

# State of Minnesota

## Before the Arbitrator

In the Matter of the Arbitration  
of a Dispute Between

Duluth ISD #709

and

BMS Case No. 13 PA 0721

AFSCME, Council 5

### Appearances:

Mr. Ken Loeffler-Kemp, Field Representative, AFSCME Minnesota Council 5, 211 W. 2<sup>nd</sup> St., Duluth, Minnesota 55802, on behalf of the Grievant.

Mr. Kevin J. Rupp, Esq., Rupp Anderson Squires & Waldspurgen, P.A., 527 Marquette Ave. South, Suite 1200, Minneapolis, Minnesota 55402, on behalf of the District.

### Arbitration Award

In accord with Article 13 of the parties' 2011-13 collective bargaining agreement, the parties jointly selected Arbitrator Sharon A. Gallagher through BMS to hear and resolve the captioned case involving the termination of the Grievant<sup>1</sup> on October 12, 2012, for violation of Article 12, Section 2(k) for failing to disclose on his 2003 and 2004 employment applications his previous name (from 1991 to 2000) and for failing to disclose that he had pled guilty to and been convicted of two marijuana-related "misdemeanors"<sup>2</sup> in March, 2000.

The parties mutually agreed and the hearing was held at Duluth, Minnesota, on May 22, 2013, and it was completed that day. No stenographic transcript of the proceedings was taken.

The parties had a full opportunity to make arguments and objections and to submit documentary and testimonial evidence. Two witnesses testified (under oath or affirmation administered by the Arbitrator)—H.R. Manager Sworsky and the Grievant. The former was also recalled on rebuttal. The parties stipulated to Joint Exhibits 1 through 6 and 8 through 10, and these were received into the record. The District offered

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<sup>1</sup> Due to the sensitive nature of the charges and information discussed in this case, I have used "Grievant" rather than use his actual name or his initials.

<sup>2</sup> The parties disagree regarding whether the Grievant's convictions were for "petty misdemeanors" or "misdemeanors".

District Exhibit 7 (which was received without objection after it was identified) and District Exhibit 11, which was submitted on rebuttal and admitted.

The parties agreed to submit briefs directly to each other with a copy to the Arbitrator, postmarked June 19, 2013. The parties waived reply briefs. The Arbitrator received the parties' briefs on June 21, 2013, whereupon the record was closed.

### Stipulated Issues:

The parties stipulated that the Arbitrator should determine the following issues in this case:

1. Whether sufficient cause existed for the removal of the Grievant from employment with the District pursuant to Article 12, Section 2?
2. If not, what is the appropriate remedy?

### Relevant Contract Provisions:

#### ARTICLE 12

##### Removals

**Section 1 – Removals.** Except as provided in 1(b) below, any employee holding a position in the classified service who has completed the probationary period prescribed in accordance with these rules may be removed only for cause; that in no case may an employee be removed on account of his/her religious or political opinions or affiliations or for refusing to contribute to a political fund or to render political service.

**Section 2 – Causes For Removal.** The following shall be sufficient cause for removal, though removals may be made for causes other than those enumerated:

- a. That the employee is incompetent or inefficient in the performance of his/her duties.
- b. That the employee has been wantonly careless or negligent in the performance of his/her duties.
- c. That the employee has been brutal in his/her treatment of public charges, fellow employees, or other persons.
- d. That the employee has been offensive in his/her conduct toward his/her fellow employees or the public.
- e. That the employee has some permanent or chronic physical or mental ailment or defect, which incapacitates him/her for the proper performance of his/her duties.
- f. That the employee has failed to obey reasonable direction given him/her by his/her supervisor when such violation or failure to obey amounts to insubordination or serious breach of discipline which may reasonably be expected to result in a lower morale in the organization or to result in loss, inconvenience, or injury to the School District or to the public.
- g. That the employee has been convicted of a criminal offense.
- h. That the employee, through negligence or willful conduct, has caused damage to public property or waste of public supplies.
- i. Employee's job performance is impaired due to his/her tardiness or absence from work.

- j. That the employee removed public or personal property from his/her place of employment without the owner's or supervisor's approval.
- k. That the employee knowingly falsified any record or report required or authorized to be kept by the School District, or knowingly made a false statement, or misrepresented or concealed any material fact, or deceived or committed any fraud in any application for employment with the School District.

. . .

### Background:

The Grievant was employed as a trader at the Grain Exchange in Minneapolis from 1987 to 1991.<sup>3</sup> Sometime in 1991, he moved from Minneapolis to Duluth because his fiancée had gotten a job after graduating from college in the Duluth area. The Grievant's fiancée asked him to change his last name from a three-syllable last name to a two-syllable name. (This meant that the Grievant would have to take the "-ney" off the end of his name, M----.) Because he loved her, the Grievant agreed to remove the "-ney" from his name and he did so by filing an application to change his name on June 16, 1991, in a St. Louis County Court (Jt. Exh. 8). The Grievant's application was granted on July 25, 1991. The Grievant was then married and he and his wife lived in Duluth.

In January, 1991, the Grievant became employed by Edina Realty and remained so until January, 1998. In March, 1998, the Grievant was hired by the Proctor ISD #704 as a maintenance/cleaning worker (Jt. Exh. 4). The Grievant worked at Proctor until June, 2002, when he left to become a self-employed shaper and salesman of surfboards. This third job the Grievant kept until he applied to be a Substitute Special Education Assistant at the District on September 23, 2003. It is undisputed that on his 2003 District employment application the Grievant answered the following question by filling in the "NO" box:

Have you ever entered a plea of guilty or been convicted of a misdemeanor or a felony?

Also on this 2003 application, the form asked the Grievant for his "Prior Work/Volunteer History", from most recent backward; it gave him four boxes. The form instructed the Grievant to "[L]ist all paid and/or volunteer experience....Additional work history should be listed on a separate sheet...." This form also asked the Grievant to list his educational background and personal references. Finally, this application stated:

...I hereby certify that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that if employed, falsified statements on this application shall be considered sufficient cause of dismissal (Jt. Exh. 4, p. 4).

The Grievant signed and dated this form. The District further required the Grievant to fill

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<sup>3</sup> The Grievant did not list the Grain Exchange as a prior employer on either of his District employment applications.

out a separate criminal background check form, which asked him to fill in his name and, on a separate line, to list “Maiden, Previous, Alias”. The Grievant left this line blank. This form also stated:

I authorize the Minnesota Bureau of Criminal Apprehension to disclose criminal history record information to [the District] pursuant to Minnesota Statute #123B.03 for the purpose of employment...with this school district (Jt. Exh. 5).

The Grievant signed, dated and submitted this form to the District on September 23, 2003. By letter dated October 14, 2003, the District advised the Grievant that no record of criminal history was found “in your name”. The Grievant was hired as a Substitute Special Education Assistant by the District.

After hire, the Grievant subbed as a Special Education Assistant at various District schools, starting in Early Childhood at UMD and moving between District middle schools and high schools. The Grievant worked with DCD students, developmentally disabled children who have significantly below-average IQs.

It is undisputed that the Grievant loved his job and that he did it very well; that the Grievant “went the extra mile” with and for his students, caring about them, buying them hats, gloves and jackets at the Goodwill store if they lacked proper winter clothing, and getting to know them generally. As a result, the Grievant’s students trusted and confided in him. The Grievant could get some students to exhibit good behavior rather than misbehaving/acting out at school.

At the beginning of the 2004 school year, the Grievant was assigned to sub at Morgan Middle School. At this time because of his excellent work, the teachers and the principal at Morgan took action to get the District to hire the Grievant at Morgan as a regular full-time Special Ed Assistant. As a result, the Grievant was required to fill out a second employment application for the full-time Assistant job at Morgan Middle School. On November 1, 2004, the Grievant filled out another (slightly amended) application form. Again, the Grievant filled in the “NO” box in response to the following:

Have you ever entered a plea of guilty or been convicted of a misdemeanor, gross misdemeanor, or a felony? (Jt. Exh. 6, p. 1.)

This form also required the Grievant to

[ ]list all other names under which you have been employed or under which your employment or educational records may be found (Jt. Exh. 6).

For the second time, the Grievant left this line blank. The Grievant listed only his sub employment at the District in the Work/Volunteer History section.<sup>4</sup> This second application contained slightly different certifications:

**CRIMINAL BACKGROUND CHECKS:** Minnesota Statute § 123B.03 requires school districts to make a criminal history background check of all employees. Pursuant to the law, all applicants who are offered employment in

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<sup>4</sup> This section of the Grievant’s 2004 application was identical to the same section on the 2003 application form, quoted above.

the District will be required to provide an executed criminal history consent form and a money order or cashier's check payable to ISD 709 to cover the cost of the background check. I understand that any offer of employment I receive will be subject to, and conditional on, the successful completion of a criminal background check required by Independent School District No. 709. I understand that my employment is subject to immediate termination if the District determines that the results of my criminal background check are not acceptable.

. . .

I certify that the answers I have given on this application are true and correct to the best of my knowledge. I understand that any false or misleading information provided, or any omission or concealment of facts, will disqualify me from consideration for employment, and constitute grounds for my immediate dismissal should I be employed by the School District.

On November 15, 2004, the Grievant was hired as a regular full-time Special Ed Assistant at Morgan Middle School and that status was made retroactive to September 9, 2004. During his regular employment at Morgan (and later at Lincoln Middle School),<sup>5</sup> the Grievant worked both one-on-one with DCD students and as a building-wide Special Ed Assistant.

At Morgan, it is undisputed that the Grievant had a habit of arriving at school early to welcome the students. The Grievant created and supervised the surfboard club, the skateboard club and "School of Rock" club. These clubs met after school under the Grievant's sole supervision. They were very popular, mostly with regular education students at Morgan.<sup>6</sup> It is undisputed that the Grievant built good rapport with all of the sixth through eighth grade students at Morgan that he worked with from 2004 through the date of his discharge in 2012. It is also clear that the Grievant got on well with his coworkers and he filled in for them when needed. The Grievant stated that his students loved him, that his mother was a teacher, that he loved his job at the District and that he wants his job back if the grievance is sustained. It is undisputed that the Grievant had never been disciplined by the District during his nine years of employment.

### Facts:

On September 20, 2012, the Grievant's ex-wife, Vicki ----,<sup>7</sup> visited H.R. Manager Sworsky. She asked whether her ex-husband had disclosed information on his legal name changes to the District when hired. Ms. Vicki ---- showed Sworsky the legal name change documents as well as plea/conviction reports showing her ex-husband had pled guilty to and been convicted of two misdemeanors and that there had been a disorderly conduct police report from 2010 or 2011. Sworsky looked at these documents and wrote down some information from them but he did not take the documents. Sworsky asked why

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<sup>5</sup> When Morgan Middle School was closed and Lincoln Middle School was opened, the Grievant continued working at Lincoln without interruption.

<sup>6</sup> A few special education students were involved in these clubs if they had transportation home after school.

<sup>7</sup> Vicki was the Grievant's second wife.

Vicki ---- had come forward, and she responded that she was concerned because her ex-husband was working with kids.

Sworsky immediately followed up by going online to do another criminal background check on the Grievant, using both names the Grievant had used. Sworsky found and printed off the original documents showing:

1. The Grievant's 7/25/91 name change from ---ney to ---- (Jt. Exh. 8);
2. The Grievant's guilty pleas and convictions of the charges of possession of drug paraphernalia and possession of a small amount of marijuana in a motor vehicle on March 2, 2000 (Jt. Exh. 10);
3. The Grievant's 5/1/00 request for a name change back to ----ney from ----, granted June 13, 2000 (Jt. Exh. 9).

Regarding the March, 2000, convictions, the Case Type was listed as "Moving – Misdemeanor" (Jt. Exh. 10). Sworsky then reviewed both of the job applications filed by the Grievant and confirmed that the Grievant had signed them and certified their truth/accuracy, that he had filled in the "NO" box on both applications regarding pleas and convictions, and that the Grievant had not listed any previous names or aliases on either application. When he searched online, Sworsky also saw and printed a copy of a court record showing that the Grievant had been charged with and pled guilty to having exceeded a 30 m.p.h. speed limit by 13 m.p.h. on November 23, 2004. On this document, the Case Type was listed as "Speeding – Petty Misd." (Dist. Exh. 11). Finally, in early October, Sworsky called the Duluth police department and an officer confirmed that the Grievant's drug-related convictions had been misdemeanors.

On October 12, 2012, without giving a reason, Sworsky called the Grievant in along with his Union Representative and the H.R. Manager of Non-Certified Staff, Harrison Dudley. Sworsky showed the Grievant the two name change documents and his two misdemeanor convictions, and his employment applications with the "NO" boxes filled in. Sworsky asked the Grievant if he was aware of the documents. The Grievant admitted that he had completed the applications and signed them, that the court documents were his, and he admitted, without explanation, that he had been convicted of possessing drug paraphernalia and of possessing a small amount of marijuana. At this point, Sworsky showed the Grievant the following typed letter, which Sworsky asked him to sign:

We have come upon information that leads us to believe you have falsified your application with ISD 709 at the time of your hire. We have two (2) completed applications from you. One application is signed and dated September 23, 2003, and another signed and dated November 4, 2004. There is a similar question on both applications that asks if you have ever entered a plea of guilty or been convicted of a misdemeanor or a felony. On both applications you answered "no". Additionally, on the application dated November 4, 2004, there is a statement that asks you to list all other names which you have been employed or under which your employment or educational records can be found. You left this response area blank, indicating there are no other names of which you may have been employed under [sic].

The employment application dated September 23, 2003, contains a statement that reads "I understand that if employed, falsified statements on this

application shall be considered sufficient cause of dismissal". The employment application dated November 4, 2004, contains the statement "I certify that the answers I have given on this application are true and correct to the best of my knowledge. I understand that any false or misleading information provided, or any omission or concealment of facts, will disqualify me from consideration for employment, and constitute grounds for my immediate dismissal should I be employed by the School District".

On September 23, 2003 you completed an authorization allowing the School District to complete a background check. The form requested information as to any other previous names or alias [sic] you may have used to identify yourself. That statement was left blank indicating there are no other names or alias [sic] you may have been known by.

Court records show that in July of 1991 you legally changed your last name from "----ney" to "----". Additionally, court records show that in May of 2000 you again petitioned the court and changed your name from "----" back to "----ney". Court records indicate that on March 3, 2000, you plead [sic] guilty to "possession of a small amount of marijuana in a motor vehicle". This was a misdemeanor.

The School District has concluded that there were omissions on your application that would have otherwise enabled the School District to make the best hiring decision possible based upon a verified background check given your previous name changes.

Because you agreed to provide accurate and factual information at your time of hire or be subject to dismissal, the School District is terminating your employment as of today, October 12, 2012.

The Grievant was informed that he was terminated and he was immediately escorted out of the building.

The Grievant stated herein that he had been told in 2000 by courthouse employees to whom he paid the fines involved in his convictions, that his convictions were for "petty misdemeanors" and that they would not go on his record. These comments, and a "P" next to each offense on the court form led the Grievant to believe that the "P" stood for "petty" misdemeanor. The Grievant stated he believed he had never pled guilty to or been convicted of a "misdemeanor or a felony" as listed on his 2003 application, or of a "misdemeanor, gross misdemeanor or a felony" as listed on his 2004 application, because the term "petty misdemeanor" was not used on either application and therefore, he believed his answers to those questions had been correct.<sup>8</sup>

The Grievant stated on direct examination herein that he reported all prior employers correctly on his applications, whether as ---- or as ----ney. However, on cross examination, the Grievant admitted that he had not listed two employers—the Grain Exchange (1987-1991) and Amazing Grace Bakery (summer work from 2009 to date) on his District applications. The Grievant explained that he left the previous names section of the applications blank because at the District, he was going by the name he had been born with, so he listed that name and he did not think about the other name he had used. The Grievant stated that his previous name, ---- was "irrelevant to me".

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<sup>8</sup> On cross-examination, the Grievant admitted he had had marijuana in his car in 2000, but he stated he never used it.

Mr. Sworsky stated herein that it is important for District employees to be truthful; that the District does not hire those who have pled guilty to or been convicted of drug-related offenses; and that had the District known of the Grievant's offenses it would not have hired him. In addition, Sworsky stated because the Grievant regularly worked with vulnerable, disabled children, either alone or in groups, and he supervised club activities alone after school, his contact with students concerned the District because of his falsifications and criminal background. Sworsky stated the District should not have to employ the Grievant.

### Positions of the Parties:

#### District:

The District asserted that the evidence showed that the Grievant knowingly falsified his employment application by failing to disclose material facts regarding his drug-related convictions which, if known to the District, would have caused the District to refuse to hire him. The District urged that the Grievant's excuse for failing to disclose his convictions—because they were petty misdemeanors and not misdemeanors—was incredible. In this regard, the District noted that the Court documents in this record listed the Case Type of the drug offenses as “Moving – Misdemeanor”, while his 2004 speeding offense listed the case as “Speeding – Petty Misd.” Therefore, the Grievant must have known the difference. Also, the District asserted that H.R. Director Sworsky stated herein that he asked the Duluth police about the Grievant's convictions in 2000 and they confirmed that the Grievant's drug-related convictions were misdemeanors, not petty misdemeanors. The Grievant's failure to disclose these material facts violated the labor agreement and privileged the District to terminate him immediately.

The District argued that the Grievant's failure to disclose his name changes on his employment applications also constituted grounds for his termination. On this point, the District asserted that the Grievant's failure to disclose the name he went by for nine years (1991-2000) denied the District the ability to run a complete background check on the Grievant and to gain all material information on him. Background checks are required on all District employees under Minnesota law, and the District has historically used this information to ensure the safety of its students and its staff. The Grievant knew from reading the forms that the District would not hire him if he failed his background check.

The District contended that the Grievant's reasons for failing to disclose his prior name were not credible. The Grievant claimed his first wife asked him to change his last name from a three-syllable name to a two-syllable name and yet, the District asserted, the Grievant could not recall what year he divorced his wife, although he claimed he decided to change his name back to a three-syllable name after his divorce. As the Grievant changed his name just two months after his drug convictions under his two-syllable name, the District urged that the Arbitrator must conclude that the Grievant's actions, statements and admissions herein showed he had systematically attempted to whitewash his past.

The Grievant testified that he did not list his two-syllable name on his District applications because he felt his prior name was irrelevant, that he did not feel like that person anymore and that he felt he only had to list his then-current name, the name he

was born with. The District argued that the mandatory background check forms and the certifications on the applications the Grievant signed asked him for all names he had used and gave him no options to exclude information. Furthermore, the District observed that the Grievant had signed and certified that all information on his applications was true and accurate and that falsifications (1<sup>st</sup> application), misleading information, omissions, or concealments (2<sup>nd</sup> application) would constitute sufficient grounds for discharge. The Grievant must have known the import of the clear language of these forms. In addition, the District pointed out that the Grievant admitted herein that he failed to list two jobs he worked under his two-syllable name on his District applications, supporting a conclusion that the Grievant intentionally chose to provide incomplete, inaccurate and misleading information on his applications.

Even if one were to set aside the Grievant's failure to disclose his drug misdemeanors, the fact that he failed to disclose his prior name on two employment applications was sufficient grounds for his termination under the contract. "Without an honest disclosure of all prior names an applicant may have used, the District cannot ensure the safety of students" (ER. Br., p. 11). Here, the discharge penalty was appropriate given the District's obligation to assure the safety of its vulnerable DCD students and its need to have its employees model honest and drug-free behavior. Therefore, the grievance should be denied in its entirety as the Grievant admitted to Sworsky and admitted herein that he omitted facts on his employment applications and background check authorizations, which facts, if known, would have resulted in the District refusing to hire the Grievant in the first place.

#### Union:

The Union asserted that the Grievant worked as a District paraprofessional without receiving any discipline for nine years; and that he was a respected, highly skilled and well liked employee throughout his tenure. The Union asserted that the District failed to conduct a proper investigation of the Grievant's alleged misconduct. The Union also noted that the sole reason for the Grievant's discharge was stated in the discharge letter as his failure "to provide accurate and factual information" at the time of his hire. No citation of Article 12 was made in the letter and the District failed to prove the reason for discharge herein.

Here, the Union urged that the Grievant provided all information he believed the District had requested to complete his background checks and that the Grievant truthfully answered "no" to the question regarding guilty pleas and convictions because he believed "petty misdemeanors" were not a category included therein. Regarding the question concerning previous names he had used, the Union contended that the Grievant "inadvertently left this line blank" (U. Br., p. 2). The Union asserted that the Grievant otherwise "provided all necessary relevant and material information regarding his employment and educational records."

Also, the Union asserted, the District failed to prove that the Grievant actually pled guilty to two misdemeanors rather than two petty misdemeanors as he claimed. In this regard, the Union urged that Sworsky's testimony regarding the unsubstantiated statement of an unidentified Duluth police officer that the Grievant's convictions were misdemeanors should not stand up against the Grievant's testimony that he spoke to four

District Court employees when he paid his fines, who told him his convictions were petty misdemeanors and they would not appear on his record.

The Union contended that the District

...provided no credible or conclusive evidence that [the Grievant] knowingly falsified any record or report required or authorized to be kept by the School District, or knowingly made a false statement, or misrepresented or concealed any material fact, or deceived or committed any fraud in any application for employment with the School District (U. Br., p. 3).

Given the fact that the Grievant specifically denied committing any misconduct under oath herein, the Arbitrator must find that the District failed to meet its burden of proof that it had “sufficient cause” to discharge the Grievant.

The Union therefore requested that the Arbitrator sustain the grievance; that she reinstate the Grievant with full backpay, seniority and benefits; and that she expunge the Grievant’s record of all documents relating to his termination.

### Discussion:

Article 12, Section 1 of the collective bargaining agreement provides that non-probationary classified service employees can only be terminated for “cause”. Article 12, Section 2 lists some of the misconduct which constitutes “sufficient cause” for discharge, including Subsection (k): “That the employee knowingly falsified any record or report required or authorized to be kept by the School District; or knowingly made a false statement, or misrepresented or concealed any material fact, or deceived or committed fraud in any application for employment with the School District.”

The language of Article 12, Section 2(k) is clear and unambiguous. To be subject to immediate discharge under Section 2(k), the employee must knowingly falsify a required record or report or make a false statement, or misrepresent, conceal, deceive or defraud the District in any District employment application. Inadvertent errors on a District application concerning material facts (which are necessarily neither intentional nor committed with knowledge of their effects) would not trigger immediate discharge under Article 12, Section 2(k).

In this case, although the discharge letter did not cite Article 12, Section 2(k), it used terminology from Section 2(k) to describe the Grievant’s misconduct—that the Grievant falsified his employment application at hire. Also, the discharge letter detailed the certifications signed by the Grievant in which he attested to the truth and accuracy of the information listed on his applications. The letter also noted that the Grievant had revealed no aliases or previous names on his applications and that he had answered “no” to questions on both applications indicating that he had never pled guilty or been convicted of a misdemeanor or a felony (1<sup>st</sup> application) or of a misdemeanor, gross misdemeanor or a felony (2<sup>nd</sup> application). The letter also described the Grievant’s legal name change request made just two months after his convictions in March, 2000, on two drug-related charges. The discharge letter concluded that the Grievant’s “omissions” on his employment application had robbed the District of the opportunity to make the best hiring decision based upon a verified background check and the letter concluded that the Grievant’s actions specifically subjected him to immediate discharge because he had not

been truthful and accurate on his application. These were the District's detailed reasons for discharging the Grievant. Based on the above, the Union's assertion that the only reason given for the Grievant's discharge was his failure to provide accurate and factual information at hire is too simplistic and it is rejected.

The Union has argued that the District failed to conduct a fair and objective investigation in part because the District began its investigation by checking out assertions made to Sworsky by the Grievant's ex-wife, Vicki. In this Arbitrator's view, the District had no choice but to make every effort to confirm or refute Vicki's assertions against her ex-husband. This is exactly what Sworsky did. The fact that Sworsky was able to check out Vicki's allegations/assertions with relative ease because he had taken notes from the official documents she showed him does not mean that Sworsky's investigation was incomplete, improper or unfair. Indeed, Sworsky obtained all relevant official documentation regarding both the Grievant's conviction record and his legal name changes. Sworsky also confirmed with the Duluth police that the Grievant's convictions were for misdemeanors and he studied the Grievant's personnel file and work record before he drafted the October 12<sup>th</sup> proposed discharge letter. Sworsky's questioning the Grievant on October 12<sup>th</sup> to get his position regarding the serious allegations against him before terminating the Grievant was also appropriate and fair as it showed that Sworsky wanted to get the Grievant's side of the story before taking any action. Frankly, this Arbitrator does not see what other relevant and material evidence Sworsky should have sought in his investigation.<sup>9</sup>

The Union has argued that the Grievant 1) believed he had not pled guilty to or had any convictions that he had to disclose on his District application; 2) that he inadvertently left the previous names line blank on his application; and 3) that he had provided all necessary relevant and material information to the District. In my view, the record facts as a whole do not support these assertions. In this regard, it is significant that the Grievant completed two District employment applications. This means that he must have been familiar with the forms because he had read through them and answered the questions twice. In addition, the Grievant read through the application certifications twice, so he was clearly put on notice of the serious consequences if he failed to answer the questions truthfully and accurately, and got caught.

Also, the Grievant knew the importance of accurately listing his name and birth date on his 2003 District criminal background check form. In 2003, the latter was a separate form that he knew he had to complete in order to be considered further for employment. In addition, the Grievant appreciated (perhaps more than others) the significance of previous names and aliases because he had legally changed his name in court proceedings twice. Although the Grievant's 2004 District employment application was slightly different from the one he completed in 2003, the 2004 form was more specific regarding the need for and the consequences of failing to properly complete the form and failing to pass the criminal background check. This evidence weighs in favor of the District. Non-disclosure of any requested information for any reason was not an

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<sup>9</sup> Sworsky reviewed the Grievant's District work history during his investigation, but he did not seek testimonials as to the Grievant's character or good work since 2003. This is not a fatal flaw as the language of the labor agreement, the application form and the background check authorization do not require the District to recognize any defenses or exceptions to discharge for the misconduct listed on these documents.

option on these District forms. Therefore, the Grievant's reasons for or feelings concerning non-disclosure irrelevant.

Regarding the Grievant's assertion that he had only committed "petty misdemeanors", which the District's forms did not ask him to disclose, the documents of record simply do not support this assertion. The Grievant's reliance on Court employee payment clerks' statements regarding the seriousness of his convictions and that his convictions would not go on his record was an unreasonable reliance on laymen's advice, belied by the language of the formal documentation. Comparing District Exhibits 10 and 11 clearly shows under "Case Type" that the Grievant's drug-related convictions were for misdemeanors, not petty misdemeanors. The "P" used prior to the court description of the Grievant's offenses is used on all of his convictions. This supports a conclusion that the "Ps" are for internal use only and that they do not signify the type of offense committed.

The facts simply do not support the Grievant's assertion that he inadvertently left blank the previous names/aliases line on his 2003 background check form and that he inadvertently left this line blank on his 2004 application. On this point, I note that again, the Grievant was asked for this information twice on two different District forms. It is hard to believe that the Grievant did not pay close attention to properly completing these forms that he knew were necessary for his hire at the District. In addition, the timing of the Grievant's request to change his name back to his original name just two months after his drug-related convictions is suspicious. And the Grievant's excuse that he failed to state his previous name because he no longer felt like ----, simply does not ring true, given the fact that the Grievant certified the truth and accuracy of the information on these forms.

Although the Union and the Grievant asserted herein that the Grievant had provided the District with all necessary, relevant and material information, the record did not bear this out. Rather, the Grievant admitted on cross-examination that he failed to list two prior employers on his employment applications. This admission did not enhance the Grievant's credibility.

Furthermore, I note that when Sworsky presented the Grievant with his employment applications and court documents concerning his name changes and his misdemeanor convictions on October 12<sup>th</sup>, and questioned him concerning them, the Grievant immediately admitted everything—the Grievant admitted that the court documents were his, he admitted completing the applications and signing them and he admitted he had been convicted of possessing a small amount of cannabis and drug paraphernalia. The Grievant then signed the discharge letter without asking any question or offering any objections or explanations. The Grievant's initial reaction on October 12<sup>th</sup>, given that he had no warning that he would be confronted in this manner, was likely to be a truthful one and it is one piece of evidence that could be said to implicitly demonstrate that he knew the import of his actions when he completed his District application forms.

It is also very significant that no evidence was submitted to contradict the District's assertion that it has historically required successful applicants to pass background checks and that it would not have hired the Grievant had the District had complete background information under both of his names. Thus, no evidence of disparate treatment or of a past practice contradictory to the District's actions herein was presented in this case.

In all of these circumstances, I agree with the District that the discharge penalty was appropriate. What makes this case so tragic is that the Grievant has had an exemplary work record both as a part-time/substitute and as a full-time paraprofessional over the last nine years, that he got along well with his colleagues, that he went above and beyond in his work, that he had a positive effect on students and that he loved his job. And it is also undisputed that no accusations of this type had ever before been made against the Grievant. However, it is axiomatic in labor relations that employers, especially those in the field of education, must be able to rely on the honesty of their employees and they must be able to trust them to act as appropriate role models for impressionable, young students. If this trust is seriously undermined or destroyed, immediate discharge can be appropriate.

Here, the District has had a consistent rule that it will neither hire applicants who fail to pass criminal background checks, nor will it continue to employ employees who have misrepresented, omitted or concealed material facts on their applications which, if known to the District, would have resulted in the employee's failing their criminal background checks. In the latter case, Article 12, Section 2(k) clearly states the District is privileged to immediately discharge such employees if it chooses to do so. The record facts here proved that the Grievant knowingly and intentionally concealed and/or misrepresented material information regarding his previous name and his pleas/convictions. Based on the above, I am loathe to disturb the District's decision to terminate the Grievant and I issue the following

## AWARD

Sufficient cause existed for the removal of the Grievant from employment with the District pursuant to Article 12, Section 2.

The grievance is therefore denied and dismissed in its entirety.

Dated and Signed this 30<sup>th</sup> Day of June, 2013, at Oshkosh, Wisconsin

Sharon A. Gallagher