BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUSAUKEE EDUCATION ASSOCIATION

and

WAUSAUKEE SCHOOL DISTRICT

Case 47
No. 63801
MA-12717

Appearances:

Ted Lewis, Director, Northern Tier UniServ, appearing on behalf of the Association.

James Morrison, Attorney at Law, appearing on behalf of the School District.

ARBITRATION AWARD

The Association and District named above are parties to a 2003-2004 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Wayne Hoffmann. A hearing was held on October 7 and 8, 2004, in Wausaukee, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 15, 2004.

ISSUE

The parties ask:

> Did the School District of Wausaukee have just cause when it discharged Wayne Hoffmann? If not, what is the remedy?

BACKGROUND

The Grievant is Wayne Hoffmann, a teacher in the District for four years. He taught technology education. This case centers around computer classes and certain 8th grade girls, who will not be named in person in this Award.

The Principal, Pamela Beach, had a call from someone who said a mother of a student discussed a matter of concern with him. Beach called the mother who informed her of several incidents that she overheard her daughter and her friends talking about. The girls were talking among themselves while the mother was in the kitchen and overheard what they were saying. Beach first talked to the mother on April 3, 2004. The mother reported an incident involving her daughter and told Beach that there were other incidents that took place. Beach asked for permission to speak to the daughter about it and did so on April 6, 2004. Beach talked to several students on that date.

When Beach talked to the students, she asked if they were comfortable telling her about any incidents in which they may have been involved with the Grievant, but she did not specify that those incidents may have had sexual overtones. The students eventually wrote down statements for Beach. Beach talked to some of the classroom or lab partners of the students but not all of them. She also talked to some boys but did not get any information from them.

Student #1 was in the Grievant's technical education class when she was in 8th grade. She was getting a D in the class in the spring of 2004. Beach asked her if she knew anything that was going on with the Grievant, and she said yes. Beach asked her to write it down, and she wrote the following:

> When we first started tech ed Mr. Hoffmann was really freaky he was like trying to hit on all the girls in our class. First he started coming over to (name omitted) and my spot and like showing us stuff on the robots where the gears were and then he would keep asking us how we were doing and if we were having any trouble when we were doing just fine. Then when I went out to get a drink and I was talking to a friend he typed how was the drink and a whole bunch of other stuff. Also at the beginning of the year when the class first started he was asking how I could read such long books and all that. Well I told (name omitted) that I could feel my face getting hot and he said "Yeh because you're getting hotter." Then he asked me to take the gps thing home and he asked me to show him how to work it. I just thought it was very weird. He just freaked me out.

Student #1 testified that she was talking to her friend about reading the fifth Harry Potter book when the Grievant asked her how she could read such a long book. She replied that it was interesting and not boring, like some science books. The Grievant said that she needed to read all books to understand how to do things. She then started to get nervous and said to her friend that her face was getting hot, and that's when the Grievant said, "That's because you are getting hotter." Student #1 took the statement to mean that she was good looking or hot. Then the bell rang and she left the classroom. This happened sometime around the beginning of the third quarter class but Student #1 did not report it to anyone.

The Grievant testified that he could have made a comment related to the temperature in the room, because the temperature is not constant in the classroom some days. He thought that the girls may have been wearing something that day that would make them warm. He recalled the words of "hot" or "hotter" but did not recall in what context they were said. He stated he was not making any sexual suggestions, that he would not imply such things.

Student #2 was also in the 3rd quarter tech ed class as an 8th grader. She gave the following written statement to Beach:

> I was sitting next to the computer. (Partner's name omitted) was sitting at the computer doing the questions. I had the work book, and a "chat to module" box popped up and I was sitting there twirling my pen through my fingers and also chewing on it. The box popped up and it said, "Nice pen movement...(Student #2's name) LOL !!" And that's it. I sat there kind of confused and disgusted. Then (partner's name omitted) closed the box and I went back to work. When the box popped up I looked at Mr. Hoffmann and he was smiling at me.

Student #2 was getting a D grade in the class. She knew that the Grievant could send chat messages from his computer to the students' computers but they could not start messages to him, only reply to him. Other students could not chat among themselves via the computers either, so the message had to have come from the teacher. When Student #2 got the message about "nice pen movement," she did not believe that he meant that she should pay attention to her work or not goof around. She thought that his reference to chewing on her pen inferred that "there could be something with him," in her words. Student #2 believed that the Grievant sent a message to Student #1 and her partner once that created some laughter and a remark from Student #1 of "ewe." However, Student #2 never saw what was on the screen. Students #3 and #4 also reported the same incident about Student #1 receiving a message and saying "ewe" or "euw" or however one spells that word.

Student #2 did not mention the "nice pen movement" message to anyone until other students started talking about incidents. The incident happened shortly before Beach talked to her. Her lab partner in the class should have seen the message but was not called to testify. A student who did not testify wrote a note saying that she did not believe what Student #1 was saying, that it was a lie, but this note confirms the remark about "getting hotter" and goes on to state that the Grievant was not guilty of everything he was accused of. This student also confirmed in writing the "nice pen movement" comment which the Grievant e-mailed to Student #2.

The Grievant recalled that Student #2 was not focused and he spent a great deal of time working with her, trying to get her back to work. He did not recall sending a message to her stating "nice pen movement" or something like that. He testified that his own daughter had taken the class, that he had three children, and he was sensitive to those kinds of things. It was

possible that he sent a message saying something about a pen if someone were clicking a pen and it was distracting. But he denied ever sending a sexually suggestive message to any student.

Student #3 was also in the Grievant's tech ed class in the third quarter. She did not testify at the School Board hearing but she testified at the arbitration hearing and wrote the following statement on April 6, 2004:

> (Student #4) told me to smell her wrist, then I did. She told me that my nose was cold and Mr. Hoffmann looked over at us and asked how (Student #4) would know that my nose was cold. She said because she was smelling the perfume on my wrist. Then Mr. Hoffmann looked over at (Student's name omitted) and said oh things could get weird. I don't think this is something that a teacher should be saying. (Student #6) and people in her class had told me that Mr. Hoffmann would sometime get a little closer than he should, and even sometimes brush up against her chest.

Student #3 testified that she and Student #4 were standing in line while the Grievant was with other students when the above incident happened. Both of them took the statement from the Grievant about "things could get weird" as an implication that they were lesbians, and their statements are substantially the same. Student #3 told Student #6 and another friend about it. The girls testifying did not get together as a group to discuss their testimony. Student #4 had heard a story about the Grievant from Student #6 before she gave her statement to Beach.

The Grievant recalled this incident and thought that there were about six students near his desk at the time. There was an outburst in the line while he was working with another student, and he made a comment about it getting weird or something of that nature. He said he used the word "weird." He was uncertain whether he said "weird" in relationship to the girls' outburst or to the students he was working with at the time.

Student #5 was in the first quarter class that the Grievant taught, along with Student #6. Student #5 made the following statement to Beach:

> I caught Mr. Hoffmann looking at (Student #6) in ways that we got the impression that he was checking her out. I wasn't the only person to notice it so we told (Student #6) and she started to notice it as well. He was mostly looking at her chest when she would ask him to help her with a question in the book or something like that.

Student #5 was not very far away when she made the observation about the Grievant, and she was certain that his eyes were focused on Student #6's chest. Student #5 had a lab partner that wrote a similar statement but did not testify. This student's statement went a little further and stated that she saw the Grievant brush up against Student #6's chest with his arm. However, neither party called her to testify about this.

Student #6 was in the first quarter class that the Grievant taught. She testified that she was asking him for help and the Grievant brushed up against her chest and did not move away or make it seem as if it were an accident. She wrote the following statement for Beach:

> Sometimes Mr. Hoffmann comes closer than he should. It makes me feel somewhat uncomfortable and other people in the class feel uncomfortable. He also seemed to stare, from what other people said, especially at my chest, but I haven't had his class since first quarter. However, he never touched my chest, but occasionally he would brush against my body. The one time when (student's name omitted) and I asked a question, I was holding the book for our thing that we were working on. He was trying to answer us, but he was trying to find the page in the book, and his arm brushed up against my chest. I didn't really think that it was happening and tried to forget everything about it, (which I did do a pretty good job at) but (Student #5 and her partner) brought it up like every class I had in there. (Student's name omitted) also saw it but only said something to me about it once. After this I never held the book while asking a question. After I finished the class nobody really brought up the subject of him accidentally brushing against me again, so it was easier to just put it aside.

Student #6 testified that when she wrote that the Grievant did not touch her chest, she meant that he did not grab it. She made a distinction between touching (or grabbing) and brushing up against her. She also did not think that the Grievant brushed up against her accidentally, because he would have said he was sorry and moved away quickly. But he did not say he was sorry or move away right away. She did not talk with her friends about it at the time but talked with them during the third quarter when she heard some stories about the Grievant.

The Grievant stated that he did not intentionally or inappropriately touch a student's chest. He admitted that it was possible that he accidentally brushed up against a student. The Grievant testified that he never made a sexually suggestive statement to any student at any time. He said he did not target a group of friends or anybody for any type of sexual harassment. Some of the girls making allegations were getting good grades, some were not.

Student #7 was a second quarter student of the Grievant's, a female student who thought he was a cool teacher and did not believe the stories she heard about the Grievant. She never felt uncomfortable around him and said he did not treat the boys and girls differently. She never saw any inappropriate behavior from him and would take a class from him again.

Student #8 was in the third quarter class. He thought the class was fun, that the Grievant was a nice guy, and he never saw the Grievant doing anything inappropriate. He heard stores circulating around school about the Grievant but did not believe them. The instant messages he received from the Grievant were about getting to work, stop talking to his neighbor.

Student #9 was in a second quarter class. He thought the Grievant was a good teacher and never saw him doing anything inappropriate. He also heard stories about the Grievant, but did not believe them because he never saw him do anything like it to any of the kids in his class. Student #10 was also in the second quarter class and also thought the Grievant was a good teacher. She was never uncomfortable with him and did not see any inappropriate behavior of any kind of his part. Student #11 was in the Grievant's first quarter class. She thought he was a good teacher and she never saw any inappropriate behavior on his part.

Student #12 was in the Grievant's third quarter class. She thought he was a really good teacher. She never saw him do anything that was inappropriate. She received instant messages asking what she was working on or asking if she needed help. She did not believe the stories she heard about the Grievant that were circulating through the school. She thought that maybe some kids didn't like him and made up some stories. She was not in the same class as Student #6 but testified that Student #6 is a friend and talks to her and she knew what happened in class. Student #12 said that Student #6 would tell her (#12) that she (#6) would hold books up to her breasts so that the Grievant would look at her, and then when he would turn the page, she (#6) would try to get him to touch her breasts but he never did.

Beach did not talk to the Grievant about her investigation and conversations with the students or their statements. She felt that the pattern and nature of the statements given by the girls were enough for her to report it and that she was not required to get another side of the story. She did not talk to the school social worker or psychologist. She was convinced that the girls' statements were true. Beach testified that she did not interview a lot of other students because she was trying to keep the circle small. There were a couple of students whose parents would not allow any further discussion. It was an embarrassing situation, the girls were embarrassed, and she did not want to broaden the circle and bring more people into the investigation. She reviewed the District's anti-harassment policy but did not submit a written report to the District Administrator as the policy requires. She reported the results of her investigation to the District Administrator, the Board, and to Health and Human Services Department. She recommended to the Board that the Grievant be terminated.

On April 8, 2004, Attorney James Morrison, on behalf of District Administrator William LaChapelle, sent a letter to the Grievant. It states:

> This letter is to advise you that you are being placed on administrative leave with pay pending the completion of an investigation and expected recommendation of your discharge for misconduct.
>
> Reliable information has been presented to us that during this academic year you have engaged in numerous instances of grossly inappropriate comments and actions of a highly offensive sexual nature to students in at least one of your classes. This conduct, in and of itself, appears to be more than necessary to support your discharge for cause, however you are certainly well aware that last year you were the subject of a nonconclusive investigation with

respect to other acts of misconduct with respect to students and staff which were both sexual and otherwise harassing. That investigation did not include discipline because the Administration did not believe that it had adequate evidence at that time to support those very serious charges. The Administration will be re-opening that investigation because that conduct, if true, appears to be part of a pattern of conduct that was both inappropriate and harassing. Further, the complaints against you this year are especially troubling because they involved 8th grade girls and this conduct, taken with the past theretofore unproven conduct, would very strongly suggest a pattern of predatory conduct in which your victims are decreasing in age and increasing in vulnerability.

The investigation with respect to these matters is ongoing, however, we are providing to you at this time a basic outline of the charges against you so you can be fully informed.

We expect to conclude this investigation very promptly and as soon as it is concluded we will provide to you a detailed listing of the charges again you.

Specifically, students have complained of a number of instances when you made inappropriate comments both verbally and through the instant messaging system in your classroom to girls in that classroom, that you have responded to requests for assistance with respect to student matters by placing yourself in physical positions where you brushed up against the breasts of at least two girls, where you routinely bring yourself inappropriately very close to young ladies in order to ostensibly show them things in textbooks or otherwise. On at least one occasion you made a highly provocative sexual comment to a young girl which she took to be sexually embarrassing and which any reasonable teacher would understand to be sexually embarrassing, concluding with your statement to the young girl that she was "hot." In another case you observed a young girl who was doing school work and in the process was sucking on her pencil and sent an instant message to her as follows: "nice pen movement . . .(name of student)LOL." The investigative file in this matter is sufficiently advanced that I have reasonable cause to believe that your conduct may be abusive and that as a mandatory reporter under the law, I will be providing my investigative file, to date, to the Department of Human Services.

This is an ongoing investigation. You will be provided with the results of that investigation in sufficient time to properly prepare your defense. If you have any contact with any School Board members relative to this matter during the course of this investigation, the School Board members will, of necessity, be excluded from the Board when the Board considers the charges which we expect to make to it. If you have any contact with any of the potential or complaining witnesses in this case prior to the conclusion of our investigation, you will stand

> a very high likelihood of that conduct being interpreted by those witnesses as harassment or intimidation and such conduct would in and of itself be grounds for discipline. You have the right to fully confront your accusers and any evidence, favorable or unfavorable to you, which we uncover during the course of this investigation will be provided to you or your representative in adequate time for the hearing. Any action you might take to impede or obstruct our investigation will be very counterproductive to you.

The reference in the above letter to the Grievant brushing up against two girls was later determined to have been incorrect and that only one girl reported such an incident.

On April 23, 2004, Beach sent the Grievant a letter stating that she was recommending his discharge effective immediately based upon his physical and verbal comments and actions directed toward female students that she and they considered highly inappropriate, sexual, and exploitative in nature. Beach noted that she believed his behavior to constitute sexual harassment.

Pamela Kanikula is the school social worker and has worked in the District for 15 years. She is also the compliance officer for sexual harassment complaints. In May of 2004, she worked with the Association to investigate the charges against the Grievant. She interviewed a number of students who had been in the Grievant's class - nine girls and four boys. Kanikula thought that many students in that 8th grade class were quite sexually precocious and arranged for a one-day workshop on teen pregnancy prevention, which was held on May 12, 2004.

The Grievant did not have any prior discipline except for a reprimand for being late to in-service meetings and closing his eyes in them. He had good evaluations, being marked in all categories as either commendable or satisfactory. He was knowledgeable and enthusiastic about his classes and teaching. He has been a teacher for 11 years and has a masters degree.

The Grievant did not find out about the charges against him until he was given the letter telling him he was on a leave of absence. He was called into a meeting with LaChapelle and Beach along with a Union representative and given the letter. The letter was already prepared when he arrived and he was not asked for his side of the story. He was told to get his personal belongings and turn in his keys.

DISCUSSION

As a preliminary matter, the Association makes many objections regarding the investigation done by the District. The District did not speak with the lab partners of the girls making allegations against the Grievant. It did not speak with the Grievant at all. The Arbitrator agrees with the Association that giving the accused a chance to be heard is a

fundamental part of due process. The Arbitrator does not agree that all lab partners or other students were the most relevant witnesses. It depends on whether they were witnesses to anything. While the Association has submitted that the girls were a group of friends, it did not show that all the girls were in the same social circle or close friends. The most disturbing part of the process was that the District failed to talk to the Grievant, to seek out his side of the story before it decided to discharge him. Although the District argues that the Grievant had that chance to tell his side of the story at the School Board hearing, that's too late. A fair investigation includes hearing a Grievant's side of the story during the investigation of the matter and before any decision regarding discipline has been made. Thus, the District failed to make a fair investigation in the matter.

The Arbitrator has given much thought to the issue of whether the lack of a fair investigation demands that an employee be reinstated. In certain cases, the Arbitrator has in the past reinstated employees where the investigation has been seriously flawed, but in those cases, the poor investigation resulted in the employers' failure to prove their cases. That is the more common scenario – employers who fail to fully investigate charges cannot later prove them. This is different – a case where the employer proves its case but the investigation is so poor that the employee might be returned to work on due process grounds alone. Arbitrators split their opinions on this issue. But most agree that there are some employees who should not be put back to work, no matter how flawed the investigation. One would not put a thief back to work, nor someone who has been violent with other employees or supervisors. One would not put a teacher who sexually harassed students back to work. It would defy public policy and any notion of common sense. Proven egregious conduct gives an employer just cause for discharge, with or without a fair investigation. Having said that, however, the Arbitrator cautions the District to note that it must do better in future investigations because some arbitrator might find its lack of a fair investigation to be a fatal flaw and overturn a discharge on that basis, depending on all the circumstances. As Arbitrator Greco noted in COLUMBIA COUNTY, MA-10871 (OCT, 2000):

> There is only one possible valid reason for not sustaining his discharge and that centers on the County's failure to give Voightlander a chance to respond to the charges levied against him at the time of his discharge and the County's failure to inform Union Steward Mael about those charges so that the Union could properly defend Voightlander after he was discharged. These failures are simply inexcusable and in other circumstances might well warrant setting aside an employer's disciplinary action on this basis alone. For, it is well recognized that: (1), an employer must give an employee the chance to defend himself before discipline is imposed; and (2), the specific nature of any alleged wrongdoing must be spelled out in detail in order for an employee to properly mount his/her defense. See *How Arbitration Works*, Elkouri and Elkouri, pp. 919-920 (BNA, 5th Ed., 1997); ENTERPRISE WIRE, supra., p. 363-364.

> Contrary to the Union's claim, however, that does not automatically mean that Voightlander's termination must be overturned because of the County's failure to follow these two important procedural safeguards of the just cause standard. Rather, the determinative test is whether such failures unfairly prejudiced Voightlander's case. See *How Arbitration Works*, supra, pp. 919-920; AMAX COAL CO. 85 LA 225 (Kilroy, 1985). If they did, his discharge must be overturned. If they did not, his discharge must stand.

The Association in this case claims that the delay in notifying the Grievant of the charges against him prejudiced him in that he could not more clearly recall the incidents. The District notified him of the charges in a timely manner from the time the District learned of the incidents. The District had no knowledge of the incident occurring in the first quarter class until much later in the year. When these things came to light upon Beach's investigation, the District acted rather quickly. Beach first talked to students on April 6th – the District put the Grievant on administrative leave on April 8th, with a letter spelling out many of the details of its investigation and the specific nature of the allegations. The Association complains that the Grievant did not receive any specific information until several days after April 23rd. However, the letter given to him on April 8th is very specific – it refers to brushing up against the breasts of girls, calling a girl "hot" and sending the message about "nice pen movement." The Association's claim that the Grievant may have recalled more details of the events if he had been informed about them earlier is without merit. The Grievant had fairly quick notice of the allegations made against him, just about as quick as the District learned of those allegations. He was not prejudiced by any delay since the April 8th letter spelled out the major charges. Therefore, the discharge will not be overturned on due process grounds.

The misconduct still must be proven, of course. If the Grievant did what he is accused of doing, he does not deserve his job back. The District would then have just cause to terminate him. The burden of proof in an arbitration proceeding need not meet the criminal standard of beyond a reasonable doubt. The loss of one's job – while a severe penalty – is not the loss of one's liberty. It is never appropriate to impose a standard of proof of beyond a reasonable doubt in an arbitration case. However, due to the nature of the allegations in this case, it is appropriate that the standard be set higher than a mere preponderance of the evidence or the tipping of the scales. The standard in this type of case, where one's reputation and moral character are at issue, is that the employer must prove its case in a clear and convincing manner.

The Arbitrator has also given much thought to the clear and convincing standard and what the District needs to prove its case. A clear and convincing burden of proof need not be a cumulative matter, that the Grievant did so many things so many times. One instance, if believable, can suffice. Repeated conduct may be helpful in proving cases, and those cases may be easier for arbitrators to decide. The fact that there is not a great deal of evidence does not mean that it is not clear or convincing. The evidence in this case is narrow – there is no

documentary evidence and no corroborating evidence. However, as long as the Arbitrator is clearly convinced that the Grievant's misconduct did indeed occur, and that it was intentional, the District will have met its burden of proof.

The remarks made to students would not be sufficient in and of themselves to sustain a discharge. The remarks could be taken different ways. The most blatantly offensive remark was to Student #1 – "you're getting hotter." The Grievant admitted that he said something about "hot" or "hotter" but was referring to the room temperature. That lacks the ring of truthfulness. However, the more appropriate disciplinary measure for such conduct would have been at most a reprimand and perhaps some counseling. The incident with Student #2 – "nice pen movement" – is hard to determine. It appears more likely than not that the instant message was sent to the student, but it more difficult to tell what was meant by it. The remark about "things could get weird" is largely discounted. Those students made a giant leap to lesbianism from that remark. Accordingly, the Arbitrator concludes that none of the remarks would be just cause for discharge, although certainly a reprimand and counseling might be in order for at least one of the remarks. However, intentionally brushing up against a young girl's breasts is another matter. That conduct alone would be grounds for discharge, if the conduct is proven.

The Arbitrator is well aware that there is more than meets the eye here. Both parties opted to not bring certain witnesses forward, for reasons unknown to the Arbitrator. There may be some smoking guns there but both parties will have to live with the evidence they presented and the Arbitrator will not speculate beyond that. And the Arbitrator has discounted any evidence that came to light following the discharge, because the District must have just cause for discharge at the time of the decision, not later. The evidence was somewhat limited, and this has been a difficult case to decide. It really comes down to one person's word against another person's word. Student #6 versus the Grievant. A young teenager against a teacher. He said/she said. He said that it didn't happen, but if it did, it was an accident. She said it happened, and it was no accident.

She was the more credible witness. He was vague and not convincing in some of his testimony. The student was more compelling, particularly because she clearly understood and articulated the difference between an accidental touching or brushing against her and an intentional act. She noted that if it were accidental, a teacher would apologize or move away quickly, and she added that the Grievant did not move away right away. That was probably the most compelling testimony of the hearing. (The fact that the Grievant had to leave the room in tears during her testimony is of no importance to the Arbitrator, who has seen many people cry and has not found all of them to be truthful.)

Of course, it would be nice to have some corroborating evidence but there was none. That should not be a surprise, because a teacher making intentional sexual contact with a student would likely want to keep it away from view. The Arbitrator has to rely on credibility from testimony itself. The Arbitrator has largely discounted the witnesses' demeanor during

their testimony, because it is usually of little value. However, motive, bias or self interest is of some value. Why would the student lie? Student #6 was not getting bad grades, and there is no suggested motive for her to fabricate a story that would destroy another person's career. She was old enough to understand the consequences of her testimony. Her parents attended the hearing and listened to her testimony. Her mother is an employee in the District. The community is a small one and there is little place to hide in such communities. It was not in the student's self interest to bring forth such a charge. It was embarrassing to her, her classmates are well aware of the situation, and she has had to testify under oath on a couple of occasions. She has not sought out the attention, it has been unwanted.

Arbitrator Coyle in SAFEWAY STORES, 96 LA 304, at 310 (1990) gave the following summary of factors arbitrator may use to assess credibility:

> In evaluating the testimony of these two individuals the Arbitrator looks to established norms in evaluating the credibility or reliability of testimony given by any witness.
>
> These include, but are not limited to, (1) the relative strength of their recollections, (2) consistency between testimony given at one point in time with testimony given on the same subject at other times during the hearing, (3) consistency with prior statements made on the same subject in other forums, (4) evident bias or prejudice, (5) evident motivations to misrepresent known facts, (6) obvious emotional stress during examination, (7) other evident feelings in a witness that would ordinarily impair a careful and accurate response to questions asked, (8) refusals to respond without acceptable reasons or evident evasiveness in responses given, (9) the quality of testimony considered in its entirety, (10) corroborating testimony of other witnesses, (1) the reasonableness of testimony considered in its entirety and in relation to other credible testimony offered, and (12) any other factors which in the opinion of the Arbitrator, tend to strengthen or weaken the credibility or reliability of testimony.

This Arbitrator has looked at all of those factors and relied most heavily on the testimony given at the arbitration hearing before her. The Association notes that in Student #6's written statement, she refers to the Grievant accidentally brushing against her. She also wrote in that statement that he never touched her chest but occasionally he would brush against her body. In her testimony, she explained that she meant "grabbing" her breasts when she said "touching." Twice in her testimony, she noted that the Grievant brushed up against her chest and did not move away right away or try to make it seem like it was an accident. The student was quite convincing in her testimony that the Grievant intentionally brushed up against her breast. The Grievant had no reason to be that close. While he was trying to find a page in a book, he could have done that in several ways without getting that close to the student.

The Arbitrator has concluded that the District had just cause to discharge the Grievant based primarily on the finding that the Grievant intentionally made sexual contract with a student on at least one occasion. The conclusion is bolstered by statements of other students who noticed the Grievant staring at the breasts of the student he later brushed up against. If the incident had been either minor or accidental, the student would not have been complaining. She was not trying to make any trouble for the Grievant and did not come forward on her own but was asked by the Principal. She kept quiet about the incident for several months until she was asked about the Grievant's conduct. She had no ax to grind, and she came forward most reluctantly. If she had wanted the attention, she would have not waited so long to tell her story. The Arbitrator has weighed the evidence and testimony extensively and finds ample reasons to credit Student #6 over the Grievant, albeit with much sadness for all concerned.

The Association argues that the penalty is too severe and cites several cases. In some of those cases, warnings were given rather than the ultimate penalty of discharge. And the Arbitrator would agree with the Association that if the only conduct proven were statements made by the Grievant, the penalty of discharge would be too severe and unreasonable. However, there is a big difference between a teacher making sexually loaded comments to statements and intentionally touching a young girl's breasts. The latter conduct crosses the line by a big leap and puts the Grievant's job squarely on the line. It clearly gives the District just cause for discharge. It would be inappropriate for the District to warn him or suspend him and give him another chance. There are some mistakes for which no second chance would be warranted. This is one of them. A teacher cannot intentionally make sexual contact with a student and expect to keep his or her job.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 15th day of February, 2005.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

KJM/anl
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