided Iverson with vague suggestions as to how to improve her performance.

POSITION OF THE PARTIES:

<u>District</u>

The District argues that progressive discipline does not apply in the present situation because is it generally a matter of contract. Noting that the applicable contract for the period of July 1, 2006 through June 30, 2008 does not contain a progressive discipline provision which was included in the more recent agreement, the District argues that the 2008-2010 agreement was not in effect until the date of its execution on July 18, 2009 and does not apply in the present arbitration. Becky Hespen, the Association President conceded this point on cross-examination. Inasmuch as the applicable

contracted did not contain any provision addressing progressive discipline, progressive discipline is unnecessary in the instant case.

Even assuming *arguendo* that progressive discipline does apply, according to the District, Progressive discipline was followed. Performance problems began as early as the 2000-01 school year. Since that date there have been numerous discussions with Iverson by the two special education teachers who supervised her and Principal Perdaems regarding these performance problems. When there was no improvement, the problems were addressed in an evaluation and improvement plan at the end of the 2004-2005 school year. The problems however, continued and were addressed in an evaluation as well as a Letter of Expectation at the end of the 2007-2008 school year. In this letter, Iverson was expressly notified that if she failed to correct her performance, she could be terminated. A verbal warning was issued to Iverson on October 20, 2008. She received an amended evaluation, a new evaluation and a written warning on October 24, 2008. The written warning again notified Iverson that she could be terminated if she failed to correct her performance. When the performance still did not improve, she was terminated effective November 24, 2008. In the District's view, it is unfathomable to conceive that this series of notices could be characterized as anything short of progressive discipline.

The District concedes that Iverson can only be discharged for just cause pursuant to Article VI, Section 9, Subdivision 2 of the collective bargaining agreement. Although the agreement does not define what constitutes "just cause" for termination, "just cause" is traditionally described as cause which, given the totality of the circumstances, enables an impartial observer to determine that the adverse action taken against an employee is in all respects a reasonable assertion of the authority designed to meet legitimate management objectives. In sum, the analysis involves a determination of whether the misconduct occurred and if so, whether the penalty imposed was in all respects just. The District asserts that the standard of proof in ordinary discipline and termination cases is a preponderance of evidence.

The record is replete with evidence establishing significant and longstanding performance problems with respect to Iverson. These problems go right to the heart of the primary responsibilities of a special education ESP. Iverson had continually demonstrated an inability and/or failure to properly monitor and proactively intervene with students to de-escalate their inappropriate behavior. She would either fail to act at all waiting for another staff member to do so, or in the few occasions where she would intervene, she would engage in behavior that would escalate the student's inappropriate responses. Both special education teachers and Perdaems had innumerable discussions with her and provided her with strategies that she could employ in such situations. She also had ample opportunities to observe both teachers and other special education ESPs deal with students and to model their behavior and techniques. She also attended a workshop dealing with this issue on October 30, 2001. Despite the various evaluations, verbal and written warnings and the assistance and/or training provided, Iverson had not improved over a period of approximately eight years. Her lack of performance is uncontested.

The District has also established by a preponderance of the evidence that Iverson was deficient in the area of punctuality, particularly with respect to getting students to their mainstream classes on time. The last such incident on November 14, 2008 when Iverson did not get a student to his mainstream class on time resulted in the student missing a spelling test. Notwithstanding that Iverson had been warned about this repeatedly and provided with significantly detailed schedules to support her performing her duties in a timely manner, there was no change in her performance in this respect.

Iverson has repeatedly failed to follow instructions over a significant number of years resulting in countless conversations with the special education teachers which have had little, if any, impact. Even when left with detailed written instructions or clear verbal and written communication, Iverson has failed to follow them. The record has also established that Iverson has exhibited a continued inability to perform even the simplest tasks after repeated instructions, eventually resulting in the special education teachers' modifying her assignments by removing such duties. Iverson has been unable to help students with their academic assignments beginning in the 2002-2003 school year and continuing right up to her termination on November 14, 2008. As the November 14, 2008 incident establishes, she did not know how to pronounce some of the spelling words included on the elementary student's spelling test and could not use the works in a sentence when she met with Perdaems to discuss her administration of the test.

Iverson has been unable to follow the Boys Town Instructional Model adopted by the Strategies program since the beginning of the 2004-2005 school year and she has failed to follow other applicable policies and procedures such as the standard protocol used for the administration of a spelling test or the standard protocol of having students bring their jackets to the lunch room in preparation for going out to recess. Iverson has continually used poor judgment in dealing with everyday educational situations. All of these performance issues, taken individually and collectively, go to the heart of the essential duties of a special education ESP in the District's Strategies program. There is no real dispute that these performance issues exhibited by Iverson fall within the grounds for termination set forth in the termination notice. Taken individually or in concert, they constitute a lack of general competence, a failure to follow policies and procedures, a lack of professionalism, a lack of communication, initiative and/or cooperation and a lack of productivity. There is no question that the District had "just cause" to terminate Iverson.

The District asserts that the imposed penalty of termination is in all respects just. These significant performance deficits continued over a period of approximately eight years despite numerous attempts by the District to improve Iverson's performance, i.e., repeated discussions with her, the provision of detailed schedules and instructions, and modifications of her assignments not provided to any other ESP in the Strategies Program. The District points to the Improvement Plan dated May 29, 2005 as evidence that it has attempted to address and assist Iverson correct the deficiencies. Nevertheless, her performance did not improve although modifications were made consisting of not assigning her additional tasks, assigning her younger students to work with academically, assigning her students that had less severe behavioral problems, providing her with

detailed schedules and written instructions whenever possible and not sending her to mainstream classes as often as the other ESPs. When she still did not improve, she was given a letter of instruction.

While there is some dispute as to the precise offers of assistance, there is no dispute that there were offers of assistance made by the District at the time that Iverson was given the June 5, 2008 letter of expectation. The District offered to let Iverson take textbooks and teacher manuals home during the summer, to allow her to check out test materials and offered a math tutor. Iverson did not accept any of these offers and did not request any additional support and assistance beyond that offered. None of her explanations as to why she did not take the District up on its offers were credible.

When Iverson did not improve during the 2008-2009 school year, she was given a verbal warning on October 20, 2008 and evaluated shortly thereafter on October 24. That evaluation revealed a continuation of the performance issues and when coupled with her failure to correct them, she was given a written warning. It is undisputed that when her performance issues continued unabated after the written warning, the District terminated her effective November 24, 2008. It is noteworthy that each and every staff member that testified during the hearing testified that Iverson was wholly incompetent.

The Association does not contest that some sort of disciplinary action is appropriate, but rather focuses on the argument that, under the facts of this case, termination is not appropriate. To support its position, the Association makes four points. First, it argues that it is inappropriate to terminate Iverson given her long tenure with the District. While it is true that one of the factors considered in evaluating discipline is length of service with the employer, this factor must be viewed in conjunction with the employee's work record. Here Iverson has had significant performance issues for at least the last eight of her twenty-three years with the District. This can hardly be characterized as the type of work record that would justify downgrading a termination.

Second, the Association argues that Iverson was not given a sufficient amount of time to remedy her deficiencies. This is not supported by the underlying facts which demonstrate that she had eight years to correct her performance problems. She took absolutely no action to improve her performance over this period of time.

Third, the Association claims that termination is not appropriate because the District did not provide appropriate assistance to grievant. This contention is flawed for two reasons. It is not supported by the facts which establish that the District both provided training and offered assistance. Both special education teachers, Stimac in particular, provided Iverson with constant feedback, including strategies that could be used in dealing with individual students. Stimac and Sikka reviewed the Boys Town Educational Model on an individual basis with Iverson and tried to provide modeling examples for her. The District offers training to all Level I and Level II ESPs. The Union's President acknowledged that training was available but attempted to downplay its significance by claiming that it was not very well advertised. However, Barnes testified that these sessions are always full. With regard to some of the performance

issues, the District questions whether any specific training is necessary, such as getting an employee to follow basic instructions.

Stressing that the Association, through Hespen's testimony, is claiming that the District merely shuffled Iverson from position to position without addressing her significant performance deficits, the District notes that this is precisely what the Association is requesting, namely to move Iverson to yet another ESP position. After approximately eight years of significantly deficient performance going to the very heart of the responsibilities of the ESP position, coupled with the numerous interventions and assistance provided by the District, with no reciprocity shown by Iverson, "enough is enough." The District has proven just cause to terminate Iverson's employment. It requests that the grievance be denied in its entirety.

Association

The Association contends that the District lacked just cause to discharge Iverson because it did little to nothing to train her and help her succeed over the course of her eight plus years of employment as a Special Education ESP. The District set her up to fail during the 2008-2009 school year by moving her to a classroom where her weaknesses would be more problematic and failed to use progressive discipline when it fired her. Stressing that Iverson has 23 years of employment with the District, the Association maintains that in the space of two and one-half months, the District took steps to terminate her employment. Since the three-day suspension was not part of the hearing and is not before the arbitrator, the Association insists that the arbitrator cannot rely on that discipline in any way to support the District's termination.

The issue is not whether Iverson had serious issues regarding her competence as a Special Education ESP. The Association concedes that she clearly did. Rather the Association maintains that, but for one negative evaluation in the Spring of 2005, the District by and large did nothing to identify Iverson's problem areas, nothing to direct her to take specific, identified, appropriate training paid for by the District or to use other specific resources to address her problem areas which then would have formed the basis to hold her accountable for using that training and other resources to improve her performance or to discipline her if she did not improve.

In the Union's view, the disciplinary "clock" started running on June 5, 2008, the last day of the 2007-2008 school year. Although the District has sought to show that Iverson's entire history as a Special Education ESP can be used to support the discharge, the only documentation provided by the District prior to June 5, 2008 was the evaluation that Iverson received in June of 2005 noting areas needing improvement accompanied by an improvement plan. These documents were not disciplinary in nature and there was no follow up on the problem areas identified for three full years. The arbitrator should find that the District's failure to timely address the concerns it identified as early as 2005 with no further notice to Iverson that it had continuing concerns about her performance until June 5, 2008 bars its reliance on her past performance and should mean that the District's attempt to impose progressive discipline starts from "Square 1" on June 5, 2008.

The District, whether deliberately or not, set up Iverson to fail by transferring her to a different classroom for the first part of the 2008-2009 school year. Given that June 5, was the last day of the 2007-2008 school year, the relevant time period from September to mid-November of 2008 constitutes the time period for which Iverson was adjudged deficient. During this time it involuntarily transferred her to a different classroom working with a different Special Education Teacher, different ESPs, and different, older students.

Noting that the District claimed that it transferred Iverson in the hope that she would succeed with older students in grades 4-6, the District initially told her that she would be transferred to the older special education classroom until October 15, 2008 when another ESP returned from leave. On October 10, 2008 Principal Perdaems told her that in order to maintain consistency in programming in that classroom, Iverson would remain in that classroom through winter break although the other ESP had returned from leave. If the District were so concerned about consistency, it would have hired a substitute to replace the ESP out on leave for the six weeks that she was absent and not moved Iverson from one classroom to another with no training on working with older students provided. If the District thought that Iverson was incompetent to work with younger students in grades K-3, why would it think she would have a greater chance of success working with older students at a higher academic level?

The Association also points out that Perdaems' testimony as to the reasons for transferring Iverson conflicts with that of Stimac who worked with Iverson for over eight years. Stimac testified that Iverson's problems were exacerbated when the class level changed from younger students to third to fourth, and sometimes fifth graders, because the higher academics became a problem.

The District did not use progressive discipline with respect to its discharge of Iverson. She is an employee with over 23 years of experience with the District. Nevertheless, she ended up on the fast track for termination, being written up at the very end of the 2007-2008 school year, then receiving a similar write-up in Mid-October of 2008, then being fired after her last day of employment on November 14, 2008. After years of doing little to nothing, the District rushed to fire Iverson, with no reasonable time and reasonable assistance provided for her to improve. Acknowledging that the formal steps of progressive discipline were not set forth in the applicable contract, the Association claims that the District followed the principles of progressive discipline prior to their inclusion in the current collective bargaining agreement. With or without contract language or past practice, the principles of progressive discipline apply as a matter of fundamental fairness in discipline cases.

Because the arbitrator cannot rely on the three-day suspension which is not part of the case, the District's history of disciplining Iverson consists of two Letters of Expectation of Unsatisfactory Performance, dated May 29, 2008 given to her on June 5, 2008 and the other given to her on October 24, 2008.

In addition to failing to follow the principles of progressive discipline, this is a case where Iverson was performing well in her position as a Media Aide in Classification I, when she agreed to transfer to a Special Education ESP in Classification II to help out her principal. Then, for over eight years, she was given virtually no training or assistance in a position in which she was clearly floundering. Unlike teachers and other salaried employees who are expected and required to work on their professional development, ESPs are hourly employees and unlikely to participate in voluntary training opportunities for which they are not paid. The District put the blame on Iverson for not figuring out what training she needed and then going out and getting it on her own time and her own dime. The District would have Iverson, an employee who was fired for her incompetence and failure to take the initiative with students and to follow through with teachers' suggestions, determine what help she needed and then follow through to completion. This was a prescription for failure and relieves the District of any responsibility to its ESP staff.

The Association requests that the arbitrator find that there was no just cause to discharge Iverson. Iverson is willing to accept whatever level of lesser discipline that the arbitrator feels is appropriate. It requests reinstatement to her position with back pay and benefits, less any amount of compensation that she received from the date of her discharge to the date of reinstatement.

The Association feels that Iverson might do better in a different special education program working with younger students with different disabilities and has indicated a desire to negotiate with the District regarding Iverson's placement in a different position, perhaps even a different classification. While, the Association understands that it is beyond the Arbitrator's authority to order the parties to enter into such an agreement, the Association makes note of this because it wants the arbitrator to understand that it wants Iverson to succeed with the District provision of appropriate and necessary training so that she can succeed. In sum, the Association requests that the grievance be sustained.

DISCUSSION:

On its face, the case appears to focus upon Iverson's competency to perform in the Strategy ESP position to which she was assigned. The District has presented a compelling case, which the Association really does not dispute, that she was wholly and grossly incompetent in her performance of that job assignment. Rather, the Association makes four arguments which must be addressed in order to ascertain whether there was just cause to sustain the termination.

First, the Association, relying upon Hespen's credible testimony about training opportunities, argues that although Iverson had difficulties performing her job, the District failed to offer adequate training and to assist her in overcoming her deficiencies so that she could succeed in the classroom. This argument fails for several reasons. Whatever the level of training offered by the District for Strategies ESPs, it has been sufficient for all of the other Strategies ESPs to perform adequately or even excellently in their positions. Kimsey's testimony established that educational training opportunities

existed if the ESP sought them out. Further, the record is replete with instances where both Stimac and Sikka, recognizing Iverson's difficulties, singled her out for more detailed explanations, counseling as to how to handle behavioral situations as they observed them arising, attempted to model the correct responses according to the Boys Town Model, and made many adjustments in their job assignments in an attempt to overcome or circumvent the deficiencies that Iverson was exhibiting. Frankly, it is difficult to conceive of what other training the District could offer other than one-on-one tutoring that would have addressed the type of deficiencies that Iverson exhibited.

In making this conclusion, the undersigned makes no inferences on the adequacy or inadequacy of the general level of paraprofessional development offered to ESPs in the District and finds it laudable that the parties are working on a concrete plan to expand and address training and development issues through their memorandum of understanding. The only issue before the undersigned is whether the District left Iverson to flounder, as the Association alleges; and the evidence suggests that this is not the case. Iverson did not take Barnes up on any of his suggestions to correct her academic deficiencies. She had an obligation to at least attempt to address her academic deficiencies. Her explanations as to why she could not do any of the proposed suggestions do not suffice, especially when it comes to taking home and studying textbooks and teacher's manuals.

The other difficulty with the Association's position that the District did not offer sufficient training which could have corrected many of Iverson's problems in the classroom is that the evidence leads to the opposite conclusion. Iverson displayed poor judgment in many classroom situations, could not read, i.e., monitor, the student's emotional state, had difficulty pro-actively intervening or refraining from intervening depending on what was appropriate, and therefore, could not re-direct or de-escalate the student exhibiting the inappropriate behavior. She could not perform the core function of her job and would not have been able to do so with or without additional training. In the opinion of the undersigned, she just did not get it. Much of the District's criticism also centers around her inability to follow directions, complex or simple in nature, and her inability to get students to mainstream classrooms, lunch, recess, special classes, punctually. Again, it is difficult to understand what more training could have done to remedy these problems.

One area where classes and training could have made a difference is in academic competency. Here the District made the offer of the math tutor and permitted Iverson to take home textbooks, teacher manuals and ParaPro materials over the summer, which Iverson declined. She did nothing to correct her deficiencies during the summer when she was on clear notice that her job was in jeopardy. Without some effort on Iverson's part, her academic competency could not improve. Moreover, simple observation of Iverson's demeanor at the hearing buttresses the conclusion that her understanding of concrete substantive issues presented in any context is lacking. The undersigned doubted whether Iverson actually understood all that was being said during the hearing in this matter. It is unlikely that any amount of training could rectify her inability to understand what was occurring in the immediate environment in which she functioned.

One final point must be made with respect to this training/professional development issue. Based upon testimony from Iverson and Kimsey, it is apparent that at least in the fall of 2008, upon Kimsey's return, Iverson was making some efforts to try to modify her interaction with students by looking to Kimsey for assistance and direction. She may have been making some small efforts at this time, but her deficits were just too great. Based upon her inability to follow directions, she could not function appropriately in the classroom no matter how much training and support she received.

The Association's second argument is more difficult to address. The Association argues that the District must apply progressive discipline to sustain the serious penalty of termination and that it failed to do so in this instance. The District's argument that it need not follow any sort of progressive discipline because there is no specific contract language in the applicable agreement is rejected. The Association is correct that progressive discipline is often considered when making a determination of whether there is just cause for discharge, irrespective of whether specific language is included in the collective bargaining agreement. However, without specific language as to the method of progression to be followed, arbitrators have generally ruled that the progressive discipline must consist of at least the following elements: (1) providing clear notice of deficiencies; (2) providing notice that discipline will be imposed for failure to correct them; and (3) providing adequate time and opportunity in which to correct the deficiencies, or at least show improvement. In other words, without specific contract language requiring a progression beginning with a verbal warning, followed by a written warning, then a suspension of some sort, and ultimately termination, arbitrators look to see if an employee has been adequately warned that her deficiencies are not acceptable and unless corrected will lead to discipline and/or discharge.

The District here bears some burden for failing to appropriately and timely deal with Iverson's performance issues. Contrary to representations by the Association, it is unclear that Iverson was performing well in her Library/Media ESP position. It is clear that she was not performing up to standards in the Resource Manager position at Fair Oaks. Based upon Stimac's testimony, Iverson probably should not have passed probation as a Strategy ESP or been permitted to believe that she was performing adequately in that position for at least the first three years. Perdaems and Stimac bear some responsibility in deferring the process of documenting Iverson's deficiencies and issuing appropriate disciplinary notices in a timely fashion. The failure of the District to follow-up after Barnes drafted the Evaluation and Improvement Plan in June of 2005 for three years, until June of 2008, can only lead to the conclusion that Iverson did not have adequate notice in the context of progressive discipline that she was continuing to perform inadequately and unacceptably to the extent that her job was in jeopardy until the June 5, 2008 Evaluation and Letter of Expectations.

Therefore, the Association is correct in alleging that the time period from which Iverson received adequate notice that she must correct her performance problems or face further discipline commenced on June 5, 2008 and ran to the date of Iverson's effective discharge. Given the specific problems that the District identified in both the June 5, 2008 evaluation and letter or performance, its offer of various types of assistance to

correct the problems, the concrete instructions provided by Sikka and Perdaems throughout the fall of 2008, and Iverson's inability to correct her performance or to make any but the smallest attempts at improvement, it must be concluded that the District's actions in issuing the evaluations and letters of expectation along with verbal and written reprimands constituted sufficient notice and opportunity to improve to comport with the principle of progressive discipline in this context. The undersigned does not draw this conclusion lightly.

The Association argument that transferring Iverson from Stimac's room to Sikka's room was a prescription for failure is rejected. While the transfer may have resulted in creating more issues with respect to Iverson's academic competency, it could just as easily have solved or partially remedied several other problems that Iverson was experiencing such as her difficulty following Stimac's instructions, or her problems monitoring and de-escalating behavior because she would be working with older children who most likely would be possessing more emotional and behavioral control than younger children. The undersigned does not ascribe ulterior motives in Iverson's transfer to and retention in Sikka's classroom.

The record establishes that in mid to late November of 2008, Iverson's performance was causing even more concern on the part of more and more teachers and ESPs who were communicating to Perdaems how these deficits were impacting on their ability to teach or deal with the students. Her failure to do anything affirmatively to address the District's concerns during this time period and her continual failure to follow simple directives or handle simple educational tasks like administering a spelling test convinces the undersigned that Iverson was given the opportunity to correct or at least begin to correct her performance issues in the fall of 2008. She simply would not or could not do so.

The Association raises Iverson's long tenure of twenty-three years as an employee of the District. Obviously this is a serious consideration in any determination to discharge an employee. Tenure alone, however, cannot serve as a shield for continuing incompetence. In this case, given the performance deficits of this employee, the undersigned cannot substitute her judgment for that of the District and mitigate the discipline based upon Iverson's tenure alone. The undersigned cannot and will not exceed her authority as an arbitrator by substituting her judgment for that of the District with respect to its determination that reinstatement to some other position within the District is not appropriate for this employee.

Accordingly, it is my decision and

AWARD

1. Independent School District, No. 279, the Osseo School District, had just cause to discharge the grievant, Janice Iverson.

2. The grievance is denied and dismissed in its entirety.

Dated this 26th day of April, 2010, in Madison, Wisconsin.

By /s/Mary Jo Schiavoni_____
Mary Jo Schiavoni, Arbitrator