

STATE OF MINNESOTA
MINNESOTA BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN:

ELK RIVER INDEPENDENT SCHOOL
DISTRICT NO. 728,

EMPLOYER

-and-

ELK RIVER EDUCATION ASSOCIATION,

UNION.

ARBITRATOR'S AWARD
Grievance Arbitration
Discipline – Suspension
BMS Case No. 10-PA-1365

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Todd Jesperson
DATE OF GRIEVANCE:	December 1, 2009
DATE ARBITRATOR NOTIFIED OF SELECTION:	June 22, 2010
DATES & PLACE OF HEARING:	September 23 & 29, 2010 Zimmerman, Minnesota
DATE POST HEARING BRIEFS RECEIVED:	December 2, 2010
DATE OF AWARD:	January 3, 2010

ADVOCATES:

FOR THE EMPLOYER:

Michael J. Waldspurger, Attorney
Ratwik, Roszak & Maloney, P.A.

FOR THE UNION:

Jess Anna Glover, Attorney
Education Minnesota

ISSUE:

Did the Employer have just cause to suspend the Grievant for five (5) days without pay?

Does the District’s memorandum of suspension and directives contain information that is false and inaccurate under Minn. Stat. Section 122A.40, subd. 19?

If the evidence does not support the discipline administered, what is the appropriate remedy?¹

WITNESSES:²

FOR THE EMPLOYER:

Student Witness # 1
Student Witness #2
Student Witness #3
Student Witness #4
Student Witness #5
Student Witness #6
Student Witness #7
Student Witness #8
Student Witness #9
Student Witness #10
Student Witness #11
Mark Huss, Assistant Principal
Student Witness #12
Rodney Barnes, Dir. Human Resources

FOR THE UNION:

Daniel Nabedrick
Todd Jesperson, Grievant
Julie Breyen, Teacher
Julie Novak, Para-Prof.
Connie Cederberg, Para-Prof.

ALSO PRESENT:

Sandy Miller, Ed. Minnesota
Bill Hjertstedt, Pres. E.R. Ed. Assn.
Hal Shogren, E.R. Ed. Assn.

¹ The Parties stipulated to the Statement of Issues.

² Witnesses are listed in order of their appearance. Student witnesses, being juveniles, are referenced by number of appearance rather than by name.

JURISDICTION:

The matter at issue, regarding disciplinary action of the Grievant, came on for hearing pursuant to the Grievance Procedure contained in the Collective Bargaining Agreement (CBA) between the Parties. Said Agreement, is in effect from July 1, 2009 through June 30, 2011. The Grievance Procedure, Article 15, in relevant part provides as follows:

“15.1 Definitions. A grievance is any controversy between the School Board and the Association or between the School Board and an employee or group of employees as to:

- A. Interpretation of this Agreement
- B. a charge of violation of this Agreement
- C. an alleged violation involving wages, hours, or “terms and conditions of employment” as defined in PELRA, as amended (Chapter 179A.03, Subdivision 19) resulting in an unnecessary hardship.”

“15.8 Arbitration Procedures. In the event the teacher and the School Board are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:

15.8.1 Level 4. A request to submit a grievance to arbitration must be in writing on the attached designated form, Appendix G, signed by the aggrieved party, and such request must be filed in the office of the School Board within ten (10) days following the decision in Level 3 of the grievance procedure.

15.8.2 Prior Procedure Required. No grievance shall be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal provisions.

15.8.3. Selection of Arbitrator. Upon the proper submission of a grievance under the terms of the procedure, the parties shall, within ten (10) days after the request to arbitrate, attempt to agree upon the selection of an arbitrator. If no agreement on an arbitrator is reached, either party may request the Commissioner of the Bureau of Mediation Services to appoint an arbitrator, pursuant to M.S. 179.A21, Subdivision 2, providing such request is made within twenty (20) days after request for arbitration. The request shall ask that the appointment be made within thirty (30) days after the receipt of said request.

15.8.4. Powers and Limitation. The arbitrator shall set the time and place for the hearing, the method or procedure, and make all necessary rulings. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of the Agreement or to any agreement made supplementary hereto, and shall only be allowed to rule on those cases that apply to the definition of a grievance as described in this article. The decision of the arbitrator, if within the scope of his or her power, shall be binding on both parties within the limitations of PELRA as amended.

15.8.5. Expenses. The teacher and the School Board shall bear their own expenses in connection with arbitration including expenses relating to the party's representative, witnesses, and any other expenses which the party incurs in connection with presenting its case in arbitration. A transcript or recording shall be made of the hearing at the request of either party. The parties shall share equally fees and expenses of the arbitrator, the cost of the transcript or recording if requested by either or both parties, and any other expenses which the parties mutually agree are necessary for the conduct of the arbitration."

The Employer has promulgated a policy regarding religious, racial or sexual harassment and violence, which in relevant part provides as follows:

"TITLE: RELIGIOUS, RACIAL OR SEXUAL HARASSMENT AND VIOLENCE

1.0 GENERAL STATEMENT OF POLICY

- 1.1. It is the policy of Independent School District No. 728 to maintain learning and working environment that is free from religious, racial or sexual harassment and violence. The School District prohibits any form of religious, racial or sexual harassment and violence.
- 1.2 It shall be a violation of this policy for any pupil, teacher, administrator or other school personnel of the School District to harass a pupil, teacher, administrator or other school personnel through conduct or communication of a sexual nature or regarding religion and race as defined by the policy. (For purposes of this policy school personnel includes school board members, school employees, agents, volunteers, contractors or persons subject to the supervision and control of the District.) The scope of District 728's responsibility to administer the provisions of the policy would include all educational activities, events, and contracted services supervised by District 728 employees. District 728 and its employees will not be

responsible for policy violations by individuals who use District 728 facilities or property with or without permission for private purposes.

- 1.4. It shall be a violation of this policy for any pupil, teacher, administrator or other school personnel of the School District to inflict, threaten to inflict, or attempt to inflict religious, racial or sexual harassment or violence upon any pupil, teacher, administrator or other school personnel.
- 2.2. Sexual harassment may include but is not limited to:
- 2.6. Unwelcome behavior or words of a sexual nature directed at an individual because of gender.”

The Parties processed the instant grievance through the process set forth in the CBA Grievance Procedure, and failing to resolve the matter, advanced the dispute to arbitration

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted in accordance with the provisions of the CBA and the Public Employment Labor Relations Act (MS 179A.01 – 179A.30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

The Parties stipulated that the matter at issue was properly before the Arbitrator and there were no procedural challenges.

Witnesses were sworn under oath and were subject to examination and cross-examination. There was no request that a stenographic record be made of the hearing.

Student witnesses, being juveniles, are referenced by order of appearance rather than by name.

BACKGROUND

Elk River Independent School District #728 (Employer) is a public education institution that operates schools in some sixteen different locations. The location where the instant matter arose is Zimmerman Middle School, Zimmerman, Minnesota.

The Elk River Education Association (Union) is the exclusive representative of teachers employed by Elk River Schools. The Employer and Union are Parties to a Collective Bargaining Agreement (CBA) in effect from July 1, 2009 through June 30, 2011.³

The instant matter involves the suspension of the Grievant (Todd Jespersen) for five (5) days without pay on charges of insubordination, unprofessional conduct, conduct unbecoming a teacher, conduct that materially impaired his educational effectiveness, and conduct that raises serious questions about his fitness to serve as a teacher.

The Grievant is a science teacher at Zimmerman Middle School. He began teaching in the Elk River School District in September 1998. During the course of the Grievant's career as a middle school teacher, there have been allegations that the Grievant stared at the breasts of female students and looked down their shirts.

From 1999 to 2004, the middle school counselor received at least one complaint per year from female students who felt uncomfortable about the way the Grievant stared at them.⁴ In the winter of 2003, two female students informed the middle school counselor that the Grievant looked at their breasts in a manner that made them feel uncomfortable. Although the Grievant denied the allegations, he

³ Employer Exhibit #7.

⁴ Employer Exhibit #1 at 2.

acknowledged that he would need to be extremely diligent in maintaining a professional countenance.⁵

In early 2004, a female student alleged that the Grievant was looking at her breasts during a parent-teacher conference.⁶ The student's mother petitioned the Employer to remove the student from the Grievant's classroom.⁷

On October 18, 2004, a female student alleged that the Grievant was staring at her in class, that he asked her personal questions which made her feel uncomfortable; and that he spoke to her in a smooth and scary voice.⁸

On October 18, 2004, another female student alleged that the Grievant was staring at her in class, asked her personal questions which made her feel uncomfortable, and spoke to her in a smooth and scary voice.⁹

On November 24, 2004, the Employer served the Grievant with a Letter of Deficiency and placed a copy in his personnel file.¹⁰ The Letter of Deficiency informed the Grievant of the allegations against him and they had been investigated and substantiated. The Grievant was put on notice that his conduct constituted "sexual harassment in violation of state law and School District policy. The Grievant was further put on notice that, if such conduct reoccurred, it would meet the statutory grounds for his termination.¹¹

⁵ Employer Exhibit #1 at 2.

⁶ Employer Exhibit #1 at 3.

⁷ Employer Exhibit #1 at 3.

⁸ Employer Exhibit #1 at 3.

⁹ Employer Exhibit #1 at 3.

¹⁰ Employer Exhibit #1 at 1 (Affidavit of Service & Exhibit #3)

¹¹ Employer Exhibit #1 at 2 (Ref: Minn. Stat. Section 122A.40, subd. 9)

The November 24, 2004, Letter of Deficiency contained the following recommendations and directives:¹²

1. You will abide by the School District's sexual harassment policy as well as all applicable state statutes regarding sexual harassment.
2. You will not stare at female students, particularly at their breasts, in such a manner as to make them feel uncomfortable.
3. You will not comment about students' looks, clothing, appearance, or behavior unless required to do so by the School District's discipline policies or regulations.
4. You will not discuss sexuality with students, either individually or as a group; you will not make sexual comments, innuendos or any comments or gestures towards student that could be interpreted as a sexual or have a sexual connotation.
5. You will not offer any opinions to students about sexuality their physical appearance, and their feelings and moods.
6. You will always conduct yourself with students in a professional and positive manner.
7. You will meet with the building principal or his/her designee every three months for the balance of the year to review the relationship with your students and your teaching performance.

The Grievant responded to the above allegations and directives in a letter dated December 10, 2004.¹³ The Grievant denied the allegations and challenged the Employer's investigation as not being fair and objective. The Grievant identified a number of persons that he believed would attest to his integrity and be a resource to establish the true facts of the allegations.

The Grievant, in his response of December 10, 2004, also requested that the Letter of Deficiency be removed from his personnel file and the investigation be dropped. In a letter of December 16, 2004, the Employer responded that the Letter of Deficiency would not be removed. The Employer informed the Grievant if he wished to seek removal, he would need to follow the procedure set forth in Minnesota Statutes, 122A.40, Subd. 19.¹⁴

¹² Employer Exhibit #1 at 2-3.

¹³ Employer Exhibit #2.

¹⁴ Employer Exhibit #3.

On September 30, 2009, a student in the Grievant's classroom made an allegation that he had placed a candy bar in the front pocket of her hooded sweatshirt rather than in her hand, which she had extended to receive it. The student further alleged that, after placing the candy bar in her pocket, the Grievant slid his hand across her buttocks.

The Grievant acknowledged having put the candy bar in the student's sweatshirt pocket, explaining that he did not want other students in the classroom to see him give it to her. Although the student did not make the allegation to School Administration herself, the allegation came to the attention of School Administration via the parent of another student who had heard of the allegation.

In October 2009, on three separate occasions, students alleged that the Grievant stared at their breasts and/or looked down their shirt. It was also alleged that the Grievant showed favoritism to the female students by giving them credit, even though they had not completed their assignment. It was further alleged that the Grievant had caused humiliation to a male student by commenting, in front of the class, that he was overweight.

The Employer in a letter dated October 9, 2009, informed the Grievant he was being placed on paid administrative leave pending the outcome of an investigation into the above allegations.¹⁵ Thereafter, School Administration conducted an investigation of the allegations against the Grievant and concluded that there was sufficient evidence to support disciplinary action.

In a Memorandum dated November 9, 2009, the Grievant was placed on a five (5) day suspension without pay. The Memorandum also detailed the Employers findings regarding the allegations that were the basis of the disciplinary action and

¹⁵ Employer Exhibit #4.

set forth some fifteen (15) directives that were to be complied with as a condition of continuing employment.¹⁶

A Grievance was filed on behalf of the Grievant on December 9, 2009.¹⁷ The Grievant also filed a detailed response to the allegations cited in the suspension document, stating that the November 9, 2009 Memorandum should be removed from his file.

Thereafter, the grievance was processed through the CBA Grievance Procedure without resolution. On April 19, 2010 a request was submitted to the Minnesota Bureau of Mediation Services for a list of Arbitrators.

The disputed matter now comes before the instant arbitration proceeding for resolution.

EXHIBITS

EMPLOYER EXHIBITS:

E-1, Affidavit of Service with documents attached:

- Notice of Deficiency, 11/24/2004.
- Minn. Stat. 122A.40, Subd. 1 – 19.

E-2. Letter, Grievant to Jana Hennen & David Lorenz, Response, 12/10/2004.

E-3. Letter, Jana Hennen-Burr to Grievant, Personnel File, 12/16/2004.

E-4. Letter, Rodney Barnes to Grievant, Administrative Leave, 10/9/2009.

E-5. Memorandum, Rodney Barnes to Grievant, Suspension, 11/9/2009.

E-6. Grievance Report, dated 12/1/2009 and record of progress through Grievance Procedure.

E-7. Collective Bargaining Agreement, 7/1/2009 – 6/30/2011.

¹⁶ Employer Exhibit #5.

¹⁷ Employer Exhibit #6

E-8. Religious, Racial or Sexual Harassment and Violence Policy, 6/9/1998.

E-9. Memorandum to Barnes, Rebuttal of allegations, 12/9/2009

E-A, Schematic, Grievant's classroom – seating locations.

UNION'S EXHIBITS:

U-1. Section Summary Report – Students, first period, 10/22/2009.

U-2. Class activity record, Sept. & Oct. 2009.

U-3. Student Dress Code,

U-4. Letter of Reference, Julie Novak, 10/15/2009.

U-5. Letter of Reference, Connie Cederberg, 10/11/2009.

POSITIONS OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Grievant admitted to placing his hand in the female students pocket:
- In addition, the Grievant's admission that "I may have put my hand in her pocket, but I tried not to," is unequivocal testimony that he placed his hand in her pocket.
- Placing his hand in the female student's pocket is unprofessional conduct and conduct unbecoming a teacher.
- By placing his hand in the female student's pocket, the Grievant violated the directive given him, to "always conduct himself with students in a professional and positive manner."
- Professional boundaries and common sense prohibit a teacher from placing a hand into a student's clothing to deliver a candy bar.
- By doing so, the Grievant also violated the directive to "abide by the School District's sexual harassment policy as well as all applicable state statutes regarding sexual harassment."

- The Grievant act of ignoring the directives he was given constitutes insubordination.
- By placing his hand in the female student's pocket, the Grievant unreasonably interfered with her education and created an intimidating and offensive educational environment, which is in direct conflict with the District's sexual harassment policy.
- The Grievant did not deny that he touched the female students buttocks. On direct examination, he made the following admission: "It's possible that I bumped her bottom when I removed my hand."
- The Grievant admitted that his hand would not have been in a position to touch her buttocks if he had not crossed the boundary in the first place by putting his hand in her pocket.
- The reliable evidence of record overwhelming shows that the Grievant touched the female student's buttock.
- The female student subject and another student both testified unequivocally that the Grievant did, in fact, touch her buttock, and left his hand there for approximately two to three seconds.
- Further, the Grievant stared at his hand while it was on her buttock.
- The testimony of the female student subject was creditable that the Grievant slid his hand into her pocket and onto her buttock; that he kept his hand on her buttock for approximately two or three seconds; and that he stared at his hand while it was on her buttock.
- Moreover, the Grievant admitted that all the District witnesses, except B.E. were telling the truth from their perspective. It is difficult to imagine how the female student subject could have a clearer perspective of the events that occurred. If the female student subject was telling the truth from her perspective, then the Grievant intentionally touched her buttock.
- Even if one to assume, for the sake of argument, that the Grievant accidentally slid his hand down the female students side and accidently touched her buttock, the Grievant is no less culpable for the inappropriate touching.
- By intentionally crossing the student-teacher boundary and putting his hand in her pocket, the Grievant put himself in a position that was likely to lead to an inappropriate touch.

- Like a gunman who fires into a crowd, the Grievant knew or should have known that his hand was going to make contact with the female students body when he pulled it out of her pocket, after plunging it deep enough so that she could feel his hand in her pocket.
- By touching the female student's buttock, the Grievant engaged in unprofessional conduct, immoral conduct, and conduct unbecoming a teacher. He violated the directive to "always conduct himself with students in a professional and positive manner" and to "abide by the School District's sexual harassment policy as well as all applicable state statutes regarding sexual harassment." Again, the Grievant's violation of directives constitutes insubordination.
- The reliable evidence of record overwhelming shows that the Grievant has stared at the breasts of numerous female students. At least five students testified about personally observing the Grievant stare at their breasts or the breasts of other female students.
- The observations of these students are consistent with the observations of numerous other female students who have reported the same conduct over the past decade. The repeating nature of the allegations adds to the creditability of the female students who complained about the Grievant staring at their breasts.
- The Grievant's conduct – staring at the breasts of seventh grade female students – is shocking and appalling, and it has had very real and tangible consequences for his victims.
- One female witness testified that she would get physically ill when she was in the Grievant's presence. Other female students withdrew from the Grievant's class to avoid him.
- These are not the actions of students who have a simple misperception about the Grievant, nor are they the actions of female students prone to gossip. Such reactions are from students who feel violated and unsafe in the Grievant's classroom.
- It is worth noting that the students did not make allegations against any other teachers, and they did not withdraw from other classes. Their concerns and allegations were specific to the Grievant and his conduct in his classroom.
- The Grievant could not bring himself to say under oath that any students, other than B.E. had lied at the hearing and there is a reason for this. The students told the truth and the Grievant knows what he has done.

- Under oath, the Grievant could not maintain a firm denial of the allegations that he stared at female student breasts. Instead, he made equivocal statements like, “I never *intentionally* focused my eyes on girl’s breasts” and “I may have inadvertently looked at girls’ breasts” when they wore clothing that violated the dress code.
- By staring at the breasts of numerous female students, the Grievant has engaged immoral conduct; unprofessional conduct; conduct unbecoming a teacher; conduct that materially impairs his educational effectiveness; and conduct that raises serious questions about his fitness to serve as a teacher.
- In addition, by staring at the breasts of numerous female students, the Grievant repeatedly violated the directives not to “stare at female students, particularly at their breasts, in such a manner as to make them feel uncomfortable.
- Such conduct also repeatedly violated the directive to “always conduct himself with students in a professional and positive manner and constitutes insubordination.
- Finally, the evidence overwhelmingly supports the conclusion that on October 6, 2009, the Grievant made a comment, in front of the entire class, suggesting that a particular student was overweight. The evidence shows that the Grievant’s comment hurt and embarrassed the student.
- The Grievant’s comment violated the directive not to comment about a student’s appearance; the directive not to “offer any opinions to students about . . . their physical appearance”; and the directive to “always conduct himself with students in a professional and positive manner.” The Grievant’s violation of these directives constitutes insubordination.
- The Grievant’s conduct undermined the student-teacher relationship and impaired his educational effectiveness.
- Based on the evidence, the District respectfully requests that the Arbitrator deny the grievance and, thereby, uphold the five-day suspension without pay, which has already been served.
- The evidence shows that the suspension is clearly supported by just cause and is reasonably calculated to prevent the Grievant from engaging in similar behavior in the future.
- In addition, the evidence shows that the Notice of Suspension is accurate in all material respects.

THE UNION SUPPORTS ITS POSTION WITH THE FOLLOWING:

- The Employer's evidentiary proof in support of the allegations was inconsistent, based on hearsay, or simply not substantiated.
- It is the Employer's burden to establish, by a preponderance of evidence, that there is just cause to discipline the Grievant.
- The statements related to inappropriate touching of Student #1's abdomen, are false and not supported by evidence. No student testimony was presented to verify the account given by administrators.
- In addition, the Employer has failed to prove that the Grievant inappropriately touched Student #1's buttocks.
- No evidence was provided to support the Employer's charge that the Grievant pressed his hand deep into Student #1's front pocket so she felt pressure against her abdomen, nor was evidence produced to support the allegation that Student #1 felt pressure against the right side of her abdomen as he removed his hand her pocket.
- Student #1's testimony was that she kind of felt the Grievant drop the candy bar into her pocket, but she did not feel his hand on her stomach, which is consistent with the Grievant's testimony.
- At the crux of this case is the creditability of the witnesses. The Grievant's responses are supported by other witness testimony.
- The Grievant admitted to dropping the candy into Student #1's pocket, acknowledging it was a poor decision. He did so because he did not want the other students to see it, as he only had that one piece of candy.
- There is no evidence to support the Employer's allegation that Student #1 had reached out her hand to receive the candy, but the Grievant ignored it and placed the candy in her pocket.
- The Grievant has no recollection of Student #1 reaching out her hand. Furthermore, other witnesses to the entire incident did not testify to Student #1 reaching out her hand.
- If the Employer believed that the Grievant favored female students over male students, the Grievant should have been disciplined for that. It can be surmised that these are simply rumors being used to paint the Grievant as

having inappropriate propensities toward female students and to diminish his otherwise credible testimony.

- The Employer's use of student witnesses to create a picture of the Grievant as an ill-intentioned man who touches girls and looks at them inappropriately is simply not true.
- The Grievant has been a science teacher for 11 years at Zimmerman Middle School and has five years teaching experience in Minneapolis Schools. The Grievant is a licensed teacher, has a master's degree and is a family man.
- The Grievant has coached girls tennis for many years and has served 20 years in the Air National Guard. He has never received any discipline, nor is he aware of any misconduct allegations related to either his coaching or military service.
- It is possible that, with an unwarranted reputation as a pervert, students would misinterpret some of his otherwise appropriate behavior, which might lead them to feel uncomfortable. This is not a problem with the Grievant's behavior, but is a misperception by the students founded in rumors, gossip, drama, and possibly even lies.
- It is possible that the Employer will argue that the Arbitrator should uphold the discipline based on the statements of Mr. Huss or Mr. Barnes, because that is the only evidence that could be mustered. However, these statements are hearsay and should be given no consideration.
- Even worse, is that the Employer did not offer the notes that Huss and Barnes recorded during the investigation. These notes would also have been hearsay, but would have been more creditable than the self-serving verbal summary of the investigation as given by Huss and Barnes.
- It is absolutely contrary to argue that the testimony of Huss and Barnes should be allowed, while at the same time arguing that the notes of their investigation should be protected. This resulted in the Grievant's inability to explore through cross-examination whether, or not, the results of the investigation reflect the allegations made by the Employer.
- It is notable that Barnes was unable to recall relevant detail, such as which students supported some of the allegations.
- Hearsay evidence, by itself, is insufficient to establish just cause for discipline, particularly when it is contradicted by sworn testimony.

- The evidence does not support the Employer's allegation of an intentional touch to Student #1's buttocks.
- The Employer's discipline states that, as the Grievant removed his hand from Student #1's front sweatshirt pocket, he slid his hand across part of her right buttock.
- The Employer's chooses to balance the Grievant's denial against Student #1's testimony, her prompt report, and the eyewitness report of another student. However, the eyewitness testimony of the other student does not substantiate the allegation. Further, Student #1 did not promptly report the incident and her testimony was based on a misperception, because of her embarrassment and the Grievant's unjustified reputation.
- There are only three relevant witnesses to the allegation that the Grievant touched Student #1's buttocks – the Grievant, Student #1 and Student #2.
- Although the Grievant denies the allegation, he is cognizant of the fact that it is possible his hand inadvertently touched Student #1's buttock when she turned away, after he had placed the candy in her pocket.
- An inadvertent touch could not support the Employer's belief that the Grievant engaged in insubordination, unprofessional conduct and sexual harassment.
- Any possible inadvertent touch was not done to intimidate Student #1 or for the Grievant's pleasure – there is no evidence to support an element of intent.
- Student #1's testimony that the Grievant slid his hand down and touched her bottom, watched his hand while doing so and held it there for about three (3) seconds is simply not creditable.
- Student #1's testimony is simply not creditable because the testimony of two other witnesses, the Grievant and Student #2, does not support the allegation that the Grievant purposely held his hand on Student #1's bottom for three (3) seconds.
- It is understandable that Student #1 felt uncomfortable and misinterpreted what had happened, given the terrible (and undeserved) reputation that has plagued the Grievant for the past few years.
- Students that create terrible rumors hurt the subjects and are, simply put, cruel. Student #1 had heard some of the rumors about the Grievant being a "pervert," "creepy," stares at female student chests and will give you an "A" if you let him look at your chest.

- Student #1's feelings based on her misinterpretation explains the inconsistency between the two witnesses, but cannot be the basis for severe discipline in this case.
- The conclusion to be drawn from the evidence of the three witnesses is that if there was a touch, it was an inadvertent touch. However, an inadvertent touch is not the basis of the Employer's discipline.
- The record does not support the Employer's conclusions, in part because of the prompt report of Student #1. Student #1 told her friends, but did not tell a teacher and did not tell her parents until about a week later. Student #1's statement taken during the investigation was a month or so later. Surely, this cannot be the prompt report the Employer relies on.
- Although there are only three (3) witnesses with direct testimony regarding the allegation that the Grievant touched Student #1's bottom, the Employer felt it necessary to bring several other students to provide hearsay testimony about what had happened.
- The testimony of these witnesses (Students #3, #4, #6 and #13) is inconsistent and suspect. Such hearsay testimony cannot substantiate the allegations and should be disregarded. Regarding the touching matter, their testimony is unreliable – none witnessed what happened and none promptly acted to report what happened.
- Further, the testimony of these witnesses is suspect, not because they are bad students, but because they were all standing up for their friend. Students #1, #3, #4, and #13 were all friends at the same lab table. They all had time to discuss the details with each other before reporting. All had heard the things about the Grievant that they believed supported the incident.
- Hearsay evidence presented by administration does not substantiate the allegations. The testimony of Huss and Barnes is all hearsay and should not be given any weight. Discipline cannot be supported with this kind of evidence.
- The testimony of administrators brings into question the validity of the investigative process. Their testimony indicates questions asked of Student #1 were clearly leading and highly suggestive. One could conclude that there were other similar flaws in their investigation.
- The allegation that the Grievant stared at breasts of female students is not supported by substantial evidence.

- Discipline of the Grievant, based on staring at Student #5's breasts while helping her with an assignment on October 1, 2, and 5 2009, cannot be substantiated. Student #5's testimony is simply not credible and cannot substantiate the allegations.
- In contrast, the Grievant's credible testimony was that he did not stare at Student #5's chest on any of the reported occasions. Therefore, the allegations are not supported by evidence and any discipline based on the allegations is with just cause.
- Student #5 testified that Student #6 had been stared at by the Grievant, however Student #6 testified that she had never been stared at or made to feel uncomfortable by the Grievant.
- Student #5's testimony can simply not, by itself, be substantial evidence supporting discipline when balanced against the credible testimony of the Grievant, that he does not engage in these behaviors and the lack of any supporting testimony from other witnesses.
- The Union did not object to the striking of a particular statement from Student #5's testimony, however, it absolutely calls into question her entire testimony.
- Student #7's testimony did not substantiate the allegations against the Grievant that he had looked down her shirt when helping her with work. Student #7, known to be gossipy and seeking attention, testified that the Grievant looked down her shirt, but was not sure if he was standing, sitting, what he was wearing or even what month it happened.
- Student #7 testified that she had heard from other students and friends that the Grievant looks down shirts of female students and she wanted to see him fired.
- Witness Novak, a paraprofessional, testified that Student #7 told her that the Grievant had looked down her shirt, but questioned the validity of her statements because Novak was familiar with Student #7 fabricating things and starting rumors.
- Witness Cederberg, a paraprofessional heard Student #7 and other students discussing the Grievant looking down female student's chests, but had not observed that behavior when in the Grievant's classroom.
- What is clear from the evidence is that the allegations are supported by misperception rumor and gossip – not actual evidence.

- All of the students making allegations were in the Grievant's seventh grade class of 2009. Witness Breyen, also a teacher, testified that they were a troublesome group, identified as having issues with hostility, gossiping, thriving off of drama, cheating and behavior issues.
- Both the Grievant and Breyen testified as to the difficulty in enforcing the dress code, citing Students, #2, #4 and #7 as routinely violating it.
- The Employer's allegation that the Grievant made inappropriate comments about a student's appearance are founded in misperception. Student #8 testified that the Grievant said students should stand up so more blood would flow to their brain. Another student questioned; are you calling us fat, to which the Grievant responded no, but some boys and then mumbled Student's #8 name.
- Student #10 testified that the Grievant said students couldn't sit on the lab tables, that standing would help their brain cells, lose weight and some guys were fat – then named Student #8. Student #8 then said to the Grievant, are you calling Student #8 fat, to which the Grievant did not answer.
- The relevant inconsistencies in the testimony of Students #8 and #10 supports a misunderstanding of what the Grievant said. One student heard Student #8's name after a student asked if they were being call fat; another heard Student #8's name as being fat and then asked if the Grievant called him fat.
- Put another way one student said the Grievant made the statement that Student #8 was fat, the other heard him say Student #8's name in response to someone else making the fat statement. While it seems an irrelevant distinction, it demonstrates that the students are not certain of what they heard.
- The first time the Grievant heard of the allegation was the first day of the hearing when Student #8 testified. The Employer withheld that information which did not fully allow the Grievant to recall at a time closer to the alleged incident what might have been said and where the misunderstanding happened.
- The Grievant has admitted when he has made a poor choice, like sticking a candy bar into Student #1's pocket. He certainly knows that it is inappropriate to call a student fat and is capable and willing to acknowledge mistakes, if he has made them, but does not believe he did so here.

- The discipline is too severe for evidence in the record. Discipline must be supported by just cause, which includes consideration of the severity of discipline and whether it is supported by the record.
- Otherwise appropriate discipline cannot be added to because of rumor and gossip or previous discipline of allegations that do not show a pattern of behavior.
- The Grievant did not file a grievance on his “Notice of Deficiency” dated November 24, 2004, because he believed it was absurd, troubling and wanted to move on. In addition, the 2004 Notice states that his actions violated state law, which is simply false. The Grievant’s rebuttal highlights what he believes are allegations from students upset with grades.
- The Employer failed to provide any non-hearsay evidence that there have been any allegations related to the Grievant’s conduct in the five (5) intervening years. The previous discipline cannot justify the severity of discipline at issue in this case.
- Because the Employer has not met its burden to show that it had just cause to discipline the Grievant, the Union respectfully requests that the November 9, 2009 Memorandum of discipline be withdrawn and the Grievant receive repayment of lost salary during the unpaid five-day suspension.
- In the event the Memorandum or a reduced version of it is retained, any false and inaccurate information it contains to be expunged pursuant to Minn. Stat. Section 122A.41, subd. 15.(19?)

WITNESS TESTIMONY

At the onset, it is recognized that the importance of this matter to both parties cannot be overstated. For the Grievant, it is recognized that, as a career teacher with many years of experience, protection against false and unfounded charges is of great importance. For the Employer, it is recognized that providing an education environment free of any inappropriate teacher conduct is of great importance. The Arbitrator recognizes that findings in the instant proceeding must be based on a careful and through analysis of the evidence.

Since there is no stenographic record of the hearing and due to the importance of a careful and thorough analysis of the evidence, the Arbitrator has included detail of

the testimony presented by witnesses. Generally, hearsay testimony has been omitted.

Student #1 testified that, although she held her hand out to receive the candy bar, the Grievant “skipped” her hand and put the candy bar into her pocket

On cross-examination, Student #1 testified that she reached out to take candy, but Grievant bypassed her hand and inserted the candy into her pocket with his left hand. Student #1 further testified that she could feel the Grievant’s hand in her pocket.

Student #1 testified that when removing his hand from her pocket, the Grievant slid his hand down on her butt and held it there for about three seconds. Student #1 testified that she believes the Grievant did this on purpose, because it did not feel like an accident. Student #1 further testified that this made her feel confused and she didn’t like what was going on. She then walked back to her desk and told other students what had happened.

On cross-examination, Student #1 testified that when the Grievant pulled his hand out of her pocket, he slid it down to her right butt. Student #1 testified that she has seen other students get candy from the Grievant and before being in his class had heard he treated girls more favorably than boys. Student #1 testified that she was an “A” student and did not recall Grievant having not done anything previously to her that made her feel uncomfortable.

The Grievant testified that Student #1 was wearing a sweatshirt with a pocket in front. The Grievant testified that, although she may have, he didn’t remember Student #1 putting her hand out to receive the candy. The Grievant testified that he put the candy in her pocket because he didn’t want the other students to see. The Grievant testified that he does not remember sliding his hand across her butt, but may have done it inadvertently.

On cross-examination, Student #1 testified that the questions asked during administrations investigation were pretty much the same as she is being asked now. Student #1 testified that the Grievant treated girls better – students shared each other’s grades and one female student who didn’t turn in an assignment received an “A”. Student #1 testified that she knows this because she saw the other student’s records.

On redirect, Student #1 testified that only girls received candy bars. Student #1 testified that after the incident she has had nightmares. Student #1 testified that at the end of the semester, she did her work online because she didn’t feel comfortable in the Grievant’s classroom.

Student #2, whose desk was adjacent to the Grievant’s desk, testified that she had observed the incident described by Student #1 and the Grievant. Student #2 saw the Grievant’s hand touch Student #1’s butt, but didn’t think it was on purpose because it was for a very short time. Student #2 testified that the Grievant treats girls better – it is easier for girls to get better grades and would let them off without turning in assignments. Student #2 testified that the Grievant yells at the boys.

On cross-examination, Student #2 testified that she saw the Grievant put candy into Student #1’s pocket and when Student #1 turned to walk away her face got red. Student #2 testified that, even before being in the Grievant’s class, she had heard he treated girls better.

Student #3 testified that she observed Student #1 walking back toward her desk fast after the incident, appearing scared and nervous. Student #3 testified Student #1 doesn’t usually draw attention to herself.

Student #3 testified that the Grievant makes her feel uncomfortable by the way he looks at her – when taking a test he looked toward the bottom of her neck. Student

#3 testified that the Grievant favors girls by letting them off without doing work and he did it for her. Student #3 testified that she saw the Grievant looking over the shoulder at the chest of Student #2.

On cross-examination, Student #3 testified that she did not see the incident involving the Grievant and Student #1, but noticed Student #1 returning to her desk because she was walking fast. Student #3 testified that she was interviewed about a week after the incident and asked pretty much the same questions as she was being asked now – “tell us what happened.” Student #3 testified that before she was in the Grievant’s class she had heard he was different toward girls. Student #3 testified that the only time she knows the Grievant looked at her inappropriately she didn’t report it.

On redirect, Student #3 testified that the Grievant didn’t continue looking at her inappropriately long after she made eye contact with him.

On cross-examination, Student #3 acknowledged that eye contact is different than goggling.

Student #4 testified that she observed Student #1 return to her desk after the incident. Student #4 testified that Student #1 was quiet (whispered) and looked uncomfortable. Student #4 testified she has known Student #1 for about three (3) years, does not draw attention to herself and doesn’t know any reason why Student #1 would want to get the Grievant into trouble.

On cross-examination, Student #4 testified that Student #1 told her about what had happened. Student #4 testified that this was during class but she doesn’t remember what assignment she was working on at the time. Student #4 testified that she had been told by her brother, who is a year older, to swatch out for Grievant.

Student #5 testified that the Grievant had looked down her shirt three (3) times. The first time was October 1, when he was kneeling beside her desk – he wasn't paying attention to what she asked him and instead was looking down her chest. The second time was October 2, when he looked at her chest – he was standing at her desk and she told him to forget it and went to her friend to get the information. Student #5 testified that that the third time he looked at her chest was when the Grievant was holding the door open as students were entering the classroom. Student #5 testified that she reported it to the Principal on October 5. Student #5 testified that she couldn't take it anymore, felt uncomfortable talking to him and told her mother about it.

Student #5 testified that she saw the Grievant stare at several other girl's chests, including Students ¹⁸and #10. Student #5 testified that the Grievant treated girls better than the boys – girls would get full credit for late work and boys would get one-half credit.

On cross-examination, Student #5 testified that she heard the Grievant would look down girl's shirts on the bus when she was in the sixth grade. Student #5 testified that the first time the Grievant looked down her shirt, she was at her desk and the Grievant was kneeling beside her – she had asked for assistance, but he didn't explain what to do with the work sheet and he wasn't looking at her paper. Student #5 testified that she later asked a student sitting across from her for help. Student #5 testified that the Grievant had looked at her earlier that day - she was wearing a short sleeve shirt open down from neck.

On cross-examination, Student #5 testified that the second time was when she was asking to go to bathroom and if she needed to do more work, as her work had not been graded. Two students were behind her, it was about the middle of the period, the students were loud, but it didn't seem like the Grievant cared what other

¹⁸ The witness later acknowledged an error in her testimony by referencing the wrong student. The parties stipulated that this reference is to be stricken from the record

students were doing. Student #5 said she told him “forget it” and went to the bathroom and later asked another student of assistance.

On cross-examination, Student #5 testified the third time was when the Grievant held the door open with his foot and was staring at her - she doesn't remember what she was wearing that day. Student #5 said she reported the matter that same day to Principal Huss and later met with both Principal Huss and Rod Barnes. Student #5 testified that she saw the Grievant stare at other girls (including Student ___¹⁹ and #10), when they asked for assistance from the Grievant. Student #5 testified that she told Students #6 and #10 before reporting the Grievant's behavior.

Student #6 testified that that she is in eighth grade and knows the Grievant is a fifth hour science teacher. She testified that Student #1 is one of her best friends and told her about the Grievant putting candy in her pocket. She testified that Student #1 looked worried and upset and doesn't usually draw attention to herself. She testified that the Grievant would let a girl go to the bathroom after he told a boy he couldn't go.

On cross-examination Student #6 testified that Student #1 told her about the incident in the hallway in the morning and later on the bus – then told her mom and dad about the same time. Student #6 testified that the Grievant taught her 5th hour science class OK. Student #6 testified that she had not heard anything about the Grievant before being in his class and she did not experience the Grievant doing inappropriate conduct to her.

Student #7 testified that the Grievant looked down her shirt near the beginning of the year when helping her with work at her desk. Student #7 testified that she saw the Grievant's eyes look down her shirt for a few seconds and then look up. Student #7 testified that she reported it to the Principal around the same time as it made her

¹⁹ The witness later acknowledged an error in her testimony by referencing the wrong student. The Parties stipulated that this reference is to be stricken from the record.

feel uncomfortable. Student #7 testified that later the Grievant was more mean to her and would say, “look in the book.”

On cross-examination, Student #7 confirmed that the incident was toward the beginning of the year, but don’t remember what she was wearing. Student #7 testified that she had heard Grievant had done this from older kids. Student #7 testified that she saw the Grievant looking down Student #4’s shirt. Student #7 testified that she was in special Education most of year and Connie Cederberg helped her with science and other work. Student #7 testified that when she reported the incident to Principal Savage she was by herself. Student #7 testified that Savage did not ask her questions, just wrote it down. Student #7 testified that she told Savage about seeing the Grievant look down Student #4’s shirt and she believed the Grievant is a pervert. Student #7 testified that she had not heard about the candy bar incident-involving Student #1. Student #7 testified that she received an “F” in the Grievant’s class, but also received an “F” in other classes. Student #7 testified that she heard form other students last year that they wanted the Grievant fired.

On re-direct, Student #7 testified that the incidents before the candy bar incident, involving Student #1, were the reason she heard others say they wanted the Grievant fired.

Student #8 testified that on October 6, the Grievant told students to stand up to help blood go to their brain and to help lose weight. Student #8 testified that the Grievant implied he was fat hurt and made him feel sad. Student #8 testified that the Grievant did not apologize and his parents were upset. Student #8 testified that the Grievant would give answers to girls but not to boys – he told boys, “try to figure it out.”

On cross-examination, Student #8 testified that the Grievant only made the statement about him being fat one day – he heard the Grievant mumble his name as

he sat in the front row and was near the Grievant. Student #8 testified that the Grievant was explaining the lab at the time of the incident – he said no sitting today applied to everyone. Student #8 testified that the students are co-ed, but no matter who asked a question, he usually helped the girls.

Student #9 testified that the Grievant said stand up, it will make the brain work better and implied that Student #8 was fat. Student #9 testified that Student #8 appeared shocked and she felt bad for him.

On cross-examination, Student #9 testified that she was sitting near Student #8 at the time of the incident. Student #9 testified that the Grievant helped her and would help boys as well. Student #9 testified that the Grievant did not make her feel uncomfortable. Student #9 testified that she observed kids being disrespectful of Grievant and had heard he was a pervert and looked down girl's shirts. Student #9 testified that she left Zimmerman because kids are not very nice and troublemakers.

Student #10 testified that she knows Student #1 and Student #8. Student #10 testified that the Grievant said you can't sit on the table - if you stand you will lose weight and pointed at Student #8.

On cross-examination, Student #10 testified the Grievant said no sitting on tables; it helps lose weight and referred to Student #8, all in one statement. Student #10 testified that she was sitting in the third row and the Grievant was writing on the board near his desk. Student #10 testified that she asked Student #8 if he was OK after the Grievant's remarks, but did not report it to anyone. Student #10 testified that girls did not have to do full work to get a good grade, but boys had to do everything to get good grade. Student #10 testified that students corrected each other's work and talked about what they did and the credit they received. Student #10 testified that she did her assignments in full. Student #10 testified that the Grievant's class was easy and you could get by with a lot of stuff.

Student #11 testified that the Grievant would give girls answers, but boys were told to “figure it out.” Student #11 testified that once the Grievant gave her the answer key and gave her credit for work she didn’t do (100%). Student #11 testified that the Grievant looked at girls in a weird way, which she saw five to fifteen times, usually at the front or back of the room. Student #11 testified that when girls would walk back to their desk, the Grievant would look at them. Student #11 testified that the Grievant would look at her in a way she didn’t like, which made her feel uncomfortable. Student #11 testified that she left the Grievant’s science class and was home schooled because she felt uncomfortable in the Grievant’s class.

On cross-examination, Student #11 testified that she heard the Grievant was looking at girls and treated girls better than boys, prior to being in his class. Student #11 testified that her sister was in the Grievant’s class and also left to be home schooled. Student #11 testified that she received 100 % credit from the Grievant for a worksheet, even though she did not turn it in and the same thing happened another time. Student #11 testified that on a number of occasions, she saw the Grievant looking at girls chests, including Student #9 – five to fifteen times. Student #11 testified that she left the Grievant’s class in the third quarter and don’t remember names of all the girls he goggled. Student #11 testified that on Halloween, the Grievant gave the girls directions to his house. Student #11 testified that she didn’t report it because she felt she wouldn’t be believed, but told her parents about it and they and her sister discussed it.

Employer Witness #13, was Mark Huss, Assistant Principal. Huss has 20 years classroom experience as a teacher and is in his fourth year as Principal of Zimmerman Middle School, where the instant matter arose.

Huss testified that Student #5 asked to talk to him and Principal Savage about the candy bar incident involving Student #1 and another incident where the Grievant was alleged to have looked down a girl’s shirt. Huss testified that Student #5 is an above average student, has no record of discipline and had no reason to question her creditability.

Huss testified that Student #1 was interviewed regarding the candy bar incident. Huss testified that Student #1 is in the upper 10% of the class, is well adjusted and found her creditable. Huss testified that he made every effort to find discrepancies in the information given by other student witnesses interviewed in the investigation, but found them to be creditable.

Huss testified that on October 8, 2009 he received a phone call from the father of Student #8, stating that his teacher had referred his son to as "fat" and wanted the matter investigated. Huss then interviewed Student #8. Student #8 told him about the "fat" incident, but also about some situations where girl students were alleged to have received credit for work not completed. Huss testified that he found no holes in Student #8's story and did not see his motive as getting the Grievant in trouble.

Huss testified that his investigation involved questions such as: What did you see? What did you hear? Huss testified that he received a phone call from Student #1's mother who expressed concern about questions he asked that seemed to cast doubt on what the students told him.

On cross-examination Huss testified that he brought Principal Savage into the student interviews so as to not be alone in room with female students and because female students of that age can feel intimidated. Huss testified that he asked Savage to accompany him because administration is mostly made up of males and no other females were available.

On cross-examination Huss testified that students can hear things different than other students and that is why you want first hand accounts. Huss testified that student #5 reported two incidents where Grievant was alleged to have looked down the shirt of female students. Huss testified that Student #5 was not subject to behavioral issues and that it is true that he heard some inconsistencies in the

student testimony given during the hearing. Huss testified that he interviewed Student #5 on the fifth and Student #1 the following day.

On cross-examination, Huss testified that it is possible that students can be creditable and yet mislead, but not in this case. Huss testified that he was not aware of all the rumors about the Grievant that were presented in the hearing today. Huss testified that seventh grade last year had it disciplinary challenges, but not involving the students that testified in the hearing today.

On cross-examination, Huss testified that every year you get complaints about dress code violations, but no complaints about stories being made up. Huss testified that he did not make the decision on suspending the Grievant for five days and that Rod Barnes made the decision.

On re-direct, Huss testified that the inconsistencies he heard in the student testimony in the hearing today concerned time lapses.

Student #12, testified that Student #1 is a friend and usually doesn't lie and doesn't try to be center of attention. Student #12 testified that Student #1 appeared frightened and scared regarding the candy bar incident. Student #12 testified that she has observed the Grievant looking at girls in inappropriate ways on a couple occasions, which made her feel uncomfortable. Student #12 testified that it is not right that the Grievant treats girls better, giving them better grades and picking on people. Student #12 testified that girls asked for better grades and the Grievant gave them what they wanted. Student #12 testified that the Grievant called on girls more often than boys.

On cross-examination, Student #12 testified that she did not like science because the Grievant did not explain a lot. Student #12 testified that she had heard before being in the Grievant's class that he looks at girls and had heard this from girls in the ninth grade. Student #12 pointed to the lab table where she was at time of candy

bar incident – she sat at second desk from Grievant, more at beginning of year and middle of year. Student #12 testified that from where she was standing she overheard two girls ask the Grievant for better grades and the Grievant gave it to them - she could also see the Grievant's computer from where she was standing. Student #12 testified that she didn't report what she observed when she saw the Grievant looking at other girls.

On re-direct, Student #12 testified she didn't report what she observed when the Grievant looked at other girls because the Principal did not do anything when things were reported.

Employer Witness #14, Rod Barnes, is Director of Labor Relations and Personnel Services. Barnes previously held Director of Human Resources positions for several public and private organizations and served 21 years in Human Service for the US Coast Guard. Barnes testified that he has some 30 years experience conducting investigations.

Barnes testified that the instant matter first came to his attention in a phone call from Huss. Barnes testified that he reviewed the results of the interviews Huss had held with the students – he inquired of the students records and found them to be good students, not the kind that tend to make up stories.

Barnes testified that he then interviewed the Grievant with Huss, (?), and the Union Representative present. Barnes testified that at the first meeting the Grievant said he could not recall the candy bar incident with Student #1, but later acknowledged it had occurred. Huss testified that he also reviewed the other allegations made by students, including the “fat” incident, involving Student #8, which the Grievant said he couldn't recall. Barnes testified that he noted a discrepancy in the Grievant's explanation of where he gave Student #1 the candy bar – at the front table or at his desk. Barnes further testimony involved introducing Employer Exhibits #1 through #8.

On cross-examination, Barnes acknowledged that investigating students is different than investigating adults. Barnes acknowledged that he has not conducted a lot of student investigations and the instant investigations are the first he recalls doing in the Elk River School District. Barnes testified that the first interview with the Grievant was on October 7, 2009 and among the questions asked was if he provided rewards (candy), but don't recall all the questions asked. Barnes testified that the Grievant was informed of the allegations received up to that time.

On cross-examination, Barnes testified that at the second meeting with the Grievant, he acknowledged giving candy to Student #1 and placing it in her sweatshirt pocket. Barnes testified that he interviewed Students #1 and #5 with Huss after Huss had previously interviewed them. Barnes testified that he asked the students to tell him what had happened.

On cross-examination, Barnes testified that he believed the five-day suspension was warranted based on his conclusion that what was alleged had happened, was a serious matter and should not happen again. Barnes testified that the five-day suspension given the Grievant was the first since his tenure there, but there have been some greater since the Grievant's suspension.

On cross-examination, Barnes testified that he went to great length with the students not to be discussing the allegations with other students and made great emphasis on this. Barnes testified that he believes the students complied with his request. Barnes testified he did not take written statements from the students.

Union Witness #1, Daniel Nabedrick, is Director of Tennis at the Golden Valley Country Club. Nabedrick testified that he has known the Grievant since 2004 as a personal friend and supervised him in his work as tennis instructor during the summer months. Nabedrick testified that he supervises 15 to 20 instructors each summer, has had no complaints about the Grievant and receives lots of positive feed

back about his work. Nabedrick testified that the Grievant works there with boys and girls of all ages and can use him anywhere because he does a fantastic job.

On cross-examination, Nabedrick acknowledged that he was not aware of all the allegations, which were the basis for the Grievant's five-day suspension, and was not aware of the Grievant's discipline in 2004. Nabedrick testified that if the Grievant were to do these things at the Golden Valley Country Club, it would be a big deal and the matter would be referred to Human Resources. Nabedrick testified that he doesn't know what the Grievant does in his classroom, only what he does when working at the Golden Valley Country Club.

Union Witness #2, Todd Jespersion (Grievant) is a seventh grade teacher of Life Sciences in the Elk River School System, Zimmerman Middle School. The Grievant has taught there since the 1998-1999 school year and previously taught sixth and seventh grade in the Minneapolis School System. The Grievant has a degree in Life Science Education and a Masters degree in Curriculum, Instruction and Principal. The Grievant is a coach for the Elk River School District in girl's tennis and varsity. The Grievant also teaches seventh and eighth grade girls after school and coaches at Maple Plain and Rogers. The Grievant has served 20 years with the Air National Guard.

The Grievant testified that he has supervised females at the Air National Guard in the Orderly Room and has had no issues.

The Grievant testified that his typical class at Zimmerman Middle School is about one half boys and one half girls, averaging about 35 students per class. The Grievant testified that seventh grade students are energetic and peer influenced. The Grievant testified that he also teaches special needs students with a Para-professional assistant and he lectures about 30% of time with activities and lab making up about 70% of time.

The Grievant testified that the first month he assigns seats and divides students in lab, but later may let them choose or will choose for them. The Grievant testified that, in theory, all students work on the same thing at the same time and the curriculum is the same for all, but some finish earlier and may be doing something else.

The Grievant testified that he did not grieve the "Notice of Deficiency" issued to him in 2004, as he didn't know he could and wanted to move on. The Grievant testified that although the Notice stated his actions constituted sexual harassment, police never contacted him.

The Grievant testified that students get upset when he assigns lab partners and they are not allowed to work with students of their choice. The Grievant testified that Student #1 is an "A" student, quiet and has a group of friends she works with.

The Grievant testified that on the day of the candy bar incident, Student #1 performed extra work for him after having finished her regular assignment. The Grievant testified that after Student #1 completed the extra work, she came back to his desk and he took a candy bar out of his desk and put it into her front sweatshirt pocket. The Grievant testified that he tried not to put his hand in her pocket, but may have. The Grievant testified that he doesn't recall Student putting her hand out to receive the candy, but put the candy in her pocket because he didn't want the other students to see or they also would have wanted some. The Grievant testified that he has given out candy before, but it is not part of a normal routine. The Grievant testified that he gave Student #1 the candy as a way of saying thank you.

The Grievant testified that he does not remember sliding his hand onto Student #1's bottom, but may have inadvertently. The Grievant testified that Student #1 or other students did not say anything, but he heard about it from Rod Barnes on October 2, 2009 in an investigative meeting. The Grievant testified that he did not touch

Student #1 to intimidate her or for sexual pleasure as he knows doing so is inappropriate.

The Grievant testified that the 2009 seventh grade class had behavior problems such as cheating and lying – it was one of the rougher student groups he as worked with and was a subject of discussion with meetings with other teachers.

The Grievant testified that he was familiar with the Memorandum (Employer Exhibit #5) containing the allegations and denied those identified on page three (3) as occurring on October 1, October 2 and October 5, 2009. The Grievant testified that he doesn't recall holding door open when students entered the classroom on October 5, 2009 and denies staring at Student #5 when she was entering the classroom. The Grievant testified that he does not recall the alleged incident. The Grievant testified that Student #5 is a "B" student, has no problems and remained in his class for the entire school year.

The Grievant testified that he never intentionally focused his eyes on student's breasts. The Grievant testified that he knows he has a reputation among students that he is pervert, is hard on students and his tests are unfair. The Grievant testified that this student perception is not accurate. The Grievant testified that he agrees he is a hard teacher, but his tests are fair and being called a pervert makes him angry and helpless – it is hard to dispel rumors.

The Grievant testified that he is familiar with the District's dress code, which teachers are expected to enforce. The Grievant testified that students violate the code 25% of the time, with common violations being short shorts, midriffs and straps showing. The Grievant testified that he has not been able to enforce the code as he has been directed to not discuss student clothing with the students. The Grievant testified that he enforced the code until 2004, when directed not to. The Grievant testified that if he discussed student clothing it would lead to problems.

The Grievant testified that in 2008, he started enforcing the code as he felt his reputation had improved and he could do so without repercussions. The Grievant testified that he reported students for code violations and if cited, the students either must change or are will be sent to the office (nurse).

The Grievant testified that he doesn't allow students to sit on lab tables to prevent them from lying down, a rule he made at the beginning of the school year and if he sees it he tells them to get down. The Grievant testified that he doesn't recall saying don't sit down to improve your blood flow on October 6, 2009, but it is possible I said it and it is consistent with the rules. The Grievant testified that he vaguely recalls some girls saying, are you calling us fat. The Grievant testified that he wrote on the board, "you need to stand up so it increases the blood flow to your brain. The Grievant testified that he don't recall saying to anything to Student #8 about his weight or appearance or saying some boys need to lose weight. The Grievant testified that he never jokes about student's appearance.

The Grievant testified that he was interviewed twice by administration about the allegations, the first time was October 7, 2009 when he was told about the candy bar allegation, but not told about the looking at breasts allegation or the allegation that he had commented inappropriately about a student's weight. The Grievant testified that one student told him "students said they have to zip up their shirts as he was looking down their chests". The Grievant testified that his colleague, Connie Cederberg, said she overheard students saying they were going to report him staring at their chest.

The Grievant testified that he was concerned about when he would serve the suspension, not wanting to miss three working days at school, because he was on administrative leave the week before and had time off for a tennis tournament that his daughter was in.

On cross-examination, the Grievant acknowledged that in 2004 he received a Notice of Deficiency when students reported he had been looking at their breasts, but did not file a grievance. The Grievance acknowledged that he received recommendations to correct his conduct, but did not follow through on any of them.

On cross-examination, the Grievant acknowledged his response to the 2004 Notice of Deficiency claiming that the investigation was unfair and one sided, that the Principal did not follow up on an allegation that he stared at a students breast during a parent teacher conference, and blamed the policy, which is the same as in most other schools in the state. The Grievant also acknowledged that his response included references to a number of other claims about the investigation and the discipline process, particularly that the girls made up the allegations and similar rumors and allegations were not being made against other teachers.

On cross-examination the Grievant acknowledged that he has no evidence to support the allegation in his response of December 9, 2009, that students were retaliating against him for picking their groups. The Grievant further acknowledged that, if students were retaliating against him, Student #4 has a good academic and behavior record and would not be a part of the female retaliation group. The Grievant further acknowledged that Student #1 has no reason to make up a story and he does not have any first hand knowledge of a conspiracy by girls.

On cross-examination, the Grievant acknowledged that the directives given him in the 2004 Notice of Deficiencies were still in effect and no one had told him they were no longer in effect.

On cross-examination, the Grievant testified that he did not recall the “fat” comment alleged to have been made by Student #8, but may have said it. The Grievant testified that he did not think Student #8 would lie, but may have misunderstood – “it is possible I said his name, but don’t know.” The Grievant acknowledged he

would be violating the 2004 Directives if he had said something to the effect that Student #8 needs to lose weight.

On cross-examination, the Grievant acknowledged that it was inappropriate for him to put his hand in Student #1's pocket and giving candy may also seem inappropriate. The Grievant acknowledged that staring at breasts is wrong and unprofessional as is touching a girls butt. The Grievant testified that he did not intentionally touch Student #1's butt may have done it inadvertently. The Grievant acknowledged that putting the candy bar in Student #1's pocket materially impaired his educational effectiveness and acknowledged that seventh grade is a time of physical change for female students.

On cross-examination, the Grievant acknowledged that during the first investigative interview he did not recall putting candy in Student #1's pocket, but when asked about touching her butt, it triggered his memory of putting candy in her pocket.²⁰

On cross-examination the Grievant acknowledged that Student #2 was telling the truth when she saw him put the candy bar in Student #1's pocket after taking it out of his desk drawer. The Grievant testified that he was depressed and looked down, which was interpreted as looking at breasts. The Grievant acknowledged that after making the lab group assignments on September 30, 2009, no students said they were upset. The Grievant acknowledged that he may have had two candy bars when he put one in Student #1's pocket, that students could see he put candy on the front table and did know that Student #1 would share the candy he gave her with the other students.

On cross-examination, the Grievant acknowledged, it would be fair to conclude, that if he had not placed his hand into Student #1's pocket, his hand would not have bumped her butt. The Grievant acknowledged that he knows of no others who put candy in a student's pocket. The Grievant acknowledged that Student #7 is the only

²⁰ See Employer Exhibit #9, pg. 4, para. 4.

one of the students who testified that has a behavioral problem. The Grievant acknowledged that there were no times when his eyes inadvertently focused on girl's breasts.

On cross-examination the Grievant acknowledged that he could tell a student to go to the office for a dress code without violation of the 2004 directive, if he did so without telling the student what the violation was.

On re-direct, the Grievant testified that he has heard rumors about other teachers, i.e. he is a hard teacher, etc., but doesn't pay attention to rumors and gossip in the faculty lounge. The Grievant testified that he doesn't know who hangs out with whom outside of class, cafeteria, etc.

On re-direct, the Grievant testified that when candy was out in the open – not given away on desk, it doesn't necessarily attract attention like when giving it to one student.

On re-direct, the Grievant testified that it was not accurate that Student #7 was the only Student with a behavioral problem as there was one other and both were in special education.²¹

On cross-examination, the Grievant acknowledged that the only student in special education who testified in the hearing was Student #7.

Union Witness #3, Julie Breyen is a Seventh Grade World History Teacher with twelve years at Zimmerman and 17 years with the Elk River School System before that. Breyen testified that she has known the Grievant for a long time and has shared a classroom on testing days. Breyen testified that she has not actually observed the Grievant teaching, but seventh grade teachers meet to coordinate

²¹ The other student named was not one of the student witnesses.

schedules, etc. Breyen testified that teachers meet to discuss issues such as attendance, work completion, parent meetings, student of the week, discipline, etc.

Breyen testified that teachers have different teaching styles, but discipline is similar and there is a lot of trouble with discipline, including bad language, behavioral issues, mistrust of teachers, etc. and teachers would discuss whether all are having the same problems.

Breyen testified that in 2009, she was nominated for teacher of the year, but did not submit the required papers. Breyer testified that a lot of it was the students. It was exhaustive and disappointing. Boys have a hard time sitting still, bad language, and sexually harass girls. Girls are more into gossip about other girls. Dress code violations were a problem – there is resistance to correction. There is a harassment problem between students – call each other names that would make you cringe.

Breyen testified that she has heard rumors about the Grievant – one day there was a lot of whispering that Grievant was going to get fired for doing perverted things. Another time girls said Grievant is going to get fired because he doesn't teach us. A student asked her, is it true that he is looking at girls in class – not said in a sexual way. Principal Huss told her if there were any more questions to refer them to him. Breyen testified that she told parents not to discuss the Grievant's issues with her – she doesn't teach his kids. Months later a student asked if it was true that the Grievant was looking at girls.

Breyen testified that dress code violations occurred every hour in the spring – it is girls with short shorts, too much cleavage, spaghetti straps, etc. Female teachers were the ones telling kids to conform – male teachers were asked not to confront girls about dress code. Among the dress code violators named was three of the student witnesses in the instant hearing.

Breyen testified that she does not associate with the Grievant outside of school. Breyen testified that she has heard Grievant gives candy to girls, touched a girls butt and looks at girls breasts in class, but no one told her about the candy bar incident or the student being touched

On cross-examination, Breyen testified that she was told about candy bar incident by the Union, but wasn't told the candy was put in the student's pocket rather than in her hand or that the Grievant possibly touched her butt. Breyen testified if done intentionally, it would bother her. Breyen testified that she had not personally seen the Grievant do any thing inappropriate.

On cross-examination, Breyen testified that she had Student #1 in her class last year and she was a good student and no behavior problems. Breyen testified that if it is true that the Grievant stares at girl's breasts, it is not appropriate. She knows several students said their breasts were stared at, but didn't know if they were from a different class period.

Breyen testified that she knows the Grievant was disciplined for staring in 2004 and didn't grieve the discipline. Breyen testified that she knows of no other teacher accused of this.

Breyen acknowledged that few seventh graders are capable of maintaining a lie on a face-to-face basis, particularly when both parent and teacher are present. Breyen testified that it would be hard not to momentarily stare if a person is not covered properly, but not for an extended period. Breyen testified that she would wonder if someone looked at her daughter's chest for an extended period.

Union Witness #4, Julie Nowak, is a paraprofessional in her fourth year at Zimmerman. She works primarily with teacher Penny McDonald, a teacher in Special Education, but goes in and out of classes with special education students.

Nowak testified that she has a large caseload and goes with special education students to help them out and has been in the Grievant's classroom. Nowak testified that the Grievant is very laid back and she has not seen him staring at students inappropriately. Nowak testified that she has heard allegations involving certain students, some of which she works with in special education after their class period with the Grievant.

Nowak testified that she does socialize with the Grievant outside of school. Nowak testified that she drafted a reference for the Grievant because she feels he is falsely accused and feels he would do the same for her if the situation were reversed.²²

Nowak testified that Student #7 ran up to her screaming that the Grievant had looked down her shirt. Nowak testified that she told Student #7 to quit making accusations. Nowak testified that another student made the same accusation and she questioned, are you certain, as the student was wearing a shirt with a higher neckline. Nowak testified that she told them to never speak of it again and after the students left mentioned it to a co-worker. Nowak testified that she did not believe Student #7, as her daughter grew up with her and Student #7 made up a lot of things.

Nowak testified that she was not interviewed regarding the allegations against the Grievant, but would be concerned if a male teacher stared at her daughter's chest.

On cross-examination, Nowak testified that during sixth hour she goes in and out of the classroom with kids occasionally and it was about three weeks to a month last year. Nowak acknowledged that she was not in the Grievant's classroom during first and third hour and would go into the classroom for about 20 minutes each day for about a month.

²² Union Exhibit #4.

On cross-examination, Nowak testified that she gave the reference to the Grievant around October 15, 2010 and wrote it because the allegations were pretty rough. Nowak acknowledged that when she told Student #7 and the other student to never mention it again, she didn't consider that they may be telling the truth and she did not inquire of the details before they left.

On cross-examination Nowak acknowledged that not seeing something does not mean it did not occur. Nowak testified that she did not know that the Grievant was disciplined in the past for staring at female student's breasts and does not know that a number of students have said the Grievant looked down their chest. Nowak testified that she knows Student #10 and there is no problem with her.

On cross-examination, Nowak testified that she does not know the circumstances of what took place in the Grievant's class and is not aware of any other rumors or allegations against the Grievant.

Union Witness #5, Connie Cederberg, is a Paraprofessional in Special Education at Zimmerman Middle School. Cederberg has worked at the Zimmerman Middle School since 2005 and has previous experience as a sub at Princeton and other schools. Cederberg was called to testify under subpoena.

Cederberg testified that she pulled Special Education students out of classroom as needed and worked with Special Education students, including Student #7. Cederberg testified that she absolutely did not see the Grievant look at student's chests. Cederberg testified that she had heard about the incident involving Student #1 from Special Education students, but did not witness it herself.

Cederberg testified that she provided the Grievant reference.²³ Cederberg testified that Student #7 approached her in the hall and she told Student #7 that she had a

²³ Union Exhibit #5.

right to report it, but she needed to consider how serious these allegations were. Cederberg testified that she then told the Grievant what Student #7 had told her. Cederberg testified that a second Special Education student also said the Grievant had looked down her shirt and other students were talking about going down to the office to report it. Cederberg testified that she went to the Principal and told him what the students had said and also told the Grievant the students were mad at him.

Cederberg testified that Student #7 made allegations against her and took off in the parking lot in the rain and hid behind a van, claiming Cederberg had left her there.

On cross-examination, Cederberg testified that she appeared under subpoena, as it seemed good business to do so. Cederberg acknowledged that she does not see every thing that takes place in the Grievant's classroom. Cederberg acknowledged that the Sexual Harassment Policy requires that complaints be reported to a counselor. Cederberg testified that when Student #7 told her, she went to the Grievant and Principal and told them. Cederberg testified that later when another student made allegations, she reported it to her supervisor.

On cross-examination, Cederberg acknowledged that a male teacher should not put his hand in the front pocket of a female student. Cederberg testified that she did not see the alleged incident involving Student #1 and the Grievant and doesn't know Student #1.

On cross-examination, Cederberg testified that she doesn't know how many students have made allegations against the Grievant. Cederberg testified that the Grievant had talked to her about some allegations but not all the other allegations. Cederberg testified that in the meeting with Huss and Barnes she was asked a lot of questions. Cederberg testified that her discussion with the Grievant was not extensive and was not aware that allegations involved third hour students. Cederberg testified that if she had seen misconduct, she would have reported it.

On cross-examination, Cederberg testified that she has not heard the Grievant refer to students as fat and it would be inappropriate to do so. Cederberg testified that the Union and Grievant told her who the other students were that made allegations, but the only students she has direct knowledge of making allegations were those two she worked with in Special Education.

DISCUSSION

The disciplinary action taken against the Grievant (five day suspension without pay) was based on the following charges:²⁴

1. Reaching his hand into the pocket of a female student and placing a candy bar therein.
2. When removing his hand from the female student's pocket, sliding his hand across her buttock.
3. Creating an intimidating and offensive educational environment for the student by inappropriate touching.
4. Staring at the breasts of female students.
5. Making a comment that implied a student was overweight.
6. Violation of a previous directive to "always conduct yourself with students in a professional and positive manner."
7. Violation of a previous directive to "abide by the School District's sexual harassment policy as well as all applicable state statutes regarding sexual harassment."
8. Violating a directive not to "offer any opinions as to students about . . . their physical appearance."

CHARGES #1, #2, #3 & #4.

²⁴ Employer Exhibit #5.

The evidence substantiates that there is no dispute to the charge that, upon requesting that female Student #1 come to his desk, the Grievant placed his hand inside her pocket and inserted a candy bar.²⁵

What is in dispute is whether by placing his hand inside her pocket, the Grievant's hand came into contact with the student's body. Also in dispute is whether, after removing his hand from the student's pocket, the Grievant's hand touched her buttocks.

The record shows that Student #1 was wearing a sweatshirt with a pocket in the front. Although not placed into evidence, the design of such sweatshirts is essentially universal with the pocket located in the front center near the bottom. The pocket is essentially horizontal and designed for the wearer's hands to enter the pocket from each side.

It is axiomatic that an adult man's hand, holding an object and inserted into this pocket, would make some contact with the wearer's body, particularly when entering from the opposite direction, as was the case in the instant matter. Student #1 testified on cross-examination that she could feel the Grievant's hand when he inserted it into her pocket with the candy bar, but not on her abdomen.²⁶ This strongly suggests that the sweatshirt pocket fell somewhere below Student #1's abdomen, likely nearer her pubic area. This may explain why her face was red and she appeared as though something was wrong when she walked away from the Grievant.²⁷

This observation is further supported by the Grievant's hand touching her buttocks when Student #1 turned to walk away and the Grievant's hand was withdrawn from

²⁵ Testimony of Grievant

²⁶ Student #1's testimony on cross-examination.

²⁷ Testimony of Student #2.

her pocket. If the Grievant's hand had been in the area of her abdomen, his hand would have been more at her waist level rather than at her buttocks level

There are two witness that observed the Grievant hand brush across Student #1's buttocks, Student #1, who saw and felt it and Student #2 who observed the entire incident from her desk, located a short distance away.²⁸ While Student #1 felt that the Grievant's hand was on her buttocks for a few seconds, Student #2 observed it being there only momentarily. A summation of The Grievant's own direct testimony, and while under cross-examination, essentially confirms that his hand touched Student #1's buttocks, although it is not clear whether it was intentional or the result of putting his hand in Student #1's pocket:

- "went to desk and grabbed candy and then put it in her pocket"
- "(Student #1) was wearing a hooded sweat shirt with front pocket and I placed candy in her pocket."
- "Absolutely did not slide my hand across her butt and did not hold it there for three seconds."
- "Do not remember touching her butt, but may have inadvertently."
- "Agree that Student #1 has no reason to make up story."
- "Yes, it was inappropriate to put my hand on Student #1's pocket."
- "I was not extremely diligent when I put candy in Student #1's pocket."
- "Agree, touching butt was wrong and unfortunate."
- "Did not intentionally touch Student #1's butt, but may have inadvertently."
- "Agree that putting candy in Student #1's pocket materially impaired my effectiveness."
- "Yes, I did know that Student #1 would share candy."

²⁸ Testimony of Student #1 and Student #2.

- “It is a fair conclusion that if had not put candy in pocket would not have bumped her butt.

The allegation that the Grievant made reference to a male student as fat or overweight, in conjunction his directive for students to stand-up is supported by the testimony of several students. Student #8, the subject of the alleged reference, testified that he was in the front row near where Grievant was standing and heard him mumble his name when implying some boys needed to lose weight. The incident was confirmed by the testimony of Student #9, who was sitting near Student #8 and also heard the comment. The testimony of Student #10, who was sitting in the third row, also references the matter. She asked the Grievant, “Did you just call him (Student #8) fat, wherein the Grievant didn’t respond. The Grievant’s testimony was:

- “I vaguely remember some girls saying, are you calling us fat?”
- “I don’t recall making the Student #7 comment – maybe I said it, but don’t recall.”
- “Student #8 would not lie, but may have misunderstood – it is possible I said his name, but don’t know for sure.”

Allegations of the Grievant looking inappropriately at girls have been made by a number of students:

- Student #3 testified, that Grievant makes her feel uncomfortable by the way he looks at me –when taking test he had a weird look toward bottom of my neck, which made me feel violated and scared. This was the only time I know of and I didn’t report it but talked to my sister and mother about it.
- Student #3 testified, I saw Grievant looking over the shoulder at the chest of Student #2.
- Student #4. My brother, who is year older, said watch out for Grievant.
- Student #5 testified that the Grievant looked at her inappropriately three times:

- The first time was on October 1 when he was kneeling beside my desk, but wasn't paying attention to what I asked him – instead he was looking down my chest. I didn't say anything because I thought I would get in trouble
- The second time was on October 2 when he looked at my chest and then looked away at another girl and was looking at her chest.
- The third time the Grievant was holding the door open to the classroom and stared at me for some five seconds, looking at my chest – his eyes were focused below mine and it made me feel ill. I reported it to the Principal on October 5, as I couldn't take it anymore. I felt uncomfortable talking to him and asked friends for help instead of asking him. I told my mother about it.
- Student #5 testified that she observed the Grievant stare at several other girls, including Student #6.
- Student #7 testified that the Grievant looked down her shirt near the beginning of the year as he was helping her with work at her desk. I saw his eyes look down my shirt, maybe two seconds. I reported it to the Principal around the same time because it made me feel uncomfortable. Afterward, the Grievant was more mean to me and when I asked for help, he would say, look in the book.
- Student #11 testified that the Grievant looked at girls in weird ways and saw it a number of times. When girls walked back to their desk the Grievant would look at them in a way that made her feel uncomfortable and looked at her in ways she didn't like. I left his class and was home schooled because I felt uncomfortable with Grievant. I didn't report it because I felt I wouldn't be believed, but told parents and discussed it with my sister.
- Student #12 testified that she observed the Grievant looking at other girls but didn't report it because the Principal didn't do anything when she reported other things.

The Union argues that these allegations are likely based on rumor, misperception, misunderstanding and lies. The record shows the following testimony concerning the character of student witnesses:

- Student #1:
 - Creditable witness, in upper 10% of class – Huss
 - Creditable witness - Barnes

- Good student, no behavior problems – Breyen
- Quiet, no reason to make up story - Grievant
- Student #2:
 - Creditable witness - Huss
 - Violated dress code –Breyen
 - Talkative, gossipy – Breyen
 - Told the truth about candy incident - Grievant
- Student #3:
 - Creditable witness – Huss
 - Beginning of year tough academically, OK later, talkative, gossipy – Breyen
- Student #4:
 - Creditable witness - Huss
 - Violated dress code – Breyen
 - Late to class, gossipy – Breyen
 - Good academic record and behavior record, would not retaliate - Grievant
- Student #5:
 - “B”- “C” student, no discipline, no reason to question her creditability – Huss
 - Creditable witness - Barnes
 - Creditable witness, not subject to behavioral issues - Huss
 - Academically average, nice, follower – Breyen
 - “B” student, has no problems, in class for entire year - Grievant
- Student #6:
 - Creditable Witness - Huss
- Student #7:
 - Only student witness in Special Education Program (EBD) - Grievant
 - Only one with behavioral problems - Grievant
 - Violated dress code – Breyen
 - Daughter knows her – fabricates at lot of things - Nowak
- Student #8:
 - Creditable witness – Huss
 - Would not lie, but may have misunderstood - Grievant

- Student #9:
 - Creditable witness - Huss
- Student #10:
 - Creditable witness - Huss
 - No problem with her, few issues, talked about others, did well academically – Breyen
- Student #11:
 - Creditable witness – Huss
 -
- Student #12:
 - Creditable witness - Huss

It is to be recognized that some of the attire worn by females is styled to emphasize their physical features and it is natural for one to notice it. However, there is a difference between being noticing something and staring or goggling at it or positioning oneself to gain a better visual advantage. A person who works around others should clearly understand and respect the difference. We may not have the option of influencing how others present themselves, but we remain responsible and accountable for our own behavior.

FINDINGS

The Arbitrator finds that charges #1 through #4 are supported by a preponderance of the evidence.²⁹

The primary witness (Student #1) to the incident, where the Grievant inserted his hand into her pocket is a highly creditable witness. There is no evidence that Student #1 had any reason to testify to other than the truth. The other witness with direct knowledge of the incident (Student #2) provided creditable testimony that essentially comports with that of Student #1.

²⁹ Blacks Law Dictionary, 2001 – Preponderance of the Evidence – The greater weight of the evidence, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

A review of the record reveals that the Grievant's testimony lacks creditability, being marked by changing and conflicting statements. At times the Grievant's testimony ranges from absolute denial to full admission.

The incident involving the Grievant inserting his hand into the student's pocket can be, at best, considered a serious lapse of judgment, unbecoming a professional teacher, and at worst, sexually motivated. The Grievant's initial explanation for inserting his hand into the student's pocket was so that the other students would not see it. However, on cross-examination, the Grievant admitted that this was not true, as he knew the other students would know.

The Grievant's hand having touched the student's buttocks was, at best, an inadvertent consequence of inserting his hand into her pocket, and at worst sexually motivated.

The evidence supporting allegations regarding the Grievant having looked inappropriately at female students, although less conclusive than the evidence supporting the previously referenced matters, is never the less substantial. Although it is to be recognized that perception is a significant factor in this issue, the number of alleged incidents and the number of students making the allegations cannot be dismissed as inconsequential. Most of the students making these allegations are creditable witnesses.

To whatever degree this inappropriate conduct is taking place, it is important that it be corrected. The record reveals that the consequences, are not only detrimental to the affected students, but to the school as a whole. The record reveals that this inappropriate conduct generates fear, rumors, inequitable treatment and gossip that pervades the entire institution, including students and staff.

With respect to the incident where the Grievant is alleged to have implied that a student has a weight issue, the Arbitrator finds the creditability of the witnesses

making the allegation to be more creditable than the Grievant. The students making the allegation were clear and convincing, whereas the Grievant 's memory of the incident was unduly vague.

With respect to charges, #5, #6 and #7, the Arbitrator's finding, for a preponderance of the evidence supporting the earlier charges, by implication, also supports a finding that charges #5, #6 and #7 have also been violated.

AWARD

The grievance is denied. The Arbitrator finds the discipline to be for just cause.

The contents of the Memorandum, titled: "Unpaid Suspension and Directive," issued to the Grievant on November 9, 2009, are accurate and supported by evidence in the record.

CONCLUSION

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

Issued this 3rd day of January 2011 in Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR