

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

| | | |
|------------------------------------------------------------------------------------------------------------------------------------------|---|-------------------------------------------|
| INDEPENDENT SCHOOL DISTRICT NO. 696 ELY, MINNESOTA |) | BMS CASE NO. 14-PA-0684 |
| |) | |
| |) | |
| “SCHOOL DISTRICT” |) | |
| |) | DECISION AND AWARD |
| AND |) | |
| |) | |
| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES UNION, AFL-CIO, GREATER MINNESOTA COUNCIL 65 – LOCAL 295 |) | RICHARD R. ANDERSON ARBITRATOR |
| |) | |
| |) | |
| “UNION” |) | JUNE 11, 2014 |
| |) | |

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson in Ely, Minnesota on May 8 and 9, 2014. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing closed on May 9, 2014. Post-hearing briefs were timely received on June 2, 2014, at which time the record was closed and the matter was taken under advisement.¹

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ July 1, 2011 through June 30, 2013 collective bargaining agreement, hereinafter the Agreement, which was in effect at the time the grievance issue arose. (*Joint Exhibit 1*)² The relevant language in Article XVI [Grievance Procedure] provides for arbitration to resolve all grievance issues pursuant to Section 179.70 of PELRA.³ The parties stipulated that this matter does not involve contract arbitrability or any other substantive or procedural issue that would prevent it from being duly considered, and is properly before the undersigned Arbitrator for final and binding resolution.

¹ Email copies of the briefs were received on May 30, 2014.

² Although the Agreement had expired prior to the issue involved herein, the terms of the Agreement continued to be in effect.

³ This Statute has been revised. See Grievance Procedure under Relevant Agreement Provisions.

APPEARANCES

For the School District

Kelly M. Klun, School District Attorney
Alexis Leitgeb, Current Superintendent
Ray Marsnik, School Board Chair
Amy M. Richter, School Board Director
Rochelle Sjoberg, School Board Director
Ray Toutloff, District Superintendent from July 1, 1998 - June 30, 2004

For the Union

Teresa Joppa, AFSCME Council 65 Attorney
Grievant, Maintenance Engineer 1st Class C
Ida Rukavina, AFSCME Staff Representative

THE ISSUE

Whether the Grievant was terminated for just cause; and if not, what is an appropriate remedy?

BACKGROUND

Independent School District 696, hereinafter the District, is comprised of Ely Memorial High School and Washington Elementary School. The District is located in Ely, Minnesota, which is in northern St. Louis County on the edge of the Boundary Waters Canoe Area. There are approximately 550 students and 43 teachers in the District. The American Federation of State, County and Municipal Employees Union (AFSCME), AFL-CIO, Council 65 – Local No. 295, hereinafter the Union, is the collective bargaining representative of the District's Support Staff, which includes Maintenance and Custodial employees. The Union has represented this bargaining unit since 1953.

The Grievant was verbally notified on November 7, 2013 by Superintendent Alexis Leitgeb that he was being placed on paid administrative leave because of sexual harassment allegations. A follow-up letter by Superintendent Leitgeb to the Grievant that issued the same day informed the Grievant that the School Board would conduct a closed door *Loudermill*⁴ hearing on November 12, 2013 to consider the alleged sexual harassment allegations levied against him. (*District Exhibit*

⁴ The term *Loudermill* comes from a U.S. Supreme Court decision, Cleveland Board of Education v Loudermill Board, 470 U.S. 532 (1985). The purpose of a *Loudermill* hearing is to provide a public employee with an opportunity to present his/her side of the story before the employer makes a decision on discipline. Prior to the hearing, the employee must be given specific written notice of the charges and an explanation of the employer's evidence so that the employee can provide a meaningful response and an opportunity to correct factual mistakes in the investigation and to address the type of discipline being considered.

10) After hearing all the evidence, the School Board made a unanimous decision to terminate the Grievant for sexual harassment involving District teachers. On November 13, 2013 Superintendent Leitgeb issued the Grievant a termination letter. (*Joint Exhibit 2*) On November 14, 2013, the Union through Staff Representative Ida Rukavina filed a grievance alleging that the School District violated Articles II, V and XII of the Agreement when it terminated the Grievant on November 13, 2013. (*Joint Exhibit 3*) The parties agreed in late November 2013 to skip Steps 2 and 3 of the grievance procedure and proceed directly to arbitration. (*Joint Exhibits 4 and 5*) The Union then filed for arbitration (exact date unknown). Thereafter, Union Council Sarah Lewerenz notified the undersigned by email on February 14, 2014 that I had been selected by the parties as the neutral arbitrator in this matter.

RELEVANT AGREEMENT PROVISIONS

ARTICLE XII SUSPENSION AND DISCHARGE

Section A. *For insubordination for whatever cause, an employee shall first be suspended for not more than five (5) calendar days, and the Grievance Committee and the employee shall be given notice thereof in writing. Within said five (5) calendar days, the Employer shall determine and notify the employee in writing whether said initial suspension shall be extended or whether the employer proposed to convert same into a discharge. Within said five (5) calendar days after notice to the Grievance Committee and the employee as above provided, the employee may, if he believes that he has been unjustly dealt with, request a hearing and a statement of the offense before the School Board or its representative with or without a representative of the Grievance Committee being present. At such hearing, all facts concerning the case shall be made available to both parties. If the suspension or discharge is revoked, the employee shall be returned to employment and receive full compensation at his regular rate of pay for the time lost, unless it is agreed by both parties hereto that such employee shall be disciplined without pay as a condition of revocation. In the event the hearing shall result in either the affirmation of the suspension or discharge, in whole or in part, the employee may within five (5) calendar days appeal in writing such disposition and the provisions of Article XV shall apply.*

ARTICLE XV GRIEVANCE PROCEDURE

Section A. *The Board and the Union shall attempt to adjust all grievances which may arise in the following manner:*

4. *If no settlement is reached in Step 3, the grievance may be submitted to arbitration as provided for in the 1973 P.E.L.R.A., Law 179.70. [179.70 was repealed (1984 c 462 s 28). 179A.21 is now the State statute encompassing grievance and arbitration procedures.]*

179A.21 GRIEVANCE ARBITRATION.

Sub. 1. Definition.

For purposes of this section, "grievance" means a dispute or disagreement as to the interpretation or application of any term or terms of any contract required by section 179A.20.

Subd. 2. Selection.

If the parties to a contract cannot agree upon an arbitrator or panel of arbitrators as provided by the contract grievance procedures or the procedures established by the commissioner, the parties shall alternately strike names from a list of arbitrators selected by the commissioner until only one name remains. This arbitrator shall decide the grievance and the decision is binding upon the parties. The parties shall share equally the costs and fees of the arbitrator.

I.S.D. #696 HARASSMENT AND VIOLENCE POLICY/REPORT FORM

1. PURPOSE

The purpose of this policy is to maintain learning and working environment that is free from religious, racial or sexual harassment and violence. The school district prohibits any form of religious, racial or sexual harassment and violence.

II. GENERAL STATEMENT OF POLICY

A. *It is the policy of the school district to maintain learning and working environment that is free from religious, racial or sexual harassment and violence. The school district prohibits any form of religious, racial or sexual harassment and violence.*

B. *It shall be a violation of this policy for any pupil, teacher, administrator or other school personnel of the school district to harass a pupil, teacher, administrator or other school personnel through conduct or communication of a sexual nature or regarding religion and race as defined by this policy. (For purposes of this policy, school personnel includes (sic) school board members, school employees, agents, volunteers, contractor or persons subject to the supervision and control of the district).*

C. *It shall be a violation of this policy for any pupil, teacher, administrator or other school personnel of the school district to inflict, threaten to inflict, or attempt to inflict religious, racial or sexual violence upon any pupil, teacher, administrator or other school personnel.*

D. *The school district will act to investigate all complaints, formal or informal, verbal or written, of religious, racial or sexual harassment or violence, and to discipline or take appropriate action against any pupil, teacher, administrator or other school personnel who is found to have violated this policy.*

III. RELIGIOUS, RACIAL AND SEXUAL HARASSMENT AND VIOLENCE DEFINED

A. Sexual Harassment; Definition

1. *Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when:*

a. *submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining or retaining employment, or of obtaining an education; or*

b. *submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or*

c. *that conduct or communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education, or creating an intimidating, hostile or offensive employment or educational environment.*

2. *Sexual harassment may include but is not limited to:*

a. *unwelcome verbal harassment or abuse;*

b. *unwelcome pressure for sexual activity;*

c. *unwelcome, sexually motivated or inappropriate patting, pinching or physical contact, other than necessary restraint of pupil(s) by teachers, administrators or other school personnel to avoid physical harm to persons or property;*

d. *unwelcome sexual behavior or words, including demands for sexual favors, accompanied by implied or overt threats concerning an individual's employment or educational status;*

e. *unwelcome sexual behavior or words, including demands for sexual favors, accompanied by implied or overt promises of preferential treatment with regard to an individual's employment or educational status; or*

f. *unwelcome behavior or words directed at an individual because of gender.*

D. Sexual Violence; Definition

1. *Sexual violence is a physical act of aggression or force or the threat thereof which involves the touching of another's intimate parts, or forcing a Person to touch any person's intimate parts. Intimate parts, as defined in Minn. Stat. § 609.341, includes the primary genital area, groin, inner thigh, buttocks or breast, as well as the clothing covering these areas.*

2. *Sexual violence may include, but is not limited to:*

a. *touching, patting, grabbing, or pinching another person's intimate parts, whether that Person is of the same sex or the opposite sex;*

b. *coercing, forcing or attempting to coerce or force the touching of anyone's intimate parts;*

c. *coercing, forcing or attempting to coerce or force sexual intercourse or a sexual act on another; or*

d. threatening to force or coerce sexual acts, including the touching of intimate parts or intercourse, on another.

FACTS

The Grievant⁵ is a 52 year old male currently living in Babbitt, Minnesota with his wife of 32 years⁶. They have a married 30 year old daughter with one child and a 27 year old son who will be married in June, both of whom also live in Babbitt. The Grievant has a 4-year finance degree from St. Cloud State University. He is active in a local church where he has been the president of the congregation for the past six years. He was also heavily involved in youth groups when his children were growing up. He was also active in teaching youth Sunday School as well as Vacation Bible School in the summer and also has coached various youth sporting activities.

The Grievant was initially hired by the District as a part-time bus driver in 1987. During early January 2000 his insurance business was not doing well so he applied for a full-time custodian position at the District. The Grievant was initially denied the position because he did not have a special boiler license, which had recently been added as a requirement for the position. The Grievant grieved his denial contending that the contract allowed him 30 days to obtain this license. He was successful in his grievance and obtained the license within the 30-day time period. The Grievant successfully bid on a half custodian and half maintenance position in 2008. At the time of his termination, the Grievant had a 1st Class C Boiler License and was working as a full time maintenance man on the day shift which normally ended at 2:50 p.m.

As a maintenance man his duties included fixing equipment, being in charge of the boilers that supplied heat to the District buildings, setting up equipment for various special events, procuring and setting up equipment requested by teachers, repairing equipment, being in charge of lawn care and snow/ice removal, painting lines on the football field and maintaining the compressors for the hockey arena.⁷ The Grievant also volunteered in the weight room, which took place after his shift was over. The attendees included members of various District sport teams as well as other students.

Various Union witnesses had nothing but positive things to say about the Grievant. A female family friend who has known the Grievant and his wife for over 30 years testified that the

⁵ Pursuant to Minnesota Data Practices Act, Minnesota Statutes 2008, section 13.43, subd . 2 and 179A.01 to 179A.25, the Grievant's name is not being disclosed in this Decision. Further, to protect the privacy of all witnesses save current or former District administrative officials, their names are being kept confidential.

⁶ The Grievant was born and raised in Ely, which is approximately 20 miles from Babbitt.

⁷ During the last year of his employment, the Grievant let the staff know that he preferred requests for his service to be initiated by email in order for him to more efficiently keep track of them.

Grievant was like “a loveable teddy bear” who was “likeable, funny and had loving concerns for family and friends”. She further testified that she and the Grievant have children of the same age. When they were growing up, their children would spend time together in church groups and playing together including having sleepovers at each other’s homes. She also testified that she felt very comfortable around the Grievant and never had any qualms about leaving her daughter at the Grievant’s home. According to her, she was not surprised at the Grievant saying flattering things to women. Adding that, the Grievant consistently calls her “honey” or “beautiful” when he greets her, which is usually followed by a “hug”. Finally, she testified that she had never had the opportunity to observe the Grievant in any District setting.

A former cafeteria assistant cook testified that she worked at the District from 2001 until 2011. During that time period, the Grievant would come into the cafeteria on various occasions on work-related matters. During these occasions, she would have conversations with the Grievant whom she described as “friendly, outgoing and somewhat flirtatious.” She further testified that he would joke around with her and, he would give you a hug if you needed one. She also testified that neither she nor any of the cafeteria staff felt the Grievant exhibited any inappropriate behavior towards them. During cross-examination, this witness testified that she had limited contact with the Grievant and was never alone with him, that all of the hugs took place prior to 2004, that she never saw the Grievant interact with teachers or students and that she had limited contact with the Grievant outside of the workplace.

A current custodian, who has been employed at the District for approximately two and one half years and worked on the same day shift as the Grievant during the first two months of his employment, described the Grievant as “friendly”, “respectful” and someone who would “bend over backwards to help the teachers.” If he was asked to do something for the teachers, he would drop everything to accommodate them. For example, when he and the Grievant would weightlift together during lunch time, the Grievant would cut short his lunch time in order to respond to a teacher’s request for assistance.⁸ During his tenure, he observed the Grievant interacting with teachers and students and never saw the Grievant engage in any inappropriate behavior including touching or making sexual comments. This custodian further testified that he was never given the

⁸ After this witness left the day shift and worked on the afternoon shift, he would come in during the Grievant’s lunch break to “lift” with him.

District's handbook, or told that he should read it; nor was he ever apprised of the District's sexual harassment policy or did he ever receive any sexual harassment training.

The Grievant was involved in three incidents during 2002 and 2004 that the District alleges supports its decision to terminate the Grievant. On January 31, 2002, a teacher filed a Sexual Harassment Incident Report alleging that the Grievant attempted to tie the strings attached to the back of a 10th grade student's long blouse or sweater.⁹ (*District Exhibit 5*) The report alleges that when the student objected and walked away the Grievant allegedly "put his hand on the student's butt with a hold/swat movement."

The Grievant's testimony during both the arbitration and the *Loudermill* hearings is that he had known this student since she was a year old while she was attending his mother's day care center.¹⁰ When he saw her standing facing her locker, he noticed the strings on her long sweater or blouse hanging loosely. As a joke he grabbed them and pretended to tie the strings into a bow on the back of her blouse. He denied ever touching the student. The Grievant added that he considered the student to be a friend of the family and he would never do anything sexual towards her.

Former District Superintendent Ray Toutloff, who testified by telephone, stated that he met with the Grievant concerning this matter on January 31, 2002 and drafted a letter that same day addressed to the teacher who reported the incident. (*id*) The letter states inter alia that the Grievant "*acknowledged touching the strings on the student's blouse, but denied touching her anywhere else on her body. He indicated to me that he has known the student since she was one year old and that he definitely would not be sexual with her. Adding that, the Grievant "related to me that he likes to interact with students verbally but never gets physical."* Superintendent Toutloff went on to write that the Grievant "*was warned that another report of this type would result in further investigation and the consequences more severe."* Superintendent Toutloff further testified that he considered this discussion to be a verbal warning although there is no evidence that the Grievant was told that this was a verbal warning nor was there any documentation in the Grievant's personnel file that this was a verbal warning.

Superintendent Toutloff also testified that he believes he personally interviewed this student; however, there is no documentation to support this. There is, however, a letter dated January 30,

⁹ She was not called as witness.

¹⁰ Hereinafter when addressing the Grievant's testimony, no distinction will be made between the two hearings unless otherwise noted.

2002 in District Exhibit 5 addressed to Superintendent Toutloff presumably written by the teacher who reported this incident. The letter indicates that the student did not want to report the Grievant because she is friends with the Grievant's kids.

The second incident occurred on December 11, 2002. A teacher alleged in a Sexual Harassment Incident Report that the Grievant was “*hugging students in the hallway leading to the cafeteria in full view of other teachers and students.*”¹¹ (District Exhibit 6) According to Superintendent Toutloff, he met with the Grievant on December 12, 2002 to discuss this incident and sent a letter to the complaining teacher that same day. (*id*) The letter states inter alia that he “*had a discussion with the {Grievant} regarding his hugging elementary students as they come in to the Memorial Building for lunch. Your name was not divulged as the witness.*” Superintendent Toutloff went on to say that the “*{Grievant} has a difficult time recognizing the danger in this behavior. His response was that he cares about kids and they sometimes need a hug. We had quite lengthy discussion about how his behaviors can be misinterpreted, especially by students that may have been abused or molested in the past. Even after our discussions I’m not sure he ‘got it’. I concluded the meeting by telling {Grievant} to not hug, touch or pat students under any circumstance. This letter will serve as documentation of this Incident.*”

The Grievant testified that he was born and grew up in Ely and at the time of this incident had nephews in kindergarten. When the nephews would seek a hug, he would respond. Other students, who witnessed the hugs, also wanted to be hugged. He added that all of the hugs were initiated by the students. The Grievant also testified that he was never told by Superintendent Toutloff that there was a “blanket” restriction on touching. Further, the Grievant testified that since this incident he no longer hugs students, but will give them high 5’s.¹²

Superintendent Toutloff further testified that he did not believe from the Grievant’s facial expressions and body language that he meant any harm or had any malicious intent toward the students. Superintendent Toutloff also stated that he considered this to be a written warning; however, there is no evidence that the Grievant was informed that he was receiving a written warning for this incident nor was there any documentation in the Grievant’s personnel file indicating that the incident was a written warning. Finally, Superintendent Toutloff testified that the Grievant should have received a copy of this letter to the teacher; however, he is not copied on

¹¹ She also was not called as a witness.

¹² He felt high 5’s were appropriate since he witnessed his supervisor giving high 5’s to students on numerous occasions.

the letter nor was one addressed to him contained in his personnel file. The Grievant also testified that he did not receive a copy of the letter.

The third incident occurred after school on Tuesday April 20, 2004. A letter by a teacher addressed to then School Principal Joselyn Murphy on April 23, 2004 stated, “*After school on Thursday, April 22, {student} asked if she could speak to me in my room. She told me that on Tuesday of this week, she had been at her locker after school and was approached by {Grievant}. {Grievant} asked her about softball, and made other small talk. In the course of the brief conversation, he held onto the lapels of her jacket, then rested his forearms on her shoulders. {Student} demonstrated this to me, and the distance between the two would have been less than a foot. She seemed flustered as she was telling this to me, and knows that I am passing this information on to you.*” (District Exhibit 7 p.2) Presumably after conferring with Principal Murphy, she filed a Sexual Harassment Incident Report with Principal Murphy on behalf of the student dated April 27, 2004.¹³ (*id p.1*)

This teacher confirmed the contents and accuracy of District Exhibit 7 p.2 during her arbitration hearing testimony. She also testified that that during her first year of teaching, which was 11½ years ago, the Grievant made her feel uncomfortable by certain remarks that he would make. She did not report these remarks until she was solicited by Superintendent Leitgeb on November 6, 2013 to report any incidents at school that made her feel uncomfortable.¹⁴ The teacher then drafted a memorandum to Superintendent Leitgeb dated November 6, 2013. (*District Exhibit 4*)

According to the memorandum and the testimony of the teacher, whenever the Grievant came into her room at various times during her first year of teaching, he would make a number of remarks that made her feel uncomfortable. The Grievant called himself a "flirt" and referred to himself “as a nurturing person who loves to give hugs”, adding that "It is just the way I am.” According to her, the Grievant never tried to hug her or tried any other physical contact with her. She further testified that with the Grievant, “it is always part of a story, like when he's talking about his family”. The Grievant also told her that he sees himself as “always willing to help” and also made remarks like he “loves to help women ” or "It's easy to help someone so cute." This teacher also testified that comments like this would happen 3-4 times a year until recently when

¹³ Ms. Murphy is no longer with the District and did not testify.

¹⁴.She was solicited because she was involved in the 2004 incident.

their paths didn't cross as much. Finally, the teacher testified that early on those comments gave her "overall feelings of unwanted attention/familiarity"; however, "she doesn't feel that way anymore."¹⁵

After receiving the aforementioned Sexual Harassment Report (*District Exhibit 7 p.1*) Principal Murphy interviewed the student on April 28, 2004 and authored a report dated that same day. (*District Exhibit 7 p. 3*) The report stated:

"I spoke with {student} this morning regarding the report I had received from {teacher}. {Student} told me that last Thursday, April 22, she had gone home after school and came back for softball. Her dad brought her back after school because she realized that she had left her uniform in her locker. She went up to get her uniform and as she was at her locker. {Grievant} started walking toward her. She said he was asking 'why she was there' because he thought he had already seen her down stairs ready for softball. She said that she answered his questions but wanted to hurry and get downstairs because her mom had cautioned her about {Grievant}. I asked what her mom had told her and she said that her mom had heard some things, but did not tell her what it was only that he was very "flirty". As he approached her he took hold of her jacket lapels and placed his forearms on her shoulders. She said he told her that he thought he had seen her downstairs and that "it is hard to forget someone as unique as you." She said that she felt very uncomfortable and a little scared. She said that she made a big deal of looking at the clock and saying that she needed to go because she would be late for softball. He still had his hands on her shoulders as she moved to leave. She reported this to {teacher} because she said she trusted her and felt she wanted to tell someone what had happened.

The Grievant testified that when he approached the student, who had both hands occupied with books, he noticed that the lapels of her coat were inside the coat so he fixed them. He denied resting his arms on her shoulders or making the statement regarding the students "uniqueness".

Superintendent Toutloff testified that after the interview he sent the teacher who had reported this incident the following letter dated April 30, 2004 summarizing his discussion with the Grievant.

I met today with {Grievant} to discuss the incident regarding an eighth grade female. Allegedly {Grievant} had physical contact with the student that made her feel uncomfortable. The incident took place on April 22, 2004, after school in the hallway of Memorial High School. {Grievant} acknowledged talking to the student, but could not recall having physical contact with her. He indicated to me that he has known that student for many years and couldn't do anything to physically threaten her.

¹⁵ Neither party queried the Grievant as to his response to this teacher's testimony.

I have placed {Grievant} on a two work day suspension covering April 30 and May 3. He was warned that another incident of this type would result in more severe consequences, with the possibility of permanent dismissal.

Your name as the reporting person was not divulged. However, {Grievant} was warned that reprisal against anyone involved with my becoming aware of this matter is not tolerated under the ISD # 696 Harassment and Violence Policy.

Please assure the student that I have been made aware of the incident, have talked to {Grievant} about it, and have warned him about reprisal. Also encourage her to report any future problems with {Grievant} to a staff person immediately.

Superintendent Toutloff further testified and the Grievant acknowledged that he instructed him to read the Sexual Harassment Policy¹⁶, but he was never given a copy nor did Superintendent Toutloff or anyone else in administration follow-up to see if he had read the Policy. The Grievant stated further that back then he did not have a copy of the District Handbook that contained the Policy or know where to access it. Adding that, he did not know if a Handbook was maintained in his supervisor's office and never tried to find out where he could get a copy of the Policy.

Superintendent Toutloff further testified that he believed that the Grievant received a copy of the letter to the teacher; however, again there is no indication on the letter that he was copied nor was one discovered addressed to him in his personnel file. The Grievant also testified that he never received a copy of this letter. The Grievant did acknowledge; however, that he received the following letter from Superintendent Toutloff dated April 30, 2004: (*District Exhibit 8*)

As a result of the third report I have had regarding physical contact with a student I am suspending you, with pay, from your position as custodian for two work days. Your suspension will begin on April 30 and will conclude on May 3. You may return to work on Tuesday, May 4, 2004.

I hope you will realize the seriousness of the situation you are in and refrain from allowing this to happen again. Another incident could lead to an extended leave without pay or a permanent dismissal.

I must also remind you that reprisal toward anyone involved in reporting the recent incident is not tolerable under the ISD #696 Harassment and Violence Policy.

The Grievant testified that he did not know that the disciplines were grievable since he never disclosed any of his conversations with Superintendent Toutloff to anyone else because he was too embarrassed. He also testified that, except for the suspension letter, he had never seen any of the documentary evidence regarding the aforementioned three incidents prior to his *Loudermill* hearing.

¹⁶ Hereinafter any reference to the Policy will refer to the Sexual Harassment Policy unless otherwise stated.

The Grievant further testified that he did not have a good relationship with Superintendent Toutloff. He believed that Superintendent Toutloff was upset with him because of his grievance regarding his not receiving the custodial position in 2000 that resulted in Superintendent Toutloff's nephew not receiving that job posting. Outside of being confronted by Superintendent Toutloff on September 30, 2003 for wearing inappropriate work attire (dark glasses, weight lifting gloves and a skullcap), the Grievant proffered no other evidence to support this assumption. Incidentally, when he obtained a doctor's excuse for the glasses and gloves, he was allowed to continue wearing them.

There were no recorded incidents and/or discipline involving the Grievant from April 30, 2004 until the beginning of the 2013-2014 school year when incidents alleging sexual harassment were reported to Superintendent Leitgeb by three female teachers. A first-year teacher reported that on October 30, 2013, the Grievant had grabbed her by the waist.¹⁷ This teacher testified at the arbitration hearing that as she was walking students to the high school at approximately 2:50 p.m. she noticed the Grievant running toward her.¹⁸ As a courtesy she held the door open for him. As he approached the door the Grievant commented "Have you ever seen an old man running so fast?" As they both went through the doorway, the Grievant, who was behind her, briefly touched her on her waist/hip area. At first the teacher thought that the Grievant might have slipped and grabbed her to steady himself; but in retrospect, she realized that his touch was too soft to stabilize a trip. Furthermore, the Grievant never acknowledged or apologized for the "touch" nor did she tell him that his actions were inappropriate.

According to the testimony of the teacher, she was very upset about this incident and felt it was a continuation of unwanted sexual conduct directed toward her ever since she started at the District in August 2013. She testified that on her very first day, the Grievant was in her room installing equipment for most of the day. While they were alone, the Grievant told her that he likes to have fun and feel comfortable around people and remarked, "You seem like someone I can have fun with." Later in the week the Grievant came into her room and asked her what she was doing that weekend (Labor Day), to which she replied she was working on the house with her

¹⁷ The teacher initially reported this incident to a fellow teacher who advised her to report it to the Elementary Principal who in turn told her to report it to the Superintendent, which she did on November 6, 2013. Superintendent Leitgeb then instructed her to make a written account of this incident and any other incidents she felt constituted sexual harassment. (*District Exhibit 1*)

¹⁸ The following testimony of this teacher was consistent with her written submission to Superintendent Leitgeb dated November 6, 2013.

husband. (She testified that she felt she needed to let the Grievant know that she had a husband.) The Grievant then laughed and said he wanted to know if her husband wanted to play on his softball team; adding that, "It was more fun to ask you that way."

According to the testimony of the teacher, the Grievant went on to describe how he had asked another guy to play and then hang out at a cabin to sauna (Finish term used to describe bathing in a bath house). The Grievant then told her the man declined so he then asked if this man's wife could come in his place, but that invitation was also declined. The teacher went on to testify that the Grievant then told her that "he just had to ask" adding that "that just because the man couldn't come there was no reason that the wife couldn't come have some fun." The Grievant then remarked that "he is the last person to worry about since he has been married for thirty some years." During this time period, another teacher had asked her how the prepping was going to which she replied great but she did not get much done because the Grievant was in her room all day chatting. This teacher then made the comment "Oh, Creepy (Grievant)." This made her wonder why someone would have a nickname like that.

During this discussion the Grievant also commented to the effect that he loves his softball guys and their wives and loves helping with the softball league; and that "most guys are nervous around pretty women but he was not nervous around a pretty woman like her." The teacher further testified that she left the conversation scratching her head and wondering why he needed to tell her those things. His comments made her feel uncomfortable as they were unnecessary and suggestive; however, she did not apprise the Grievant of her feelings. She then discussed it with her husband who plays in the same softball league as the Grievant. After this, she tried to avoid the Grievant unless it was absolutely necessary.

On another day shortly thereafter (exact date unknown), the Grievant came into her room and asked her if she "runs", to which she replied "yes". She testified that the Grievant then said that he had seen her running in Babbitt the day before. She told the Grievant that it could not be her since she had not run for months. The Grievant responded by saying to the effect that he saw this "pretty and in shape women running and thought it was her." Although this remark also made her feel uncomfortable, she never informed the Grievant of these feelings.

The Grievant testified that he never knew what the allegations were involving this new teacher until being questioned by the District's Council Kelly Klun at the *Loudermill* hearing. He testified that he was just being friendly with her and was telling her the same stories that he has told other

new District staff members that he loves people as well as certain things related to his softball team and how to remember how to spell his first name with an “i” like in “dirt, skirt and flirt”.

The Grievant also remembers asking this teacher whether she had been out running on the previous night. According to the Grievant, he had seen a women running who had waved at him from a distance. Because the teacher also lives in Babbitt, he thought it was her running. He did not recall whether he made the “pretty” and “shapely” women comment; however, it is possible that he made this comment or something similar to it. He also recalls using the word “love” to describe his relationship with other softball team members and other people. He testified that there is a core group of six members who go to a lake after games where they build a fire, cook out and “sauna” together.

The Grievant further testified that when he uses the term “love” it is nothing sexual, rather it reflects that he more than likes that person. He acknowledged that his comments to this teacher could be wrongly interpreted and understood why she felt the way she did.

The Grievant also testified he remembers making the comment to the teacher regarding “running”. He stated that he was on his way to the elementary school at the end of his shift where he was called because some student had a tantrum and tipped over shelving and desks scattering books all over. According to him, the teacher was heading across the common courtyard to the high school building with a group of students while he was going in the opposite direction to the elementary school when he called out the “running fast” comment. Adding that, he spent the last six months trying to figure out how he could have possibly engaged in the alleged conduct when he was nowhere near her in this situation. He further testified that he does not recall ever touching the waist area of this teacher at any time. The Grievant stated that he does not believe this teacher is a liar because he would never call anyone a liar, just that he has no recollection of ever touching her.

The second incident that led to the Grievant’s termination involved a teacher who had requested that the Grievant do something to sound proof her room. This incident occurred a few weeks before November 6, 2013 and was not reported until after she was solicited to do so by Superintendent Leitgeb. According to the testimony of this teacher, she had unsuccessfully suggested a number of ways to accomplish this task until the Grievant suggested a solution which

she agreed to.¹⁹ She further testified that she thought she was being difficult during this entire scenario and constantly apologized to the Grievant for being difficult. The Grievant responded by lightly touching her cheek for three or four seconds and making the comment, “I could never be mad at you. You are too cute”, both of which made her feel very uncomfortable. Then, teacher also testified that the Grievant sometimes made her feel uncomfortable because he would stand too close to her while they were talking. According to this teacher, she never told the Grievant that any of his actions, including touching her on the cheek or his “cute” comment or standing too close to her while he was talking, made her feel uncomfortable.

The Grievant testified that this was the only teacher that he ever had touched. He had been directed to find a way to sound proof her room. This teacher had suggested a number of ways to accomplish this; however, he rejected all of them until they finally resolved the problem. While they were trying to find solutions to this problem, this teacher had been constantly apologizing to him, implying that she had been difficult to deal with. According to the Grievant, he then lightly touched her cheek for a brief second and made a comment to the effect that “with communication they can work anything out.” He considered this brief tap to her cheek to be a friendly gesture, like a tap to the back. The Grievant further testified that he does not recall ever making the “cute” comment; however, it is possible that he could have.

The Grievant also testified that he could see how his action in touching this teacher could make the teacher feel uncomfortable and be construed as sexual harassment. He further testified that he did not realize that his standing close to staff members made them feel uncomfortable. The Grievant stated that he has a hearing problem; however, he has never been diagnosed nor sought treatment for it. The Grievant further acknowledged that his overly friendly actions toward teachers and his comments could be taken by the teachers as flirtatious and sexual in nature; however, he never expected such a reaction. The Grievant was extremely remorseful during both his arbitration and *Loudermill* hearing testimony for any of his alleged conduct that could be construed as sexual harassment.

During cross-examination, the Grievant denied he ever referred to himself as a “flirt” stating that he did use the word as an example of a how to spell his name. The Grievant stated that there is so little politeness in the world today that people mistake politeness for flirtation, adding that he

¹⁹ The following testimony of this teacher was consistent wither written submission to Superintendent Leitgeb dated November 6, 2013. (*District Exhibit 3*)

is a very polite person. The Grievant testified that to him flirting is something you do when you want something back, that he is not asking anything back and that he is just trying to be friendly. The Grievant also could not remember if he ever used the word “cute” in the workplace.

The Grievant acknowledged that he was directed by Superintendent Toutloff to read the District’s Policy. He testified that he never did read the Policy nor did anyone ever give him a copy of the Policy or follow-up to see if he had read it. He rationalized that he did not believe that any of his conduct in 2002 and 2004 was sexual in nature. The Grievant further testified that he had never been given any specific sexual harassment training nor does the District conduct such training, at least not for the support staff.

Superintendent Leitgeb testified that the District conducted a workshop on August 29, 2013 for all staff which the Grievant attended. There was not a specific presentation involving sexual harassment; however, there was a presentation on a District-wide initiative for Positive Behavior Intervention Support (PBIS) that lasted approximately 45 minutes. Superintendent Leitgeb testified the ultimate goal of PBIS is to help students develop self-discipline based on an understanding of how certain behavior contributes to the efficiency of community and the benefits that can be received. The focus of PBIS has a proactive, District wide, problem solving approach.

The workshop sought to involve all staff, including janitorial and maintenance, in positively and actively correcting inappropriate student behavior, rather than being punitive. As testified by Superintendent Leitgeb, "Ely Paw Pride" was presented as the framework to create a safe, respectful and cooperative school environment. After the staff workshop, the students were engaged in determining what behavior was respectful and helped create posters indicating the correct behavior and conduct. Within a couple of weeks of the start of school, these posters were posted throughout the District. (*District Exhibit 19*) The posters are in chart form and have columns with various physical locations within the District, e.g., hallways, cafeteria, etc., listed at the top and rows listing three sub categories on the right margin. The posters make individual references to “Be Respectful” and “Respect others space”; and multiple references to “Hands, feet and objects to yourself”.

The Grievant acknowledged during his testimony that he did not believe the workshop applied to him so he did not pay much attention to the presentation, adding that he was just there to get a key fob for the new school security system. He further acknowledged that he put up one of these posters but never really read it, again adding that he did not think it applied to him.

Superintendent Leitgeb testified that an investigation into the Grievant's sexual harassment behavior was initiated when she received a verbal complaint from a teacher on November 6, 2013 alleging that the Grievant had inappropriately touched her on her waist area. The teacher was advised to record this complaint and any other harassment allegations in writing. After receiving her written complaint (*District Exhibit 1*), the Superintendent contacted the teachers whose names had come up during her initial investigation regarding unwelcomed incidents perpetrated by the Grievant. Superintendent Leitgeb testified that when she contacted the individual teachers, she asked each one if they had had any unwelcomed incidents with anyone without specifically mentioning the Grievant or anyone else by name.

After receiving this evidence from the teachers (*District Exhibits 1-4*) and examining the Grievant's personnel file where other incidents in 2002 and 2004 (*District Exhibits 5-9*) were addressed, she contacted the School Board and arranged for a *Loudermill* hearing. The Grievant was then suspended (*District Exhibit 10*) pending the *Loudermill* hearing. Prior to the hearing District Council Klun mailed to Union Council Lewerenz copies of the documents in *District Exhibits 1-10* as well as the teacher interviews that she had conducted during the investigative process.

The Grievant appeared with Union Council Lewerenz before the full Board on November 12, 2013 wherein he was questioned by District Council Klun regarding the recent sexual harassment allegations levied against him as well as the previous incidents arising during 2002 and 2004 documented in his personnel file.²⁰ Union Council Lewerenz also asked the Grievant questions and made a summary statement on his behalf before the School Board began its secret deliberations. (*District Exhibit 14*)

This statement in the transcript reflects that she informed the Board *inter alia* that certain words or actions can be interpreted in different ways and that it doesn't cross over into the line of sexual harassment unless somebody is told that their friendly behavior makes somebody feel uncomfortable. She acknowledged that the Grievant may have come across as being a little bit too friendly and she believes that he has learned that he should never touch a co-worker ever again, and that maybe someone is being disrespectful even if they think they are not. She added that although the District needs to get the message out, terminating the Grievant is not the answer.

²⁰ The Grievant's appearance before the Board was recorded and transcribed. (*District Exhibit 14*) District Council Klun did the vast majority of the District's questioning although a couple of Board Members did ask questions.

During this whole process Superintendent Leitgeb did not make a recommendation because she had recently been appointed Superintendent so she left it up to the Board to decide the Grievant's fate. Board Member Amy Richter, who had been a Board Member for six years, testified that she had no idea what was going to be presented at the *Loudermill* hearing.²¹ During the hearing, she did not ask the Grievant any questions, however, other Board Members did.

She further testified that the Board deliberated for approximately two hours before arriving at its decision. During this deliberation, there was a discussion about putting the Grievant on the afternoon shift and other options short of termination; however, the Board rejected these options because the Grievant would still be in contact with students and faculty. She testified that she voted to terminate the Grievant because she believed the teachers were truthful in their statements that the Grievant had sexually harassed them, that the Grievant had been previously disciplined for similar conduct and that he was warned that any conduct involving touch or of a similar nature could result in his termination.²² She also took into account the fact that the Grievant could not remember touching the teacher on the waist area or making any of the alleged comments directed at the teachers. Further, the Grievant did not believe that he had done anything wrong nor did he exhibit any remorse; rather, he rationalized that his conduct was him "just being friendly."

Board Member Richter also testified that she was upset that the Grievant, although being directed by Superintendent Toutloff in 2004 to read the District's Policy, did not take this direction seriously. She further testified that the Board never considered the Grievant's tenure or work record or whether the Grievant could be rehabilitated; in fact none of these things were ever discussed during the Board deliberations. Finally, she testified the Grievant's Union activity, including the pending Union bus grievance, was never discussed at this Board deliberation.²³

School Board Member Rochelle Sjoberg, who had been a Board member since June 2013, testified that she is the Human Resource Director at a local hospital where she inter alia is responsible for hiring and firing and contract administration including the processing of grievances as well as being knowledgeable in the "just cause" standard in applying discipline.²⁴

²¹ It appears that she received the evidence that the District had compiled for the *Loudermill* hearing prior to the hearing.

²² According to her, this was the first person that she was aware of that had ever been terminated.

²³ This bus grievance will be discussed later herein.

²⁴ She has been the Human Resource Director for the last four years and was the Assistant Human Resource Director a few years before that.

She further testified that a verbatim transcript of the recording of the hearing (*District Exhibit 14*) was formulated by the District, which she subsequently reviewed and attests as accurate.

Board Member Sjoberg also testified that because of her labor relations experience, the Board relied heavily upon her recommendation that termination was the appropriate discipline. The Board made the decision to terminate the Grievant based upon the evidence in the “packet” (*District Exhibit 16*) given to the Board regarding the evidence uncovered during the District’s investigation, the testimony of the Grievant in response to the allegations contained in the “packet”, as well as documents regarding the Grievant’s prior disciplinary record including being warned in 2004 by Superintendent Toutloff that he could be terminated if he ever was involved in similar conduct. In formulating her decision to terminate the Grievant, she testified that she did consider his lengthy tenure with the District, but did not consider his work performance or evaluation history since they were not included in the “packet”. The Board also did not discuss whether the Grievant could be rehabilitated since he had demonstrated that his behavior did not change after his suspension. Further, she did consider the fact that the Grievant had been progressively disciplined, although this was not contractually required. She believed that termination was the next appropriate action since the Grievant’s last discipline had resulted in a suspension and a warning that a repeat violation could result in termination. In addition, the severity of the incidents of touching students in the past and now touching faculty is not a “do over”, especially in the school setting.

Board Member Sjoberg also testified that it was her impression that the Grievant never expressed any remorse for his actions, that he failed to recognize that he had done anything wrong and that his only defense was that he was a friendly person. Whether or not he is a friendly person does not give the Grievant license to touch or say things to teachers that could be construed to be sexual in nature. She took offense to the statement made at the hearing (presumably by Union Counsel) that it was okay to touch or say something in a sexual manner if the recipient of the conduct did not object. She also did not believe that the Grievant took the “no touch” warning seriously since he continued to give students high 5’s after he was warned in 2004 not to touch students.

Board Member Sjoberg further testified that it “grated” everyone on the Board that the Grievant had never read the District’s Policy, and she attached significant weight to this. She also

testified that the Grievant's Union activity, including the recent filing of the bus grievance, was not discussed nor was it a factor in her or the Board's termination decision.

The Grievant had been the Union President for approximately nine years prior to his termination. During that time period he had filed a number of grievances including four grievances separate from his termination grievance. Grievances filed on February 17, 2012 and March 5, 2012 (*Union Exhibits 5 A & B*) alleging that bargaining work was given to a non-bargaining employee were subsequently settled on May 14, 2012. As a result of the settlement, the Grievant was re-assigned job duties, received back pay, and was awarded an increased rate of pay for boiler work. (*Union Exhibit 5 C*) The Grievant also filed a grievance dated October 9, 2012 (*Union Exhibit 2 A*) alleging the District failed to pay him at an increased hourly rate of pay for week-end boiler work from May through October 2012, which was again resolved in his favor through a Memorandum of Understanding attached to the most recent contract. (*Joint Exhibit 1 and Union Exhibit 2 B*)

The Grievant alleged that during negotiations for the current contract someone in District administration, he could not remember who, threatened to reduce the Grievant's work week, overtime and/or his week-end work unless he reconsidered his October 9, 2012 grievance. In response to this threat, Union Field Representative Rukavina sent a letter dated December 10, 2012 to Superintendent Leitgeb addressing this threat and requesting an apology.²⁵ (*Union Exhibit 3*)

On November 1, 2013 the Grievant, on behalf of a recently hired bus driver, filed a grievance alleging that the District used a non-unit bus driver on October 29, 2013. It appears that the District hired a private contractor who operated a charter bus to transport students to a science fair in Duluth, Minnesota rather than using a District bus and unit driver. The use of charter buses had been a contentious subject of negotiations that were ongoing at the time of the Grievant's termination. It appears that the District wanted to be able to use charter buses and non-unit drivers to District functions whenever the costs were paid by a private party, such as a "booster club". It also appears that during this time a football booster club wanted to use a private contractor to transport students to playoff games. This resulted in the subject surrounding the grievance becoming an issue of community contention according to the testimony of Board Member Richter.

²⁵ It is not known if an apology was ever issued.

The Grievant testified that Superintendent Leitgeb called him into her office on November 4, 2013. She informed him that she was upset because he had filed a grievance over the teacher who had hired the charter bus, adding that the teacher was new and did not know the rules. During this meeting, Superintendent Leitgeb also made the comment that he was now being disrespectful to her. Apparently a couple of weeks previously (exact date unknown), the Grievant had gone into the Superintendent's office to complain that he was not happy with the way the District had been treating him lately while he was the acting supervisor of the maintenance department, referring to an incident where a contractor had shown up while he was in charge and he did not know anything about plans for the contractor to be there. During this discussion with Superintendent Leitgeb, he made the remark that he felt that he was not being treated with respect in this situation. According to the Grievant, they amicably worked out this matter.²⁶

The bus grievance was still pending at the time the Grievant was terminated. It was finally resolved in early December 2013. The settlement allowed the District to use private charter buses with non-unit drivers under certain situations. (*Union Exhibit 4*)

SCHOOL DISTRICT POSITION

The School District's position is that it had just cause to discipline the Grievant, and the appropriate discipline was termination. In support of this position, the School District argues that:

- The District applies a two-part test to determine whether "just cause" has been met: (1) whether the conduct complained of had a serious adverse effect on the District's operation and (2) whether the District sought to eliminate any future adverse effect before taking the final step of discharge. Certain conduct in and of itself is so serious that an employer need not risk its repetition and should not be compelled to use training or a lesser discipline in an effort to eliminate the chance of repetition. The Grievant, by his conduct, engaged in such serious misconduct that termination was the appropriate discipline.
- The Grievant violated the District's Policy when he touched two female employees in October, 2013. The Grievant also violated the Policy when he made sexually suggestive remarks to the two teachers during the "touching incidents" as well as

²⁶ Although, Superintendent Leitgeb was recalled as a witness to explain the August PBIS workshop, she was not queried about this conversation.

sexually suggestive comments to one of the aforementioned teachers at the beginning of the 2013-2014 school year. The Grievant also made sexually suggestive comments to a third teacher.

- The Grievant had been disciplined twice in early and late 2002 for touching students and received a verbal and written warning, respectively for these actions. The Grievant was disciplined again in April of 2004 for touching another student and received a two-day paid suspension for this action.
- The Grievant was fully on notice that failure to follow policies and directives could subject him to discipline including termination. During his discussions with Superintendent Toutloff regarding the 2004 incident, the Grievant was instructed verbally and subsequently in writing to review the District's Policy, which he admitted he never has done, either at that time or subsequently.
- During this 2004 incident, then Superintendent Toutloff also informed the Grievant verbally and subsequently in writing that another incident (of touching) could result in his termination. The letter specifically warned the Grievant that a "recurrence of this conduct or similar conduct could result in more severe discipline." In spite of this warning, the Grievant admitted during the *Loudermill* hearing that he had touched a teacher on the cheek and had continued to touch students by giving them high 5's.
- In addition to his failure to read the Policy, the Grievant admitted that he did not pay attention during the PBIS workshop at the beginning of the 2013-2014 school year wherein the importance of creating an atmosphere of respect within the District was discussed. The Grievant also admitted that he failed to read the posters developed after the workshop setting forth how students should treat one another even though he personally hung up the posters.
- The District complied with due process when it made its determination to terminate the Grievant. The District conducted a fair and impartial investigation that included apprising the Grievant through Union Council of the specifics of the conduct that he was being charged with. The District then allowed the Grievant to respond to these allegations at the (*Loudermill*) hearing where he was represented by Union Counsel

who was allowed to participate in the proceeding. In fact, the hearing was stopped a number of times in order for the Grievant to confer with Union Council.

- During the *Loudermill* hearing the written testimony provided by the teachers and staff was compelling as opposed to the testimony of the Grievant which was vague, self-serving and somewhat savory. Moreover, the Grievant failed to acknowledge his actions including making what can be construed as sexual comments to the three teachers, save the touching of one of the teachers on her cheek. Not only did the Grievant not take responsibility for his actions, he did not demonstrate any remorse; rather, he attributed them to his being an overly friendly person.
- The School Board took the matter seriously, deliberating for over two hours, before it made its decision to terminate the Grievant. The Board based its decision on the credible written testimony of the teachers, the seriousness of the Grievant's offenses that violated the District's Policy and the fact that the Grievant had previously been disciplined and warned that repeated similar conduct could result in his termination. The Board also took into consideration the Grievant's admitted failure to read the District's Policy. Further, the Grievant had demonstrated that he could not be rehabilitated since he still engaged in prohibitive conduct including touching students (high 5's) and touching the teachers after he had been repeatedly warned.
- Although the Grievant was the Union President and had filed several grievances, one of which was pending at the time of his termination, the Board did not consider any aspect of the Grievant's Union activity when it deliberated during the *Loudermill* hearing. It should be noted that all of his individual grievances were resolved in his favor.
- The Grievant violated the District's trust when he engaged in the conduct leading up to his termination. The District must be able to trust its employees citing an excerpt in a decision by Arbitrator Sharon A. Gallagher wherein she stated, "*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.*"²⁷

²⁷ Duluth ISD#79 and AFSCME, Council 5, BMS No. 13PA0721 (June 30, 2013 Gallagher)

UNION POSITION

The Union's position is that the Grievant did not engage in conduct that gave the District just cause to terminate him. In support of its position, the Union argues that:

- The Grievant is an overly friendly and talkative individual who some people do not know how to take. Witnesses for the Grievant testified to these attributes at the arbitration hearing.
- The Grievant did not engage in any conduct as defined in the District's Policy. More specifically, there never was any unwelcomed or inappropriate touching, patting or physical conduct proscribed by the Policy. The touching of a teacher lightly on the cheek while making the comment "I could never be mad at you. You are too cute.", if you credit the teacher, is not sexually-motivated or inappropriate touching. It may be condescending or patronizing or not okay in terms of general behavior, but it was not sexual nor was it sexual harassment. Moreover she only complained after being solicited to do so, which goes to show how serious the alleged offense was to her.
- With respect to the alleged touching of the teacher in the waist area as they were going through a doorway, this is also not sexual nor is it sexual harassment. If this did happen, it is possible that the Grievant was in a hurry while going through a doorway and heading up or down some stairs and wanted to ensure that the teacher didn't move in the wrong direction while he was trying to get by her.
- If this did happen, it may also be unacceptable behavior in a school setting; but, it was not because he wanted to sexually harass her or get some sexual gratification from touching her. In fact the Grievant did not even remember encountering her in a doorway or ever touching her on the waist area at this time or any other time. The Grievant also places the comment to the effect of how fast an old man like him could run as occurring not at any doorway; rather, while she was with her students in the courtyard between school buildings or near the athletic field.
- The Grievant's comments to the teachers that allegedly made them feel uncomfortable may be inappropriate, but they do not constitute sexual harassment under the District's Policy. If they felt uncomfortable or were sexually harassed by the Grievant's comments, why did they not immediately report them to District administration?

- The District failed to conduct a fair and unbiased investigation. The Grievant was not questioned until the *Loudermill* hearing, nor were any witnesses that may have supported him questioned at any time. Instead it chose to confront the Grievant at the hearing with the full Board where he was forced to answer questions with little or no information about what he was accused of.
- The Grievant was questioned under extremely stressful conditions and told the truth to the best of his ability. He owned up to touching the teacher on the cheek and he acknowledged that it was wrong to do this. He also honestly did not remember touching the waist area of the other teacher.
- The Grievant had been asked to read the District's Policy, which he did not do because he believed that his conduct was not of a sexual nature. After he was directed to read the Policy, there was never any follow-up by District administration to ensure that he read the Policy or any sexual harassment training to ensure that he had understood the Policy if it was to govern all of his future actions with students and teachers. There was also no District-wide sexual harassment training for support staff employees. In addition, there was no staff training to make sure that they understood the Policy and knew how or when to report a problem.
- The District failed to consider the Grievant's 26-year tenure with the District and his job performance when it decided to terminate him. The only black marks on his disciplinary record were the three incidents that occurred more than nine years earlier. The District failed to consider that the Grievant had an unblemished work record from March 2004 until October 2013 and from the date of his hire (1987) until the first incident in January 2002. These long non-disciplinary periods are evidence that the Grievant can be rehabilitated, especially if the rules of conduct are set out for him and he receives adequate behavioral training.
- There is anti-Union animus which influenced the School Board to terminate the Grievant even though the Superintendent and Board Members denied it at the arbitration hearing. Superintendent Leitgeb admits being upset with the Grievant for filing the bus grievance. The District and the Union had also just finished negotiating a contentious grievance over the Grievant's job title, responsibilities and pay for being on-call or working overtime and on weekends when the bus grievance came up.

OPINION

This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the School District just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances. It is the School District's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

The evidence firmly established that the Grievant did engage in inappropriate conduct that warranted disciplinary action.²⁸ The Grievant admitted touching the cheek of a teacher a few weeks before his termination.²⁹ The Grievant is also accused of making inappropriate comments of a sexual nature to this teacher, which made her feel uncomfortable, when he touched her on the cheek. Based on her testimony, I credit the teacher that the comments were indeed made. She was very forthcoming and specific in recalling what transpired during the touching incident and had no reason to lie; while the Grievant, though he admitted the touching, was hesitant, vague, self-serving and gave a different version of what he said during this episode. In the end the Grievant, during cross-examination, acknowledge that he could have made the comments attributed to him. In addition, there is a history of the Grievant making similar inappropriate comments to other teachers.³⁰

The Grievant is also accused of making inappropriate comments to a teacher who was new to the District that could be interpreted as being of a sexual nature. As outlined in this Decision, the comments were numerous and made this teacher also feel very uncomfortable, so much so that she avoided interacting with the Grievant unless it was absolutely necessary. I credit this teacher for the same basic reasons that I credited the previous teacher. The Grievant also could not specifically remember the comments attributed to him; however, he did acknowledge during cross-examination that he could have made some of the comments.

²⁸ The Grievant's alleged inappropriate conduct for which he has already been disciplined in 2002 and 2004 cannot be used as a basis to determine whether or not the Grievant should be disciplined; rather, it is only relevant in determining the appropriateness of the discipline imposed.

²⁹ The Grievant categorized the touch as akin to the pat on the back. This is immaterial since either action involves touching.

³⁰ Besides the two teachers involved in the touching incidents, a third teacher testified that she too was on the receiving end of inappropriate Grievant comments. She described the comments as making her feel very uncomfortable; however, she never did report them to administration until she was solicited to do so in November 2013.

It is understandable why this teacher felt uncomfortable. She was a new teacher in the District; and to have a stranger make comments that could be interpreted as inappropriate, suggestive and sexual in nature would make any person feel uncomfortable. His defense was that he was just trying to be friendly. The Grievant did acknowledge during his arbitration hearing testimony, that in retrospect his comments could be taken as “flirtatious”; however, he never intended them to be that way. The Grievant’s inappropriate comments directed at the teachers have no place in the school setting no matter what the Grievant’s motive or intent was.

This brings us to the “touching” incident alleged by this teacher. I credit her that the Grievant did touch her “lightly” and “briefly” on the waist. It is understandable that she was very upset over this incident since the gist of her testimony was that she viewed the Grievant’s action as a continuation of his attempts to be overly friendly with her and a continuation of what she perceived as sexual harassment.

The Grievant denied he ever touched this teacher at any time including a time when they were going through a doorway together. He did acknowledge making the “running fast” comment; however, he places it under a different circumstance, e.g., while meeting in the courtyard when they were going in opposite directions or near the athletic field. I credit the teacher that the “touch” did occur; however, I also credit the Grievant when he stated that for the last six months, he had tried to remember if such a scenario took place, but could not.

In examining this “touch scenario” there is the possibility that the Grievant deliberately put his hands on the teacher’s waist for inappropriate reasons. It is also a possibility that the Grievant may have touched this teacher in the manner that she complained of, but it was only to ensure that the he did not bump into her while he hurriedly went around her. Such an innocuous touch under this circumstance could easily escape one’s memory. This alternative scenario is consistent with the teacher’s testimony that the touch was “light” and “brief”, and that the Grievant had been in a hurry when he approached the door. It was only in retrospect that she dismissed the touch as not being inadvertent because of the Grievant’s prior inappropriate comments. It is possible she would not have given this incident a second thought if there had not been a recent history of the Grievant making inappropriate

comments.³¹ Thus under the circumstances, this alleged conduct is shaky at best in finding just cause to discipline the Grievant.

Based upon all of the evidence, however, I conclude that the District had ample grounds to discipline the Grievant regardless of whether or not I consider the touching of the teacher on her waist warrants discipline. In making a determination that the District had just cause to discipline the Grievant, it is not necessary to make a determination that the Grievant's actions specifically violated the District's Policy. Whether or not the Policy was violated is not dispositive in the finding that the District had just cause to discipline the Grievant since the Grievant's actions in and of themselves are inappropriate and just cause for disciplinary action.

I do believe, however, that the Grievant never intended nor is there any evidence that his actions or comments to the teachers were intended to be sexually motivated. Nevertheless, such actions and comments are arguably proscribed in page 2 of the Policy, which states under Item 2, "Sexual harassment may include but is not limited to: 2(a) *unwelcome verbal harassment or abuse*, 2(c) *....or inappropriate patting pinching or physical contact....* and 2(f) *unwelcome behavior or words directed at an individual because of gender*. The fact that none of the teachers ever complained to the Grievant that his actions were inappropriate is not a prerequisite in establishing that the Grievant's actions were inappropriate and/or violated District Policy.

There is, however, not sufficient evidence to adduce that the Grievant was disciplined because of his Union activity. The only evidence that could support such an allegation is cursory at best since it consists of some unknown Board Member or District Administrator making a statement to the effect that the Grievant could lose his week-end work or overtime if he pursued a grievance. It is entirely possible that if this statement was made, it could be interpreted as being lawful changes that could occur as a result of the grievance rather than consequence imposed for his filing or pursuing the grievance.

The Union further argued that a contentious grievance involving bus drivers, which was filed shortly before the Grievant was terminated, was a motive for his termination. Union Counsel Teresa Joppa argued in her brief that the bus grievance was on the agenda to be

³¹ It also makes one wonder whether the teacher would have reported this activity if the perpetrator was another staff member.

discussed at the Board meeting on the same evening that the Board made its decision to terminate the Grievant. It supported this argument by attaching a public record of the Board's agenda, which disclosed that the bus grievance was on the Board agenda for November 12, 2013.

The District objected to the Union's introduction of this document citing that it constituted an exhibit which could not be introduced because the record was closed at the conclusion of the hearing on May 9, 2014. Procedurally, the record does not close until briefs are received; however, if this were in fact an exhibit, I would not have accepted it after the hearing closed unless prior arrangements for its introduction were approved by the undersigned.³²

For the record, I am not treating this document as an exhibit per se, rather as a document that supports an argument made in a brief. This is similar to attaching a prior arbitration decision to a brief in support of an argument; however, I would not have accepted any supporting evidence if it were so proffered.³³ Moreover, since it is public record, I could have taken judicial notice of the document and its contents.

In any event, there was no evidence adduced at the hearing of a nexus between the bus grievance being listed in the Board agenda and the hearing involving the termination of the Grievant other than they both allegedly occurred on the same evening.³⁴ Thus, except for timing, the Union did not proffer nor is there any evidence in the record to support this allegation. In any event Board Members Richter and Sjoberg testified credibly that the Grievant's Union activity, including the filing of grievances, was not considered by the Board in its decision to discipline the Grievant nor the nature of said discipline.³⁵

I also reject the Union's allegation that the District did not conduct a fair investigation before it made its decision to discipline the Grievant. While the Union contends that the Grievant was "blindsided" at the *Loudermill* hearing, the evidence established that the Grievant was questioned on allegations and evidence that the District had uncovered during

³² The only other way to get the exhibit into evidence is by reopening the hearing thus allowing foundation to be established and to ensure the right of the District to cross-examine the witness through whom the exhibit was offered.

³³ This public document was generated at least six months prior to the arbitration hearing. The Union had sufficient time to discover it and develop testimony at the hearing, if it so desired.

³⁴ In fact, it is not known if the Board adhered to its original agenda for the November 12, 2013 Board meeting in view of its decision to hold a *Loudermill* hearing that same evening.

³⁵ In view of this determination, I will not consider the anti-Union allegation in discussing the appropriateness of the discipline imposed.

its investigation, which the Grievant was made aware of prior to the hearing through Union Counsel Lewerenz.³⁶ Union Counsel Lewerenz was also allowed to participate during the hearing including asking questions, conferring privately with the Grievant at various times during the course of the hearing and making a summary statement in support of the Grievant.³⁷ Thus, even though things progressed rather quickly, there was no evidence adduced at the arbitration hearing that the Grievant was prejudiced by this short notice.³⁸

Although the Employer may have had just cause to discipline the Grievant, the question remains whether termination was the appropriate discipline under all of the circumstances relevant herein. The School Board unanimously determined that the Grievant violated the District's Policy when he inappropriately touched two female teachers and by his inappropriate sexually-based comments to the aforementioned two teachers as well as to a third teacher.³⁹

The Board also considered progressive discipline standards, although not contractually mandated to do so, when it considered the Grievant's past disciplinary record. It determined that termination was now appropriate since the Grievant had received a verbal and written warning in 2002 and a 2-day suspension with pay in 2004 coupled with a warning that a "recurrence of this conduct or similar conduct could result in more severe discipline."

The District has an obligation to maintain a work environment for its employees free from sexual harassment. Engaging in any conduct with sexual overtones that a reasonable person would conclude is inappropriate in any environment, and even more so in a school setting, clearly warrants more than just a slap on the wrist. This is especially true here wherein the Grievant was warned when suspended in 2004 that touching (anyone) will not be tolerated and could be grounds for termination. It is immaterial that the warning was issued almost 10 years ago; it still continues to be applicable.⁴⁰

The Union cites the failure of the District to train the Grievant in its Policy as a mitigating factor to be considered in determining an appropriate discipline. The District

³⁶ She received this evidence at least five days before the scheduled hearing. It is not known when she shared it with the Grievant.

³⁷ Union Staff Representative Rukavina was also present at the hearing. She did not ask any questions, however, she did participate in the private off-the-record discussions with the Grievant and Ms. Lewerenz.

³⁸ The Board complied with the *Loudermill* pre-disciplinary investigative standards. Any witness favorable to the Grievant could have arguably been presented by the Union.

³⁹ Only the testimony of those teachers that testified at the arbitration hearing is being considered in this Decision.

⁴⁰ Although the warning may never expire, there is a question whether it can be used to establish progressive discipline. This will be discussed further herein.

admitted that it has no sexual harassment training program for support staff employees. The Union argues that had the District given the Grievant sexual harassment training, he would not have engaged in the conduct that he is charged with. While there is no specific sexual harassment training, the District has a Sexual Harassment Policy in its Handbook, which all employees receive during orientation and are expected to read.

When he was suspended April 2004, the Grievant was specifically directed to read the Policy which contains various general examples of proscribed conduct; but failed to do so because he felt this Policy did not apply to him. In fact, the Grievant admitted that he has never read this Policy. If the Grievant had followed the directive to read this Policy, he might not be in the position that he is in right now.

The District as recently as eleven weeks before his termination conducted PBIS training. Although sexual harassment was not a specific topic at the workshop, the need to treat others with respect, respect the space and privacy of others and to keep your hands to yourself was emphasized. The District also put up “Paw Pride” posters, emphasizing those points as well as other appropriate conduct, in numerous locations throughout the District. The Grievant admitted that he attended this workshop, but did not pay attention because he felt it did not apply to him; and that he was just there to get his key fob for the buildings. The Grievant further admitted that he also put up at least one of the posters in a building location and saw other posters hanging up in other locations throughout the District, but did not read them because he felt they did not apply to him.

While there is ample evidence to discipline the Grievant, there are a number of mitigating factors that undermine the District’s decision to terminate the Grievant:

- The Grievant is a long-term (26-year) employee with a satisfactory job performance record.⁴¹ This job performance was never considered when the Board made its termination decision.
- Although the Grievant was specifically instructed to read the Policy, no one from the District followed through to see if he had complied. Moreover, because the District has such a strict “no touch rule” and high sexual harassment standards, it should have conducted adequate sexual harassment training to ensure that staff members, including the Grievant, were well versed in the District’s Policy; and

⁴¹ Absent evidence to the contrary, it is assumed that it was satisfactory.

under what circumstance a perceived violation should be reported. In other words, the District has a responsibility to ensure that its employees know what this Policy entails as well as the penalties for violating the Policy to ensure that prohibitive conduct, such as was attributed to the Grievant, never occurs.

- The Grievant's conduct involving the alleged touching of the teacher on the cheek and on the waist of another teacher, which I have thoroughly discussed in this Decision, clearly in and of themselves do not rise to sexual violence or sexual assault that cries out for termination, which is industrial capital punishment. While this conduct is grounds for discipline, it is not a sufficient basis to invoke termination, either standing alone or in conjunction with the inappropriate comments.
- It was the District that labeled the Grievant's comments and actions as "sexual harassment". While his actions may fall within the broad definition of sexual harassment, there is no evidence that the Grievant had a sexual motive or intended to sexually harass the teachers. It also appears that the teachers, except for the teacher who reported the touching of her waist, did not take the Grievant's conduct very seriously since they did not report the incidents until solicited to do so by Superintendent Leitgeb.
- The Grievant, contrary to the position of the District, demonstrated remorse and was apologetic at both the *Loudermill* hearing (*District Exhibit 14 p. 14*) and arbitration hearing.
- While Superintendent Toutloff may have considered the 2002 incidents to be verbal and written warnings, there is no documentation to show that either the Grievant or the Union was aware that he treated the incidents as such.⁴² The letters that Superintendent Toutloff sent to the teachers after his meetings with the Grievant, which he treated as verbal and written warnings in his testimony, do not specifically indicate that the Grievant was receiving said warnings or is there any evidence that the Grievant was put on notice that his conversations with Superintendent Toutloff were verbal and/or written warnings. Although it is a

⁴² Under these circumstances, the discussions between the Superintendent and the Grievant could very well be viewed as consultations rather than formal discipline.

customary labor relation's practice to inform the Union of any disciplinary actions, there is no evidence that the Union was so informed. Without proper documented notification, an individual right to file a grievance is abridged resulting in an employer being precluded from using those incidents to support progressive disciplinary action at a later time.⁴³

- There is also a question whether the incidents the District relied on meet the progressive discipline standard in determining an appropriate discipline in view of the lengthy time interval and the seriousness of the preceding discipline.⁴⁴

I conclude that the seriousness of the Grievant's conduct and consideration of the aforementioned mitigating factors preclude termination. There is, however, sufficient evidence to levy a long-term suspension on the Grievant. The Grievant engaged in admitted inappropriate touching of teacher(s) coupled with inappropriate remarks to three teachers, which not only made them uncomfortable, but arguably violated the District's Policy. The Grievant also voluntarily admitted during his arbitration hearing testimony that he continued to touch students after he was specifically warned in 2004 not to engage in any "touching" activity. He nevertheless consciously choose to continue the practice of giving students high 5's, rationalizing that it was okay because he had seen his supervisor do this.

The Grievant also violated the trust that the District expects from its employees. His overall general attitude was that it was okay to engage in behavior which a reasonable person would conclude as inappropriate because he was a friendly person who loves other people and never intended his actions to be sexual in nature. The Grievant further demonstrated a cavalier attitude in his refusal to read the Sexual Harassment Policy, his lack of attention in the PBIS workshop and his failure to read the "Paw Pride" posters the District put up following the PBIS workshop because he did not believe that they applied to him.

The Grievant has a history of inappropriate behavior during his employment, albeit there were lengthy gaps in any reported incidents of misconduct. It is not known whether there were other incidents of inappropriate conduct that went unreported since all the incidents, with the exception of the incident involving touching a teacher on the waist, went unreported

⁴³ Elkouri & Elkouri, *HOW ARBITRATION WORKS*, at p. 985 (6th Edition 2003).

⁴⁴ Id at pgs.986-987

until solicited by Superintendent Leitgeb during her investigation of the waist touching incident.⁴⁵

Although the District never considered rehabilitation during its termination deliberations, I do believe that the Grievant can be rehabilitated because he is remorseful and has been put on notice that the District is serious about enforcing its Policy. In addition, the Grievant now understands which conduct is inappropriate, and that the District will not tolerate any continuation of inappropriate conduct.

Under all of the circumstances herein, I believe a harsh penalty is appropriate in order to ensure that the Grievant understands the message that a continuation of his inappropriate conduct will be justification for his immediate termination. I, therefore, conclude that an appropriate discipline is a 90-day suspension without pay.

AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is partially sustained.

IT IS FURTHER ORDERED that the Grievant's termination be reduced to a 90-day suspension without pay. FURTHER, any reference to his termination will be expunged from his personnel file.

IT IS FURTHER ORDERED that the Grievant be reinstated to his former position; and be made whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the District's action, less the 90-day unpaid suspension and any interim earnings.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: June 11, 2014

Richard R. Anderson, Arbitrator

⁴⁵ Only a handful of teachers were solicited during her investigation.