

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

Independent School District
No 138 (North Branch)

and

BMS Case No. 10PA1521 (G.K. Grievance)

SEIU, Local 284

Appearances:

Ms. Sarah Huntley, Esq., 450 Southview Blvd., South St. Paul, Minnesota 55075,
on behalf of the Union.

Mr. Joseph E. Flynn, Esq. and Ms. Jennifer K. Earley, Esq., Knutson, Flynn &
Deans, P.A., 1155 Centre Pointe Drive, Suite 10, Mendota Heights, Minnesota
55120, on behalf of the District.

Arbitration Award:

Pursuant to Article XV, Grievance Procedure, Section 8, Subsection 3, Arbitrator Sharon A. Gallagher was jointly selected by the parties to hear and resolve a grievance regarding the discharge of the Grievant, G.K.¹ on January 29, 2010. The first day of hearing was held in North Branch, Minnesota on October 7, 2010 by agreement of the parties. A stenographic transcript of the proceedings was made. The second day of hearing was held in North Branch, Minnesota on January 21, 2011 and concluded that day. A transcript thereof was taken.

The parties had full opportunity to present their evidence and arguments. Twelve witnesses testified on oath or affirmation; twenty-six documents were received into the record. At the hearing, the parties agreed to postmark their briefs by close of business on March 7, 2011, and they reserved the right to file reply briefs ten working days after receipt of the other's initial brief. The transcript was received on January 31, 2011. Extensions of time on the briefs were granted so that initial briefs were received by April 8, 2011, and the District's reply brief was received on April 18, 2011, whereupon the record was closed.

Issues:

¹ The Grievant's initials will be used in this award. Four current employees' initials will also be used due to the nature of G.K.'s alleged comments concerning them.

The parties were unable to stipulate to the issues to be determined herein but they stipulated that the Undersigned could frame the issues based upon the relevant evidence and argument herein and the parties' suggested issues.

The District's suggested issues were as follows:

- 1) Did the School District violate Article 14, Section 2, when it discharged G.K.?
- 2) If so, what is the appropriate remedy?

At the hearing, the Union offered the following issues for decision herein:

- 1) Did the School District have just cause to discharge the Grievant as outlined in the collective bargaining agreement?
- 2) Did the District act with a discriminatory motive when it discharged the Grievant?
- 3) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument and given that the labor agreement does not contain a discrimination clause and that the Union's Issue 2 is subsumed in the inquiry whether just cause exists for G.K.'s discharge, this Arbitrator finds that the Union's Issues 1 and 3 reasonably state the dispute before her and they shall be determined herein.

Relevant Contract Provisions:

**ARTICLE XIV
DISMISSAL AND PROBATIONARY PERIOD**

. . .

Section 2. Nonprobationary Employees: An employee who has completed the probationary period or an extended probation as described in Section 1 hereof shall be termed a nonprobationary employee and may be suspended without pay or discharged only for just cause.

. . .

**ARTICLE XV
GRIEVANCE PROCEDURE**

Section 9. Election of Remedies and Waiver: A party instituting any action, proceeding or complaint in a federal or state court of law, or before an administrative tribunal, federal agency, or seeking relief through any statutory process for which relief may be granted, the subject matter of which may constitute a grievance under this Agreement, shall immediately thereupon waive any and all rights to pursue a grievance under this Article. Upon instituting a proceeding in another forum as outlined herein, the employee shall waive his/her right to initiate a grievance pursuant to this Article, or, if the grievance is pending in the grievance procedure, the right to pursue it further shall be immediately waived. This section shall not apply to actions to compel

arbitration as provided in this Agreement or to enforce the award of an arbitrator.

Background:

The District serves eight Minnesota Communities, educating almost 4,000 students from pre-school through high school. The District employs approximately 410 employees (S.D. Exh. 7). The Union’s bargaining unit, involved herein, consists of 25 employees in classifications of lead custodian, custodian and schoolkeeper. At all times relevant to this case, three to four unit employees were assigned to both day and night shifts in each of five buildings.² In 2009-10, night shift unit employees began work between 1:30 and 3:00 pm.³ Schoolkeepers work in all District buildings; they are essentially responsible to clean the schools and to do minor maintenance. Schoolkeepers know their jobs but when necessary, schoolkeepers receive direction from custodians (if no lead custodian is assigned to their shift/building).

G.K. was hired by the District in 1998 as a schoolkeeper. In April of 2006, G.K. posted into a custodian position as the senior qualified employee (Article VI, Scope of Work, Section 2). The job description for the custodian position reads in relevant part as follows:

II. Job Summary

To provide students and staff with a clean and functional environment for education.

III. Essential Duties and Responsibilities

% of time	Job Duty
40%	Performs cleaning of buildings and equipment. Performs daily cleaning of classrooms, offices, hallways, bathrooms, locker rooms, etc. including such things as emptying trash, recycling, dusting, vacuuming, dust mopping, disinfecting and washing. Performs major cleaning of buildings when school is not in session.
20%	Performs minor maintenance to buildings and equipment. Performs various maintenance activities including such things as replacing light bulbs, repairing lockers, desks, chairs, etc., unplugging drains, assembling furniture and equipment, and painting. Shovels and sands sidewalks and steps.

² The District has downsized and now operates out of four buildings.

³ Buses bearing students home leave between 3:00 and 3:30 pm daily.

- 10% **Performs major maintenance to buildings and equipment.** Performs a full range of preventive maintenance and general operations tasks. Troubleshoots and repairs a wide range of malfunctions, leaks, failures and breakages.
- 10% **Moves and transports various supplies and equipment and sets up for various activities.** Moves furniture, materials and equipment, including such things as setting up lunchrooms, warehousing materials, set up extracurricular activities, special events, and community education activities. Assists in receiving of deliveries.
- 5% **Operates energy management systems.** Operates and monitors building energy management system.
- 5% **Monitors inventory of appropriate supplies and materials.** Monitors inventory levels and reports needs to Lead Custodian.
- 5% **Provides work direction to building custodial staff:** Provides direction to schoolkeepers in the building regarding custodial activities in the absence of the building Lead Custodian.
- 5% **Monitors building security.** Opens and closes buildings each day, and insures that the building is secure and the security system is set. Is on call when school is not in session.

IV. Job Outcome

Projects a positive, cooperative and respectful attitude with community members, parents, students and other employees.
 Provides a clean, safe, comfortable and functional environment.

Supports students and staff by providing services, facilities and materials for education activities and programs.

V. Qualifications

Education required: High school diploma or equivalent

Experience required:
 Cleaning and building maintenance preferred

Certification/Licensure required:
 Boiler License – Minnesota Second Class Grade C
 Minnesota Driver’s License

VI. Decision-making/Freedom to Act/Major Challenges

Major challenges are unexpected breakdowns and acts of vandalism.
 Makes on the spot decisions when discrepancies arise in regards [sic] to the community use of buildings.

IX. Mental Effort Required

Position requires responding to requests from staff, the ability to read instructions and directions, and the means to decipher formulas for mixing and applying chemicals.

X. Machines, Tools, Equipment, Electronic Devices, Software Require

Forklift, personnel lift, hand and shop tools, ladders, cleaning equipment, snow blower and shovel, boilers, computer and H.V.A.C. equipment.

XI. Supervision of Others

Gives direction to other custodians and schoolkeepers in the absence of the building lead custodian.

. . .

On August 12, 2005, Director of Building and Maintenance Mike Johnson issued G.K. (then a schoolkeeper), the following written notice of deficiency:

. . .

The conduct, which forms the basis of this Letter of Deficiency, includes the following:

1. I have given you more than one verbal warning about your profanity, particularly profanity towards other employees.
2. We have also discussed your attitude and unwillingness regarding helping other employees complete assigned duties.

This deficiency is inconsistent with and contrary to the policies, procedures, and philosophy of the school district and may have a negative impact upon the students, staff and your effectiveness as a schoolkeeper.

A copy of this Letter of Deficiency has been placed in your personnel file.⁴

⁴ M.H. stated herein that, in 2005, she, G.K., and retired employee Gary Heldt were standing around at the end of a shift at the High School where she was a schoolkeeper, when G.K called female schoolkeeper K.M. a “whore”. G.K. stated he would like to take his cock and shove it down her throat until it came out her fucking ass, and then he’d wrap it around her neck and choke her with it (Tr. 134). M.H. stated she was disgusted and very upset by G.K.’s statements and that she complained about G.K.’s statements to management. H.M. stated that she requested and received a transfer out of the High School after G.K. made these comments. G.K. did not deny making this comment; he stated he did not recall making it (Tr. 365). Schoolkeeper K.B. recalled that in 2005, G.K. called K.M. “slut, whore, skank” when she worked at the High School (Tr. 170).

Although K.M. stated that she was not afraid of G.K., in 2005 (Tr. 332), she admitted that she hid from G.K. by standing on toilet seats in the High School bathroom stalls on several occasions (Tr. 323-324)

G.K. did not grieve this notice. G.K. received no further discipline for this kind of misconduct until the 2009-10 school year.

Pursuant to Article XII, Rates of Pay, Section 3, subsection 2, G.K. was required to acquire (and maintain) a 2nd Class C Engineers license within 24 months of his entering the Custodian position. In the Fall or Winter of 2008, G.K. had taken the exam but failed to get his Class C license. Director of Personnel/Finance Randi Johnson called G.K. in to discuss the matter. At this time G.K. requested accommodation due to a reading disability. Ms. Johnson asked G.K. to document his disability. G.K. did so and the District accepted G.K.'s documentation and accommodated G.K., as he requested, allowing him more than 24 months to get his license. However, G.K. was able to pass the licensing exam in April, 2008 before the (contractual) 24 months had expired.⁵

From September, 2009 through January, 2010, G.K. was assigned as Custodian at the Middle School on the night shift. During this period, Schoolkeepers M.H., Frank Green and Tammy Siedlecki worked with G.K. at the Middle School on the night shift, and G.K. was the only Custodian on the shift so he had the responsibility (for 5% of his time) to direct the three schoolkeepers on his shift.

On September 14, 2009, Director of Building Management Johnson issued G.K. a second written notice of deficiency which contained some verbiage identical to that quoted above in the August 12, 2005, written notice. The following additional language appeared on the September 14th notice of deficiency:

The conduct, which forms the basis of this Letter of Deficiency, includes the following:

1. I have given you more than one verbal warning about your profanity, particularly profanity towards other employees.
2. Also, you need to stop telling other employees that they do not do anything during their shift.

This written notice was triggered by a conversation on Friday, September 11th between G.K. and Schoolkeeper K.B. On September 11, K.B. was working days (5:30 a.m. to 2:00

because she wanted to avoid being verbally abused by G.K., K.M. stated that the reason she hid from G.K. in this manner was because at this time, G.K. "would start yelling at her for no reason" (Tr. 335). Notably, K.M. reported that she never hid from any other District employee in this manner (Tr. 335).

⁵ At this meeting, G.K. complained to Ms. Johnson that a sign had been posted in the custodial area which read "Why do I read but not understand?" G.K. said he felt the sign was offensive; that he did not know who posted the sign; and that he (G.K.) removed the sign and threw it away. Ms. Johnson stated herein that she did not feel she had sufficient evidence to investigate G.K.'s complaint and that she did not view G.K.'s comments as a harassment complaint. Significantly, G.K. stated that he took pictures of the sign with his cell phone and gave them to the Union, but no evidence was submitted to show that the District ever received any pictures of this sign (Tr. 344).

p.m.) and G.K. was working nights at the Middle School. G.K. came into work at 1:30 p.m. very angry, accusing day shift employees of failing to clean “shit” out of the bathrooms the previous day.⁶ K.B. denied knowing there were feces left in the bathroom and said she would have cleaned it if she had known about it. G.K. replied, “Bullshit.” G.K. accused K.B. of lying and knowingly failing to clean the feces from the bathroom so he would have to do it. K.B. stated that she did not know about the problem and she denied leaving feces in the bathroom. G.K. “started flipping out” and said, “I’m your boss and you have to listen to me”. G.K. threatened to call Mike Johnson. He said, “You little whores running around here [K.B. and C.R.] never do nothing.” G.K. then called K.B. and C.R. “whores, sluts, bitches and cunts.”⁷ K.B. said G.K. got red in the face (Tr. 167-168).

On September 15th, Randi Johnson suspended G.K. (with pay) pending a full investigation of a complaint against G.K. K.B.’s complaint to Ms. Johnson came one day after G.K. had gotten angry at K.B. for K.B. and C.R.’s alleged failure to clean feces out of a bathroom at the Middle School. K.B. told Ms. Johnson that G.K. was angry, explosive and profane and that she was afraid of him (Tr. 174). Ms. Johnson then interviewed all day-shift schoolkeepers (C.R. and K.M.) and all evening schoolkeepers (M.H., Frank Green and Tammy Siedlecki) about G.K.’s behavior with them.

Ms. Johnson stated that during her investigation, all employees stated that G.K. regularly engaged in aggressive outbursts, inappropriate, volatile behavior, that he had an explosive temper; that his face would get red and he would scream, and use profanity (using “fuck” often), and he regularly (sometimes daily) demeaned females by calling them “bitches,” “sluts,” “whores,”⁸ and “cunts.”⁹ Ms. Johnson stated that all employees she interviewed stated that they were afraid that G.K. would lose control and snap; and that he would stand in a threatening manner during his outbursts. One schoolkeeper (K.M.) told Johnson that she hid from G.K. by standing on the toilet in the women’s bathroom on more than one occasion when they worked together at the High School years before.

Based on her investigation, Ms. Johnson concluded that G.K. had engaged in a pattern of inappropriate conduct. On September 23rd the District, G.K. and Union Representative McCorkle met to discuss the results of the District’s investigation. Ms. Johnson shared the facts revealed and that the District believed it had sufficient evidence to discharge G.K. G.K. denied using the language he was accused of using and he denied

⁶ Feces had been spread around one of the Middle School bathrooms.

⁷ K.B. also stated that when she worked at the High School, G.K. befriended her, buying her lunch and dinner often. Once G.K. took her and Jean ____ out to dinner. At this time K.B. told G.K. they were just friends and she had no interest in being G.K.’s girlfriend. After this, K.B. stated, G.K. started checking her work more; that she found pennies on the floors of the rooms she was assigned to clean which she thought G.K. placed there to see if she was cleaning consistently (Tr. 182-184).

C.R. stated herein that in September, 2009 she was assigned to deliver mail starting at 1:45 in the afternoons; that when G.K. arrived at work, normally around 1:30 p.m., she would have to leave. In September, 2009, C.R. stated she heard G.K. say that K.B. had her legs spread open all weekend long laying on her back (Tr. 193) and that G.K. often called K.B. a whore and a slut (Tr. 194). C.R. stated she reported G.K.’s comments about Betts to Mike Johnson.

⁸ All other witnesses told Johnson that they had heard G.K. use these three words referring to female employees.

⁹ C.R. did not hear G.K. use this term.

engaging in the conduct alleged; G.K. stated that his language at work was no different from that of other employees; and that K.B. had in fact failed to clean feces out of the Middle School bathroom on September 11th.

Another meeting was held on September 29th between the District, G.K. and Union Representatives McCorkle and Lucker. Ms. Johnson was convinced at the end of this meeting that G.K. had acknowledged he needed to improve his conduct and that he would do so, which made discharge inappropriate in her view. During this meeting, the parties discussed appropriate ways for G.K. to deal with his fellow employees including going to his immediate supervisor Mike Johnson with any issues. The parties then entered into the following settlement agreement:

LETTER OF AGREEMENT

This Letter of Agreement is entered into among Independent School District No. 138, North Branch, Minnesota (hereinafter the "School District"), SEIU Local 284 (hereinafter the "Union") and G.K. (hereinafter the "Employee") as follows:

1. The Employee has been the subject of an investigation and disciplinary action by the School District.
2. The School District has determined that the employee's action warrants an immediate discharge, and the School District was prepared to proceed with such action. However, the parties have reached an agreement for a lesser disciplinary action in consideration of the employee's commitment to change his behavior and also to forego filing a grievance regarding the written reprimand, which he acknowledges receiving.
3. The Employee recognizes that any violation of the directive will result in immediate dismissal action on the part of the School District.

Part of the settlement included the insertion of the following suspension letter into G.K.'s file:

On September 15, 2009, you were placed on a paid administrative leave, pending an investigation regarding a complaint against you. The investigation has been completed and involved interviewing you, as well as a number of your School District colleagues.

Basically the complaint concerns your treatment of other employees during the course of your employment with the School District, culminating on Friday, September 11, 2009, when you engaged in abusive verbal behavior toward a fellow female employee. The verbal attack upon the employee consisted of using profane, unprofessional, abusive, crude, offensive and inappropriate language, while engaging in a temper tantrum. Unfortunately, this is not the first time you have engaged in these activities, and you have been warned repeatedly about the inappropriateness of such conduct. Such behavior has also been demonstrated from time to time with your supervisors.

Your behavior causes concern and anguish among your colleagues, and your temper outbursts cause fear among these colleagues. Your conduct is totally inconsistent with the standards of conduct required in a School District, and it has been made clear to you on many occasions that this conduct will not be tolerated. You have failed to correct your behavior.

As a result of this behavior, constituting continuing violations of School District policies, practices and directives, you are suspended without pay for a period of 10 working days, effective immediately. During this period of unpaid suspension, you are directed not to enter upon School District premises or facilities, and you are not to have contact with any School District employees, except for the union stewards. You will be notified as to the day you may return to work, provided you comply with the directives as contained in this letter.

You are also cautioned about retaliation against any of your fellow employees that you may perceive were involved in discussing your behavior during the investigation. Any such activity will result in immediate discharge.

G.K. did not grieve the ten-day suspension without pay.

Facts:

No further complaints were lodged against G.K. until the end of December, 2009. Over the Christmas break, two employees complained to Ms. Johnson about G.K.'s conduct. M.H. told Ms. Johnson about a confrontation she had with G.K. on December 23rd. Hughes stated that she was working the night shift with Frank Green, Tammy Siedlecki and G.K. At 8:00 p.m. M.H. got Siedlecki (who was then vacuuming) and asked her to go with M.H. to the 6th grade hallway, which had been closed due to a tornado to look around. M.H. stated that thereafter they could take their breaks. M.H. and Siedlecki were looking at the tornado damage when G.K. and Green saw them. G.K. said to M.H. "If all you's are going to do is stand there with your head up Tammy's fucking ass then you could get down here and clean some desks and start moving some stuff" (Tr. 122). M.H. defended her actions. G.K. yelled at her and accused M.H. of giving him a "line of shit" and that she had not been working; that she'd been "sitting on her ass." Again, M.H. said she and Tammy had been working, G.K. then got red in the face and accused M.H. and Siedlecki of being on break for the last two hours and he told M.H. that she was going to do what he told her to do and he would talk to Mike Johnson about M.H.'s conduct. M.H. also heard G.K. call her a "dumb bitch" (Tr. 122-24). M.H. said that she and Siedlecki just walked away from G.K. but he followed them down the hall on the "Cushman" about 15 feet behind them.¹⁰

¹⁰ Neither Siedlecki (Tr. 431-433) nor Green confirmed Hughes' assertion that G.K. drove the Cushman and that G.K. followed M.H. and Siedlecki down the hall on the Cushman on December 23rd. M.H.'s testimony (Tr. 130-32) regarding the December 23rd confrontation was otherwise corroborated by K.B. and confirmed by C.R. (Tr. 166-68; 189-92) and Green (Tr. 206-09). M.H. added that she stayed and defended M.H. and told G.K. to calm down, that he looked like he was going to have a stroke; that she told him she did not believe anyone was taking advantage of him or his kindness. However, Siedlecki (Tr. 189-190) and Green did not corroborate M.H.'s account of the specific profanity Hughes attributed to G.K. during his conversation about the lawyers.

M.H. stated herein that G.K. used profanity daily when she worked with him; that he often called C.R. and K.B. “cunts, whores and bitches” behind their backs; that she was afraid G.K. would get a gun and shoot her (Tr. 141); that G.K. had anger issues and was volatile; that he got red in the face and yelled and screamed profanities. M.H. stated that she could not work with G.K. if he were reinstated and that her coworkers told her they would not work with G.K. if he was returned to work (Tr. 138).

Frank Green confirmed that on December 23rd, he was driving the Cushman and that he and G.K. did not follow M.H. and Siedlecki down the hall that night. Green stated that on December 23rd, G.K. got very angry at M.H. and Siedlecki; that he accused them of just walking around/not working; that G.K.’s face got red; that G.K. said that he (G.K.) was the boss; that he spoke to M.H. using profane language (“mother fucking bastards”, “sons of bitches” and “you’ve got your head up your ass”) (Tr. 229). Green stated that this confrontation went on for fifteen minutes and that G.K. was the aggressor, and that G.K. was hostile and continued to pursue the confrontation.¹¹

C.R. also made a complaint to Ms. Johnson about G.K.’s conduct on or about December 23rd at work. C.R. stated G.K. made derogatory comments about K.B., he thought K.B. didn’t do her share of work, and G.K. said he had talked to all the District employees and that he thought K.B. had talked to the District’s attorneys about him when he got suspended. C.R. stated that G.K. asked her if she had talked to the lawyers too. C.R. responded that she’d been told employees were not supposed to talk about that subject.

C.R. stated herein that she felt uncomfortable during her confrontation with G.K.; that G.K. was agitated, using the “F” word, standing, red-faced and hollering and that she snuck out so she would not have to hear anymore.¹² C.R. stated she became concerned that G.K. would retaliate against her for speaking to the District’s lawyers so she went to management and described G.K.’s conduct and statements to Ms. Johnson.

On December 30th, G.K. was placed on paid administrative leave while the District investigated the complaints received against G.K. in December, per a letter from the Ms. Johnson (S.D. Exh. 8). The letter also contained the following paragraph:

. . . .
During this time, you are not permitted on any school premises except with my express permission. Further, you are not permitted to have contact with any school employees except union officials during this administrative leave.

Upon completion of its investigation, the District will be in contact with you.

¹¹ Green also stated herein that G.K. referred to K.B. as a “fucking cunt”. Green said that G.K. used profanity two or three times a week and that he (Green) was offended by it and did not like it. Green also stated that other employees used profanity but not to the frequency and level that G.K. did. Green stated he was not afraid of G.K. but that he knew that other employees were (Tr. 213).

¹² R. also stated that when G.K. worked at the District she was afraid he’d “jump” her or blow up at her about her work or start talking derogatively about K.B. (Tr. 196). C.R. stated that she and Betts would not be happy if G.K. were reinstated (Tr. 196-97), that she (C.R.) would be afraid of G.K.’s moods (Tr. 197-98). Since G.K. has been gone C.R. stated the atmosphere at work is happy and laid back and that she is not afraid to go to work (Tr. 196). C.R. stated that prior to September, 2009 she complained to Mike Johnson about G.K.’s conduct/language.

Ms. Johnson stated herein that it took one month for the District to fully investigate the December, 2009 complaints against G.K. Johnson also stated that the District has never discharged another employee for the reasons it terminated G.K.

On January 28, 2010, the District held an investigatory meeting with G.K. and his Union Representatives regarding the results of their investigation into G.K.'s conduct in December, 2009 to get G.K.'s side. The District told G.K. that he had been accused of using profanity and having another outburst against a female employee and that he had violated the no-retaliation directive in his suspension. G.K. said he was innocent, he flatly denied using profanity and engaging in any outbursts, and he denied any violation of the retaliation directive in his suspension notice. G.K. also declined to resign. A notice of discharge was issued to G.K. on January 29, 2010, as follows:

Please be advised that you are discharged from employment with the North Branch School District pursuant to Article XIV, Section 2 of the collective bargaining agreement between the School district and your Union effective immediately.

As you are aware, as recently as September 29, 2009, you were disciplined for engaging in abusive verbal behavior toward fellow School District employees. You were warned at that time that your continued use of profane, unprofessional, abusive, crude, offensive and inappropriate language during temper tantrums was inappropriate and that such conduct was inconsistent with the standards of conduct required by the School District. This warning preceded previous written disciplinary actions for similar and other misconduct during your employment with the School District.

It is to be noted that your inappropriate conduct is highly offensive, not only to the School District but also to your colleagues who have repeatedly complained about your treatment of them.

It was also called to your attention in the September 29, 2009, disciplinary letter that you were not to engage in any retaliation activity against your fellow employees who may have been involved in describing your inappropriate behavior and that any such retaliation on your part would result in your immediate discharge.

This discharge is effected because of your long history of inappropriate conduct and your failure to follow the written warnings and directives from the School District given to you on September 29, 2009, which was accompanied by a 10-day suspension without pay. You violated both the directives on your treatment of fellow employees, as well as the no retaliation directive.

Positions of the Parties:

District:

The District argued that G.K. had a significant history of inappropriate, verbally abusive, derogatory and profane language toward co-workers (particularly females),

which included angry outbursts and retaliating against co-workers who complained about his abusive conduct. In this regard, the District noted that prior to August, 2005, G.K.'s supervisor verbally warned him several times to stop using profane and abusive language to his co-workers. The District urged that between 2005 and 2009, either complaints against G.K. were not brought to the District (until September and December, 2009), or Mike Johnson dealt with them by giving G.K. verbal warnings.

The District contended that when G.K. engaged in additional similar misconduct in early September, 2009, and when G.K. refused to sign the written warning Mike Johnson offered him, Johnson reported the incident to H.R. Director Randi Johnson. Ms. Johnson decided further investigation was necessary so she placed G.K. on paid leave pending the investigation. Ms. Johnson then interviewed four employees and she then met with G.K. to get his side of the story.

The District decided to discharge G.K. but instead it agreed with G.K. and the Union to settle the case by issuing lesser discipline (a ten-day suspension) and a last chance agreement in which G.K. agreed not to retaliate against fellow employees and G.K. agreed "that any violation of the directives (in the agreement) will result in immediate dismissal action..." (S.D. Exh. 6). The District noted that Steward McCorkle represented G.K. and advised him of the implications of entering into the settlement.

Three months later, in December, employees M.H. and C.R. lodged complaints against G.K. The District placed G.K. on paid leave and found G.K. had violated the prior settlement agreement. The District investigated the complaints and found them believable. On January 28th, the District then had an investigatory meeting with G.K. where, again, he had Union representation. G.K. denied having engaged in another outburst with a female employee and engaging in retaliation; he said he was innocent and that his co-workers were lying. G.K. refused to comment further and he refused to resign. The District argued it appropriately discharged G.K. on January 29th for cause.

The District argued that the Arbitrator lacks jurisdiction to consider the Grievant's allegations of discrimination made before EEOC and MDHR based on the clear language of Article XV, Section 9 of the labor contract. In these circumstances, the Union is also precluded from arguing the Grievant's discrimination claims, made in two other forums, in this case. And the Arbitrator is prohibited from considering and ruling upon claims regarding the Grievant's alleged reading disability as Article XV of the contract expressly states that the parties had no intent to arbitrate such a disability claim or any issues involving external law.

The District asserted that it proved by a preponderance of the evidence that it had cause to discharge the Grievant. On this record, the District appropriately discharged based on clear evidence that he repeatedly engaged in abusive and inappropriate verbal conduct during temper tantrums aimed at his co-workers and for his retaliation against the employees who reported his misconduct, as alleged. In this regard the District noted that all of G.K.'s co-workers who testified herein stated G.K. regularly swore at work and that he regularly employed profane, abusive and derogatory language in addressing his female co-workers (i.e., bitch, whore, cunt, slut, etc.). While G.K. admitted only using such language behind female employees' backs, female witnesses herein stated that they heard these comments made about other female workers or directed toward themselves. In addition, the District proved herein that G.K.'s female co-workers felt threatened by him and at least one of them hid from him.

Furthermore, the District showed that prior to September, 2009, G.K. had been verbally warned repeatedly and that he had received one written warning to cease engaging in this type of misconduct, but failed to correct his behavior. And G.K. did not grieve any of this prior discipline. Also, G.K. admitted swearing at Betts in September, 2009. (The District urged that K.B.'s more detailed account of the incident should be credited here.) For the September incident, G.K. agreed to take a ten-day unpaid suspension, he agreed not to grieve the discipline and that any similar misconduct would result in G.K.'s "immediate dismissal."

Although G.K. asserted herein that he did not understand the September, 2009, settlement agreement he signed, the District urged that G.K.'s assertion is unbelievable. The District noted that two Union representatives were present when the agreement was reached and McCorkle stated herein that she read and discussed the agreement with G.K. before he signed it. The District also noted that G.K. never questioned or challenged the agreement until after his January, 2010, discharge.

The District argued that four witnesses to the two incidents in December, 2009, three months after G.K.'s suspension, showed that G.K. engaged in further profane, derogatory, and hostile confrontations with female co-workers. G.K.'s denials should be disregarded. Also, the District noted that G.K. never denied and the Union otherwise failed to contest C.R.'s assertion that G.K. sought to retaliate against her.

In sum, the District urged that G.K.'s serious misconduct justified his discharge after he had been repeatedly warned therefor. The Arbitrator should also sustain the discharge based on the weight of the record evidence and the fact that G.K.'s various defenses offered herein are insufficient to overcome the District's case. In this regard, the District pointed out that the evidence showed that G.K.'s comments went beyond mere "shop talk", that other employees' (undisciplined) profanity did not come close to the seriousness of G.K.'s comments and that the evidence showed that G.K. did not always make derogatory statements about female co-workers behind their backs. Concerning the last "defense", the District argued that even if such comments were made behind a female co-worker's back, it does not necessarily make the comments less offensive. Regarding the "defense" of disparate treatment, the District pointed out that the Union failed to prove that other employees engaged in serious verbal abuse of others on the same level as G.K. Also, the District received no employee complaints about other employees' language or conduct at work. Significantly, G.K., who directed the work of these employees, did not report that they had engaged in any misconduct similar to his own. H.R. Director Johnson stated she had never heard that any other employee engaged in conduct of the type and severity of G.K.'s.

Finally, regarding G.K.'s assertion that the District failed to investigate a harassing sign regarding reading disabilities posted by a fellow District employee which undermined and humiliated G.K., the District noted that G.K. never gave the District any specific information about the sign, or a copy of the picture of the sign he said he took with his phone so that the District could launch an investigation into G.K.'s assertion. Also, the evidence regarding G.K.'s various outbursts showed that on each occasion, G.K. confronted the female employees involved without provocation and that G.K. never complained about his female co-workers' conduct.

If the Arbitrator finds cause for G.K.'s discharge, and as the parties agreed in September, 2009, that any additional similar misconduct by G.K. would cause his

immediate discharge, the Arbitrator has no discretion herein to modify the penalty in this case, unless the District engaged in an abuse of discretion by discharging G.K. Finally, the fact that several female employees who were the victims of G.K.'s outbursts and inappropriate comments have stated that they are afraid of him, have hidden from him, and do not wish to work with him in the future should be considered by the Arbitrator here. In all the circumstances, the District urged the Arbitrator to deny and dismiss the grievance in its entirety.

Union:

The Union urged that the District did not have just cause to terminate G.K. for his part in the December 23rd incident, given that when G.K. directed M.H. to perform assigned duties, M.H. was insubordinate to G.K., twice refusing G.K.'s direction and verbally attacking him. The Union asserted that as a witness herein, M.H. was not to be believed. In this regard, the Union noted that G.K.'s account of what occurred was corroborated by Tammy Siedlecki, and in part by Frank Green.¹³ Finally, the Union asserted that M.H.'s accusation that G.K. made a profane statement about K.M. to M.H. and Heldt was denied by both G.K. and Heldt,¹⁴ showing M.H. was not credible on this point as well. Also, as a general matter, witnesses Anderson and Union Representative McCorkle stated that M.H.'s reputation for truthfulness is not good, that M.H. is a bully, antagonistic with other employees and has trouble getting along with others, and that M.H. has had to transfer within the District several times as a result of these problems. M.H. also demonstrated that she had no respect for G.K. and called him (and Siedlecki) names like "retarded" and "stupid." Union Representative McCorkle also stated that M.H. was aggressive with McCorkle on two occasions, one in February of 2009 and another over three years ago (Tr. 311). Anderson also stated she has seen M.H. act aggressively with staff and that Siedlecki had told Anderson she was "a little bit afraid" of M.H. Anderson also stated that M.H. has problems taking direction, is insubordinate, and sometimes refuses to perform assigned tasks. M.H. also contradicted her own testimony herein when she blamed G.K. for her anxiety but later stated she had been taking anxiety medications for four years.

The Union argued that G.K. was never given a chance to respond to the charges against him prior to his discharge. In this regard, the Union contended that G.K. first received the details of "the charges against him during his unemployment appeal herein." Also, Union Steward McCorkle confirmed that the District failed to give G.K. "the allegations against him in the January 28th meeting" (U. Br., p. 9), and that the District refused, thereafter, to give the Union information about the charges against G.K. "despite numerous requests" (U. Br., p. 9).¹⁵

¹³ Contrary to the Union's brief, Green did not clearly confirm that M.H. refused to do as G.K. directed her on December 23rd.

¹⁴ This Union assertion was not borne out by the transcript. Neither Heldt nor G.K. specifically and directly "denied the statement was ever made" as the Union argued (U. brief, p. 8) (See, Tr. 395; 365). Heldt asserted he could have left the room or did not recall the conversation.

¹⁵ However, McCorkle did state that on January 28th, the District mentioned the suspension letter, "about the outbursts and inappropriate behavior that he received on 9/29", when he was suspended, "and all was fine until the complaints in December, and that there was to be no retaliation and he violated this

The Union further contended that the District treated G.K. more harshly than other employees, that it disciplined him twice for the same offense, that it exploited G.K.'s lack of sophistication and reading disability, all of which demonstrated that the District bore animus toward G.K. and that it intended to force G.K. from his job. In this regard, the Union urged that the District gave G.K. both a written warning and a suspension for the September incident. And the District did not discipline K.B. for her part in the incident, which included her profanity, and her insubordination. The Union also asserted that the District took K.B.'s account of the incident at face value and it did not interview any other witnesses thereon. When Mike Johnson attempted to serve the written warning on G.K. and to get him to sign it, Mike Johnson tried to take advantage of G.K.'s reading disability and when G.K. refused to sign the warning, Johnson lost his temper and threatened G.K. with contacting "his people." Thereafter, the District clearly "retaliated against the Grievant by issuing [him] a suspension" (U. Br., p. 10). Finally, the District's argument that after G.K. refused to sign the written warning, it discovered new details about G.K.'s misconduct which caused it to suspend him rather than warn him. The Union rejected this justification as it argued that the District never gathered any new evidence before suspending G.K. in September.

Finally, the Union asserted that the District was responsible for G.K.'s conduct because it failed to train G.K. to lead his co-workers and because the District ignored G.K.'s complaints about K.B.'s poor work performance and about harassment by his fellow employees. The Union contended that the District set G.K. up to fail by failing to properly train him for his position and that the District's refusal to investigate the posting of the sign disparaging G.K.'s reading skills further undermined G.K.'s authority with staff. The Union noted that, Siedlecki and Anderson's testimony support the Union's claims on this point—that co-workers did not respect, listen to or follow directions from G.K. and that K.B.'s work was sub-par.

In all of these circumstances, the Union urged the Arbitrator to sustain the grievance and reinstate G.K. with full backpay and benefits and G.K.'s record should be expunged.

Reply Brief:¹⁶

District:

The District argued that the Union's brief contained "factual misrepresentations which raise serious issues as to the veracity of the Grievant..." (ER Reply, p. 1). First, the Union asserted that the District never allowed the Grievant to work boilers even after he acquired his Class "C" license. Not only was there no record evidence to support this assertion, the Grievant testified to the contrary (Tr. 404). In any event, as this assertion even if proved is irrelevant to the grievance, the Arbitrator should disregard it. Second, the Union asserted the Grievant was never interviewed regarding the K.B. September, 2009, incident. The District contended that two meetings between the District and the

directive..." (Tr. 307). Under cross-examination, McCorkle admitted that when given the allegations against him, on January 28th, G.K. denied everything, stating that he went by the book, that he had done nothing wrong and G.K. then stated that he had nothing more to say (Tr. 315).

¹⁶ The District chose to file a timely reply brief herein. The Union chose not to file a reply.

Grievant and his Union representatives occurred on September 23 and 29, 2009, where the Grievant was informed of the allegations against him and given the opportunity to respond to them. Although the Grievant denied making any derogatory comments toward K.B. in September, 2009, the Grievant admitted at hearing that he swore at K.B. during this confrontation (Tr. 346). The Letter of Agreement covering this incident which the Grievant signed and in which he admitted to the misconduct and agreed to change his conduct in the future, shows that the Union's argument in its brief that the Grievant had no opportunity to defend himself was essentially negated by the Grievant's entering into a settlement of the charges made and accepting discipline thereon. Nonetheless, as no grievance was filed regarding this incident, it was not raised in the instant grievance and the time limitations for grieving the matter have long expired.

The Union also asserted that the Grievant did not have an opportunity to respond to his conduct toward M.H. and Tammy Siedlecki, on December 23, 2009. However, Union Steward McCorkle stated that although the District did not identify the names of the employees involved, McCorkle admitted on cross-examination that the District's counsel did review the allegations made and that the Grievant responded that none of the allegations was true and then he refused to comment further. The District asserted that these are just a few examples of the Union's misrepresentation of the evidence and the record facts herein but they clearly demonstrate that the Grievant's version of events and assertion that his conduct does not warrant discharge "cannot be believed" (ER Reply, p. 4).

The Union claim that the alleged misconduct of other employees, even assuming the claim were supported by sufficient evidence (which the District does not concede), is not only irrelevant to the grievance but it cannot justify the Grievant's misconduct. The District noted that the Union pointed to inconsistencies in M.H.'s testimony and urged the Arbitrator to discredit her. But, the District urged, the Grievant's testimony contained more internal inconsistencies and directly contradicted disinterested witnesses' testimony which corroborated M.H.'s assertions herein. The two employee witnesses (who largely supported Hughes' version) should be credited over the Grievant regarding the December 23rd incident.

The Union's assertion that discharge is too harsh a penalty for the Grievant's misconduct is "unsupported by the record and the law" (ER Reply, p. 5). The District urged that its investigation of the Grievant's conduct was full and fair and that the evidence herein overwhelmingly proves that the Grievant engaged in inappropriate conduct toward his co-workers. The Union's claim that the Grievant was treated disparately because K.B. was not disciplined for her foul language is baseless. On this point, the District noted that no evidence was presented to show the Grievant ever complained about other employees' language. At most, the record showed that the Grievant complained to his supervisor that K.B. was lazy and slept on the job (Tr. 280, 328, 350). Beyond this, the Grievant's misconduct involved much more than foul language—he was terminated for "ongoing inappropriate disparaging hostile and threatening conduct toward his female coworkers after having been warned that such conduct would result in termination" and "for engaging in retaliation...about the September 2009 investigation" (ER Reply, p. 6). No other employees had engaged in this type and degree of misconduct.

The District further contended that the Grievant was not subjected to “double jeopardy” as it is properly defined regarding the September 11, 2009, incident. In any event, as the discipline the Grievant received was never grieved, the Arbitrator is without authority to consider this claim.

The Union’s arguments that the District set the Grievant up to fail, because he was not properly trained to direct employees, and that the District allowed employees to harass, exploit, ridicule and retaliate against him because he was disabled were not supported by the evidence. Regarding the Grievant’s disability, the District urged that the Union had given it no evidence to support such a claim until the hearing herein and even then the medical report was largely redacted (U. Exh. 4). The District noted that the Grievant had been represented by the Union whenever the District disciplined him. Also, the Grievant failed to show the District his co-workers had sought to harass or embarrass him about a reading disability. As the Grievant failed to show the posted sign, a picture from his cell phone thereof or provide any useful information, his claim could not be investigated and he never reported to his supervisor that other employees made fun of him at work as he contended herein. Also, the District noted that the Grievant had been warned several times not to direct employees’ work using abusive, profane and derogatory language and engage in temper tantrums. Training not to engage in this kind of conduct would be useless in any event. Even assuming his co-workers subjected him to harassment, the District argued, this did not justify the Grievant’s misconduct. It was the Grievant who was the instigator and aggressor in his confrontations with employees and these confrontations were wholly unconnected to the Grievant’s alleged disability based upon the record in this case.

In all the circumstances here, the Grievant should not be rewarded for his misconduct and the District should not be required to expose its employees further to the Grievant. The District had just cause to terminate the Grievant, and the Arbitrator should deny the grievance in its entirety.

Discussion:

As an initial matter, it must be observed that the underlying grievance herein (Jt. Exh. 2) clearly states that G.K.’s “termination without cause” is the action grieved. The grievance is the basis for the assertion of arbitral jurisdiction and authority herein. G.K.’s prior discipline, including his ten-day suspension and “last chance” settlement agreement are not before this Arbitrator on their merits. Having said this, the evidence of G.K.’s prior misconduct in September, 2009, as well as witness accounts of his statements and actions back to 2005 are relevant as background, as part of G.K.’s work history and for use in judging G.K.’s credibility in this case and in analyzing whether progressive discipline was applied to him.¹⁷ In this regard, the Arbitrator notes that the evidence from interested and disinterested witnesses clearly showed that on September 11, 2009, G.K. shouted at K.B. and C.R., accusing them of not doing their jobs and of lying to him, that G.K. used profanity in referring to female schoolkeepers and asserted he was the boss. As

¹⁷ The Union’s argument that G.K. was subjected to double jeopardy, that he received two penalties (a warning and a ten-day suspension) for his September, 2009, conduct is neither relevant nor material to the instant grievance because that argument goes to the merits of G.K.’s (ungrieved) suspension.

part of the settlement concerning G.K.'s September 11, 2009, behavior, G.K. admitted engaging in the misconduct as alleged, not to retaliate against his co-workers who had given information to the District about G.K.'s conduct and he agreed not to file a grievance and to commit himself to changing his behavior in the future in exchange for lesser discipline (a ten-day suspension rather than immediate discharge).

In this Arbitrator's view, G.K.'s agreement to this 2009 settlement agreement constitutes an admission of misconduct and tends to support a conclusion that G.K. had a pattern of engaging in this kind of behavior toward a female co-worker who had resisted his advances. Furthermore, G.K.'s treatment of and comments regarding K.M. in 2005 also supported this conclusion. On this point, the Arbitrator notes that neither G.K. nor Heldt denied that G.K. made the comment M.H. stated G.K. made regarding K.M. In fact, G.K. admitted having had a relationship with K.M. that broke up prior to 2005 (Tr. 386-387). Although K.M. stated she is not afraid of G.K. and that she did not recall hearing G.K.'s comment about her, she stated herein that she hid from G.K. on several occasions to avoid G.K.'s yelling at her for no reason. Also, former employee Heldt failed to specifically deny hearing G.K. make the 2005 comment about K.M. Rather, Heldt stated: "I don't ever remember him (G.K.) saying that, unless I wasn't there or I walked out whatever" (Tr. 395). This evidence weighs against G.K.'s credibility herein.

The parties have argued in depth regarding which witnesses this Arbitrator should believe and which she should discredit. In labor arbitration, arbitrators are often asked to judge witness credibility. It is relatively rare that a "head-to-head" credibility resolution between two or more witnesses on opposite sides of the dispute will determine who wins and who loses the case. This is so because arbitrators try very hard to avoid having their decisions turn *solely* upon credibility. Arbitrators closely analyze the documentary evidence and disinterested witnesses' testimony in order to avoid relying solely upon credibility to decide a case so as to do no harm. Experienced arbitrators are aware that employees and supervisors who appear before them will have to return to the community of the workplace and they will have difficulty doing so smoothly if an arbitrator has found them incredible. However, if there is no other choice, no other way, to determine whether just cause exists to support the discipline or discharge of an employee, the arbitrator must do her best to get to the truth of the matter, which includes judging and relying upon witness credibility.

Various measures of credibility have been traditionally used by arbitrators. Some of these measures include witness' appearance of confidence and the directness, or lack thereof, of their responses; openness, evasiveness or emotional responses; whether or not witness responses are consistent with prior accounts; whether the witness is biased or interested; whether the witness has a reputation for truthfulness/honesty; and whether the witness can communicate his/her perception and recollection convincingly/effectively.

Professor Richard Mienthal best described the human forces and internal conflicts which affect witnesses in arbitration who must recount their experiences, as follows:

When two people are involved in a highly emotional confrontation, their recollection of the facts is far from reliable. Each tends to repress whatever wrong he'd done. Each quickly recasts the event in a light most favorable to himself. As time passes, this distorted view of the event slowly hardens. By the time the arbitration hearing is held, each man is absolutely certain that his

account of what happened is true. Perhaps neither man is then telling a deliberate untruth. Their own self-interest and self-image operate to limit their capacity for reporting the truth.¹⁸

In the instant case, G.K.'s testimony directly conflicts with that of M.H. and K.B. In the view of this Arbitrator, all three of these employees had a bias or interest in the outcome of this case: G.K.'s interest is in winning reinstatement and/or backpay, M.H. and K.B.'s interest is in assuring that G.K. does not return to work with them at the District. Based upon other disinterested employees' testimony as well as my analysis of the credibility of the witnesses before this Arbitrator, this Arbitrator finds that G.K.'s version of the events herein is less credible than the other witnesses who testified in this case. On this point, the Arbitrator has done a close analysis of G.K.'s testimony. The following quotations demonstrate that G.K.'s position shifted herein:

BY MR. FLYNN:

Q What do you have a memory on – there are five famous words. Do you remember what they are that you've been accused of using with the female employees of this School District?

. . . .

BY MR. FLYNN:

Q Do you remember what they are?

A **No, I don't.**

Q All right. I'll repeat them for you so we're clear.

The "f" word was one of them, and there was "whore" and there was "slut" and there was "bitch," and the last one was "cunt."

You sat here during the proceedings and you heard –

. . . .

BY MR. FLYNN

Q – M. H., K. B., C. R., and your friend Frank Green testify about your regular usage of those words on these female employees on a regular basis. Did you or did you not use those five words on those several women that testified –

A **No, I did not.**

Q – As well as others?
Pardon?

A **No, I did not.**

Q Absolute denial. Is that what you're saying?

A **That's exactly what I'm saying. I did not.**

Q All these women, your colleagues that you said you befriended, they all lied in this proceeding. Is that your testimony?

A **Exactly.**

Q And by the way, isn't that the same position that you took on the day of the meeting on January 28th? You denied everything, didn't you, when I questioned you?

A **(No response.)**

Q About your conduct with those employees?

¹⁸ Mittenthal, "Credibility—A Will-O'-The-Wisp," Proceedings of the 1978 NAA Annual Meeting, ed. Gershenfeld (BNA Books 1979).

A **Because it never happened.** (Tr. 370-372)

BY MR. FLYNN:

Q Let me ask you again: Did you ever use those words, the famous five that I just listed, on a regular basis in attacking those other employees?

MS. HUNTLEY: Objection, compound question.

BY MR. FLYNN:

Q “Yes” or “no”?

A **No.**

ARBITRATOR GALLAGHER: No.

You said “no”?

THE WITNESS: No.

ARBITRATOR GALLAGHER: You never did?

THE WITNESS: Not on a regular basis like he said, no.

ARBITRATOR GALLAGHER: Okay.

BY MR. FLYNN:

Q Well, did you ever do it?

A **I have – I have used those words before, yes, I do admit it.**

Q Let me ask you – on the day of the January 28th meeting I asked you the questions about that, and you denied it absolutely, did you not?

A **Because I did not say it.**

Q Oh. Well, now you just got through saying you did say it now.

A **No, because you turned it around and tried to make it say that I said it to their faces or whatever and stuff.**

Q No, I –

A **I did not ever say that to a woman’s face period.**

Q Well did you ever say it behind the backs –

A **I have –**

Q – to other employees?

A **– more respect for women than that.** (Tr. 374-375)

The above quotations also showed that G.K. threw down the gauntlet when he asserted that his co-workers had to be lying whenever their factual accounts differed from his. To be clear, the record herein showed that Ms. Johnson thoroughly investigated both the September and December, 2009, co-worker complaints against G.K. In the view of this Arbitrator, there were just too many points on which all other witnesses’ testimony agreed with each other and contradicted G.K.’s version of the events described herein, making crediting G.K. impossible.

Furthermore, if we set aside the variations in the accounts surrounding the September 11, 2009 and December 23, 2010, incidents and look at what is not disputed, we find that G.K. got red in the face; that G.K. shouted at female schoolkeepers, using profanity and accusing female schoolkeepers of lying and not doing their jobs; that G.K. asserted he was the boss; and that G.K. was the aggressor and he pursued these confrontations. What also stands undenied by G.K. is that on December 23rd, G.K. stated he thought K.B. had talked to the District’s lawyers about his conduct prior to his suspension and he asked C.R. if she had also spoken to the lawyers about him (Tr. 189-190). These undisputed facts essentially prove that the District had previously warned G.K. and then issued G.K. a ten-day suspension for the same type of misconduct for which he was discharged.

The Union has asserted that on December 23rd M.H. was insubordinate twice when she refused G.K.'s direct orders to clean lockers and move furniture. On this point, this Arbitrator notes that G.K. never reported M.H.'s alleged insubordination to District management, and no evidence was presented to show that K.B. and M.H. had been disciplined by the District for any misconduct during their employment. In addition, the Union's assertion that Hughes was the aggressor on December 23rd was unsupported by the record. In this regard, Frank Green¹⁹ stated that G.K. was the aggressor and that he pursued the confrontation and he confirmed G.K.'s "head up your ass" comment on December 23rd. The fact that Green did not corroborate all of M.H.'s testimony concerning the events of December 23rd does not detract from the facts as reported by Green which were also corroborated by K.B. and C.R. Other assertions made by the Union regarding K.B. and M.H.'s reputation for truthfulness, their ability to get along with co-workers, and their language at work, even if they had been proved,²⁰ are not determinative of what occurred between C.B. and G.K. in 2009 and what occurred between M.H. and G.K. on December 23rd.

Regarding G.K.'s undisputed comments to C.R., the Arbitrator notes that C.R. stated herein that she feared retaliation from G.K. if he found out she had spoken to District lawyers in September, 2009, and this was why she lodged her complaint about G.K.'s comments to her with Ms. Johnson. In these circumstances, this Arbitrator finds that the District met its burden of proof that G.K. engaged in the misconduct for which he was discharged and that the discipline was progressive, flowing from his oral and written warnings and his ten-day suspension for the same type of misconduct.

The Union has asserted that G.K. never had an opportunity to respond to the charges against him concerning the incidents on December 23rd. On this point, this Arbitrator is satisfied that at the January 28th investigatory meeting, G.K.'s conduct effectively halted the meeting. The record showed that the District gave G.K. the charges against him, which G.K. immediately and specifically denied. G. K. denied using profanity, he denied engaging in any outbursts and he denied violating the retaliation directive of his suspension agreement. He said he was innocent. G.K. completely answered all of the charges against him, so there was no need to prolong the meeting. In these circumstances, G.K. had a full and fair opportunity to respond to the allegations against him and it was his conduct, his manner of responding to the allegations, that ended the meeting.

The Union contended that the District bore animus against G.K. by its treatment of him—that he was more harshly treated than other employees like K.B. and M.H. and that the District exploited G.K.'s reading disability and lack of sophistication to force him out of his job. Concerning disparate treatment, it is significant that no evidence was submitted to show that any employees (other than G.K.) were formally disciplined for profanity toward co-workers or engaging in violent outbursts toward employees. In fact, Ms. Johnson stated that in 29 years at the District, she had never seen misconduct like

¹⁹ This Arbitrator finds that Frank Green was a disinterested and highly credible witness herein. Green had never complained about G.K., Green was not intimidated by G.K. and Green had never been a victim of G.K.'s outbursts. Also, Green's demeanor was impressive—confident and direct and yet willing to admit his recollection was not perfect.

²⁰ It is unnecessary to determine (and this Arbitrator has not done so) whether the Union's various negative assertions about K.B. and M.H. were proven by the record evidence.

G.K.'s. Also, without any past history of District knowledge of misconduct and condoning thereof or that its investigation of and decision to discipline or not discipline other employees for the same misconduct, the Union's charge of disparate treatment herein cannot stick. Here, the Union made bald assertions, without more, that other employees were insubordinate, used profanity or engaged in bullying or name-calling. As no evidence was presented to show that the District was ever made aware of any of this alleged misconduct, the District's alleged failure to discipline other employees cannot be called disparate treatment. On this point, the Union's claim of animus also falls flat and is rejected.

Regarding G.K.'s reading disability, it is important to note that the District gave G.K. an accommodation for his reading problem in order to get his Class C license as soon as G.K. requested it and provided documentation thereon. In addition, it was not until the hearing herein that the Union brought forth a document purporting to show that G.K. had cognitive difficulties. The evidence failed to prove that there was any connection between G.K.'s discharge and his alleged disabilities. Also, as stated above, the Union's arguments concerning the facts surrounding G.K.'s September, 2009, ten-day suspension and the merits of that situation are not before me as the grievance herein involves only G.K.'s termination and the time for filing and processing a grievance on G.K.'s 2009 suspension has tolled long ago. Again, the Union failed to prove that the District bore animus toward G.K. regarding this assertion.

It is also clear that G.K. failed to give the District sufficient evidence regarding the sign he claimed herein had been posted to belittle and harass him. Although G.K. claimed he took a picture of the sign with his cell phone, he never showed it to Ms. Johnson and he never filed a formal complaint. In any event, G.K. stated herein that he believed his friend at work, Keith Weston, had posted the sign, not any of G.K.'s co-workers he has asserted lied about him herein. The Union failed to prove that the District held animus toward G.K. concerning this issue.

Finally, the Union argued that the District set G.K. up to fail as when he acted as Lead Custodian by not training him how properly to direct his co-workers. However, the job description for custodian shows that directing co-workers should constitute only 5% of work time for the position if a Lead Custodian is not present. Also, the evidence showed that schoolkeepers generally knew the duties regularly expected of them and if Mike Johnson wanted special work done he normally left notes thereon, leaving little direction of staff needed. In these circumstances, in-depth supervisory training was not reasonably required for an acting Lead Custodian.

The Union has contended that even if G.K. engaged in the misconduct as alleged, discharge is too harsh a penalty for G.K.'s conduct. This Arbitrator strongly disagrees. In this case, in September, 2009, G.K. and the Union agreed to what amounted to a "last chance" agreement regarding the same type of misconduct as is before me in this case. That agreement was never grieved and it stands as an appropriate guide to what penalty should be assessed herein.²¹ That agreement makes clear that any further similar misconduct after September, 2009, would result in G.K.'s discharge. In addition, no

²¹ The Union argued that G.K. did not understand this agreement. The evidence failed to support this claim. Rather, the record showed G.K. was represented by two Union representatives when he agreed to the settlement and that they discussed its terms in caucus and McCorkle, G.K., and Lucker understood the agreement before G.K. signed it (Tr. 323-1).

evidence was presented herein to show that the District's assessment in September, 2009, that G.K.'s misconduct warranted immediate discharge was otherwise arbitrary, capricious or discriminatory. In fact, the aggressive, profane and explosive verbal abuse which G.K. engaged in repeatedly toward his female co-workers was the kind of bullying that, if allowed to continue, would change the culture of the workplace and subject District female schoolkeepers and custodians to an environment of fear of continued attacks and harassment. The District had a responsibility to put an end to such treatment of its female employees. In all the circumstances here, this Arbitrator issues the following

AWARD

- 1) The District had just cause to discharge the Grievant as outlined in the collective bargaining agreement.
- 2) The grievance is therefore denied and dismissed in its entirety.

Dated and Signed this 24th Day of May, 2011, at Oshkosh, Wisconsin,

Sharon A. Gallagher