THE MATTER OF ARBITRATION BETWEEN

STAPLES MOTLEY EDUCATION ASSOCIATION,	)	
Union,	)	
and	)	**COUGHLIN SUSPENSION GRIEVANCE**
INDEPENDENT SCHOOL DISTRICT NO. 2170, STAPLES MOTLEY,	)	
Employer.	)	**BMS CASE NO: 12-PA-1112**

Arbitrator:	Stephen F. Befort
Hearing Date:	July 10, 2012
Post-hearing briefs received:	July 24, 2012
Date of Decision:	August 9, 2012

APPEARANCES

For the Union:	Jess Anna Glover
For the Employer:	Kristi A. Hastings

INTRODUCTION

Staples Motley Education Association (Union), as the exclusive representative of a unit of public school teachers, brings this grievance claiming that Independent School District No. 2170, Staples Motley (School District) violated the parties' collective bargaining agreement by suspending Kevin Coughlin without pay for four days without just cause. The Employer maintains that the suspension was supported by just cause due to the grievant's unprofessional

behavior directed at a student. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to suspend the grievant for four days? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE V – PROFESSIONAL BEHAVIOR

Section 4. Proper Cause Required: No teachers shall be disciplined, denied a scheduled salary increase or deprived of any right, benefit, or privilege without due process. Any discipline, denial or deprivation or any adverse evaluation of teacher performance asserted by the School Board or its representative, shall be subject to the grievance procedure set forth in this Agreement.

Section 5. Teacher Representation: When a teacher is to receive a formal warning or reprimand, as in Article V, Section 6 below, the teacher shall at all times be entitled to have present an agent of the association and/or representation of the teacher's own choice. When a teacher has requested the presence of such an agent, no action shall be taken with respect ot the teacher without having the agent present. Prior to issuing a formal warning or reprimand, the teacher concerned will be informed of his/her rights and given at least three (3) working days to decide whether or not the teacher desires an agent(s) of the association and/or representation of the teacher's own choice present. Should the teacher decide to waive this right, such waiver will be in writing, with a copy of the waiver furnished to the teacher and the association. At no time will any statement or inference be made by the board or its representative that such representation would work to the detriment of the teacher.

Section 6. Procedural Requirements: When a teacher stands accused of a breach of rules and/or regulations, and/or direction of the Board or its representatives, this shall be promptly reported to the teacher and the association. The parties agree that before a formal warning, reprimand, or other discipline may be imposed on the teacher, the following due process procedural requirements will be met:

Subdivision 1: The teacher is to be presented, in writing, the school policy and/or ethical standards breached detailing:

a. The rule and/or regulation, and/or directions that the teachers stands accused of violating

b. When the alleged breach occurred

c. The names and/or statements, orally or in writing, of witnesses who will be used to substantiate the alleged breach, unless Minnesota and/or Federal data privacy laws would be violated.

Subdivision 2: Teachers are to be aware that anything the teacher says may be used against that teacher in later meetings or proceedings.

Subdivision 3: Teachers are to be aware that they will be given the opportunity to produce witnesses and/or statements in the teacher's own behalf.

Subdivision 4: Teachers are to be aware that in the event that the charges are unsubstantiated or uncorroborated, the teacher has the right to conference with the accuser(s) and/or witnesses whose statement(s) allegedly support the charge.

Subdivision 5: In most cases, teachers are to be aware that the charges must be either substantiated and punitive action taken or dismissed within ten (10) working days of notification to the board or its representatives that an alleged breach of rules and/or regulations, and/or directions has occurred. The Board or its representative may take more than ten (10) working days to make a decision about an alleged breach of discipline or policy if more time is needed to complete an investigation. A good faith effort will be made to complete any investigation and make a subsequent determination in as timely a manner as possible.

Section 7. Progressive Discipline: The School District intends to follow a policy of progressive discipline for its teachers. Any disciplinary action shall comply with law and regulation, shall be fair and equitable, and shall be consistent with the principle of progressive discipline. Disciplinary action will normally follow, but not be limited to this sequence:

1. Oral reprimand
2. Written reprimand
3. Suspension with pay
4. Suspension without pay
5. Discharge

FACTUAL BACKGROUND

The grievant, Kevin Coughlin, has taught in the Staples Motley School District since 1990. He is licensed to teach a variety of social studies subjects, and he has coached basketball and tennis teams. Both parties agree that Coughlin is a good classroom teacher. For the first 20 years of his employment, he was not subject to any discipline.

The incident leading to the discipline at issue involved an in-class verbal exchange between Mr. Coughlin and Student A that took place on November 18, 2011. The evidence concerning this incident is somewhat murky for several reasons. First, Mr. Coughlin testified that he does not recall the details of this particular exchange. Second, none of the students in the class testified at the arbitration hearing. As a result, the principal evidence relied upon by the School District is the report of an investigator who interviewed Mr. Coughlin and three students in the class.

On November 18, Student A, a male high school junior, arrived late for Mr. Coughlin's World History class. According to the investigative report, Mr. Coughlin asked Student A in front of the other students whether he was late because he had been carrying his girlfriend's books. Another student in the class, Student D, spoke up saying, "Girlfriend! Ha, ha! You've got to be kidding." Mr. Coughlin allegedly then said, "Oh, a boyfriend then?" A number of students in the class broke into laughter during this exchange. According to the investigative report, Mr. Coughlin went to Student A's seat and said something to the effect that, "its okay if you are gay, I'm not going to judge you about your choices in life."

Student A told the investigator that he was upset and embarrassed by the exchange and that he asked Mr. Coughlin to "just be quiet, please." It appears that the incident was particularly

painful due to the fact that Student A had been subject to an ongoing pattern of harassment from a number of his fellow classmates concerning his perceived sexual orientation.

During the following week, Student A's father telephoned High School Principal Ryan Luft and complained about how his son had been treated in Mr. Coughlin's class. Principal Luft, in consultation with Superintendent Mark Schmitz, placed Mr. Coughlin on investigative leave. The School District then hired attorney Joshua Heggem to conduct an investigation into the incident. Heggem interviewed Mr. Coughlin and Students A, B. and C from the World History class on December 6 as a part of the investigation. The School District provided Mr. Coughlin with advance notice of the investigatory interview, including a statement indicating that "the purpose of this interview is to collect information regarding an allegation of employee misconduct." The notice, however, did not describe either the specific incident or the nature of the misconduct being investigated. Principal Luft testified that he did not disclose the specifics of the allegation in order to keep the process "pure" from pre-planning.

During the investigatory interview, Mr. Coughlin stated that he could not recall making any statement to Student A about carrying books belonging to either a girlfriend or a boyfriend. Coughlin stated that he believes in inclusiveness and that anything he said would have been intended to convey the message that any individual's sexual orientation was acceptable to him. He went on to acknowledge, however, that the comments attributed to him by some of the students, if actually made, would be inappropriate. At the end of the interview, Mr. Coughlin offered to apologize to Student A. Superintendent Schmitz testified that the School District decided not to facilitate such an apology because of the likely additional pain it would cause to Student A.

Mr. Heggem issued his investigative report on December 8. In the Findings and Conclusions section of the report, he stated as follows:

> The allegation that Kevin Coughlin made comments about [Student A's] sexual orientation are substantiated based on the testimony of credible eyewitnesses and based on Coughlin's own admission that he trusts [Student A's] testimony and probably said something along these lines. It may not have been Coughlin's intent to cause [Student A] any distress, but it is nevertheless clear that the comments did just that.

On December 22, 2011, the School District held a pre-discipline meeting at which time Mr. Coughlin was presented with a proposed Notice of Suspension. The Notice stated that Coughlin's conduct violated School Board Policy 403 relating to misconduct and that his behavior "was extremely unprofessional, constitutes conduct unbecoming a teacher, and reflects poor judgment." The School District provided Mr. Coughlin with the opportunity to present his response to the allegations at this meeting, and Mr. Coughlin did so. Following the meeting, the School District suspended Mr. Coughlin for four days without pay.

At the arbitration hearing, the School District argued that its suspension decision was justified due to a pattern of progressive discipline. More particularly, the School District referenced the following disciplinary events involving Mr. Coughlin:

- April 19, 2011: A two-day paid suspension for overly-aggressive interaction with a student for riding a bicycle on a School District tennis court in violation of a posted notice;
- April 19, 2011: An oral reprimand for permitting students to take a hallway break without adult supervision during a test; and
- August 30, 2011: A two-day unpaid suspension for failing to timely renew his teaching license.

At the arbitration hearing, both Superintendent Schmitz and Mr. Coughlin testified that they were not aware that Student A had been subjected to a pattern of harassment by other students. The record indicates that the School District has not taken corrective action against any other faculty or students with respect to the harassment directed at Student A.

POSITIONS OF THE PARTIES

School District

The School District contends that it had just cause to suspend the grievant for four days. The School District initially maintains that Mr. Coughlin engaged in misconduct by embarrassing a student concerning his sexual orientation in front of his classmates. The School District claims that this conduct warrants a four-day suspension for the following reasons: 1) the classroom speech caused considerable pain to Student A, and 2) the level of discipline is warranted pursuant to principles of progressive discipline. The School District also claims that its actions complied with all due process procedures specified in the parties' collective bargaining agreement.

Union

The Union argues that the School District has not carried its burden to establish just cause for the four-day suspension. The Union first contends that the School District, relying solely on hearsay evidence, has not proven that Mr. Coughlin made any inappropriate statements. The Union additionally maintains that the four-day suspension is excessive in any event because: 1) the School District has not shown that Mr. Coughlin acted with an intent to embarrass Student A, 2) the School District has not shown a causal link between Mr. Coughlin's remarks and the alleged harm suffered by Student A, 3) the suspension is not supported by progressive discipline relating to similar conduct, 4) Mr. Coughlin has a long and good work record, 5) the School

District failed to take any corrective action against any other faculty or students to deter harassing conduct, and 6) the School District failed to comply with the due process procedures set out in the parties' contract.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the School District bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the School District has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The misconduct alleged by the School District involves condescending and embarrassing verbal remarks made by Mr. Coughlin in front of other students concerning Student A's perceived sexual orientation. The School District contends that these remarks constitute misconduct in violation of School District Policy No. 403. The School District further maintains that this misconduct is established by the statements given by Students A, B, and C to investigator Heggem.

The Union argues that this evidence should be discounted because it is hearsay in nature. The Union points out that the School District did not call any of the students as witnesses at the arbitration hearing, thereby depriving the Union of the opportunity to test the students'

credibility through cross examination. The Union also notes that Mr. Coughlin testified that he does not recall making the statements alleged by the School District.

It is well recognized that the formal rules of evidence do not apply in labor arbitration, and that most arbitrators will admit hearsay testimony. On some occasions, however, hearsay should not be credited where objective indicia of reliability are absent. In this instance, Mr. Heggem's investigative conclusions are supported by the consistent statements of all three interviewed students and the judgment of a trained workplace investigator. Thus, sufficient indicia of reliability support the conclusions of the investigative report.

Based on the foregoing, I find that the School District has adequately established that Mr. Coughlin made the statements as alleged. In addition, I conclude that those statements are sufficiently inappropriate to constitute misconduct within the meaning of School District policy.

The Appropriate Remedy

The School District asserts that an unpaid suspension of four days is a reasonable sanction under the circumstances of this case. The School District particularly relies on two factors in support of this decision. One factor is the pain and embarrassment experienced by Student A as noted in the investigative report. The other factor is Mr. Coughlin's disciplinary record. The School District points out that Mr. Coughlin has had three disciplinary events in less than a year preceding the incident in question, resulting in discipline ranging from an oral reprimand to a two-day unpaid suspension. Based on this record, the School District contends that a four-day suspension reasonably is supported by notions of progressive discipline.

Despite these assertions, I do not believe that the discipline imposed by the School District is supported by just cause. I reach that conclusion based upon a consideration of the following factors:

1. The Absence of Intent

The record is devoid of any evidence to support a finding that Mr. Coughlin deliberately intended to harass or embarrass Student A. Mr. Coughlin credibly testified that he did not intend to make any negative remarks about Student A's sexual orientation. While not recalling the actual verbal exchange, he stated that any remarks that he did make on the subject would have been made with an inclusive purpose to convey acceptance of any and all sexual orientations. Jerry Reck, who has taught at Staples Motley High School for 24 years, testified that, in his opinion, Mr. Coughlin would be the last person to make an intentional negative remark about a student's sexual orientation. Principal Luft also testified that he does not believe that Mr. Coughlin intended to hurt Student A with his remarks, and Investigator Heggem's report concluded that Mr. Coughlin may not have intended to cause Student A any distress. Evidence of Mr. Coughlin's state of mind also is revealed by his offer to apologize to Student A. In sum, while Mr. Coughlin's remarks were inappropriate, they were not uttered with a deliberate intent to inflict harm.

2. Evidence of Harm

The School District argues that its sanction is supported by the fact that Student A experienced considerable pain and embarrassment. The problem with this argument is that it is unclear whether the pain and embarrassment that Student A has experienced was primarily the result of Mr. Coughlin's statements or because of the ongoing harassment inflicted by his fellow students. Since Student A did not testify at the hearing, the proper allocation of blame remains unknown.

3. Progressive Discipline

The parties' collective bargaining agreement expressly incorporates a policy of progressive discipline. In this regard, Section 7 of Article V states:

> **Section 7. Progressive Discipline:** The School District intends to follow a policy of progressive discipline for its teachers. Any disciplinary action shall comply with law and regulation, shall be fair and equitable, and shall be consistent with the principle of progressive discipline. Disciplinary action will normally follow, but not be limited to this sequence:
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> 1. Oral reprimand
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> 3. Suspension with pay
> 4. Suspension without pay
> 5. Discharge

The concept of progressive discipline is that an employer should provide an employee with the notice and opportunity to correct inappropriate behavior. Under this theory, an employer usually should impose sanctions in gradually increasing levels of severity to gain an employee's attention and to discourage further missteps. A basic precept of progressive discipline is that the inappropriate behaviors at issue must be substantially similar in order to connect the dots between the disciplinary warnings and future conduct.

In this instance, the School District has imposed discipline on Mr. Coughlin for several disparate reasons. Clearly, the testing and licensing issues are unrelated to the conduct at issue in this case. The tennis court matter may be relevant if the net is cast widely to encompass unprofessional conduct relating to students. But, as a bottom line, the prior two-day unpaid suspension relating to licensure should not serve as a basis for progressive discipline relating to Mr. Coughlin's in-class remarks.

4. A Long and Good Work Record

An employee's tenure and work record are two factors that arbitrators frequently cite in mitigating discipline imposed by an employer. In this instance, Mr. Coughlin has taught for the School District for 21 years, and he was discipline-free for the first 20 of those years. Every

witness who testified at the arbitration hearing acknowledged that Mr. Coughlin is an excellent classroom teacher.

5. Enforcement of the School District's Anti-Harassment Policy

A stated reason for Mr. Coughlin's sanction is his violation of the School District's anti-harassment policy. While that is a laudable goal, one would expect that such a policy would be fairly and uniformly applied. Superintendent Schmitz acknowledged at the hearing, however, that the School District had taken no action to investigate any student behavior despite the fact that the investigation in this matter revealed a potentially serious pattern on ongoing student harassment of Student A on the basis of his perceived sexual orientation. When questioned about that inaction at the hearing, Superintendent Schmitz defended his lack of action by stating that he was unaware of the identity of any of the student perpetrators. Both Superintendent Schmitz and Principal Luft, however, were aware from the investigative report of Student D's verbal taunts that served as a prelude to the classroom incident. Yet, the School District did not undertake any investigation of Student D. The fact that the School District did not vigorously enforce its anti-harassment policy against anyone other than Mr. Coughlin raises concerns about fair treatment.

6. Due Process

The parties' collective bargaining agreement states that when a teacher is accused of committing a rule violation, the teacher is to be apprised of "the rule and/or regulation, and/or directions that the teacher stands accused of violating." When the School District notified Mr. Coughlin of the investigatory interview in this matter, the notice stated that the purpose of the interview was to investigate "an allegation of employee misconduct," but the notice did not describe either the incident in question or the nature of the misconduct under investigation. In

the end, the collective bargaining provision may not have been violated since Mr. Coughlin became aware of the misconduct allegation during the interview and prior to any formal imposition of discipline. Nonetheless, the "hide the ball' approach of the School District again raises concerns about fair treatment.

Based on the above considerations, the School District's imposition of a four-day suspension is excessive. In an email message concerning this incident, Superintendent Schmitz stated that the normal penalty for an inappropriate statement in a classroom setting would be either an oral or a written warning, but that he was considering a more significant penalty with respect to Mr. Coughlin because of his prior disciplinary incidents. As discussed above, however, the disparate nature of those disciplinary incidents does not support the School District's lockstep approach to progressive discipline. Under these circumstances, I believe that an appropriate remedy is a written reprimand coupled with a directive for Mr. Coughlin to apologize to Student A.

AWARD

The grievance is sustained in part and denied in part. The School District's imposition of a four-day unpaid suspension is reduced to a written reprimand and a directive for Mr. Coughlin to apologize to Student A. The School District is directed to make Mr. Coughlin whole for lost pay and benefits. The School District further is directed to modify the grievant's personnel file to reflect this determination. The arbitrator will retain jurisdiction for 90 days to resolve any remedial issues as may be necessary.

Dated: August 9, 2012

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Stephen F. Befort
Arbitrator