

**BEFORE THE ARBITRATOR
SHARON K. IMES**

In the Proposed Discharge of Maria Nuthak
From

**INDEPENDENT SCHOOL DISTRICT NO. 423
Hutchinson, Minnesota**

BMS Case No. 11-TD-09

APPEARANCES:

Ratwik, Roszak & Maloney, PA, by **Michael J. Waldspurger** and **Scott E. Schraut**, appearing on behalf of Independent School District No. 423, Hutchinson, Minnesota.

Anne F. Krisnik and **David M. Aron, Education Minnesota**, appearing on behalf of continuing contract teacher, Maria Nuthak.

JURISDICTION:

Independent School District No. 423 proposes to discharge Maria Nuthak, a continuing contract teacher, pursuant to Minn. Stat. §122A.40, Subd. 13, for immoral conduct, insubordination, and conduct unbecoming a teacher which requires immediate removal from the classroom or other duties. By letter dated April 27, 2011, the Superintendent notified the teacher that the School Board of Independent School District No. 423, Hutchinson, Minnesota, met and gave consideration to immediately terminating her employment with the District and adopted a resolution on April 25, 2011 proposing her immediate discharge. Pursuant to her statutory rights under Minn. Stat. §122A.40, subd. 13 and subd. 15, the contract employee requested a private hearing on this matter. She and the District selected the undersigned to hear the matter and hearing was held on September 28 and 29 and November 10, 2011, in Hutchinson, Minnesota. At that time the parties, both present, were afforded full opportunity to be heard. The hearing was transcribed and post-hearing briefs were filed. The last was received December 13, 2011, however, the last supporting documents were not received until December 22, 2011 at which time the hearing was closed.

STATEMENT OF ISSUE:

The parties framed the issue differently but granted the arbitrator the authority to frame the issue within the confines of their proposed statements. Accordingly, the issue is framed as followed:

Is there just cause to discharge a continuing contract teacher pursuant to Minnesota Statute 122A.40, subd. 13? If not, what is the appropriate remedy?

BACKGROUND:

The District cites three grounds, immoral conduct, insubordination, and conduct unbecoming a teacher which requires immediate removal from the classroom or other duties as cause to discharge this high school science teacher who has been with the District since 2000. The incident which triggered its decision to discharge the teacher took place on Friday, April 1, 2011.

The record establishes that on that day, the teacher's son who was a senior at the high school walked into the lobby of the administrative offices with his pants hanging low to go to the nurse's office. A police sergeant who was filling in for the regular school liaison officer at the school and who was sitting in the lobby saw this boy and told him to pull up his pants at least three times, including saying at one point, "Homie, pull up your pants". Two of the three times, the boy ignored the officer and the third time he was told to pull up his pants the boy turned toward the officer and said, "Who the fuck are you?". In response, the officer took boy by the arm and took him into the liaison office; showed him his badge, and told him he could be arrested for using such language and for ignoring a police officer. During this exchange, the boy who has Asperger's Syndrome, became upset enough that the officer called a teacher in the REACH program, a program in which boy was participating, to come and calm him down and when the teacher arrived the boy was excused to return to class.

The regular duty day for teachers at the high school ends at 3:00 p.m. but on Fridays all teachers are permitted to leave around 2:30 p.m. after the students are dismissed and the buses leave. At approximately 2:30 p.m. on Friday, April 1st, the boy entered his mother's classroom and said, "Mom, let's get out of here". When she asked him what was wrong he told her he would tell her when they got in the car. When they got in the car, the son described his

encounter with the officer and told her he almost got arrested and would be suspended for three days. As he described the incident he became more and more agitated. Concerned about what had happened and wanting to clarify whether her son would be suspended, the teacher turned the car around; returned to the school, and went to the principal's office to talk with him about the incident. In her discussion with the principal, she explained what had happened and expressed her concerns about the encounter, whereupon the principal told her he would check into the incident and suggested that she should call the officer to talk with him about it. She then left his office and decided to look for the officer.

On her way to look for the officer she stopped at the desk of the principal's secretary to talk with her and a counseling secretary who was also there, both of whom she knew fairly well. She began to tell them about the incident between her son and the officer and during the discussion with them said that she was "so frustrated". When another employee entered the office and came toward the secretary's desk, the teacher left the area mid-conversation and proceeded toward the liaison officer's office.

As she neared the liaison officer's office she stopped at the desk of the attendance secretary to ask if the officer was in. When she learned that he was not she became more agitated and was alleged to have said, "I'm going to kill that fucking guy. Nobody talks to my son that way."¹ The attendance secretary states that the teacher also said, "I'm going to kick his ass". After making the comment or comments, the teacher turned toward the assistant principal's office to talk with him about the incident.

As she approached the door of the assistant principal's office she asked him whether he had heard what had happened to her son that day and he told her he had not. As she began to recount to him the version of the story she knew she omitted telling him that her son had said, "Who the fuck are you?" to the officer and merely said that her son had asked who the officer was. At that point, the assistant principal corrected her and said, "No, . . . (teacher' name), he said, 'Who the fuck are you?'" When he corrected her account of the incident she thought he

¹ The attendance secretary testified that the teacher made this comment but the teacher denied making the statement when initially asked about it and no other person in the office at the time of the incident heard the teacher make that statement. Following the initial interview, however, the teacher has accepted the District's assertion that she did make this statement.

knew more about the incident than he had indicated and she became angry and began yelling at him and using the word "fuck" or "fucking" in statements she made to him.

The attendance secretary, concerned about the teacher's conduct, went to the principal's office and asked the principal to intercede. When the principal arrived at the assistant principal's office he heard the teacher say, ""This is typical . . . (assistant principal) bullshit," or something similar. He asked her if everything was all right; then told her she needed to calm down and that he thought she should leave. As he walked with her to the door of the administrative offices she continued to be loud and upset and she said that if the assistant principal became the principal the next year she would quit. After exiting the office, she was heard to have said "This fucking school," or, again, something similar to that.

After the teacher left the administrative offices, the principal talked with both the attendance secretary and the assistant principal about the incident and neither indicated that she had said she was going to kill the liaison officer. This statement also was not brought up when the assistant principal talked with the principal about the incident in the principal's office a few minutes after the initial debriefing.

Also after the teacher left the building, the assistant principal called the liaison officer and suggested that he should call her to talk with her about the incident involving her son and the teacher and the officer ultimately did talk late Friday afternoon. During their conversation the teacher states she indicated that her son has Asperger's Syndrome and, at times, exhibits anti-social behavior. The officer does not recall that she told him about her son's special needs but states that she apologized to him while they talked. Both the teacher and the officer indicated they ended their conversation on a positive note.

On Sunday evening, the principal called the teacher and told her he would like to talk with her first thing the next morning. During that conversation, the teacher indicated that she was sorry for her behavior and that she would like to apologize to the assistant principal for her behavior toward him.

On Monday morning, the teacher returned to school and met with the principal. During that meeting he asked if she had said she was going to kick the officer's ass but did not ask if she had said she was going to "kill that fucking guy". While they were discussing the incident,

the teacher again asked if she could apologize to the assistant principal and the assistant principal was called into the meeting. When he arrived the teacher apologized to him saying she was sorry for taking her frustrations out on him and using him as a "whipping boy" and he accepted her apology.

Following this meeting the teacher was allowed to teach all of her classes that day. That afternoon, however, the principal came to her classroom and handed her a letter which indicated he would be investigating the incident; interviewing witnesses regarding it, and that disciplinary action might be taken.

The next day, on April 5, the teacher was placed on paid administrative leave pending the outcome of the District's investigation and on April 6 she met with the superintendent and the director of teaching and learning to discuss the incident. During this meeting, the director told the teacher that those in the office at the time of the incident said the teacher had been "pretty elevated" and that "there was a lot of profanity". She also said that they said she had been angry with the officer and then directed her anger toward the assistant principal; that she had said that she going to kick the officer's ass; that she had said "more (. . . assistant principal's name) bullshit", and that she had said "I'm gonna kill that fucking guy". In response, the teacher said she did not remember saying she was going to kick the officer's ass and denied having said that she was going to kill the officer. At that point, the superintendent joined in and told the teacher that more than one individual had heard her say those things. The teacher denied having said it again two more times and the superintendent then said ". . . in the investigation there are people that said that's exactly what she said, word for word". Again, in response, the teacher denied making the statement about killing the officer saying she "truly did not remember saying that" whereupon the superintendent replied that she had made the statement about killing the officer "in general to the office staff". Following this assertion, the teacher replied that she couldn't imagine herself saying she was going to kill anyone and that it was not her personality but "what they heard is what they heard" and the discussion moved on. Toward the end of the meeting, the superintendent again said to the teacher that the District's "biggest concern . . . is the language that was used, the emotional outburst, but even more than that it's these threats that were made. Regardless if you

remembered them or not, there were other adults listening to that and this isn't your word against somebody else. This is multiple people hearing 'I'm going to kick his ass' and 'I'm going to kill that guy'".

On April 20, not yet having heard the outcome of the investigation, she sent the superintendent an e-mail in which she stated she was writing to him as a friend; that she loved her job; that she had not meant to threaten or cause harm to anyone; that she didn't know how hard it would be to be both a parent and advocate for her son and a teacher, and assured him that if he gave her another chance similar conduct would never happen again. On April 25, the Board of Education unanimously adopted a resolution proposing to discharge the teacher from employment effective immediately and on April 27, the teacher was notified of the proposed discharge and told to come to the superintendent's office to pick up a copy of the Board's resolution and a copy of Minnesota's Continuing Contract Act. It is this proposed discharge which is before the Arbitrator.

RELEVANT STATUTORY PROVISIONS:

§122A.40 Subd. 13 **Immediate discharge.** (a) Except as otherwise provided in paragraph (b), a board may discharge a continuing-contract teacher, effective immediately, upon any of the following grounds:

- (1) immoral conduct, insubordination, or conviction of a felony;
- (2) conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or their duties;
- (3) failure without justifiable cause to teach without first securing the written release of the school board;
- (4) gross inefficiency which the teacher has failed to correct after reasonable written notice;
- (5) willful neglect of duty; or
- (6) continuing physical or mental disability subsequent to a 12 months leave of absence and inability to qualify for reinstatement in accordance with subdivision 12.

For purposes of this paragraph, conduct unbecoming a teacher includes an unfair discriminatory practice described in Section 363A.13.

...

§122A.40 Subd. 15. **Hearing and determination by arbitrator.** A teacher whose termination is proposed under subdivision 7 on grounds specified in subdivision 9, or whose discharge is proposed under subdivision 13, may elect a hearing before an arbitrator instead of the school board. The hearing is governed by this subdivision.

...

(c) The arbitrator shall determine, by a preponderance of the evidence, whether the grounds for termination or discharge specified in subdivision 9 or 13 exist to support the proposed termination or discharge. A lesser penalty than termination or discharge may be imposed by the arbitrator only to the extent that either party proposes such lesser penalty in the proceeding. In making the determination, the arbitration proceeding is governed by sections 572B.15 to 572B.28 and by the collective bargaining agreement applicable to the teacher.

...

(e) The arbitrator's award is final and binding on the parties, subject to sections 572B.18 to 572B.28.

...

POSITION OF THE PARTIES:

The District argues that a preponderance of the evidence, the standard of proof it is required to meet under Minnesota Statute § 122A.40, shows that it has just cause to immediately discharge this teacher. According to the District the teacher was insubordinate when she yelled and swore at the assistant principal for nearly two minutes in the presence of other employees and that she engaged in immoral conduct and conduct unbecoming a teacher which requires her immediate removal from the classroom and other duties when she threatened to kill and assault the police liaison officer; when she yelled and swore at her immediate supervisor, and when she using the word "fuck" or "fucking" in the presence of students. In addition, the District, citing the criteria established in *Kroll v. Independent Sch. Dist. No 593*, 304 N.W.2d 338, 345-46 (Minn. 1981) to evaluate whether such misconduct warrants immediate discharge, maintains that the teacher's conduct is not remediable. As proof that it is not, the District charges that the teacher has a history of losing her temper in school; that the severity of her conduct, in light of her record, warrants immediate discharge; that her conduct presented actual and threatened harm to the school environment, and that her conduct would not have been corrected with a warning.

Expanding upon its position, the District asserts, first, that the statute only requires it to show by a preponderance of the evidence that one statutory ground for discharge exists but, then, argues that each of its charges has been proven. Referring to its insubordination charge, the District cites two arbitration decisions by Richard J. Miller and declares, based upon them, that swearing at a supervisor is a form of insubordination and that arbitrators have upheld an employee's immediate discharge in instances where the employee has sworn at the supervisor

only once.² Continuing, it argues that in this instance, the teacher was insubordinate when she took out her frustration on the assistant principal by loudly yelling and swearing repeatedly at him for nearly two minutes in the presence of other employees even though he was not involved in the incident relating to her son. It adds that her conduct was so "severe and intense" that the assistant principal feared for his safety.

As further support for its position, it maintains that the teacher made a conscious decision to engage in conduct she knew to be inappropriate and undermined the assistant principal's authority. As proof of its assertion, it notes that the teacher testified that she was not out of control at any time on April 1st and concludes that since she was in control she chose to yell and swear at the assistant principal and to belittle him in the presence of other employees who were subordinate to him.

In addition, the District urges a finding that the teacher engaged in immoral conduct and conduct unbecoming a teacher which requires her immediate removal from the classroom and other duties based upon the fact that she threatened to kill or assault the police liaison officer; the fact that she yelled and swore at her immediate supervisor and the fact that she used the word "fuck" or "fucking" in the presence of students. Referring to both charges, the District asserts that since neither term has been defined by the legislature or the courts the arbitrator must apply the plain meaning of the terms and relies upon *Webster's New Universal Unabridged Dictionary* to define immoral conduct as conduct "not in conformity with accepted principles of right and wrong; contrary to the moral code of the community" and conduct unbecoming a teacher as conduct which is "unsuitable or inappropriate".

Referring more specifically to its charge of immoral conduct, the District maintains that "there can be no doubt that threatening to kill and assault a police liaison officer is contrary to accepted principles of right and wrong and the moral code of the community". Further, it rejects any argument that the teacher was not angry when she made the threatening statements since the witnesses uniformly testified that the teacher was visibly angry and upset when she made the statements. As further support for its position, it states that "in the

² *In the Matter of Arbitration between Independent School District No. 522 and International Union of Operating Engineers, Local No. 70*, BMS Case No. 98-PA-614 (Richard J. Miller, 1988) and *In the Matter of Arbitration between Independent School District 94 and AFSCME Minnesota Council 65, Local 545*, BMS Case No. 11-PA-1269 (Richard J. Miller, 2011).

aftermath of numerous school shootings every teacher knows that it is contrary to accepted principles of right and wrong and the moral code of the community to threaten to kill someone at school" and that to do so is "professional suicide". As additional proof that the teacher's threats and her angry behavior were conduct contrary to the "moral code of the community", the District cites the reactions of those who witnessed the incident as well as testimony from another teacher who works in the same school as this teacher in which he indicated he would consider swearing at the assistant principal immoral conduct.

Finally, the District asserts that the teacher also engaged in immoral conduct when she yelled and used the "f" word in the presence of students. Maintaining that the teacher continued to yell and use the "f" word in the hall after exiting the administrative offices, the District states that not only could the assistant principal hear the teacher "scream" the "f" word in the hall but that she was heard to say "this fucking place" as she walked down the hall while students were present.

With respect to its charge of conduct unbecoming a teacher which requires her immediate removal from the classroom or her duties, the District states that since the teacher admits she engaged in conduct unbecoming a teacher when she said she was going to "kill that fucking guy" and when she swore at the assistant principal, the only question is whether this conduct requires her immediate removal. Continuing, it maintains that the severity and nature of her conduct requires her immediate removal because the threat she made not only "shock(s) the conscience" but cannot be allowed since teachers serve as role models and are held to a higher standard than students who are routinely expelled from school for making similar threats. As additional support for her immediate removal, the District states that school districts must take all threats seriously; rejects any argument the teacher might make regarding intent, and cites several arbitration decisions in which it declares arbitrators have ruled that intent is not relevant when threats are made.³

³ *In re: Arbitration between Minnesota Teamsters Public and Law Enforcement Union Local 320 and City of Mankato*, BMS No. 02-PA-1251 (Jeffrey Jacobs, 2002); *In the Matter of the Arbitration between Drill-A-Matic, Inc., and International Brotherhood of Teamsters Local 970*, FMCS No. 00-16079 (Jame Reynolds, 2001) *In the Matter of the Arbitration between Metal Shop, Warehousemen and Helpers Union, Local 970 of the International Brotherhood of Teamsters and Certainteed Corporation*, FMCS No. 98-05152 (Thomas Gallagher, 1998).

Continuing, the District declares that not only must the teacher be immediately discharged for making threatening statements but she must be immediately discharged for yelling and swearing at the assistant principal which in and of itself is threatening conduct. As support for its position, the District charges, as it did in its immoral conduct charge, that the teacher willfully chose to yell and swear at the assistant principal in the presence of employees who were subordinate to the assistant principal and argues that if she is permitted to continue working for the district after behaving this way she and other employees would be sent a message that they may engage in this type of conduct without repercussions.

Addressing the issue of remediability, the District states that not only has it proven its charges against the teacher but that it will also prove that her conduct is not remediable since the question of remediability has been raised. Continuing, the District cites *Kroll v. Independent School District No. 593*, 304 N.W.2d 338 (Minn. 1981) and notes the difference between §122A.40, Subd. 9 and §122A.40, Subd. 13; discusses the four factors identified in *Kroll* which the Supreme Court ruled should be considered in determining whether a teacher's conduct is remediable, and concludes that this teacher's conduct is not remediable.

Referring to the teacher's prior record, the first factor cited in *Kroll*, the District maintains that the teacher has a history of losing her temper at school. As proof, it cites the teacher's statement during the hearing that she had left a meeting with a parent because she was getting angry; her statement that the principal had told her she should not get so upset, and her statement that she had thrown a marker at a student who was causing a disturbance in her class. It adds that if it had known about the incident involving the student it would have disciplined her for it.

With respect to the severity of the conduct in light of record, the second factor, the District, citing *Kroll* and two arbitration decisions in which it has been concluded that "a single act of sufficient severity may justify dismissal in light of the teacher's record as a whole", the District argues that since the teacher's threats and her behavior toward the assistant principal were "undeniably severe" and "obviously prohibited" conduct she must be immediately

dismissed for this single incident.⁴ The District continues that this teacher's conduct also had a "serious effect upon the District and its employees" in that it undermines the chain of command and caused fear in the workplace.

Addressing the third factor, whether the conduct presents an actual or threatened harm, the District maintains that several witnesses expressed fear and concern about the teacher's conduct and the potential harm it presented and that their reactions are proof that her conduct has caused "irremediable deterioration in relations between the teacher and other faculty". Adding that it does not have to wait until the teacher physically harms a supervisor or carries out a threat before it may discharge her, it asserts that her actions presented a serious risk of harm and more than justify her immediate discharge. The District also argues that the teacher's lack of professionalism prevents her "successful reintegration into the District" and that her use of the word "fuck" or "fucking" in the presence of students in the hallway "will forever be etched in the minds of those adults and students who saw or heard" her.

And, finally, the District asserts that the fourth factor cited in *Kroll*, whether the conduct could have been corrected had the teacher been warned by superiors, also supports the teacher's immediate discharge since "some conduct is so obviously prohibited that neither a rule nor a warning" is needed for an employee to know the conduct is prohibited. As support for its position it cites *United Food and Commercial Workers, Local 6*, BMS No. 93-20326, (Thomas Gallagher, 1994). Further, it charges that the willful nature of her conduct shows a warning "could not" and "would not" correct her behavior.

Further challenging whether the teacher's conduct is remediable and the teacher's assertion that she will not engage in similar misconduct in the future if lesser discipline is imposed, the District contests the methods used by the psychologist who evaluated the teacher's behavior. It also challenges the validity of the psychologist's conclusions arguing that he failed to conduct a comprehensive evaluation; that his notes do not contain sufficient information to diagnose the teacher or rule out a diagnosis for her; that neither his notes or his testimony addresses the teacher's admission that she gets angry to the point where she cannot

⁴ *Kroll*, *ibid.*; *In the Matter of the Arbitration between United Food and Commercial Workers, Local 6 and Farmstead Foods, Inc.*, BMS No. 93-20326 (Thomas Gallagher, 1994), and *In the Matter of the Arbitration between Metal Shop, Warehousemen and Helpers Union, Local 970 of the International Brotherhood of Teamsters and Certaineed Corporation*, FMCS No. 98-05152 (Thomas Gallagher, 1998).

remember what she said at least twice a year at home, and that his conclusion that she has no psychopathology runs contrary to the fact that she is on medication prescribed by her physician. Other reasons it objects to the psychologist's conclusions include the fact that neither test administered by the psychologist can be used as a diagnostic tool or as a prediction of future behavior; that the American Psychiatric Association and other organizations have found that most cases diagnosing future predictability of dangerousness have been wrong, and that the psychologist lacked adequate information for concluding the teacher would not engage in similar conduct in the future.

Lastly, concluding that the teacher lacked credible evidence that her actions were an isolated act which would not happen again since the psychological evidence does not support her assertion, the District argues that it should not be required to risk that another incident would occur even if it is more likely that she would not behave that way again. Further, it asserts that there is no merit in her argument that she was acting as a mom and cites her threat to quit if the assistant principal became principal in the following year as proof that she was acting in her capacity as a teacher. It also posits that even if the teacher were acting as a parent case law and arbitration decisions support its decision to discharge her.⁵

The Association, on behalf of the teacher, argues, however, that the District failed to prove that the teacher acted immorally or was insubordinate or that her conduct requires her immediate removal from the classroom or her duties as a teacher and that her conduct is remediable. It also argues that the District's decision to discharge the teacher is inconsistent with discipline it issued another teacher whose actions were far more serious than this teacher's actions and urges that lesser discipline is appropriate and would correct her conduct.

Addressing the remediability issue first, the Association maintains that the teacher's actions do not warrant immediate discharge since immediate discharge is appropriate only if a

⁵ Among the cases it cites as proof are *In the Matter of the Proposed Discharge of Donald Lee Shelton*, 408 N.W.2d 594 (Minn. App. 1987); *In the Matter of Arbitration between Fillmore County and Law Enforcement Labor Services, Inc.*, BMS Case No. 97-PA-132 (Richard Miller, 1997), and *In the Matter of Arbitration between Independent School District 94 and AFSCME Minnesota Council 65, Local 545*, BMS Case No. 11-PA-1269 (Kathy Mullen, 2011).

teacher's conduct is not remediable and cites several cases to support its position.⁶ It also declares that if the conduct is remediable the teacher must be given an opportunity to correct the deficiencies. And, finally, it argues that the District failed to meet its burden of proving that the teacher's conduct is not remediable.

According to the Association, the teacher returned to the school as a parent and advocate for her son and the emotional outburst that occurred resulted from her learning about the incident involving her son from her son; being frustrated that the school had not told her about the incident; being unclear about whether he was going to be suspended, and temporarily losing her temper when talking with the assistant principal when she learned he knew more about the incident than he had initially indicated to her. It adds that she "repeatedly and immediately" recognized that she had made a mistake and that she not only took responsibility for her actions then but continues to take responsibility for her actions. As proof, it cites the fact that the teacher apologized to both the officer and the assistant principal before she learned about the District's investigation or the possibility of discipline and the fact that after learning of possible discipline she has continued to take sole responsibility for her actions as evidenced by her forthright discussions with the psychologist who evaluated her and her acknowledgement at hearing that her statements were inappropriate whether made as a parent or as a teacher. Based upon circumstances which contributed to her outburst and the teacher's willingness to accept responsibility for her actions, the Association maintains that the teacher has shown "she is capable of conforming to the District's expectations of its teachers" and that her conduct is remediable.

Speaking to the four factors identified in *Kroll*, the Association states that since the teacher has no record of prior disciplinary action against her the key questions for the arbitrator to consider are whether the teacher's conduct resulted in any harm and whether her conduct can be corrected.

Addressing the first of the two questions, the Association declares that the teacher's actions on April 1 caused no physical or psychological harm to occur. Asserting that the statements were expression of frustration and not credible threats, the Association posits that

⁶ *Kroll v. Indep. Sch. Dist. No. 593*, 304 N.W.2d 338 (Minn. 1981); *Whaley v. Indep. Sch. Dist. No. 11*, 325 N.W.2d 128 (Minn. 1982), and *Beranek v. Joint Indep. Sch. Dist. No. 287*, 395 N.W.2d 123 (Minn. Ct. App. 1986).

her statements should be evaluated by their immediate impact on those who hear her and cites *Indep. Sch. Dist. No. 51, 10-PA-1081* (Gallagher, 2010) in support of its position. The Association continues that in this case no one who heard the teacher's statements testified that they believed the teacher actually intended to harm the officer or took action which indicated they believed she would harm the officer. As evidence, it cites the fact that neither the attendance secretary nor the assistant principal mentioned the statement to the principal when he debriefed them immediately after the incident which they would have done had they perceived her statements as genuine threats. It also cites the fact that the assistant principal did not report her statement to the police or to the officer when he called the officer shortly after the incident had occurred and asked him to contact the teacher and talk with her about the incident which had involved her son. In light of these responses, the Association charges that the District failed to produce any evidence that the teacher actually intended to harm the officer or any witness who believed she intended to act upon her statements and, yet, proposes to discharge a teacher with twelve years of service for making statements she "clearly did not intend to act upon", statements which were inappropriate but conduct which is "clearly remediable".

The Association also maintains that the teacher poses no risk to students or employees in the District and that remediation is appropriate in light of evidence showing that she is unlikely to engage in this type of behavior again. As support for this position, the Association points to the fact that the teacher had a discipline-free record prior to this incident and that at the end of a five hour forensic evaluation the psychologist who evaluated her concluded that she does not pose a risk of violence or of repeating her April 1 conduct.⁷ Further, addressing the questions raised by the psychiatrist who testified for the District, the Association states that the his question as to whether the psychologist exhausted every possible method of evaluation has no bearing on this issue and the American Psychiatric Association amicus brief cited by the psychiatrist does apply to this situation since the conclusions are based upon a study concerning cases which involved serious physical violence and there was no act of

⁷ As support for the psychologist's conclusion the Association repeated his testimony at hearing in which he stated that his conclusion was based upon his finding that the teacher has no psychiatric disorder that relates to a violence potential; his finding that she has no history of violence toward others, and the fact that the staff did not react as if she had posed a threat.

violence here. The Association also points out that the psychologist is the only one who evaluated the teacher in connection with this case and his conclusions were not only based upon his five hour evaluation of the teacher but were also based upon the fact that her son, the emotional trigger for the incident is no longer attending the school so she will no longer have the difficult job of balancing her role of being both parent and a teacher in the same school which will alleviate much of the stress which resulted in the outburst. And, finally, the Association states that the steps the teacher has taken such as readjusting the medication she was taking for stress and enrolling in an exercise program will help assure that she will not engage in this type of behavior again.

In addition to arguing that the teacher's conduct is remediable, the Association maintains that the District failed to prove the teacher acted immorally; was insubordinate or exhibited conduct unbecoming a teacher which requires her immediate removal from the classroom, the grounds the District cites as cause to discharge the teacher. Beginning with the charge of insubordination, the Association, relying upon two arbitration awards and *Roberts' Dictionary of Industrial Relations*, defines the term as "constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with property authority" and states that the teacher's conduct does not meet this commonly accepted definition of insubordination.⁸ As support for its assertion, it notes that the teacher never refused a direct or implied order; that she left the office when she was asked to leave by the principal, and that there is no evidence that she refused to obey any order or some type of forewarning of consequences by the employer.

Stating that the teacher was not immoral, the Association, as did the District, notes that the statute does not define the term. It continues, however, that case law demonstrates that the standard for immoral conduct is set quite high and cites several cases in support of its assertion. It also cites this Arbitrator and another arbitrator in its effort to define the term.⁹

⁸ *Independent School District 625, St. Paul*, Ver Ploeg, 2007 quoting *Ray v. Minneapolis Board of Education, Special School District No. 1*, 296 Minn. 13, 202 N.W.2d 375 (1972); *Independent School District No.16, Spring Lake Park*, 04-PA-1445, Latimer, 2005, and *Roberts Dictionary of Industrial Relations* (4th Ed. 1994) (quoting Arbitrator Joseph Gentile in *Kay Bruner Steel Prods.*, 78 LA 363).

⁹ See *In re Shelton*, 408 N.W.2d 594 (Minn. App. 1987); *In re Etienne*, 460 N.W.2d 609 (Minn. App. 1990); *Nicholson v. Indep. Sch. Dist. No. 363*, 1992 WL 48113 (Minn. App. 1992); *Indep. Sch. Dist. No. 284, Wayzata*, 08-TD-1, (Imes, 2008), and *Indep. Sch. Dist. No. 152, Moorhead*, 00-TD-2, (Ver Ploeg, 2000).

Based upon the standards set in these cites, the Association argues that the teacher's use of inappropriate language and her comments about the officer can hardly be said to meet the standards. As further proof, it asserts that the teacher regrets her actions and that she did not set out to insult or demean her colleagues.

As for the charge of conduct unbecoming a teacher, the Association again argues that the District offered no evidence, this time, that the teacher cannot be effective in the classroom or that she must be let go immediately. And, as proof, it declares that contrary to cases where a teacher's conduct has been grounds for a finding of the need for immediate removal, here neither administrator who know of her comments thought she should be removed from her classes on the following Monday which shows that their initial reaction was that her conduct had no impact on her ability to teach.

Finally, the Association argues that the District's actions are inconsistent with discipline it issued another teacher whose conduct was far more serious than that of this teacher's and that the teacher's actions can be corrected by a lesser form of discipline. Recognizing that arbitrators generally rule against disparate treatment, the Association explains that the District issued only a two-day suspension to a teacher who threw a metal object at a student in his classroom and struck the student in the head; argues that this incident is far more serious than the teacher's statements which no one considered as threats, and charges that based upon this fact the proposed discharge is too harsh. Continuing, the Association again states that while the District does not have grounds to discharge the teacher discipline is appropriate and seeks that lesser discipline be imposed. As for the degree of discipline to impose, the Association states that the teacher seeks whatever discipline the Arbitrator deems appropriate but asks that she bear in mind that a teacher who became angry and threw a piece of metal at a student received only a two-day suspension and that if the District had imposed an unpaid suspension the collective bargaining agreement limits the length of the suspension to no more than ten days.

DISCUSSION:

The Minnesota Teacher Tenure Law, Minn. Stat. §122.40, sets forth the two procedures a school district may follow when it decides to discharge a tenured teacher. Under Subdivision

9, a teacher may be terminated at the close of the school year for certain types of conduct and the district must first notify the teacher of the deficiencies identified and give the teacher a reasonable opportunity to correct them. This subdivision specifically focuses on whether a teacher's conduct is remediable. Subdivision 13, the other procedure, allows a district to immediately discharge a teacher for certain types of more serious conduct. This subdivision does not provide for notice or for an opportunity to remedy the deficient conduct and it requires the district to report to the Board of Teaching the grounds for the teacher's discharge or the teacher's suspension or resignation while the charges are pending or under investigation. It also requires the Board of Teaching to investigate and decide whether to revoke the teacher's license or impose a lesser penalty.

As with most statutory provisions, case law helps define how the language should be interpreted and the most definitive statement concerning both termination provisions was issued by the Minnesota Supreme Court in *Kroll v. Independent School District No. 593*, 304 N.W.2d 338 (Minn. 1981). In *Kroll*, the Court discussed how a school board should analyze a teacher's conduct in determining which procedure to follow; discussed whether remediability should be considered when terminating a teacher under Subdivision 13, and concluded that under either subdivision, the district must determine whether the offensive conduct is remediable. Continuing, the Court identified four factors which it believed should be considered during any termination proceeding: the prior record of a teacher; the severity of the conduct in light of the teacher's record as a whole; whether the conduct resulted in actual or threatened harm, and whether the conduct could have been corrected had the teacher been warned by superiors.¹⁰

GROUND S FOR IMMEDIATE DISCHARGE

In this dispute, the District is proposing to immediately discharge the teacher under Subdivision 13 on the grounds of immoral conduct; insubordinate conduct, and conduct

¹⁰ Relevant to the second factor is a finding of continuing misconduct or a single incident that is "so outrageous that it cannot be remedied in light of the danger the teacher's presence in the classroom would present" and with respect to the third factor, the Court stated that psychological harm falls within the range of actual harm and that while a school board need not wait for harm to come to students before dismissing a teacher, "absence of harm should be considered in determining whether the conduct is remediable."

unbecoming a teacher which requires her immediate removal from the classroom and other duties. Since it has chosen to proceed under this subdivision, it assumes a burden of proof which requires there be a preponderance of evidence which demonstrates the teacher's actions constituted such egregious behavior that discharge is the only acceptable disciplinary action and that her conduct is not remediable. After reviewing the record, it is concluded that while the District failed to prove by a preponderance of the evidence that the teacher's actions were immoral it proved that the teacher was insubordinate when she yelled and swore at the assistant principal. It is also concluded that the District proved that the teacher's conduct was conduct unbecoming a teacher but failed to prove that her conduct was so outrageous that it warrants her immediate removal from the classroom or other duties. Following is a discussion of these findings.

Immoral Conduct: Relying upon its definition of immoral conduct, the District argues that the teacher acted immorally when she threatened to kill and assault the police liaison officer; when she yelled and swore at her immediate supervisor, and when she used the word "fuck" or "fucking" in the presence of students. The record does not support a finding that the teacher acted immorally when she yelled and swore at her immediate supervisor nor does it support a finding that the teacher acted immorally when she used the word "fuck" or "fucking" in the presence of students since the District failed to prove students were present when she swore in the hallway. The record also does not support a finding that the teacher acted immorally when she said she was going to kick the officer's ass or that she threatened to kill the officer. Since admitted making the latter statement toward the end of the hearing before this Arbitrator, however, the Arbitrator has no choice but to deal with whether the statement constituted immoral conduct.¹¹

Both the District and the Association recognize that the statute does not define the term "immoral" and offer a definition. Neither offered definition actually defines the term, however. Since some types of conduct may be acceptable behavior in one community and unacceptable in another, it is essential that the defined term identify characteristics that make the behavior unacceptable conduct in the educational community. After reviewing the

¹¹ See Transcript, page 291.

arbitration decisions submitted by the parties and a number of cites in *Words and Phrases* as well as *Barron's Law Dictionary* which defines immoral conduct as "conduct which is willful, flagrant, or shameless, and which shows a moral indifference to the opinions of the good and respectable members of the community", it is decided that in the educational environment immoral conduct is willful, flagrant or shameless conduct which has a tendency to bring both the individual and the teaching profession into public disgrace or disrespect and which has a serious impact upon the teacher's fitness to teach. Examples of such conduct are sexual advances between a teacher and a student; conduct which constitutes an offense under state statutes, or conduct which has the effect of creating an intimidating, hostile or offensive learning environment.¹² Under this definition, the teacher's yelling and swearing at her immediate supervisor and using the word "fuck" or "fucking" in the hallway where students may have been present does not rise to the level of immoral conduct.¹³

Threats of physical abuse, however, may rise to the level of immoral conduct depending upon the context in which they occur, the way the words were used; the circumstances under which the statements were made and the perceived dangerousness of the alleged threats.¹⁴ In this instance, the teacher is accused of having said she was going to "kill that fucking guy" and that she was going to "kick his ass". Both statements, if proven, are certainly deserving of discipline. Whether they rise to the level of immoral conduct which is grounds for immediate discharge is less clear.

The most damning testimony offered as proof that the teacher said she was going to kill the officer is that of the attendance secretary yet it is her testimony which is the least credible. The attendance secretary testified that the teacher "threw the door open"; that she "was a

¹² *Barron's Law Dictionary, 6th Edition*, Steven H. Gifis, Barron's Educational Series, Hauppauge, NY, 2003; *Words and Phrases*, Vol. 20, Thomson-West, 2005.

¹³ While the District argued that students were present in the hall and heard the teacher say "this fucking place" or something similar to that, the evidence does not support this argument. The only person to testify that students were present in the hallway was the attendance secretary who could not possibly have known whether there were students in the hall when the teacher left the administrative offices since she was at her desk in the administrative offices with the doors closed. Consequently, absent proof that students actually heard the teacher swear and that the swearing had a serious effect upon the students, it cannot be concluded that the teacher's use of the word "fuck" or "fucking" in the hallway as she left the building is immoral conduct warranting her immediate discharge.

¹⁴ See *Labor and Employment Arbitration, Second Edition*, Bornstein, Gosline, Greenbaum, General Editors, Lexus Publishing, 2000, Chapter 19, pp. 19-1 to 19-40; *Discipline and Discharge in Arbitration*, Norman Brand, Editor-in-Chief, ABA Section of Labor and Employment Law, Bureau of National Affairs, Inc., 1998, pp. 276-77.

woman on a mission"; that when the teacher came to her desk, she was "yelling loudly"; using the "f" word and among other things said "I'm going to kill that fucking guy". She also testified that the teacher had said "I'm going to kick his ass" as she turned toward the assistant principal's office. No other witness in the administrative offices with this secretary corroborated her testimony.

The principal testified that the teacher had come into his office; talked with him about the incident involving her son and the liaison officer, and had expressed her concern about the interaction between them. He did not testify that she had been loud or irate at that time. This testimony hardly confirms that the teacher was "a woman on a mission" as the attendance secretary testified.

The principal's secretary testified that the teacher stopped to talk with her and another employee after leaving the principal's office and shared with them the incident that had occurred between her son and the liaison officer. While she testified that the teacher had said she was "frustrated" by the incident, she did not testify that the teacher had been loud at that time or even when she stopped at the attendance secretary's desk. Instead, she testified that the teacher started yelling when she was talking with the assistant principal. This testimony does not affirm the attendance secretary's testimony that the teacher was "yelling loudly" when she came to her desk or using the "f" word at that time since their desks are in close proximity and the principal's secretary would have heard the teacher and testified to that fact.

The counseling secretary's testimony also does not lend credibility to the attendance secretary's testimony. According to this secretary, the teacher did not seem "particularly agitated" while she shared the story about her son and the officer with her and the principal's secretary. She also testified that she heard the teacher become loud when she began swearing at the assistant principal but did not testify that the teacher was "yelling loudly" while at the attendance secretary's desk. Further, neither this witness nor the principal's secretary testified that they had heard the teacher say she was going to kill the officer, a statement they most likely would have heard if it had been made in a loud, threatening way as the attendance secretary stated.

The only other person to testify that the teacher said she was going to kill the officer was the assistant principal whose testimony is also fraught with inconsistencies. According to the assistant principal, he came into the offices; saw the teacher pacing near the desk of the secretary's principal and went to his office. When asked how the incident came to his attention, he said, "And then from there, . . . (the teacher) came over and made reference to -- I believe the quote was 'I'm going to kill that 'f-ing' guy. Nobody talks to my son that way.'" He also said that he then went to his door; that she came toward him and that he could "see her face was red and upset". His testimony, more a narration than testimony as to what he heard, did, and saw, differs substantially from the attendance secretary's testimony. According to the attendance secretary, the teacher said that she was going to kill the officer when she first came to her desk and that they had a discussion as to whom she was talking about and that teacher then said "I'm going to kick his ass" as she walked toward the assistant principal's office. Given this testimony and the assistant principal's testimony as to when he heard the statement, it is more likely that the assistant principal heard the teacher say that she was going to "kick his ass" rather than she was going to kill the officer.

This conclusion is further buttressed by the fact that the assistant principal told the principal and the director of teaching and learning, during their interviews of him as they investigated the incident, that he had heard the teacher "yelling 'I am gonna kick his ass. Nobody disrespects my son.'" It is also supported by the fact that he made no reference to having heard the teacher say she was going to kill the officer. Since this statement, if made, is far more serious than the "kick his ass" statement, one would think he would have reported it during the investigation.

Also indicating that the teacher did not actually say she was going to kill the officer, or that if she did that anyone considered it a serious statement, is the fact that neither the assistant principal nor the attendance secretary reported the statement to the principal when he debriefed them immediately after the teacher left the administrative offices; by the fact that the assistant principal did not report the statement to the principal when he again talked with the principal about the incident in the principal's office shortly thereafter; by the fact that neither the assistant principal nor the attendance secretary reported the statement to any

other authority, and by the fact that the assistant principal did not mention the statement to the liaison officer when he called the officer that afternoon after the incident to ask him to call the teacher and talk with her about the incident with her son. Since the District argues that "threats" must be taken seriously and there was evidence that it does take such threats seriously, it must be concluded that either the statement was not made, or in the alternative, that the statement was not considered a "threat" since there is no evidence that the statement, if made, was taken seriously.

The teacher's responses during the investigative interview also support a finding that the statement was not made. During that interview, she denied having made the statement at least four times concluding, finally, that she did not recall making the statement but that others "heard what they had heard" after the director of teaching and learning and the superintendent wrongly insisted not only that she had made the statement but that it had been heard by several other employees.¹⁵ As stated in the facts, the director of teaching and learning told the teacher that those in the office at the time of the incident said she had said that she was going to kill the officer and the superintendent, after saying at least three times that "people" and "the general office staff" had heard her say it and concluded the meeting saying that regardless of whether she remembered making the statement, ". . . there were other adults listening to that and this isn't your word against somebody else. This is multiple people hearing 'I'm going to kick his ass' and 'I'm going to kill that guy'."

Based upon the evidence discussed above, it would be logical to conclude that the teacher did not say that she was going to kill the officer but as stated earlier in this discussion the teacher did admit toward the end of the hearing before this Arbitrator that she thought her statement that she was going to kill the officer was conduct unbecoming a teacher but not immoral conduct.¹⁶ It is possible that she mis-heard the question but based upon her responses to the question it must be concluded that she did make the statement. Having made this finding, however, does not mean that the statement rises to the level of immoral conduct, particularly given the fact that the evidence raises substantial doubt as to whether

¹⁵ At the time the teacher's interview was conducted, the investigative reports of both the principal and the director of teaching and learning indicated that only one person, the attendance secretary, had indicated the teacher had said that she was going to kill the officer.

the statement was actually made and there is no evidence that the statement was taken seriously by anyone who allegedly heard the statement.

Insubordination: According to the District, the teacher became insubordinate when she yelled and swore at the assistant principal in front of other employees and that her verbal attack was so severe that the assistant principal feared for his safety. The Association, however, maintains that the District failed to prove its charge of insubordination since one must intentionally refuse to obey a direct or implied order given by a superior in order to be insubordinate and there is no evidence that the teacher refused to obey an order given by the employer. While insubordination is normally defined as an employee's willful disregard of a direct or implied order given by a superior an employee who directs verbal or physical abuse at a supervisor may also be considered insubordinate.¹⁷ When charges of insubordination for using abusive language with a supervisor are levied, however, arbitrators usually attempt to balance an employee's right to say what he or she feels with the employer's right to discipline employees who are verbally abusive and, in general, conclude an employee has been insubordinate when the words have been said in a contemptuous fashion; when the words have been accompanied by some other conduct of a serious nature, or when the words reflect a resistance or defiance of the employer's authority. Further, in some cases, management's role in provoking the insubordination; the circumstances surrounding the incident; an employee's prior record, or an employee's conduct after the incident may be considered a factor mitigating against discharge for insubordination.¹⁸

In this instance, there is no question that the teacher was insubordinate when she yelled and swore at the assistant principal even though she was there as a parent/advocate for her son since her comments reflected a serious lack of respect for the assistant principal. There is evidence, however, that the assistant principal was partially to blame for the teacher's outburst toward him and that it should be considered when remediation is considered. The

¹⁶ See transcript, pages 290-91.

¹⁷ *Discipline and Discharge in Arbitration*, Norman Brand, Editor-in-Chief, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, D.C., 1998, p. 156; *Labor and Employment Arbitration, Second Edition*, Bornstein, Gosline, Greenbaum, General Editors, Lexis Publishing, 2000, §16.04[6], p. 16-21.

¹⁸ *Arbitration 1996 at the Crossroads, Proceedings of the Forty-Ninth Annual Meeting of the National Academy of Arbitrators*, Edited by Joyce Najita, The Bureau of National Affairs, Inc., Washington, D.C. 1997, pages 26-31.

record establishes that concern about the incident that occurred between her son and the liaison officer caused the teacher to return to school at the end of the day on April 1st; that her conversations with the principal, the staff and the assistant principal were solely about the incident involving her son, that the outburst occurred when the teacher began talking with the assistant principal about her son's incident, and that the outburst most likely would not have occurred had the assistant principal been more truthful with her when she asked him if he knew about the incident involving her son and the officer. Nonetheless, the teacher began to rant at the assistant principal when she learned he had known more about the incident than he had indicated and had done nothing, in her opinion, to protect her son or to let her know about the incident. Such behavior in front of other staff, even though she was acting as a parent and not a teacher and the assistant principal had contributed to the problem, is not acceptable behavior and does serve to diminish the assistant principal's authority.

While it has been determined that the teacher was insubordinate when she yelled and swore at the principal, the Arbitrator finds the District argument that it was so "severe" and "intense" that the assistant principal feared for his safety is not persuasive. This finding is based upon the assistant principal's testimony that he didn't think she was going to reach in her purse and take something out but that he wasn't going to get close to her; that he hoped that by sitting at his desk the situation would deescalate, and that he was relieved when the principal came to his door because he thought the principal would get her to move away from his door. While his testimony certainly indicates a discomfort with the way she was behaving, nothing in his testimony indicates that he actually feared for his safety.

Conduct unbecoming a teacher which requires the immediate removal of the teacher from the classroom or her duties: This charge is slightly different from the other two charges in that it requires that the conduct be so outrageous that it warrants immediate removal of the teacher from the classroom or other teaching duties. Consequently, even though the District has proven by a preponderance of the evidence that the teacher's conduct was inappropriate and unprofessional, it must also prove by a preponderance of the evidence that the conduct was so egregious that it affects the teacher's ability to interact with students.

With this charge, the District maintains that since the teacher admitted that she engaged in conduct unbecoming a teacher it need only prove that her conduct requires immediate removal and the Arbitrator concurs. As proof that the teacher's conduct demands her immediate removal, the District argues that that the severity and nature of her conduct, particularly the seriousness of her threats, requires her immediate removal and maintains that her behavior toward the assistant principal was threatening conduct which undermines the assistant principal's authority. It also argues that allowing her to return to work for the district would send a message to her and to the staff that they can engage in this type of behavior without repercussions. The Association rejects the District's arguments stating that the District failed to prove that the teacher could not be effective in the classroom and that her conduct was so unacceptable that all student contact must cease.

After reviewing the record, this Arbitrator agrees with the Association's assertion that the District failed to prove the teacher's conduct, while inappropriate and unprofessional, affected her ability to perform in the classroom or as it relates to the performance of her other duties. This finding is supported by the fact that neither the principal nor the assistant principal felt that her conduct was so outrageous that either recommended an immediate suspension after the incident occurred and that the teacher was allowed to teach all of her classes on Monday following the incident.

IS THE TEACHER'S CONDUCT REMEDIABLE?

Having concluded that the District did prove by a preponderance of the evidence that the teacher committed an offense under the Minnesota Teacher Tenure Law, Minn. Stat. §122.40 that is grounds for termination, the question remains whether immediate termination is the appropriate course of action since immediate discharge is proper only if the teacher's conduct is not remediable. Both parties have addressed this question with the District arguing that the teacher's conduct requires her immediate discharge and the Association maintaining that the evidence establishes that her conduct is remediable. Both rely upon the four factors the Supreme Court cited in *Kroll* as support for their respective positions. Following is a discussion of each factor and the conclusions reached by this Arbitrator.

The Teacher's Prior Record: In seeking to immediately discharge her, the District argues that the teacher has a history of her losing her temper at school and cites as proof, the teacher's testimony that she once threw a marker at a student who was being disruptive in her classroom and that she left a meeting involving the student's parent in order to avoid getting angry with the parent. It also argues that she has an anger management problem and cites as evidenced the fact that the teacher told the psychologist who evaluated her that she loses her temper at home occasionally and does not remember what she said and the fact that she testified that she gets so angry at home once or twice a year that she does not remember what she said. In addition, the District maintains that it would have disciplined the teacher had it known that she had thrown a marker at a student during class.

The District's argument that the teacher has a history of losing her temper at school is rejected since the evidence establishes that until the April 1st incident, the teacher has not been disciplined for any reason during her twelve years with the District. While she did admit at hearing that she once threw a marker at a student's desk when he was being disruptive in the classroom and that she left a meeting with that student's parent in order to avoid getting angry with the parent, a one-time occurrence in twelve years does not support a finding that the teacher has a "history" of being angry in school, particularly since there is no evidence that she was either warned or disciplined for her actions.¹⁹

The District's argument that the teacher has an anger management problem is also rejected, at least as it relates to establishing that her prior record shows she has a record of losing her temper at school. Admission that one loses one's temper at home, whether once or twice a year or more, does little to prove that the teacher loses her temper as a teacher or that, absent a showing that there is a nexus between the teacher's off-duty behavior and its affect upon the District's reputation, getting angry while off-duty affects her ability to perform as a teacher. Since there was no evidence other than the teacher's testimony that she get angry at home once in awhile it cannot be concluded that she has an anger management problem and since no nexus between those outbursts and the school environment was shown

¹⁹ While the District asserted that if it had known of this incident the teacher would have been disciplined the record establishes that it did know of the incident since the teacher testified that a District representative was present during the meeting with the parent and her testimony was not disputed.

it cannot be concluded that the teacher's off-duty behavior establishes a history of losing her temper in the school environment.

Severity of the Teacher's Conduct in Light her Record as a Whole: With respect to this criterion, the District argues that the teacher's conduct was "undeniably severe" and that it had a "serious adverse effect upon the District and its employees". In response, the Association asserts that the teacher's willingness to accept responsibility for her actions and her remorse shows "she is capable of conforming to the District's expectations of its teachers".

When the Court cited this factor as one to be considered it identified evidence of continuing misconduct as well as a single incident that "is so outrageous that it cannot be remedied in light of the danger the teacher's presence in the classroom would present". Since there is no evidence that the teacher's conduct on April 1st reflects behavior exhibited by the teacher during her twelve years with the District, it appears that the District's argument is intended to prove that the teacher's outburst on April 1st was "so outrageous that it cannot be remedied in light of the danger the teacher's presence in the classroom would present". After reviewing the record with respect to this factor and the District's arguments, it is concluded that the evidence does not support a finding that the teacher's conduct on April 1st is not remediable and warrants immediate discharge.

There is no question that the teacher's behavior is serious misconduct. No employer should have to put up with an employee who, in anger, makes statements which might be interpreted as threatening or who yells and swears at a supervisor. The record establishes, however, that neither her statements or conduct was interpreted by those who witnessed the incident as dangerous or conduct which should prevent her from being in the classroom. This is demonstrated by the fact that none of the witnesses to the incident who were questioned about how the teacher's behavior made them feel indicated that her behavior made them fear for their safety or for the life of the officer even though they said they had never seen anyone behave as she had; that they felt uncertain about what she might do; that they were "shocked" by her behavior and that they felt her behavior had been inappropriate and unprofessional but none testified that they feared for their safety or the life of the officer. It is also shown by the fact that the teacher's statements were not reported to the authorities and that she was

allowed to teach all of her classes the Monday after the incident occurred. Consequently, absent proof that the teacher's conduct created an environment which would prevent her from being in the school and/or the classroom it cannot be concluded that her conduct is not remediable based upon the severity of her conduct in light of her record as a whole.

Whether the Conduct Presents an Actual or Threatened Harm: In addition to making the same arguments it made regarding the seriousness of the teacher's misconduct, the District argues that it should not have to wait until the teacher physically harms a supervisor or carries out a threat before it may discharge her. The Association, however, argues that no physical or psychological harm was done and cites the reactions of the staff, the principal and assistant principal as proof no one believed the teacher intended to harm anyone.

While the Association's argument does not address any psychological harm the teacher's outburst may have caused, the District did not provide evidence to support a finding of psychological harm and there is no evidence that her behavior caused any physical harm. Since this incident occurred solely in the presence of staff and not in the presence of students this discussion only addresses the question of physical or psychological harm to the staff and administration.

As previously stated in the discussion relating to the severity of the teacher's misconduct and pertinent to this discussion, the District has failed to provide proof that the staff or administration believed the teacher's statements to be a threat of violence. Further, while there is evidence that the teacher was insubordinate when she yelled and swore at the assistant principal, the staff's reactions indicate there is no proof that her outburst undermined his authority with these subordinates. And, finally, there is no proof that the teacher's inappropriate and unprofessional conduct physically or psychologically harmed any students or affected her fitness to teach. Based upon these findings, it cannot be concluded that the teacher's conduct caused physical or psychological harm or that it cannot be remedied.

Whether the Conduct Could Have Been Corrected Had the Teacher Been Warned by Superiors: Stating "some conduct is so obviously prohibited that neither a rule nor a warning" is needed, the District argues that a warning is not needed for the teacher to know that her conduct is prohibited; declares her lack of professionalism prevents her "successful

reintegration into the District" and challenges the conclusion that it is unlikely that the teacher will engage in similar misconduct which was reached by the psychologist who evaluated the teacher. The Association, however, maintains that the teacher's discipline-free record and the conclusion that she does not pose a risk of violence or repeating her conduct reached by the psychologist based upon his forensic evaluation of her is evidence that her conduct is remediable. It also declares that further proof that it is not likely that the behavior will occur again is the fact that the teacher recognizes the seriousness of her behavior and has taken steps to reduce the stress which led to this outburst.

While the District correctly argues that there are some types of behavior that an employee knows is wrong without being told it is wrong, that knowledge does not mean that a warning or discipline, if given by a supervisor would not have the effect of correcting the behavior. This is particularly so with incidents involving insubordination.²⁰ And, in this case, the teacher's prior discipline-free record and evidence that she recognized at the time of the incident that her behavior was inappropriate and obeyed the principal when he told her he thought she needed to leave strongly suggests that a warning in the form of progressive discipline has the potential for correcting behavior such as that for which this discharge is proposed. Further, the teacher's record as a whole solidly supports a finding that her behavior is remediable.

Rather than prove that a warning by her superiors would not have corrected her behavior, the District went to great lengths to discredit the Association's argument that there is little likelihood that the teacher will engage in similar conduct if she is allowed to remain in the school. In doing so, it challenged the evaluation done by the psychologist who testified on the teacher's behalf in which he concluded that her conduct was remediable by having a consulting psychiatrist describe the components of a comprehensive mental health evaluation and testify as to the importance of conducting a comprehensive mental health evaluation when evaluating whether the person is experiencing mental stress, has a mental disorder or has a major

²⁰ In *Independent School District No. 622, North St. Paul-Maplewood-Oakdale and International Union of Operating Engineers, Local No. 70*, 98-PA-614, Miller, 1998, the employee was issued a one-day suspension for swearing at a supervisor; in *Fillmore County, Preston, Minnesota and Law Enforcement Labor Services, Inc.*, 97-PA-132, Miller, 1997 the employee was issued a twenty-working day suspension for an incident involving swearing at and about a supervisor; and in several other cases cited by the District the employee's discharge was sustained since the employee had a prior disciplinary record and had been warned previously about their behavior.

psychiatric disorder. The District also had him testify as to why the psychologist's evaluation of the teacher failed to meet the standards of a comprehensive mental health evaluation and to point out any diagnoses the psychologist may have missed since he did not conduct a comprehensive mental health evaluation.²¹ And, finally, the District had the psychiatrist testify as to his concerns over the conclusions the psychologist reached based upon his review of the transcript and the evidence submitted into the record.

Despite the psychiatrist's testimony, however, it is decided that the psychologist's conclusion that it is unlikely that the teacher will engage in the type of behavior that occurred on April 1 is credible. His conclusion was based not only upon the tests and interviews he had with the teacher in an effort to evaluate her mental well-being but upon a review of the circumstances which caused the teacher to be upset and which caused the outburst; observations regarding the staff's reaction to the statements made by the teacher and her outburst, and acceptance of her statement that her physician believed that she was depressed. These are methods frequently employed by psychologists when looking for cause and effect relationships between events and for broad patterns of behavior.²² In accepting the psychologist's conclusion, it is recognized that both the psychiatrist and the psychologist testified that such a finding cannot be made with complete certainty.

As the psychologist found, the record establishes that the teacher was under great personal stress during this academic year since her autistic son was a senior and her goal was to get him graduated and that she had sought help from her physician to help control this stress. The record also establishes that the incident that occurred between her son and the liaison officer and her failure to know about that incident before she heard about it from her son just weeks before graduation served as a catalyst to heighten her concern about his graduating. These factors serve to help understand whether a similar incident is likely to occur even though they do not excuse her behavior that day.

The same is true for the outburst, itself. As discussed before, the outburst was precipitated by the assistant principal's failure to be truthful with the teacher about the

²¹ See transcript, page 337.

²² These are factors arbitrators also generally consider in evaluating the likelihood of misconduct occurring again.

incident involving her son. Since the son has now graduated and is no longer a student in the school the conditions causing her stress have been removed making it less likely that a similar outburst will occur.

Finally, evidence that the teacher is not likely to engage in similar behavior is the fact that her past history with the District indicates that she had not engaged in this type of behavior during the twelve years she has been with the District; that she almost immediately recognized the seriousness of her behavior; that she almost immediately expressed remorse for her behavior and that she has continued to seek professional help in dealing with her stress. It is undisputed that the teacher apologized for her behavior later Friday afternoon when she talked with the liaison officer on the telephone; that she indicated she wished to apologize to the assistant principal for her outburst with him on Sunday evening when she talked with the principal; that she did apologize for her behavior on Monday morning before beginning to teach; that she has talked with her physician about adjusting the medication she has been taking, and that she has enrolled in an exercise program to help alleviate any stress or depression she might be experiencing. These are all strong indicators that the teacher is seeking to remedy her behavior and strongly mitigate against immediate discharge.

DISCIPLINE

Since the District argues that the teacher should be immediately discharged it does not address the issue of lesser discipline discussed by the Association. In its discussion of this issue, the Association posits that the District only issued a two-day suspension to a teacher who injured a student by throwing a piece of metal at that student; that this teacher's actions were far more serious than those of this teacher, and that the collective bargaining agreement only provides for a 10-day unpaid suspension if the District imposes an unpaid suspension. Based upon these facts, the Association asks the Arbitrator to impose a lesser form of discipline.

The facts of this case do not meet the statutory threshold to immediately discharge the teacher but they also do not support a finding that the teacher's misconduct was not as serious as that of the teacher who received a two-day suspension. Further, while the specifics of the incident involving the teacher who received a two-day suspension are not known, the seriousness of this teacher's actions warrants discipline which sends an appropriate warning

that such behavior will not be tolerated. Given this fact, it is concluded that a 30- working day suspension without pay should be imposed. The length of this suspension should put the teacher on notice that her conduct, particularly that relevant to the charge of insubordination, will not be tolerated and that a claim of remediability with respect to any future misconduct similar to it will be seriously doubted if it occurs again.

AWARD

Based upon the above discussion, the evidence submitted, and the arguments advanced by the parties, it is concluded that the District proved that the teacher was insubordinate and that her behavior was conduct unbecoming a teacher. It is also concluded that the District failed to prove that the teacher acted immorally or that her conduct unbecoming that of a teacher required her immediate removal from the classroom or her other duties. And, finally, it is concluded that the teacher's conduct is remediable but serious enough to warrant discipline. Based upon these conclusions, the District is order to rescind its proposal to immediately discharge the teacher and to issue her a 30-working day suspension without pay which shall be scheduled by the District at a time which best accommodates its curricular needs.

Sharon K. Imes, Arbitrator

March 2, 2012