

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BOSCOBEL SCHOOL DISTRICT

and

BOSCOBEL COUNCIL OF AUXILIARY PERSONNEL ASSOCIATION

Case 47

No. 67092

MA - 13752

Appearances:

Ms. Eileen A. Brownlee, Esq. Kramer & Brownlee, LLC, Attorneys at Law, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809-0087 on behalf of the District.

Priscilla R MacDougall, Esq., Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O.Box 8003, Madison, Wisconsin 53708-8003 on behalf of the grievant.

ARBITRATION AWARD

The parties jointly agreed to select Wisconsin Employment Relations Commission Arbitrator Sharon A. Gallagher to hear and resolve a dispute regarding the discharge of Aide, Connie Bender. The parties mutually agreed to hold the hearing herein on November 15 and 16, 2007 at Boscobel, Wisconsin. A briefing schedule and a possible third day of hearing in February 2008, were reserved if the Arbitrator ruled that the polygraph evidence proffered by the Association was admissible. However, the Association withdrew its request for admission of the polygraph evidence on February 1, 2008, just after the submission of briefs on the issue (dated January 29, 2008). A stenographic transcript of all hearing proceedings was taken and received by November 28, 2007, covering 322 pages. The parties submitted initial and reply briefs which, due to various extensions therefor, were not received until April 16, 2008, whereupon the record herein was closed.

STIPLUTED ISSUES

The parties stipulated and agreed that the Arbitrator should decide the following issues:

1. Was there "good and sufficient reason" pursuant to Article IV B of the 2005-07 labor agreement to terminate the Grievant?
2. If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V – GRIEVANCE PROCEDURE

DEFINITION: A “grievance” is a claim by an employee based upon an alleged violation of the interpretation, meaning, or application of the provisions of this agreement. The grievance should entail:

1. clear concise facts of the grievance
2. the part of the agreement allegedly violated, and
3. the action or inaction which gave rise to the grievance, and
4. the remedy sought.

The grievance may be initiated by an individual against the Administration, or the Union against the Board. Whenever a grievance shall arise, the following procedure shall be followed:

Step One: Within fifteen (15) days of the occurrence, the grievant shall informally discuss the grievance directly with his/her immediate supervisor. The immediate supervisor shall respond to the grievant within five (5) days.

Step Two: If the grievance is not satisfactorily resolved in Step One, the grievant(s) within five (5) days shall submit in writing the grievance directly to the immediate supervisor and the BCAP. The immediate supervisor shall reply in writing within five (5) days to the grievant.

Step Three: If the grievance is not satisfactorily resolved in Step Two, the grievant(s) shall within five (5) days, forward copies of the grievance to the District Administrator and the BCAP representative. The District Administrator shall meet with the grievant(s) and the BCAP representative within five (5) days to attempt to resolve the grievance. The District Administrator shall give his/her answer to the grievant and the BCAP representative within five (5) days of this meeting.

Step Four: If the District Administrator’s answer is not satisfactory, the grievant(s) may, within five (5) days submit the matter, in writing, to the Clerk of the Boscobel School Board. The Board shall meet with the grievant(s) and the BCAP representative at its next regular scheduled Board meeting or a special meeting held within fifteen (15) days for the purpose of resolving the grievance. The Board’s written response shall be received by the grievant(s) within five (5) days following said meeting.

Step Five: If the grievance is not resolved satisfactorily, the Council shall within five (5) days, request, in writing, a solution through arbitration. The request shall be made to the Wisconsin Employment Relations Commission which shall appoint a member of its staff to serve as an arbitrator.

. . .

The arbitrator shall not have authority to change, alter or modify any of the terms or provisions of the agreement. Findings of the arbitrator shall be final and binding upon both parties. The number of days indicated at each level should be considered a maximum and every effort should be made to expedite the process.

Unless specified time limits are extended, any grievance not processed within such limits shall be considered resolved in accordance with the previous disposition. Time lines specified herein may be extended by mutual agreement between the parties.

. . .

ARTICLE VI – DISCIPLINE AND DISCHARGE

- A. All employees shall serve a probationary period of ninety (90) days (which may be extended to one-hundred eighty (180) days per Article VI, sections E and F), following date of initial employment. During this period an employee may be disciplined or discharged for reasons not arbitrary, capricious or discriminatory.
- B. Following the probationary period no employee shall be disciplined or discharged without good and sufficient reason. The satisfaction of the following seven (7) tests shall determine the existence of good and sufficient reason.
 - 1. Did the Board or designee forewarn the employee of the possible consequence of his/her conduct?
 - 2. Was the rule or order involved reasonably related to proper school operations and/or performance the Board might properly expect from an employee?
 - 3. Before discharging the employee, did the Board or its designee make an effort to discover whether the employee did, in fact, violate or disobey the rule or order?
 - 4. Was the Board's or designee's investigation conducted fairly and objectively?

5. In the investigation, did the Board or its designee obtain substantial evidence or proof of the employee's guilty?
6. Has the Board or its designee applied its rules, orders, and penalties even-handedly to all employees in like circumstances?
7. Was the degree of discipline related to the seriousness of the offense and the employee's record?

Any such discipline or discharge including adverse evaluation of employee performance shall be subject to the grievance procedure. The specific grounds forming the basis for disciplinary action or discharge will be made available to the employee and BCAP in writing

...

RELEVANT DISTRICT POLICIES

A. Pertaining to Employees

Policy Title: Ethics and Conduct

Code No. 407.03

Ethics

- The Boscobel Area School District expects every staff member to abide by the codes of ethics prescribed by his/her professional organizations and within the generally accepted ethics prescribed by the Wisconsin Department of Public Instruction.

Conduct

- The Boscobel Area School District shall discourage undesirable staff member conduct (including vulgar, obscene, or profane modes of expression) which materially and substantially interferes with its educational purposes, processes, and operations. Employees found guilty of such conduct shall have disciplinary action taken deemed appropriate to the misconduct.

Policy Title: Maintenance of Orderly Conduct

Code No. 502.06

All students are expected to conduct themselves at all times in a manner not to impose, physically or emotionally, on others or damage property, in keeping with their level of maturity. Respect for authority vested in school employees, regard for public property and consideration for the rights and welfare of other students, should govern student behavior.

All employees of the District share the responsibility for seeing that student behavior meets standards of conduct that are conducive to learning. The aim of all school disciplinary rules and supervision is: (1) to encourage the student to take responsibility for his or her own actions; and (2) gradually increase the student's self-discipline.

At no time will corporal punishment be used as a form of discipline on students. Reasonable and necessary force may, however, be used under the following conditions:

- a) to quell a disturbance or prevent an act that threatens physical injury to any person;
- b) to obtain possession of a weapon or other dangerous object within a student's control;
- c) for the purpose of self-defense or the defense of others;
- d) for the protection of property in accordance with state statutes;
- e) to remove a disruptive student from school premises, a motor vehicle or school-sponsored activity;
- f) to prevent a student from inflicting harm on him/herself; or
- g) to protect the safety of others.

Incidental, minor or reasonable physical contact designed to maintain order and control may also be used.

Any violation of this policy shall be reported to the Building Administrator and District Administrator within twenty-four (24) hours.

Legal reference: Wisconsin Statutes, s.s.118.31, s.s.939.48

Date of Revision: February 17, 1998

Date of Adoption: August 18, 1998

Policy Title: Student Behavior & Discipline

Code No. 502.07

General

It shall be the policy of the Boscobel Area School District to expect standards of good citizenship from all members of the student body.

Good discipline in the school is extremely important to the school program.

Without good discipline the school cannot discharge its primary responsibility in the development of citizenship. Without good citizenship students cannot realize their greatest opportunities for growth.

Administrative personnel are responsible for the development and administration of reasonable rules and regulations necessary for the operation and decorum of the schools. Rules may vary from school to school dependent upon the age and needs of the pupils being served.

Rules and regulations contained in student handbooks or administrative rules shall be reviewed by the School Board annually, and when approved by the Board of Education, shall be treated as board policy.

All rules and regulations shall be disseminated and explained to those affected and where practical shall indicate the type of punishment or penalty for noncompliance with the rule(s).

The use of corporal punishment or physical force on students by staff as a disciplinary measure is prohibited except in self-defense or protecting others from harm. Physical force may be used only to restrain a student or in self-defense. Any violation of this policy shall be reported to the Building Administrator and District Administrator within twenty-four (24) hours.

Date of Adoption: August 18, 1988

B. Pertaining to Students

8. **Cheating** – cheating is
 - a. copying someone else’s work (assignment, quiz, or test) and submitting it as your work;
 - b. allowing another student to copy your work (assignment, quiz, or test) sic;
 - c. Talking during a quiz or test
 - d. Utilizing aids such as notes or crib sheets to assist in completion of a quiz or test when such aids are not authorized.

Acts of cheating will be dealt with as follows:

1. Principal notified.
2. Zero on the assignment, quiz or test.
3. Teacher will call parents.
4. Referred to Activities Director for good conduct code violation.

Additional Consequences:

- 1st offense – Saturday School
- 2nd offense – 1 day out of school suspension
- 3rd offense – 3 day out of school suspension

BACKGROUND

The District is a K-12 district which provides educational services to students living in and around Boscobel, a small town located in South-central Wisconsin. The District has two buildings – an Elementary School and a Middle School/High School. Connie Bender was first hired by the District as a part-time special education aide in 2000. In 2001, the District hired Bender as a full-time special education aide. In 2004-05 and 2005-06 Bender was assigned and she began working as a special education aide at the High School in inclusion in Mrs. Julie Schellhorn's Science (grade 9) class and Mr. Davis' Math class.¹ While working with Mrs. Schellhorn, Bender requested that Schellhorn give Bender access to the Teacher Guides and Answers so that she (Bender) could fill in the correct answers on Science 9 pre-tests, tests and worksheets for use with special education students in Schellhorn's classroom. Schellhorn agreed to this approach, telling Bender where she kept her Teacher Guides and Answers in her classroom.²

Bender was evaluated by District Special Education Directors in 2002, 2003 and 2005 (Assoc. Exh. 11).³ Bender refused to sign the 2002 evaluation because it failed to fairly describe her work and abilities and she submitted a letter in response for her file. On her 2002 evaluation, Bender received an overall score of 36, out of 50, a "Satisfactory" score. On her 2003 evaluation, Bender received an overall score of 43 out of 50, a "Good" score. On her 2005 evaluation, Bender received a score of 41 out of 50, a "Good" score. None of these evaluations addressed the issues of student cheating or the District's ethical standards in any way.

It is undisputed that teacher aides do not receive in-service training at the District either live or on-line regarding ethics/cheating issues or how to properly help students. No evidence was presented to show that teacher aides receive any in-service training on District policies and rules. No evidence was submitted to show there is a recognized code of ethics for Wisconsin aides. Although it is undisputed that District teachers are the immediate supervisors of

¹ In 2005-06 and 2006-07 Bender did not work in Schellhorn's classroom. But in 2006-07, Bender was employed at the High School assisting in Mr. Bosworth's Science 9 class and Mr. Rusbeck's Math class.

² Bender came to Schellhorn in 2006-07 and asked her for Schellhorn's teacher guides and answer keys to use in Mr. Bosworth's Science 9 class. Schellhorn agreed and gave them to Bender. Bender returned them to Schellhorn after she copied them.

³ The Director was Ms. Myrtle Preston in 2002, Ms. Trish Skofionick was Director in 2003 and Mr. Rick Walters was Director in 2005.

classroom teacher aides, no evidence was submitted to show that District teachers have ever been trained to supervise or that they have otherwise been in-serviced in human resources or trained regarding District policies and rules.

At all times relevant to this case, Ms. Donna Graham was a District Special Education Teacher who was assigned a classroom, Room 34 at the Middle School/High School which has a small separate office in back of the classroom. Bender and Special Education Aide Ferrell also had their desks and computers in the small office within Graham's room. This room had previously belonged to (Special Education Teacher) Mr. Floyd but he had requested a change because he did not like students⁴ walking through his classroom to the small office within it. The Room, 34, then became Graham's room.

In 2006-07 Graham complained to Bender and later to Principal Mercer that Bender's daughter and her girlfriends regularly entered and walked through Graham's classroom (often during class time) without knocking or asking permission, to get to her mother's small office. Bender's daughter would leave her backpack in the small office and she would return to pick up the backpack, to spend time in the office before school, during home room, at lunchtime or to visit her mother. Graham's complaints resulted in Bender's daughter apologizing to Graham after Graham complained to Bender about her daughter's conduct but Bender's daughter continued to enter and walk through Graham's classroom without knocking or asking permission (Vol. 2, Tr. 118-121).

Bender's daughter also walked through Room 21 Special Education Teacher Cindy French's room, to access Teacher Graham's room by an inner access door between Rooms 21 and 34 because Teacher Graham would often lock the hallway door to her room. Bender's daughter knocked on French's hallway door if it was locked but did not knock on French's door if the door was open and Bender's daughter did not knock on the inner door between French's room and Graham's room before entering Room 34 from Room 21. Graham found Bender's daughter's conduct disruptive and troubling but it continued despite Graham's complaints to Bender and Mercer.

In the small office contained in Room 34, Bender kept the Blue Binder in which she stored her own handwritten worksheets and pre-tests which she had completed using Schellhorn's TAG's for Science 9. It is undisputed that Bender's daughter knew that Bender stored these documents in the Blue Binder and that she knew where that Binder was normally kept (in an unlocked cupboard in her mother's small office).

When a District teacher/employee fills out a disciplinary referral on a student, it is generally processed by the Teacher. But sometimes the referral is processed by the Principal in the building. In 2006-07, Mr. William Mercer was the Principal of the combined Middle

⁴ Bender and her husband have two sons, 18 and 20 years old (as of the date of this hearing) who also went to school at the District while their mother was a special education aide at the High School from 2004 until her termination.

School/High School and Mr. Gregory Bell was Activities and Attendance Director. It is undisputed that when investigating reported student misconduct triggered by a disciplinary referral, the District does not ask students if they wish a parent to be present and students are not asked to write their own statements concerning their alleged misconduct and that if a female student is involved, the District does not have a female District employee sit in on the interview with the student; and the District does not allow students' parents to attend the interviews they hold with students concerning disciplinary referrals.

In the past, there were several District employees who engaged in serious misconduct, listed below next to their initials who were given the discipline listed next to their initials. Notably, none of these individuals was accused of deliberately assisting a student in the act of cheating:

1) A.R. (Special Ed. Para) a) Incited handicapped student with a shunt to bang her head, 2-day suspension; b) told the same child in a) that she needed to be slapped, reached out to slap her (no contact), involuntary transfer in 11/06 to another building into a non-classroom position (Assoc. Exh. 2).

2) D.H. (Probationary Teacher): a) Student verbally and physically threatened teacher with an object and teacher verbally threatened student in response, 5-day suspension (later reduced to a one-day suspension; b) teacher had classroom discipline problems and he and District entered into a settlement agreement to avoid non-renewal of D.H. (Assoc. Exh. 3).

3) D.K. (Teacher) profanity to a student/physical handling of students, one-day suspension (later reimbursed and deducted from personal leave) (Assoc. Exh. 4).

FACTS

Sometime prior to May, 2007, Science 9 Teacher Schellhorn found that Bender's daughter and another student, J.E., had written essentially identical answers on a quiz (Vol. 1, Tr. 37 and Vol. 2, Tr. 93). Schellhorn warned both girls but took no other action.

Later on the "Chemical Reactions" chapter test (p. 41), used by Schellhorn for extra credit in her 2006-07 Science 9 class, Schellhorn discovered that Bender's daughter and J.E. had completed two questions (questions 1, Section II, "Understanding Concepts" and question 1, Section IV, "Writing Skills") using language identical in all respects to the Science 9 "Teacher's Guide and Answers"⁵ – and including commas and a slash mark, just as they

⁵ Hereafter "Teacher Guide and Answers" will be known as the Answer key or TGA.

appeared in the TGA on these questions. On question 2, "Writing Skills," Bender's daughter's answer was almost identical to the TGA (District Exh. 1 and 2). Schellhorn checked her teaching materials and the textbook and noticed that some of the language Bender's daughter used in her "Chemical Reactions" pre-test ("enzymes") was not used anywhere in her materials, in her lectures or in the text and that the language and punctuation Bender's daughter used only appeared in the TGA. On the basis of her investigation, Schellhorn concluded that Bender's daughter and J.E. had cheated. Schellhorn then wrote a disciplinary referral on Bender's daughter and Schellhorn went to the District guidance counselor with the issue.⁶ The counselor referred Schellhorn to Attendance Director Greg Bell.

After Bell received this referral, he spoke to Principal Mercer about it. Principal Mercer then asked Schellhorn to investigate other extra credit sheets and pre-tests to determine whether Bender's daughter had cheated on other such documents. Schellhorn checked other chapter tests she had used for extra credit or pre-tests and found that on the "Radioactivity and Nuclear Reactions" Chapter Test which Schellhorn had used for extra credit, that Bender's daughter had answered three questions (questions 5 and 10 in Section II "Understanding Concepts" and question 4 in Section IV "Writing Skills") using language and punctuation (Dist. Exh. 3 and 4) almost identical to the TGA.

In addition, Schellhorn also noticed that Bender's daughter had written the exact verbiage found in the TGA on question 3, Section II of the "Radioactivity and Nuclear Reactions" chapter test. This was noteworthy because the answer in the TGA was wrong and it was also wrong on Bender's daughter's paper (Dist. Exh. 3, p.2). Schellhorn also noticed that the diagram Bender's daughter drew to accompany question 3, Section II of the "Chemical Reactions" extra credit was identical to that shown in the TGA and that Bender's daughter's written answer to question 3 was essentially identical to the TGA, including sentence structure and punctuation (Dist. Exhs. 5 and 6). Also, under question 2 of Section IV of this worksheet, Bender's daughter's answer was again almost identical to the verbiage in the TGA. Also, Schellhorn noticed that the diagram Bender's daughter drew to accompany question 3 of Section III on the "Chemical Bonds" a chapter test used for extra credit was identical to the one found in the TGA and that Bender's daughter's answers to questions 1 and 2, Section IV under "Writing Skills" contained language almost identical to the TGA which language did not appear in the textbook (Dist. Exhs. 5 and 6).

On May 2, 2007 in the morning, Principal Mercer and Activities/Attendance Director Bell called Bender's daughter into the office to question her regarding the disciplinary referral Schellhorn had submitted earlier to Bell⁷ regarding the following allegation:

⁶ Schellhorn did not write a disciplinary referral nor did she investigate the worksheets of the other student, J.E., who had answers identical to those Bender's daughter submitted on the "Chemical Reactions" extra credit assignment. Indeed, Schellhorn admitted herein that one could not tell from their pre-tests whether Bender's daughter had cheated from J.E. or vice versa.

⁷ Schellhorn did not take any action or otherwise process the referral in any way other than passing it on to Bell.

Cheating – (Bender’s daughter) admitted to copying answers in order to complete her assignment. She claims her mom allows her to check her answers, using a Binder developed to help special education students also taking the class, but (Bender’s daughter) ended up copying the answers she had not yet completed.

At the interview, Bender’s daughter was upset and she cried but she signed the referral form at the end of the interview and indicated that she “had been informed of the charges” against her and that she “had been given the opportunity to tell her version” (Joint Exh. 10).

During this interview Bender’s daughter answered all questions put to her, she admitted that she had cheated - - that she had copied the “lemon juice” answer (Dist. Exhs. 1 & 2, Section IV, 1); she admitted that she had access to the answers through her mother who kept the answers in a Binder her mother used to help special education students in her mother’s office; and that Bender knew her daughter had used the Binder containing the answers. Bell and Mercer then gave Bender’s daughter a zero on the “Chemical Reactions” extra credit assignment and she was given a Saturday (May 19, 2007) detention and a warning (Joint Exh. 10).

At the end of the interview with Bender’s daughter, Bell called Michael Bender at work and explained that something had happened, that his daughter had been caught cheating and would be punished. Bell then had Michael Bender talk to his daughter who was hysterical, frantic and very upset. Michael Bender told his daughter that she would have to accept her punishment but that they could all go on from there. The next day the Benders came to school to talk to Bell about their daughter’s cheating but Bell stated he did not have the authority to discuss the matter with them as he (Bell) did not have his administrator’s license.

On May 3, 2008, the District met with Bender and her BCAP representative to question Bender regarding her daughter’s having admitted cheating in Science 9. Greg Bell took notes and made a “transcript” of that meeting which read in relevant part as follows:

...

Bill: The purpose of the meeting was to discuss answer keys and the way they are used by Connie Bender in her position as a paraprofessional at Boscobel High School. Bender’s daughter reported an incident, which brought the matter to our attention.

...

Bill: “Tell us about it”

Connie: _____ had all but three of the answers done. I read her one answer and told her to put it in her own words. _____ knows where the Binder is and has used it in the past to compare her answers. She has used it a couple times.

Bill: Is ____ in Special Education?

Connie: No.

Pause

Connie: The Binder is for reference only

Bill: Can special education students copy answers from it?

Connie: No, it is just a resource. We have other keys also but they are ripped up and thrown away after being used.

Bill: Has ____ used the Binder without your approval?

Connie: Yes, she took it without me knowing it.

Bill: What did you do about it? Did you report it to the science department?

Connie: I asked to her about it.

Bill: So, this has happened before?

Connie: Yes

Bill: Do you understand confidentiality?

Connie: Yes

Bill: Your daughter has been able
(Connie started talking before Bill could finish)

Connie: No test answers, this is the first year I have had test answers.

Bill: But she has had access to the answers

Connie: I'm also at the elementary and not here to help as much now – others do

Bill: Do you think _____'s grade is a reflection of cheating?

Connie: No, she is good at Science.

Bill: Has she cheated in the past?

Connie: Julie's class is tough. She just wanted to check her answers to get them right.

Greg: How many times has she been able to do this?

Connie: Don't know. I caught her once or twice at home. She references it here at school.

Bill: She is allowed to check her answers?

Connie: Not all the time

Bill: Do you think that is okay?

Connie: Yes, special education students do it.

Bill: Do you tell special education students the answers?

Connie: No

Bill: Then

Connie: Don't change the answers just allow them to check. I don't encourage them to cheat.

Bill: _____ has taken the Binder home before?

Connie: Right

Bill: Teachers have a concern with answers out there and with _____'s access we have a serious concern. This should have been reported the first time she took the Binder home.

Connie: I do not have test answers. I chewed her out for having the Binder at home.

Bill: I am concerned with her being allowed access to answers and any other thing in class. Can other get access to the materials? We seem to have a breach of trust and security.

Pause

- Bill: From now on I want that material locked up.
- Connie: I now have a lock.
- Bill: I will be talking with Rick as to how we will use these materials.
- Greg: Other than special education students, was she the only student given access to the Binder?
- Connie: Yes.
- Bill; Why?
- Connie: She knows I'm in inclusion.
- Bill: Be careful with answer keys and storage of them. Binder should no longer be in the hands of students. Binder should only be used by teachers and paraprofessionals.

After May 15th, Bender wrote a response to the above transcript as follows which she later presented to the Board at a June 19th meeting on her grievance:

This is my response to the transcript that I and others have received from the questioning, with Mr. Bill Mercer, Mrs. Ruth Brown and Mr. Greg Bell present.

I was asked to tell about this incident. I stated that (my daughter) had all but three questions done. She had come to me and asked if I would help her. I had looked to see what chapter she was working on and got out the Binder for my reference. Two were short answers and another one. I stated that in the past we discussed using lemon juice while cutting fresh fruit so it wouldn't turn brown, read the answer and told her to use her words to finish the statement.

I also stated that I have checked her work just as I have for any other student that I was helping. If there were any wrong I would say you may want to go back and check whatever number. These sheets that she was working on were used by this specific teacher as extra credit right before the big test. I stated that I have never had the answers to any test that Julie uses. She makes up most of her own tests. Plus, I never felt comfortable with any of the answers. The answer key I am being accused of giving answers to are daily worksheets and extra credit.

Another statement, "I caught her once or twice at home," was stated wrong. I stated that I had found the Binder at home once or twice. I never said that I caught her with it. I asked (my daughter) what she was doing with it? She said she brought it home for me to help her with her home work. She had never looked in the answer keys. I had talked to her about bringing it home and never told anyone about it because I thought I had dealt with it on my own. I wasn't sure how to deal with it.

In response to "do you think it is ok for (my daughter) to check her answers" ... I did not allow her to check her answers. I checked her answers and told her that she may need to go back and check the ones that were incorrect again. I would give her clues on the ones that she struggled with the same as the teachers at the school do. Not only in the sped (sic) ed department is the (sic) this the standard practice. I know it goes on in all the classrooms as well. I would help any of the kids if they asked for help. Not by giving them the answers but by giving them clues or assistance to help them work through the problems.

Mr. Bosworth uses these same "tests" in his class as open book tests. In Mrs. Schellhorn's class, they are used as test preparation as an extra credit assignment. They have never been used as tests in her class. I also stated that day that if there was a question about my daughter's test grades to check her tests, which I do not have any answer sheets for. They will stand alone as far as her abilities. I feel the grade that she has gotten in Mrs. Schellhorn's class is representative of what she has done on her own. She is good (sic) student and made a mistake. She needs to be treated as such and allowed to continue on from this point. As for me, I believe the same thing. I am not sure why what I have done is being considered so bad when it seems to be the accepted practice within the school. I have witnessed teacher's doing the same thing and also heard of many other instances which seem to be much more worthy of discipline and yet those have went unnoticed while mine has been considered a major crime and being considered for termination.

On May 8, 2007, the District held a meeting with Bender at which it gave Bender a copy of the following "Investigative Report and Subsequent Recommendation for Termination:"

...

On May 3, 2007 at 9:00 a.m., you and I met in the presence of your BCAP representative, Ruth Brown, and Attendance/Activity Director, Greg Bell. Mr. Bell recorded our interview and that transcription is included as evidence with this document.

You are a special education paraprofessional working during the mornings in the 7-12 facility. The purpose of this meeting was to discuss answer keys and the way you use them in your position as a paraprofessional at Boscobel High School.

Your daughter, CB, reported an incident that brought this matter to our attention. Specifically, CB reported getting answers for Science 9 homework from a Binder that contained copies of the answer keys. The Binder was kept in the special education room where you work. You also used keys as you worked with special education students in Science 9. On May 2nd, CB admitted to copying answers from the answer key in order to complete assignments. She stated that her mom **allows** her to use the key to check her answers. CB admitted that she copied answers that she had not been able to complete.

Evidence gathered reveals that on three occasions (see chapter tests dated 4/2/2007, 2/6/2007, and an undated test: Chemical Reactions) CB received perfect scores. Her written paragraphs matched perfectly the language in the test key.

You admitted “CB had all but three answers done. I read her one answer and told her to put it in her own words. CB knows where the Binder is and has used it in the past to compare her answers. She has used it a couple times.”

You acknowledged that it has happened before and admitted, “I caught her once or twice at home. She references it here at school.”

When I asked you if you had reported these incidents to the Science Department you indicated that you talked to CB about it. Science teachers were not aware that CB was accessing the keys. Classroom teachers have had a fear that students could get to these documents and copy answers. Teachers have been reluctant to make the keys available to special education teachers.

I asked you if CB is in special education and you responded “no.” I asked if special education students can copy from the Binder and you stated, “No, it is just a resource.”

I asked you if you think it is okay for CB to check her answers and you responded, “Yes, special education students do it.”

I asked you if you tell special education students the answers and you said, “No.”

Boscobel School Policy

Policy 407.03 requires that

“...every staff member abide by the code of ethics prescribed by his/her professional organizations and within the generally accepted ethics prescribed by the Wisconsin Department of Public Instruction...”

The policy further states that the

“...District shall discourage undesirable staff member conduct ...which materially and substantially interferes with its educational purposes, processes, and operations...”

Policy 502.06 requires:

“...All employees of the District share the responsibility for seeing that student behavior meets standards of conduct conducive to learning. The aim of all school disciplinary rules and supervision is: (1) to encourage the student to take responsibility for actions, and (2) gradually increase student’s self-discipline...”

Policy 502.07 reports that

“...Rules and regulations contained in the student handbooks...shall be treated as board policy...”

Language found on page 19 of the Student Handbook 2006-07, reads as follows:

- “8. Cheating – cheating is
- a. Copying someone’s else’s work (assignment, quiz, or test) and submitting it as your work;...
 - d. utilizing aids such as notes or crib sheets to assist in completion of a quiz or test when such aids are not authorized...”

In view of the evidence gathered and in light of the aforementioned policies, I find that you deliberately aided your daughter in the act of cheating by allowing her access to test keys for the purpose of completing assignments with correct answers.

You have violated Policy 407.03 by engaging in “undesirable staff member conduct...which materially and substantially interferes with its educational purposes, processes, and operations..” Your actions have provided evidence to classroom teachers that these keys should not be made available to resource rooms. This fans distrust among staff members. It also has the potential to fan distrust in the community. The District has an obligation to discourage this conduct. Failure to properly discipline this behavior sends a message to the community that staff members engage in inappropriate and dishonest behaviors that help their own children get better grades.

You have also violated Policy 502.06 in that you did not encourage the student to take responsibility for actions in a manner that would gradually increase student's self-discipline. In fact you acted in an irresponsible manner and, at a minimum, allowed behavior that violates expectations for self-discipline.

Therefore, I am recommending that you be placed on paid administrative leave immediately. I am further recommending to the District Administrator and Board of Education at the May 15, 2007 Board meeting, your immediate termination from your position as a paraprofessional and as an employee of the Boscobel Area Schools.

A copy of this report will be placed in your personnel file. You have the right to respond to this report in writing for the purpose of identifying any perceived inaccuracy in this report and/or to add any other information you deem relevant. The Board will also be provided with any written response.

...

The District then placed Bender on paid administrative leave and on May 9th the District sent Bender the following letter confirming same:

...

As a result of the investigation you have been placed on administrative leave (with wage and benefits paid). The administrative leave begins effective today, May 9 and continues through Tuesday, May 15, 2007. On May 15, 2007 the Boscobel Area School Board will give consideration to an administrative recommendation of termination of your employment. You may attend the scheduled closed session and bring a BCAP representative.

The Board will review the investigative report submitted by administration and any notes that you may also provide. With this note I advise that you review the report and respond in writing, adding clarification where necessary. It is important that you take this opportunity to clarify the submitted records. Please provide copies of your response to Mr. Mercer, District Office, and BCAP representation in advance of the Board meeting.

...

By letter dated May 14, 2007, the District sent Bender her last paycheck "in anticipation that employment may be terminated Tuesday, evening, May 15," with the added instruction that if she was not discharged by the Board at its May 15th meeting, requisite changes would be made to insure her timely future payroll payments (Jt. Exh. 4). Bender did not attend the May 15th Board meeting because Bender and one of her chosen representatives, Attorney P.R. MacDougall could not attend. In mid-June Attorney MacDougall wrote to the District's Counsel, Eileen Brownlee to inquire regarding what had occurred at the May 15th Board meeting. Brownlee responded on June 15th as follows:

...

This letter acknowledges receipt of your correspondence dated June 14, 2007. For clarification purposes, there was no hearing held by the Board prior to Ms. Bender's termination. The Board did hear the investigative report by Mr. Mercer (the junior high school/high school principal) together with Mr. Mercer's recommendation. Doctor Smith, the district administrator, stated his support of the recommendation.

Mr. Mercer reviewed the investigative report that was sent to Ms. Bender on May 9, 2007. You should have a copy of that from her. I am enclosing a transcript of the interview that was conducted with Ms. Bender and some attachments as these materials were provided to the School Board. My understanding is that the materials have also been provided to Ms. Bender.

The Board considered no matter other than the one described in the investigative report and follow-up correspondence.

...

At the May 15th meeting District Administrator Smith stated that based on Mercer and Bell's investigative report and Smith's recommendation the Board discharge Bender. Smith stated his reasons for recommending termination were as follows:

(By Ms. Brownlee:)

Q Did you recommend to the Board that Ms. Bender's employment by terminated?

A I did.

Q And why did you make that recommendation?

A First of all, the evidence to me, (her daughter's) admission—(Benders) own admission that she read answers from an answer key, albeit an answer that she copies from an answer key, but read the answers of an answer key and shared those with her daughter. I saw it as an ethical violation in my mind.

I'm old school. It was a major issue for me. I'm a third-generation teacher. It didn't -- still doesn't sit well with me. I also saw it as my responsibility to my staff both my paraprofessionals and my teachers, to show some integrity with -- regarding this situation and to make the statement that this is not allowed to engage in this kind of conduct that could lead to improvement of our children's grades -- our own children's grades.

In a small town I did not want to feed a rumor in the community that we were giving our own children an edge. I felt very strong about that.

Q Did the Board follow your recommendation?

A They did unanimously. (Vol. 1, Tr. 131)

On or about May 24th the Association grieved Bender's discharge and by letter received May 29th, the District acknowledged the grievance, it waived Steps 1 through 3 of the grievance procedure and agreed to hold a hearing on the grievance after June 11th when Bender and MacDougall could attend (Joint Exh. 2A). By letter dated May 29, 2007, Smith confirmed a June 19th meeting with the Board (at a regular meeting) on Bender's grievance "For the purpose of resolving the grievance" (Joint Exh 2B).

At the June 19th meeting, Bender read the following document (Assoc. Exh. 10) and submitted Association Exhibit 11 (essentially her vita and her work in the District).

Dear Board of Education and administration of the Boscobel Public Schools:

I'm coming before you to appeal your decision to fire me because of my daughter's having used workbook answer keys in doing some extra credit work for her science class.

Let me explain the difference between a worksheet answer key and an answer key. The worksheet answer key is a document I myself prepare from the answer keys. My daughter has never seen the actual answer keys, only my worksheet keys. They look like the actual papers you already have on (my daughter's) worksheets.

What happened was this:

On the day in question, I was driving my daughter to school. She told me that she needed help on her science extra credit worksheet. She said she was done except for two or three questions that she did not fully understand and she wanted help. When we arrived at school, approx, 7:10 am. I took out my workbook answer key with the worksheet answer key off to my left side and (my daughter) on my right. (My daughter) must have seen the worksheet answer key at a glance because the worksheet answer key had the word "catalyst/enzyme" in the answer.

So (my daughter) and I read the remaining questions together. (My daughter) went right to the page in the text where the answer was. (My daughter) still didn't understand so I explained it to her, using as example how we use lemon juice at home to keep banana and other fruits from turning brown. Then I read the answer to (my daughter) from my worksheet answer key following the example of how Julie teaches it. I didn't intentionally offer the worksheet answer keys.

Another student, who frequently asks (my daughter) to show her her worksheets, looked at (my daughter) completed worksheets that day and obviously copied the word "enzyme" from one of (my daughter) answers because it was the other student's paper with the word "enzyme" on it that caught the teacher's eye.

The teacher, Julie Shellhorn, (sic) had not used the word “enzyme” in class. The word “enzyme” on the other student’s paper led her to check all the students’ papers. (My daughter) stood out because she used the word “enzyme” and the workbook test explanation verbatim.

The teacher went to the guidance counselor about (my daughter) only. She sent Julie to Greg Bell “off the record.” The other student was not questioned by the teacher. Nor do I think she was questioned by the administration.

Let me show you the different types of resources that are available.

- The answer key printed from the book.
- The worksheet with answers that I complete on my own after reviewing the materials. If I need clarification on any of the questions, Julie has offered to let me see the answer keys and even copy them so I am prepared to assist the students. Mr. Mercer has my Binders with my worksheet answer keys and the actual answer keys in them.

The worksheets that I am accused of using to assist my daughter to cheat are not used in Julie Shelhorn’s (sic) class for tests. Julie uses them as Pre-Tests extra credit in preparing the students for the test.

I never have had answer keys for any other classes. I only have answer keys to the science workbook for Julie Shelhorn’s (sic) class. I have never had copies of her tests.

It is not infrequent that Julie uses the actual answer keys in class in peer grading the Pre Tests. I worked with her last year. Julie has offered the answer keys to me in the event that students have questions. I have seen her use them with the class many times and that is what I did with my child that morning.

I do not let any students, including my own daughter, review the actual answer key. Or my worksheet answer keys. The transcript of my meeting with the administration in May misrepresents my statement. I wrote a response to it which I do not believe you have seen.

One other time I came home and found my Binder with my worksheet answer key there. I took it and asked (my daughter) what it was doing at home. (My daughter) told me that she took it home as she needed help with her science. I told her that she should not have even taken the notebook. However, I continued to help her with the worksheet, doing so just as Julie does in the classroom.

I made the mistake, however, of not telling Julie at that time. In retrospect I see that I should have told Julie. As soon as I saw the worksheet answer key at home I told (my daughter) not to bring the Binder home ever again.

When I talked with the administration I mentioned that (my daughter) took the Binder home a few weeks ago and that I scolded her and told her not to bring it home again.

Because of the fact that Julie teachers this way frequently, I really didn't think I was doing anything wrong. I don't think I should be fired for this. I am willing to take a written reprimand and even a short suspension of 1-2 days.

I love Boscobel. I know that I am a good paraprofessional. I love working with the kids. I would like to put this behind (sic) with my sincerest apologies. I have prepared a statement about my work in this district.

After this June 19th meeting, the Association brought this case forward to arbitration before the Undersigned.

Teacher Donna Graham stated herein that she spoke to Bender several times after Bender's daughter cheated about Bender's suspension (prior to her discharge). Graham stated that Bender told her that she (Bender) was going to be fired because her daughter cheated. Graham responded that Bender could not be fired because her daughter was caught cheating. Bender admitted to Graham that she had caught her daughter with the Blue Binder in her backpack at home and she (Bender) had scolded her daughter for this but that her daughter brought the Binder home again. Graham also stated that Bender told her that she (Bender) had taken the Blue Binder home once to help her daughter with her Science 9 work.

It is significant that another witness, Teacher Cindy French, also reported that after the fact, Bender admitted to her that she had brought the Blue Binder home once to help her daughter and that Bender's daughter had brought the Blue Binder home twice without her mother's knowledge/permission (Vol. 2, Tr. 128-29).⁸

Thereafter, the parties brought the case forward for arbitration before the Undersigned.

⁸ Bender denied bringing the Blue Binder home in this case (Vol. 2, Tr. 74).

POSITIONS OF THE PARTIES

District:

The District urged that in this case, its burden of proof was to show that Bender committed misconduct and there was good and sufficient reason to discharge her by a clear and satisfactory preponderance of the evidence, not the more stringent standard of beyond a reasonable doubt. The District noted that although arbitrators have used different standards, the majority of arbitrators apply the clear and convincing preponderance of the evidence burden of proof to cases such as this one, which involve dishonesty, several cases. POYNETTE S.D., DEC. NO. 52207 (MICHELSTETTER, 2006); BAY AREA MEDICAL CENTER, DEC NO. 56937 (NIELSEN, 1999); CITY OF SOUTH MILWAUKEE, DEC. No. 66799 (GALLAGHER, 2007).

Concerning the merits of this case, the District argued that Bender “deliberately assisted and enabled her daughter to cheat” in the latter’s Science 9 class with Ms. Schellhorn. As Bender did not have a Science 9 class with Ms. Schellhorn in 2006-07, the District queried why Bender would have retained the 2005-06 completed worksheets (kept in the Blue Binder) from Ms. Schellhorn’s class when she was only assigned in 2006-07 to assist a special education student in Mr. Bosworth’s Physical Science class. The District urged, therefore, that the “only reason Bender would retain her work from Ms. Schellhorn’s class (in the Blue Binder) was to enable her daughter to use those materials or to be able to provide the teacher’s guide answer to her daughter” (Dist. Brief, p. 12). The District noted that Bender never stated herein that as a District aide, she referred to or used the Blue Binder materials in any way in 2006-07. Furthermore, the District also noted that Bender’s daughter admitted in her first meeting with Mr. Bell, that her mother had allowed her to use materials from Ms. Schellhorn’s class to check her work. And because Bender knew that Ms. Schellhorn used worksheets for graded pre-tests and for extra credit, Bender also knew that when she allowed her daughter access to the Blue Binder and when Bender read answers to worksheet questions to her daughter, directly from the teacher’s guide/answer key, Bender also knew that she was giving her daughter information which no other student in the class had access.

The District urged that if the Arbitrator compares Bender and her daughter’s various accounts of the last cheating incident (Dist. Exh. 8; Assoc. Exh. 1 and 10 and Vol. 2, Tr. 19, 64 and 84-85), the Arbitrator will conclude not only that Bender is not a credible witness but that events could not have occurred as Bender claimed – specifically, that her daughter simply did not have enough time in a cramped office to neatly copy three complex answers onto her Chemical Reactions worksheet (Dist. Exh. 1) while Bender was logging onto her computer without Bender being aware of her daughter’s activities.

Also, the District asserted that the record herein showed that “Bender’s story kept changing” - - that she caught her daughter once or twice with the Binder, that she found the Binder at home once or twice, or just once. Then Bender denied taking the Binder home (Vol. 2, Tr. 73) but in conversation with two teachers after her discharge, Bender admitted

taking the Binder home to help her daughter (Vol. 2, Tr. 106, 129). Furthermore, the District contended that Bender's claim that she did not assist her daughter to cheat was not believable – it was cheating when Bender read answers to her daughter, when she allowed her daughter to copy answers from teaching materials and, the District noted, it was unacceptable that Bender made no effort to secure the Binder even after she knew her daughter was using it.

In addition, the District argued that Bender's daughter's testimony "is a mass of contradiction," as follows:

C. (Bender's daughter) thought she might have used the white Binder (containing material from first semester) but never used it at home or at school. *Cf.* T-2 at 95; T-2 at 97. She could not remember the specific work assignments on which she cheated. T-2 at 82. Her memory was crystal clear that she had only cheated three times (coincidentally the exact number for which the District had incontrovertible proof of cheating). She only took the Blue Binder home once, but did not use it. T-2 at 96-97. Although she cheated there times, she only used the Blue Binder twice. T-2 at 97. One of the times that she did use the Blue Binder was to copy the material on the chemical reactions worksheet in May. *Id.* She used the Blue Binder three times herself and twice with her mother. T-2 at 100. Both the Blue Binder and the white Binder were on a rack out in the open in her mother's office but then, when asked again where the Blue Binder was kept, stated that the Blue Binder was in a cupboard. *Cf.* T-2 at 98-99; T-2 at 99.

Finally, the District urged that Bender's attempts to justify her actions because the District failed to properly train her or to blame Ms. Schellhorn and the District for Bender's own actions should be rejected as unsupported by logic and the record. In this regard, the District noted that Bender violated Board policies on several levels. As Bender's conduct was dishonest -- the opposite of sincerity, truthfulness and frankness -- the District urged that immediate discharge was appropriate and progressive discipline should not be applied.

The District then cited and discussed a series of arbitration awards concerning alleged dishonesty by the grievant. MARSHALL ED. ASSOC, DEC. NO. 65703 (BAUMAN, 2006); POYNETTE S.D., DEC. NO. 62207 (MICHELSTETTER, 2006). BAY AREA MED. CENTER, DEC. NO. 56937 (NIELSEN, 1999); D.C. EVERET S.D., DEC. NO. 56318 (GRECO, 1998). The District urged that even if this Arbitrator were to find that the District lacked proper cause to immediately discharge Bender, that Bender should be reinstated after a one-year suspension without backpay, given Bender's serious misconduct, and the ethical expectations of the Board and District staff. In all the circumstances, the District urged the Arbitrator to deny and dismiss the grievance in its entirety.

Association:

The Association argued that because the Board of Education terminated Bender in a unilaterally scheduled May 15, 2007 closed session (which Bender's Association representatives could not attend) Bender's discharge should be set aside. The Association noted that the District refused to reschedule the meeting and then on May 14th, one day before the meeting, the District sent Bender a letter containing her last paycheck. Another hearing was later held before the Board on June 19th, where Bender appeared with her Association representatives and where she offered a response to the charges against her and a statement to the Board in her defense, but the Board had already made its decision. This approach, the Association urged, violated due process on all levels.

The Association urged that Bender's daughter clearly cheated but that an analysis of Bender's daughter's testimony herein, shows that Bender had no knowledge of her daughter's cheating, how she cheated and how often she cheated (Vol. 2, Tr. 78, 84-88, 90, 94-98), making the District's decision to terminate Bender for her daughter's cheating "unconscionable." Also, when Bender discovered the Blue Binder at home she scolded her daughter and refused to use the Binder to help her daughter (Vol. 2, Tr. 19-21). The Association urged that Bender "did not realize there was anything wrong with the way she assisted her daughter" because Bender simply did what Science 9 Teacher Schellhorn did when teaching students and handling worksheets, pre-tests and extra credit sheets (Vol. 1, Tr. 39-43, 52-53).

The Association further noted that Bender's daughter was disciplined by the District for her admitted cheating. And yet, another student, J.E., who also cheated with Bender's daughter was not even questioned by Mr. Bell and J.E. was never disciplined, even though she also cheated on the same worksheet as Bender's daughter had cheated on. This showed the District had treated Bender and her daughter more harshly for no apparent reason.

In addition, the Association noted that the labor agreement contains as its standard, Arbitrator Daugherty's seven tests for just cause and as such, the record evidence in this case must be analyzed according to each of those tests. Regarding whether Bender was forewarned of the possible consequences of her misconduct, the Association argued Bender received no such forewarning. Indeed, the Association noted that the record showed that the District has offered no training to aides regarding Board policies as well as how to properly use and store completed worksheets and what access students and faculty should have to these. Therefore, in the Association's view, there should be no consequences for Bender's use of the worksheets to help her daughter (if she did so) because Bender was simply using them as Teachers Schellhorn and Graham had modeled for her.

Regarding whether the District's rules/policies were reasonably related to school operations and/or employee work performance, the Association contended that as Bender herself did not cheat and the Board's rule/policy really constituted "an ex post facto determination of how paraprofessionals should help students or store material," the answer to this test must be no.

The Association also asserted that the District failed to fairly and objectively investigate whether Bender, in fact, violated District rules/policies. On this point, the Association noted that the District discharged Bender on May 15th without hearing her side of the story; that the evidence gathered from Bender and her daughter by Mr. Bell and Mr. Mercer was unreliable (no notes, tapes or video recordings were taken) and failed to prove that Bender “cheated by showing her daughter the written answers to certain questions in the extra credit assignment for Science 9;” and that then-Principal Mercer’s recollection of the relevant events was vague, at best.

Regarding whether the District has even-handedly applied its rules/policies in the past, the Association noted that the evidence showed it has not: the treatment of A. R., D. H. and D. K. for serious misconduct in the past was far more lenient than the District’s treatment of Bender herein. In all of these circumstances, the District’s decision to discharge Bender failed the Daugherty tests and the application of the discharge penalty herein was unwarranted. Therefore, Bender should be reinstated and made whole with full back pay “including interest” and all benefits.

REPLY BRIEFS

District:

The District urged that although the labor agreement states that an employee is entitled to attend the Board hearing on discipline, no evidence was presented herein to show that Bender and her BCAP representative could not attend the May 15th Board meeting and the fact “that extraneous individuals were unable to attend was irrelevant.” The District observed that Bender was invited to submit written documentation to the Board for its consideration on May 15th and that Bender chose not to submit same. The District also noted that Bender’s counsel failed to raise any procedural objections at the hearing. Rather, the Association’s argument on this point was made, for the first time, in its brief, and came far too late to be considered. The District asserted that if the Arbitrator found in favor with the Association’s argument on this point, at the very least, the hearing would have to be reopened to take evidence thereon. In addition, the Association’s attachment to its initial brief of its counsel’s letter regarding the polygraph issue, was inappropriate and should be disregarded as well, as this issue was withdrawn in February, 2008. As the grievance was processed without any assertion of this procedural issue (because the parties stipulated at the hearing herein to the issues before the Arbitrator) the Association’s allegation of disparate treatment is unsupported by this record.

Regarding the allegation made concerning Aide A.R., the District urged that as far as it knew, A.R. never touched the student the Association claimed A.R. physically abused (Assn. Exh. 2). Regarding the incident, involving probationary Teacher D.H. reported by the Association (Assn. Exh. 3), the District noted that D.H. used inappropriate language with a

student and was suspended therefor but that he later resigned in lieu of being non-renewed. Finally, Association Exhibit 4 showed that the settlement of the D.R. situation was not intended to set a precedent between the parties, and it should not be considered herein. Thus, the District urged that no prior case in the District was similar to Bender's situation.

Concerning the merits of the case, the District asserted that Bender clearly knew cheating was wrong; that Bender had a full opportunity to explain her side of the story in May, but Bender chose not to do so until the June grievance meeting; and that the discharge penalty was appropriate for Bender. The District urged that the Association's attempt to shift the blame to Schellhorn in its initial brief, specifically that Teacher Schellhorn failed to properly train Bender to interact with students and that Schellhorn modeled the same behavior that Bender used with her daughter in going over the extra credit/pre-test, were assertions not supported by the record but were based on the Association having taken parts of Schellhorn's testimony herein out of context. The examples of prior disciplinary actions taken by the District "are wholly unrelated" to the misconduct Bender engaged in and they should therefore provide no basis for an argument that was treated differently from others similarly situated.

Here, the District urged, it met the contractual discharge criteria – Bender knew cheating was dishonest, yet she helped her daughter cheat in violation of Board Policy which requires staff to ensure that students do not cheat. The District's investigation was reasonable and fair and the punishment Bender received "fit the crime." Therefore, the District urged the Arbitrator to sustain Bender's discharge and deny the grievance.

Association:

On reply, the Association asserted that proper standard of proof in grievance arbitration for just cause is "clear and convincing evidence," not "clear and satisfactory preponderance of the evidence" as the District claimed in its initial brief. Second, the Association objected to the District's assertions 1) that Bender retained the completed pre-tests/worksheets after 2005-05 in order to help her daughter cheat, when in fact, Bender needed/used those sheets in 2006-07 to assist her special education students in Mr. Bosworth's Science 9 class; 2) that the Blue Binder has been regularly used by other special education aides and teachers all of whom have had access to that Binder and used it.

The Association also contended that Bender's daughter's testimony showed that she was "badgered to tears" and essentially forced to sign "a false statement" that her mother had "allowed her to check her answers against the materials in the Binder." Rather, the Association observed that because the District has no rules prohibiting employees from taking "home work at night to prepare their classes," Ms. Bender cannot be said to have had the intention of enabling her daughter to cheat. The record also failed to show that Bender ever used the Blue Binder with her daughter at home or that her daughter ever used it at home without her Bender's supervision. Indeed, Bender admonished her daughter for having brought the Binder home and then Bender refused to use it to help her daughter at home.

The Association also noted that the District ignored the contractual requirement that it prove that it met all seven of Daugherty's tests for just cause and that under the Daugherty tests even one "no" answer out of seven in this case requires a conclusion that the District did not have just cause to discharge Bender. Also, the District's assertion that its teachers cannot assist their own children with their school work is "ludicrous." The fact that Teacher Schellhorn warned Bender's daughter and another student (a few months earlier) for cheating from one another on a quiz and then this same student (J.E.) cheated on the same pre-test as Bender's daughter in May, 2007, but J.E. was never questioned or disciplined shows how inconsistent and unfair the District's approach to student cheating has been.

The Association urged that the District's procedures regarding student discipline are lacking. On this point the Association asserted that the District should have students write confessions to cheating in their own handwriting, using their own words; and that a female should be present during the questioning of female students. Here, Bender's daughter was badgered into signing a "confession," yet the Association noted, there was much record evidence to show Bender's daughter was a strong student and that she never told her mother she was cheating in Science 9. On the former point, the Association attached Bender's daughter's recent grades and an April 2, 2008 notice that Bender's daughter was to receive "an Academic Excellence Award."⁹

The Association asserted that Bender's daughter "did not need to cheat to get good grades" and only did so on a few occasions in one class, learning a lesson at age 14 which she will never forget. For the District to discharge Bender for her daughter's cheating without her mother's knowledge was "irresponsible and indeed unconscionable," and is an action which should be reversed by the Arbitrator.

DISCUSSION

Initially, there are a couple of preliminary issues in this case which must be dealt with. First, as the Association withdrew its request that the Undersigned consider the results of a private polygraph test of Bender, this Arbitrator has not considered Ms. MacDougall's letter of January 17, 2008 (appended to her initial brief) or any of the evidence on that issue in reaching this Award.¹⁰ Second, the question what test should be applied to the evidence in this case under Article VI B, "good and sufficient reason" must be answered. Third, what the appropriate burden of proof should be in this case - clear and convincing evidence, beyond a reasonable doubt evidence (Association) or clear and satisfactory preponderance of the evidence (District) - must also be determined.

⁹ The Arbitrator has also disregarded this post-hearing attachment as it was not jointly submitted by mutual agreement/stipulation of the parties.

¹⁰ I have also disregarded Ms. MacDougall's submission of Bender's daughter's grades and award letter (appended to her reply brief) in reaching this Award.

Concerning the proper burden of proof, even in cases which involve (non-criminal) misconduct demonstrating the grievant's dishonesty, most arbitrators apply the lesser standard, clear and convincing evidence, not those urged by the District or the Association herein. Thus, although the allegations in this case concern Bender's knowing support and involvement in her daughter's cheating, these allegations are insufficient to support application of the stricter beyond a reasonable doubt burden of proof. And this Arbitrator is not convinced that the record evidence supports the use of the more unusual "clear and satisfactory preponderance of the evidence" urged by the District. Therefore, I will apply the clear and convincing evidence standard in this case as I have done in many discharge cases in the past and as the majority of arbitrators would do.

Concerning the application of the contractual test of "good and sufficient reason" for this the discharge, I note that Article VI Section B, paragraphs 1 through 7 essentially contain Arbitrator Daugherty's seven tests of "just cause" which the contract requires be used "to determine the existence of good and sufficient reason" for the discharge or discipline of non-probationary unit employees. Because the parties expressly agreed to use Daugherty's seven tests of just cause in discharge and discipline cases, this Arbitrator must apply each of Daugherty's tests, as stated in Article VI B, to decide whether the District had "good and sufficient reason" to discharge. Bender, as follows:

1) Was Bender forewarned of the possible consequences of her conduct?

The evidence in this case is undisputed that no in-service training either live or on-line, was offered to District paraprofessionals concerning student cheating, District policies/rules thereon or how paraprofessionals should use Teacher Guides and Answers (TGA's) copied handwritten or printed in assisting students. In addition, no evidence was submitted to show that Bender or any other employee had been warned or counseled not to assist their own children with their extra credit, homework and pre-tests as no prior cases similar to this one had ever occurred.

The May 8th Investigative Report which the Board adopted on May 15th as its reasons for terminating Bender, stated that Bender had violated Board policies 407.03, 502.06 and 502.07(Dist. Exh. 9) by "deliberately" aiding her daughter to cheat "by allowing her (daughter) access to test keys for the purpose of completing assignments with correct answers" and that Bender acted in an irresponsibly manner by not encouraging her daughter to take responsibility for her actions to increase her daughter's self discipline.

Board Policy 407.03¹¹ states that the District must discourage undesirable employee conduct which materially and substantially interferes with the District's educational purposes, processes and operations and that employees found guilty shall be disciplined "appropriate to

¹¹ However, regarding Board Policy 407.03, I note that no evidence was submitted to show that there are any codes of ethics for District paraprofessionals, either through DPI or otherwise, requiring a conclusion by this Arbitrator that no such codes exist.

the misconduct.” Thus, District staff is not only required to discourage cheating, but also the District employee who aids a student to cheat and gives the student access to completed answers which the student could copy and receive credit for, thereby violates the District’s purposes of teaching students so that they actually learn, teaching them to be responsible, good citizens, to conduct themselves in ways that are conducive to learning and to be disciplined in their work, pursuant to Policy 502.06. Furthermore, as a parent of a District student, Bender was also responsible to know the provisions of the Student Handbook at page 19, number 8 which prohibits cheating from (study) “aids” that “are not authorized.”

But the above analysis does not mean that Bender and her colleagues had no knowledge that the conduct Bender allegedly engaged in with her daughter was prohibited by the Board. In this regard, I note that Bender admitted knowledge of Board policies and as the parent of students in the District, she was required to be conversant with Student Handbook provisions. Also, the allegations of misconduct made against Bender are of a type that this Arbitrator believes Bender should have generally known were prohibited because they gave her daughter an unfair advantage not offered to other students and Bender must have known that if her alleged actions became known in the small community of Boscobel, they would undermine the District’s educational purposes and credibility and its reputation for fairness, trustworthiness and objectivity in education.¹² Therefore, in my view the fact that Bender was not specifically forewarned of the consequences of assisting her daughter to cheat was not strictly required in the circumstances of this case.

2) Were the District’s policies reasonably related to proper school operations and/or to performance the Board might properly expect of Bender?

The Board’s student Handbook and its policies 407 and 502 are reasonably related to the proper teaching of students so that they will learn and achieve results that will prepare them for further school and/or employment as adults. In short, the District’s rules and policies against cheating encourage students to take responsibility for completing their own work for credit and they make it possible for students to grow in honesty and self-discipline and they are therefore reasonably related to the District’s educational purposes, processes operations.

Board Policy 407.03 requires the District to discourage undesirable District staff conduct which materially and substantially interferes with the District’s educational purposes, processes and operations; Policy 502.06 requires District staff to be responsible to see that student behavior is conducive to learning and to encourage student self-discipline and responsibility; Policy 502.07 requires District staff to expect students to meet “good citizenship” standards. Therefore, District staff must meet these responsibilities or be subject

¹² Board Policy 502.07 was only cited in the May 8th Investigative Report to show that Student Handbook rules and regulations are to be treated as Board Policy and that the Handbook rules against cheating should be incorporated into the Board Policy.

to “appropriate” discipline.¹³ Clearly, cheating is against the District’s education purposes, processes and operations and it is reasonable for the District to expect its staff to actively discourage and punish cheating. It is therefore reasonable and appropriate for the District to discipline District staff who assist students to cheat.

3) & 4) Before discharging Bender, did the Board make an effort to discover whether Bender did, in fact, violate or disobey its rules/orders and was the investigation conducted fairly and objectively?

The District began its investigation into Bender’s conduct only after Schellhorn submitted the disciplinary referral which asserted Bender’s daughter had cheated. The evidence submitted in this case showed that the District investigated this referral in the same way it did other referrals and that District officials treated Bender’s daughter as it treated other students in these cases.¹⁴ After Bender’s daughter admitted that she had copied answers from her mother’s worksheets to complete her assignment and claimed her mother allowed her to check her answers using the Blue Binder Bender used to help her special ed students, the District began its investigation of Bender’s actions.

To investigate Bender’s actions, Mercer and Bell interviewed Bender and got further information from Schellhorn regarding Bender’s daughter’s cheating. In the May 3rd interview that the District held with Bender, Bell took notes and had a “transcript” made from those notes (which Bell stated Bender’s local union representative later told him was accurate). Although the Association strongly disputed the accuracy of the District’s “transcript” of its May 3rd interview with Bender,¹⁵ it is undisputed by the Association that Bender admitted on May 3rd that she did not read her special ed students complete answers to questions, that she used the Blue Binder as a reference only and that she (Bender) never let her Special Ed students copy answers from her Blue Binder worksheets (Dist. Exh 8).

Per the May 3rd Bender interview and the May 8th Investigative Report, what the District knew on May 8, 2007 was as follows:

1. That Bender’s daughter had cheated on at least three graded assignments using almost identical language to the TGA’s;

¹³ It is significant that the Board’s Policies fail to list what types of misconduct will be subject to immediate discharge.

¹⁴ The fact that the Association found the District’s procedures in interviewing Bender’s daughter (a female) lacking is neither not material to this grievance and this Arbitrator has no jurisdiction over such matters.

¹⁵ Bender stated (on Assoc. Exh. 1) that she “found” the Blue Binder at home once or twice, but that she did not “catch her daughter” with the Binder; and that she (Bender) never allowed her daughter “to check her answers” against those in the Binder, that she simply used the Binder with her daughter as she asserted she did with her special ed students.

2. That Bender admitted (on May 3rd) that she had read answers to her daughter that Bender had copied out of TGA's;
3. That Bender's daughter stated she had access to her mother's completed worksheets kept in the open in the (Blue) Binder in her mother's office and that she (the daughter) copied answers from that Binder;
4. That Bender admitted that she knew her daughter used the (Blue) Binder a couple of times and that her daughter brought the Binder home once or twice.

I note that upon receipt of the May 8th Investigative Report, Bender was invited to submit a written response to the Investigative Report and the transcript, but she chose not to avail herself of this opportunity to present her case prior to the Board's May 15th meeting. And for her own reasons, Bender chose not to attend the Board's May 15th meeting. This left the Board with only the fruits of its internal investigations. Given the unrebutted and substantial proof against Bender as of May 15th, the Board terminated her employment. In my view, the Board had "good and sufficient reason" for disciplining Bender at the time.

The Association raised objections (for the first time in its brief) to the fact that the District refused to wait for Bender and her WEAC representative and attorney until mid-June to hear Bender's side of the story and that it did not hold a "pre-termination" hearing before it terminated her employment. I note that the grievance filed on or about May 30th failed to object to the lack of a formal hearing, to the Board's quick action to discharge Bender or to its failure to hold a full hearing before discharging Bender (Jt. Exh. 2).

Looking at Article V, Section A, Step 4, I note that nowhere in that Section (or any other Section) are the words "hearing" or "pre-termination hearing" used. Rather, Step 4 states that the "Board shall meet with the grievant(s) and the BCAP representative... at a meeting.... for the purpose of resolving the grievance." In these circumstances, the hearing the Association now complains did not occur was not required by the contract. Nonetheless, (after the end of the 2007 school year on June 8), on June 19th, a hearing was held which Bender and her WEAC representatives (Noyce and Attorney MacDougall) attended. On June 19th it appears that Bender and her representative had a full opportunity to present Bender's position and evidence to the Board. In all of these circumstances, I reject the Association's argument that Bender's discharge must be set aside because of this asserted procedural irregularity.

The remaining problem in this area, of course, was that the District sent Bender her last paycheck on May 14th, leaving Bender (and anyone else who looked at the situation) with the feeling that Bender's termination was foregone conclusion as of May 14th, the day before the Board met regarding Bender's situation. I note that this approach was not expressly prohibited by the contract. However, on a human level, it was certainly unfeeling and in very bad taste and not justified as a money-saving tool.

To summarize, the Board met the requirements of contractual questions 3 and 4. And this Arbitrator specifically finds, as described further infra, that the clear and convincing evidence herein showed that the Board made a fair and objective effort to discover whether Bender violated its rules/policies by her conduct, using techniques it had used in past cases; that the Board fairly and objectively conducted its investigation; that the Board gave Bender two opportunities to tell her side of the story, but she chose not to attend the May 15th or to submit a written response to the charges against her prior to May 15th . I note that the Association offered no evidence to show that it had suggested other dates for a meeting with the Board prior to the end of the school year. In these circumstances, the fact that the Board then acted upon the evidence it possessed on May 15th and terminated Bender on that day requires a conclusion that the Board met tests 3 and 4 of the contract. ¹⁶

5) Did the Board obtain substantial evidence or proof that Bender committed the misconduct described in District Exhibit 9, as alleged?

As stated in the last section above, I believe that on May 15th the Board had substantial proof or evidence that Bender committed the misconduct described in District Exhibit 9. The interviews with Bender and her daughter demonstrated this. But even assuming arguendo that Bender's account in Association Exhibit 1 and her testimony herein, were credited over the transcript of her interview (District Exh. 8), Bender nevertheless admitted: 1) that she copied the answers verbatim from the TGA's onto her own worksheets/chapter tests and she maintained them in the Blue Binder; 2) that she kept the Blue Binder in her small office on a shelf or in an unlocked cupboard; 3) that Bender referred to and at times read answers from the Blue Binder to her daughter in one-on-one sessions she held with her daughter in her small office, urging her daughter "to put (the answers) in her own words (Vol. 2., Tr. 19, 47).

It is also undisputed that Bender's daughter knew where her mother kept the Blue Binder and what it contained; that Bender's daughter habitually used Bender's small office, regularly walking through Room 34 or through Rooms 21 and 34, sometimes with her friends, to get to her mother's small office within Room 34 where she left her backpack and where she could use the Blue Binder alone and undetected or with her friends, and where, on at least one or two occasions, Bender's daughter put the Blue Binder into her backpack and took it home without her mother's knowledge or permission (Vol. 2, Tr. 21; Tr. 150-151). Thus, Bender's daughter had access to correct answers which she could copy at will which no other District student had¹⁷ and Bender knew this.

¹⁶ The appropriateness of the discharge penalty will be discussed, infra.

¹⁷ In my view, the fact that Schellhorn may have read answers from the TGA's at times to her entire classes (although she tried not to do this) in answer to questions in class, is vastly different from the personal and unrestricted access Bender's daughter had to correct answers and also vastly different from the way Bender's mother used her Blue Binder worksheets in one-on-one sessions with her daughter, reading the answers to her and urging her to put the answers in her own words. In addition, Teacher Graham stated that Special Ed staff are not supposed to give Special Ed students answers to questions for credit.

In all the circumstances here, I believe that when Bender found the Blue Binder at home, she knew or should have known that her daughter was likely cheating in Science 9 and that she (Bender) then had a responsibility to report her daughter's having taken the Binder home to Schellhorn and to thereafter lock the Blue Binder up. The fact that Bender failed to take any of these steps, in my view, requires a conclusion that Bender was aware and ultimately responsible for her daughter's answers being identical or virtually identical (including punctuation) to the TGA's on the various extra credit/pre-test questions involved herein (Vol. 2, Tr. 65-72).

At this point in the Award, it is important to address the parties' arguments regarding whether Bender and her daughter were a credible witness. In this case, these issues must be resolved. A close analysis of Bender's daughter's testimony shows her lack of independent recollection, and the numerous internal conflicts within her testimony. For example, Attorney MacDougall's direct examination of Bender's daughter consisted basically of leading questions which elicited either no recollection or information which Bender's daughter later contradicted, as follows:

...

- MS. MACDOUGALL: Let's do District 1
- Q Looking at District 1, C, and the writing skills Number 1, you have admitted that you copied that from your mother's worksheets; is that correct?
- A Yes.
- Q Did you admit that you cheated other times in that class, chemistry, Science Nine?
- A Two other times.
- Q Same thing, worksheets?
- A Yes.
- Q And you cheated before this situation?
- A Yes. (Vol. 2, Tr. 81)

...

- MS. MACDOUGALL: I'm asking her if she copied from her mother's sheet on this one for her sheet.
- A Looks like it.
- Q You don't remember specifically?
- A No.
- Q Well, then I'm not going to show you the other ones. You don't remember specifically the ones you cheated on?
- A Yes. I do not remember.
- Q At any time did you tell your mother that you had cheated?
- A No.

- Q Did she—on the day that you went over the enzyme question and then cheated, did she know that you were copying?
- A What do you mean?
- Q Did she know that you were copying from her worksheet on that day that you came in and worked with her?
- A Oh, no, she didn't.
- Q Where was she?
- A She had turned her back because right away in the morning, she always turns on her computer. Then by the time that –sometimes I'll look at questions – you know, sometimes, by the time I'm done with that, she'll turn around and log onto her computer because you have to log in to get on the actual computer system.
- Q That's when you cheated, when she was doing that?
- A Yes.
- Q And her back was to you?
- A Yes.
- Q You've admitted to her now that you've cheated?
- A Yes.
- Q And you took the punishment for that?
- A Yes. (Vol. 2, Tr. 84-85)

At one point Bender's daughter admitted that the disciplinary referral she signed (Jt. Exh. 10) "accurately described" what she did, although she did not write it herself (Vol. 2, Tr. 88).¹⁸ However, later under questioning by Ms. MacDougall regarding the disciplinary referral, Bender's daughter attempted to undermine the accuracy of the document as follows:

(BY MS. MACDOUGALL):

Now, here it says on here, "She claims her mom allows her to check her answers." Could you define what is meant by that?

A That she checks them over, and then we grade – or we redo them together. Like we go in the book and check to see where they're at. If we can't find them, then she'll give me clues.

Q Is this the book to which you're referring? This is Joint Exhibit 6. Is this the book you're talking about?

A Yes.

Q So when she checks your answer, you go through the book together?

A Yes.

Q It says here, "But you ended up copying the answer she " – meaning our – "had not completed"?

¹⁸ Contrary to the Association's argument, I can find no place in the hearing transcript where Bender's daughter stated the referral was "false."

- A Yes.
Q But your mother did not know that?
A Yes.
Q “Yes” or “no,” she knew it?
A Yes, she didn’t know. Sorry. (Vol. 2, Tr.90)

What we know from a close analysis of Bender’s daughter’s testimony is that she stated that she used the Blue Binder twice (Vol. 2, Tr. 84), that she used it three times (Vol. 2, Tr. 81) or that she used it five times (Vol. 2, Tr. 100) twice when her mother was helping her and three times alone in the morning in her mother’s office either when her mother or Ferrell or other students were present (Vol. 2, Tr. 94-95, 97-98) or when her mother was not there or she was in the lounge getting something (Vol. 2, Tr. 99). Bender’s daughter also admitted that Schellhorn never read answers from the Answer Keys to the class (Vol. 2, Tr. 101-102), yet Bender asserted the opposite (Vol. 2, Tr. 35, 41). Also, Bender’s daughter failed to testify regarding the time or two when she surreptitiously brought the Blue Binder home and her mother allegedly scolded her on one occasion for doing so (Compare Vol. 2, Tr. 17-21 and Vol. 2, Tr. 84-85; 94-100). In all of these circumstances, I cannot and have not credited Bender’s daughter where her testimony conflicts with that of the District’s witnesses. Furthermore, I find it very significant, in judging Bender’s daughter’s credibility that Bender’s daughter’s answers (involved herein) were overwhelmingly identical to her mother’s completed Blue Binder worksheets (pre-tests/extra credit using the TGA’s) and that Bender’s daughter’s actual test answers were so different and showed virtually no learning from the extra credit sheet she cheated on and handed in to the actual test she took, as follows:

(Radioactivity and Nuclear Reactions)

Section II

10. How does the half-life of element Z compare to the half-life of carbon-14?

Extra credit answer 2/6/08: “Element Z has a shorter, half-life than carbon-14 (5700 yrs)” – Identical to TGA. (Dist. Exh. 3)

Test answer, 2/8/08: “They are both elements. And carbon-14 can never be nothing.” (Dist. Exh. 7)

Section IV.

4. Why can the half-life of a radioactive element such as carbon-14, be used to date objects?

Extra credit answer, 2/6/08: Radioactive element (sic) decay at a constant rate, they can be used as clocks to determine the ages of some objects. Almost identical to TGA. (Dist. Exh. 3)

Test answer, 2/8/08: “It never is nothing it always has some amount.” (Dist. Exh. 7)

Regarding Bender's credibility herein, initially I note that Bender's accounts of what she did when she found the Blue Binder at home is telling of Bender's wrong-headed and permissive approach to using this Binder with her daughter and Bender's failure to treat this action by her daughter seriously.

BY MS. MACDOUGALL:

Q There's been testimony about (the daughter) taking the blue binder home.

A She had taken it one time that I had saw at home, and it was sitting on the stairwell to go upstairs, and she had never opened it that I know of.

Q What did you do?

A I yelled at her. I said, "Why is this home?" And she said, "I brought it home because I needed help on my science, and I brought it home just in case I needed it." So we sat down at the kitchen table. The blue binder was still over on the stairwell. And as soon as I saw it, I picked it up and put it in the bag to bring back to school.

Q What did you tell her?

A I told her never to take it out f the room, never ever use it without me being around so that I could help or, you know, look at her answers to, you know, help her out.

Q Did she ever bring it home again?

A Not that I know of, no.

Q Do you know if she ever used it again? Personally, do you have knowledge if she used it again?

A No.

Q She didn't tell you if she ever used it?

A No.

Q Would there have been occasions that she could have used it?

A Could have, yeah, without my knowledge.

Q How so?

A When Mike was the basketball coach, she would ask to go into the room to sit down and do her homework. She said - - she always said she took someone else with her so she wasn't accused of cheating. There was always someone in the room with her.

Q You mean when she would be waiting for your husband to finish coaching?

A Yes.

Q He's the basketball coach?

A Yes.

(Vol. 2., Tr. 20-221) (emphasis added)

Clearly, Bender was not treating her daughter as a District student – she was treating her daughter as her daughter. The Arbitrator wonders what any other District staff member would have done had they found Bender’s daughter in possession of a binder containing her mother’s handwritten answers copied from TGA’s. This is a question Bender should have asked herself when she found the Binder at home “once or twice.”¹⁹ Also, comparing Bender and her daughter’s accounts of the one time the daughter cheated in her mother’s office, the timing simply does not ring true – there was not enough time for a girl of the daughter’s abilities to copy the “Chemical Bonds” lemon juice answer without her mother’s knowledge.

In addition, there were two credible witnesses, Ms. Graham and Ms. French, who testified that Bender made an admission to them shortly after Bender’s daughter was given discipline for cheating – that Bender told them that her daughter brought the Blue Binder home twice and that she (Bender) brought it home once to help her daughter with her homework (Vol. 2, Tr. 105-106 (Graham); Vol. 2, Tr. 128-29 (French)).²⁰ As neither Graham nor French’s testimony was successfully attacked by the Association and because of the internal conflicts and inconsistencies within and between Bender and her daughter’s testimony, I have credited Graham and French over Bender herein.

6) Has the Board applied its rules, orders and penalties even-handedly to all employees in like circumstances?

First, it is clear that the issue before me has never before arisen between the parties so there are no prior cases which involve “like circumstances” in all respects. However, the prior cases proffered by the Association did involve serious misconduct (including physical and verbal abuse or threats) by support staff and teaching personnel which the District punished by issuing up to a five-day suspension without pay for a first offense (Vol. 1, Tr. 157),²¹ and an involuntary transfer for a second offense. In this case, Bender did not engage in any verbal or physical threats toward students, which was prohibited by Board Policy or could have been actionable under Wis. Stats. 118.31 and 939.48 (Board Policy 502.06). However, I have found that Bender did engage in dishonest conduct by assisting her daughter to cheat. In my view, threats and/or verbal abuse of students constitute more serious misconduct than staff members assisting their own children to get better grades than other students. But both kinds of misconduct are very serious and they go directly against the District’s policies of protecting and educating children and helping them realize their dreams, as well as going against the

¹⁹ However, I do not believe that the record supports the Board’s argument that Bender intentionally retained the Blue Binder in 2007 in order to help her daughter cheat in Science 9. Rather, the record showed that Bender was assisting a student or students in Mr. Bosworth’s Science 9 class in 2007; and that other staff had access to and used the information in the Blue Binder.

²⁰ Although there was no rule against Bender taking her work home, there was no evidence submitted herein to show that Bender ever took the Blue Binder home to perform District work.

²¹ I believe these two kinds of misconduct, though different, can fairly be used for comparison herein.

District's goal of being an honest, decent, positive and supportive agent in the community that the public can depend upon. Thus, to punish verbal and physical abusers of students by suspending District staff for five days or less for a first offense, while discharging Bender for her conduct, demonstrates a lack of even-handedness at the District that must, in fairness, be addressed below.

7) Was the degree of discipline reasonably related to the seriousness of Bender's offense and her record?

It is undisputed that Bender had never been disciplined prior to her termination and that she had received satisfactory and above evaluations for her work. The District has argued that the Arbitrator should dismiss the grievance leaving Bender's discharge in place,²² or at the very most, if Bender is reinstated, it should only be after suffering a year-long suspension without pay. The District has also argued that under no circumstances could it countenance Bender's reinstatement because of the seriousness of her misconduct, the negative affect of her reinstatement on her fellow workers and the District's reputation in the small community of Boscobel.

I am not unsympathetic to this argument. However, in this case I note that none of the current employees who testified herein specifically stated that they would be unwilling or unable to work with Bender were she reinstated. The fact that Bender had satisfactory or good evaluations since her hire and no prior warnings for any misconduct was very significant to this Arbitrator. Also, the fact that the District gave its paraprofessionals no in-service training regarding cheating issues and Board policies in the past, was important in determining the appropriate remedy here.

On the other hand, to reinstate Bender with just a warning (as she requested under progressive discipline principles) would send the wrong message, in my view. But, in all of these circumstances, neither the year-long suspension²³ nor the discharge of Bender is justified or warranted. I note that neither party has cited any strong public policies/statutes in support of their arguments regarding the appropriate penalty herein.

Therefore, I believe it is in the interest of public policy, the community and the parties herein for me to order that Bender be reinstated and made whole following a five-day unpaid suspension. I believe that the District can assure the confidentiality of its TGA's in the

²² The cases cited by the District (p. 18-20) of its initial brief are distinguishable. Those awards involved employees discharged for stealing, for trying to access confidential records and/or for lying under oath or for sexual harassment.

²³ The District cited no authority to support its assertion that Bender should suffer a year-long unpaid suspension should the Arbitrator decide to reinstate her.

future,²⁴ and that it will be able to make appropriate policies and to in-service its staff thereon so that this kind of misconduct does not occur again. As no evidence was proffered herein that would lead me to conclude that Bender cannot be re-trained on District rules and policies so as to be rehabilitated thereafter, I believe she can be an effective District professional in the future.

I therefore issue the following

AWARD²⁵

There was not “good and sufficient reason” to terminate Connie Bender for her conduct prior to May 8, 2007, but the District had “good and sufficient reason” to discipline Bender for her proven misconduct prior to May 8, 2007 in assisting her daughter to cheat. Therefore, the District shall reinstate Bender and make her whole following a five-day unpaid disciplinary suspension.

Dated this 14th day of August, 2008 at Oshkosh, Wisconsin.

Sharon A. Gallagher /s/

Sharon A. Gallagher

²⁴ It is undisputed that the District has put locks on the cupboards in the small office Bender occupied and that there were no binders kept in the open when this Arbitrator viewed the office during the hearing in this case.

²⁵ I will retain jurisdiction of the remedy only for 30 days following the date of this Award.