

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FRANKLIN EDUCATION ASSOCIATION

and

**BOARD OF EDUCATION OF THE
FRANKLIN PUBLIC SCHOOL DISTRICT**

Case #96
No. 68820
MA-14355

(Steve Landvatter)

Appearances:

Mark Olson and Geoffrey S. Trotier, Attorneys, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202, appearing on behalf of the Board of Education.

Stephen Pieroni, Attorney, Wisconsin Education Association Council, Post Office Box 8003, Madison, WI 53708, appearing on behalf of the Franklin Education Association.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the Franklin School District (hereinafter referred to as either the District or the Employer) and the Franklin Education Association (hereinafter referred to as either the Association or FEA) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the District's decision to discharge the Grievant, Steve Landvatter from his position as a physical education teacher. The undersigned was so designated. Hearings were held on November 16, 2009 and January 26, 2010 at the District's offices, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the hearings, and a transcript was provided. The parties submitted briefs and reply briefs, the last of which were exchanged through the arbitrator on May 15, 2010, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Award.

ISSUES

The parties could not agree on a statement of the issue and stipulated that the arbitrator should frame the issue in his Award. The issue may be fairly stated as follows:

1. Did the District have good cause to terminate the Grievant, Steve Landvatter?
2. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII CONDITIONS OF EMPLOYMENT

Section 1 – JOB SECURITY

. . .

C. No full-time teacher who has become permanently employed under this provision may be refused employment, dismissed, removed or discharged, except for inefficiency or immorality, for willful and persistent violation of reasonable regulations of the School Board or for other good cause.

. . .

E. If a discharge proceeding is instituted by the District (as contrasted with a non-renewal proceeding which shall be governed by the provisions of Section 118.22, Wis. Stats.), the teacher will first be suspended, pending further investigation of the charges. If the teacher is cleared of the charges at a later date, the teacher will be reinstated with no loss of pay for the period of the suspension.

. . .

BACKGROUND

The Grievant, Steve Landvatter, has been employed as a physical education instructor by the District since 2000. He was terminated in December 2008. His termination resulted from a confrontation with a student, TJ, at the end of a physical education class on November 14, 2008.

A. General Employment Background

Prior to the incident in November of 2008, the Grievant had been disciplined several times:

- May 2004 – a three day suspension for threatening a student after he was hit by a tennis ball, by allegedly grabbing the student, asking how he would like it if he punched him and swinging his fist as if to punch him, and for insubordination;
- May 2005 – a written reprimand for insubordination for a loud argument with an administrator in the presence of students;
- January 2007 – a two day suspension for engaging in inappropriate verbal behavior, in the form of profanity, references to alcohol consumption and inappropriate sexual innuendo;¹
- September 2007 – a one day suspension for inappropriate innuendo, in asking a female student “Are you a naughty girl?”
- November 2007 – a letter of warning for telling a student “If you are going to act like a punk, I will treat you like a punk.”

In addition to these disciplinary actions, in the spring of 2008, the administration sought to non-renew the Grievant’s contract. Following a hearing before the School Board, a plurality of the Board voted to non-renew his contract. However, several members were absent and a majority vote was required, so the Board members present instead voted unanimously to place him on probation through the end of the 2009-2010 school year. The Board defined the probation as meaning “During which time, he shall be subject to immediate dismissal in the event he commits any misconduct which results in disciplinary suspension.” Superintendent Steve Patz wrote a letter to the Grievant, advising him of the Board’s action and providing him with the wording of the Motion. Patz advised the Grievant that he should consider the Board’s action a reiteration and amplification of the warning contained in his September 2007 notice of suspension – “You must understand that further misconduct of any kind will result in additional disciplinary action, including possible termination of your employment.”

After reviewing Patz’s letter, UniServ Director Ted Kraig followed up with Mark Olson, counsel for the District, to clarify what the placement on probation meant. He confirmed that the Grievant remained a permanent employee, subject to the good cause

¹ The January 2007 and September 2007 suspensions were originally longer, but were reduced in the course of the grievance procedure. The 2004, 2005 and November 2007 disciplines were not grieved. The District cited a January 2006 “letter of counseling” for embarrassing a student by suggesting in front of others that she had a learning disability, and for using profanity in class. It is not at all clear that this was actually discipline, since it acknowledges in the body of the letter that the embarrassment to the young lady was unintentional, and took place after class, not during it as suggested in the District’s characterization. The author of the letter – Assistant Principal Nelson - assured the Grievant that it was intended as a summary of their meeting and would not go in his file.

standards of the contract. Kraig sent a confirming letter to Olson, who did not dispute that characterization. Given that clarification, neither the Grievant nor the Association filed a grievance over the Board's vote.

B. The Incident on November 14, 2008

Following the conclusion of the lesson on November 14, 2008, students were awaiting the bell to signal passing time to the next class. A number of the students were throwing footballs around, including throwing them into the bleachers and at the overhead light fixture. A substitute gym teacher, Robert Gridley, was having some difficulty in maintaining order and getting the students to return the balls. The Grievant blew his whistle and called for the balls to be returned to the storage area near where he was standing. Students tossed the balls in from various directions. One of the students, TJ, threw his football with some velocity towards the Grievant. The Grievant was distracted by some equipment falling over near him. He didn't see the ball coming, and it struck him in the chest.

The Grievant was surprised and angry, and he demanded to know who had thrown the ball. TJ was identified, and the Grievant walked over to him, with his fists clenched by his side. The two had an exchange of words. According to TJ and some others, the Grievant said he ought to kick his butt. According to the Grievant, he told TJ he was lucky he didn't beat the stuffing out of him. In either event, the Grievant did not strike or attempt to strike TJ, but did send him to the office.

The Grievant made a log entry that TJ had hit him with a football during a class. The log entry noted that TJ had been disciplined earlier in the class period. Assistant Principal Chad Nelson read the entry as meaning that TJ had intentionally struck the Grievant, and he ordered TJ suspended. However, the Grievant called him later to clarify the log entry, explaining that he had spoken with TJ's father, and that he wanted to double check to be sure that the entry did not say TJ had done it on purpose. Since the incident was now characterized as unintentional, Nelson rescinded TJ's suspension, although he did not advise the Grievant of this decision at the time. On the next school day, the Grievant inquired why TJ was in class, and Nelson responded that if the student had not hit him on purpose, there was no reason to suspend him.

C. The District's Investigation

When TJ was sent to the office, he spoke with Nelson about the reasons he had been sent. Nelson met with him a second time, to tell him he would receive a suspension and during this discussion TJ told Nelson that the Grievant had been quite angry, had stormed up to him and told him "I ought to kick your butt!" Nelson reported this to Principal Mike Cady. Cady and Nelson spoke with TJ again that day, and TJ repeated what he had told Nelson earlier, that he thought the Grievant was going to catch the ball, but hadn't and was hit in the chest. The Grievant was angry, and walked quickly over to him. He told TJ "I ought to kick your butt! You are done, go to the office."

Cady spoke with the Grievant on Monday, November 17. According to Cady's notes, the Grievant said he was hit with a football in the abdomen, just above the groin, and he reacted by telling TJ "You're lucky I don't beat the stuffing out of you." TJ replied that he thought he was looking and the Grievant said he wasn't looking anywhere. He then sent TJ to the office. He said TJ was a regular discipline problem, though he had never been sent to the office before. The Grievant suggested that Cady speak with the substitute teacher, Mr. Gridley, and Cady said he would.

Over the course of the following eight days, Cady interviewed Gridley twice, TJ twice, and six other students who were identified as having been present. He also held a follow-up interview with the Grievant. According to his notes of those interviews, Gridley told him that the Grievant had gone nose to nose with TJ and told him "I am going to kick your butt." He said the Grievant seemed angry, and had later apologized to him for losing his temper. With some variations, the four students who said they heard anything reported that the Grievant mentioned kicking TJ's butt. Two said that the Grievant raised a fist during the confrontation, but made no attempt to strike TJ. Cady also reviewed the security video of the gym, which displayed the incident, but had no audio.

When Cady interviewed him, the Grievant said he may have clenched his fists and may have gestured, but did not recall doing so. He denied making any reference to kicking TJ's butt, and said he very specifically recalled saying that he ought to beat the stuffing out of him, because that was a phrase that was common in South Carolina, (sic) where he had taught earlier in his career. The Grievant told Cady that he believed TJ had intentionally thrown the football at him. He said that his call to Nelson later on the 14th was prompted by a conversation with TJ's father, in the course of which the father had accused him of saying his son had done it on purpose so that they boy would be suspended. He merely called Nelson to confirm that he had not specifically characterized the throw as having been on purpose, and had not told Nelson it was an accident. The Grievant also said that he believed he had overreacted to the situation, and that he regretted the incident. He told Cady that he was having his medication adjusted.

D. The Termination

Based upon Cady's investigation, District Human Resources Director Judy Mueller recommended a five day suspension for the Grievant. Because of the terms of the previously imposed probationary status, the recommendation was treated as a recommendation for discharge. Judy Mueller met with the Board of Education on December 3rd, and advised them of the results of Cady's investigation. She told the Board members that she believed the conduct would, standing alone, warrant a disciplinary suspension and that by the terms of the prior spring's vote the Grievant should be terminated. The Board voted to immediately terminate the Grievant's employment.

E. The Grievance and Testimony at Arbitration

The instant grievance was thereafter filed, protesting the termination. Following a hearing on the grievance before the Board of Education in March 2009, it was referred to arbitration. At hearing, in addition to the evidence set forth above, the following testimony was taken:

Assistant Principal **Chad Nelson** testified that the Grievant had clearly told him in their telephone conversation that he believed TJ had not intended to hit him with the football.

Principal **Michael Cady** testified that he did not believe there was any great factual dispute about what had occurred, other than the precise words used by the Grievant. Cady expressed the view that it made little difference whether the Grievant said he should kick TJ's butt, that TJ was lucky he didn't kick his butt, or TJ was lucky he didn't beat the stuffing out of him. All were substantially the same, and constituted inappropriate threats of violence. Cady stated that representatives of the Association were present for all of his interviews, other than the first one with TJ and the interview with the substitute teacher, Gridley. Cady's view of the interviews and the tape was that there was no evidence that TJ intentionally hit the Grievant, and this belief was buttressed by the Grievant's phone call to Nelson, during which he said it was unintentional.

During cross-examination, Cady agreed that the actions of some of the students – throwing and kicking balls into the bleachers and the like – were inappropriate and called for teacher intervention. Cady said that he had been present during the prior spring's non-renewal hearing. He had recommended non-renewal, and had left after the plurality of the Board voted to non-renew the Grievant. He did not become aware of the decision to instead place the Grievant on probation until the next morning, and he had no idea where that idea had come from.

According to Cady, both Student W and Student H had mentioned, without any prompting, that the Grievant made a fist as he approached TJ. He agreed that Student H was a witness suggested by TJ. He said he did not know if Student H has spoken with any other students about the incident before being interviewed, and he agreed that sometimes students would report as their own observations things they had actually been told by others.

Student M testified that he was in the gym class on the day of the incident with TJ and the Grievant, although he did not see the Grievant being hit by the football. He heard the Grievant yelling and saw him get in TJ's face. He told TJ he was going to kick his butt, and then sent him to the office. Student M expressed the opinion that the Grievant was quite angry. He said his face was red, and he approached TJ very quickly, with his fist clenched. Student M said he had never seen a teacher act like this, or heard a teacher say something like this before. On cross-examination, Student M said he had known TJ since 5th grade, but that TJ was a grade ahead of him, and the two did not hang around together. Student M said he

heard what was said very clearly, and was very sure that the Grievant did not say anything about beating the stuffing out of TJ. He reviewed the notes of his interview with Cady, and agreed that it made no mention of a clenched fist, and that the Grievant was quoted as saying he would kick TJ's butt if he did it again. Student M said he was nervous when he was interviewed by Cady, and that he remembered more details about the incident as time went on.

TJ testified that he was in the gym class on November 14th. Early in the class, the Grievant sent him out to the hall for five minutes because he was fooling around and not paying attention. At the end of the class, he was tossing a football with friends when the Grievant called "balls in." He tossed the football to the Grievant, but the Grievant had looked away and the ball hit him. The Grievant became very angry and demanded to know who had thrown the ball. TJ said he had, and the Grievant walked very quickly over to him, with his right hand clenched into a fist. The Grievant got to within 18" of him and told him "I ought to kick your butt." He then sent him to the office. TJ said he was kind of afraid, just because he hadn't seen a teacher do this before. TJ denied telling anyone he was going to get the Grievant fired, but said that others had asked him if the Grievant was going to be fired, and he said he didn't know. After that Cady told him not to discuss it with anyone.

On cross-examination, TJ said he and Student W were sent out to the hall earlier in the class, and that they had that coming. TJ said he was not sure whether the Grievant asked "TJ was that you?" or if he had volunteered the information. He said he realized after the ball hit the Grievant that he should not have thrown it, but the Grievant had been looking towards him when he started the throw, and he thought he was going to catch it. He denied thinking this was funny, but he agreed that he made no apology at the time, other than to say he thought the Grievant had been looking. TJ said that it was common to throw the balls in when class was over.

Robert Gridley testified that he recalled the incident at the end of class on November 14th. The Grievant called "balls in" and some of the balls were rolled over to him and others were thrown. The Grievant was hit in the chest by a football that came in with some velocity on it. He walked very quickly over to the student who threw the ball, shook his finger in his face and told him he was going to kick his ass. The Grievant was yelling, and seemed very upset. Gridley said he did not recall the Grievant raising his arms or making a fist during the incident. Later, the Grievant apologized to him, commenting that it was not one of his better days, and that he regretted losing his temper. On cross-examination, Gridley agreed that the students were ignoring him while he tried to get them to stop throwing the balls around, and that the Grievant stepped in. Reviewing the video of the incident, Gridley agreed that he was looking up into the bleachers during most of the confrontation and that he was not really focused on the Grievant and TJ. He said, however, that he heard everything that was said. Gridley said he did not believe that the Grievant ever intended to harm TJ, and he thought he was upset and making it clear to the student that he wouldn't tolerate his behavior.

Student W testified that he and TJ are friends, and that he was playing catch with TJ at the end of the class on November 14th. When the Grievant called for the balls, TJ lobbed the football to him. The Grievant wasn't looking until the very last moment. He made to grab

the ball, but it hit him in the chest. TJ laughed when he saw it hit the Grievant, but the Grievant was very angry. He rushed over to TJ with his face red and when he reached him, raised one hand clenched into a fist. He said several times that he should kick TJ's butt, and then told him "You're done, go to the office." Student W agreed that the Grievant could be strict, and stressed safety in his classes. He denied that TJ ever said the Grievant was going to be fired, but he did say the Grievant could be in trouble. He believed that TJ told the Grievant he was sorry, but he was not sure that this was said.

Franklin Education Association TRACE Representative **Kim Trendel** testified that she was present for Cady's interview with the Grievant. In that interview, the Grievant had noted that he preaches safety in the gym, and that he expects students to walk the balls in at the end of class, not throw them. The Grievant acknowledged that he may have clenched his fist at first when he was hit by the football, and said he had overreacted to the situation.

Trendel said that the FEA had made a successful presentation in opposition to the non-renewal in the spring, and she expressed concern that they had not been invited to argue before the Board against the discipline in this case. She approached Judy Mueller about it, and Mueller told her that all she was going to present to the Board was the Superintendent's letter placing the Grievant on probation, and a letter recommending that he be terminated for this incident. Trendel noted that there had been two new Board members elected since the vote to put the Grievant on probation, and that those two would have no context for that decision.

UniServ Director **Ted Kraig** testified that he had represented the Grievant in two prior discipline matters, as well as the 2008 effort to non-renew him. Kraig said he was surprised at the effort to non-renew the Grievant, because it was based on prior misconduct cases. In his experience, employees who did something warranting discharge were handled through misconduct procedures rather than non-renewal. He viewed the non-renewal effort as double jeopardy, since the Grievant had already served suspensions for the prior incidents. He expressed the opinion that it was this argument that carried the day on the non-renewal vote. When he received the Superintendent's letter in the following week advising him of the Board's vote to place the Grievant on "probation", he was concerned since the Grievant was not probationary, but was instead a permanent employee with good cause protection. He spoke to Mark Olson, the Board's counsel, to confirm that the Board understood the Grievant's contractual status. Olson told him that they did, and Kraig followed up with a letter, stating their agreement as to the meaning of the Board's Motion and the Superintendent's letter. The first point of his letter stated:

- 1) The "probation" referenced in the motion does not mean that Mr. Landvatter is on probation as defined in Article VII, Section 3 of the contract. Mr. Landvatter remains a permanent employee as defined by the contract, and the cause, good cause and just cause standards apply to any disciplinary action taken against him. . . .

Kraig's letter closed by asking that Olson advise him as soon as possible "if this letter in any way does not represent your understanding of our verbal understanding." Olson did not reply, and never expressed any disagreement with Kraig's summary. The Grievant was not allowed to appear before the Board before it voted to terminate him in December 2008, and according to Kraig, the arbitration hearing was the first time he heard that the Board believed that the Motion somehow foreclosed arguments over the appropriate penalty in this case.

Testifying in the form of a narrative, Attorney **Mark Olson** agreed with Kraig's description of their conversation, and expressed the view that the placement of the Grievant on probation was not intended to affect his status as a permanent employee, or to relieve the Board of the obligation to show good cause for discipline. Olson distinguished between that and the determination of the penalty, and said he believed he had told Kraig that probation meant what it said in the Board Motion – that if misconduct was proved that would warrant a suspension, the Grievant would be discharged.

Steve Landvatter testified that he had been a good teacher for eight and one half years in Franklin, and that his performance evaluations had been above average. On November 14, 2008 he called for balls in at the end of class. One student threw a ball in that knocked over some other equipment, and he looked over at it. At that point, TJ threw a football at him, which struck him near the groin. He was quite surprised and he raised his hands with his fists clenched and said "Who threw the ball?" TJ ducked behind some other students, but the rest of the students backed away and pointed at him. He said "TJ was that you?" and TJ admitted that he had thrown the ball. He walked over to him. He did not recall whether his fists were clenched as he walked over, but conceded that it was possible. He was initially upset but he calmed down as he approached TJ. When he got to TJ, he pointed his finger at him and said "You're lucky I don't beat the stuffing out of you." TJ said "I thought you were looking" and he replied "I wasn't looking at anything. That's it, I'm done with you. You're out of here." He then told TJ to go to the office and tell the principal what he had done.

The Grievant said he later apologized to Gridley for his students' behavior, and told him that the students in Franklin were usually pretty good. If Gridley believed he was apologizing for his behavior, Gridley misunderstood him. After speaking to Gridley, he wrote up a referral to the office for TJ, explaining why he was sent to the office. At that point he had no idea that he was in any trouble. Later in the day he got a call from TJ's father, and he explained to him that he had had a problem with TJ in class that day. The father replied that he heard the Grievant had gotten his son suspended for two days, and the Grievant explained that he had simply written a referral and didn't know what penalty the principal had imposed. TJ's father then accused him of threatening to kill his son, and the Grievant told him that was not the case. In the background, he could hear TJ saying "Yes he did – he sure did." The father then asked if he had told the principal this was intentional. He said he didn't remember writing that, but he would check. That was what prompted his call to Nelson, to be sure of what he had written in the referral. Nelson said the report did not say the throw was on purpose. Nonetheless, the Grievant testified that he did believe it was intentional.

The Grievant said he did not realize there was any problem until the following Monday, when he was called upon to make a statement to Cady. He told Cady he had overreacted, in that he took it personally because he was hit, but he could have responded more calmly. The next day he was placed on administrative leave.

The Grievant stated that, after he was discharged, he went into intensive therapy to discover the source of his anger issues. He believed he had gained a better insight into these issues, and understood that his father and his other role models had themselves been quite rigid and angry. After ten weeks of therapy, however, his COBRA benefits ran out and he had to discontinue therapy.

On cross examination, the Grievant agreed that there was no grievance filed over the Board's imposition of probation in the spring of 2008. He also agreed that he had been disciplined approximately seven times in the past. He denied telling Cady that he was going to have his medications adjusted. He believed that what he had said was that he was going to get some help, meaning therapy. The Grievant agreed that he had been angry and yelling at the beginning of this incident, and said he initially considered using much harsher language to TJ. He thought better of it, though, and simply made the reference to beating the stuffing out of him. This was not an uncommon thing for coaches to say in North Carolina, where he had worked previously. Asked if it was appropriate to say that to a student, he said it depended on whether it was a warning or a threat. He meant it as a warning. He acknowledged that he was much bigger than TJ, and said he could see how a student might view his behavior as threatening.

The Grievant said he had received the Superintendent's letter in the spring of 2008, but that he had never understood it to mean that he could be fired for any conduct that would otherwise justify a suspension, or that he would be denied a hearing before the Board of Education if the administration decided to fire him.

The Grievant said he had been on anti-depressants since his first suspension in 2004. He had been receiving free samples from a psychiatrist, but those ran out and he changed to a different medication that left him feeling agitated. After this incident, he changed back to his original medication. He had told Cady about this, and he speculated that that may have been the basis of Cady's incorrect notation in his interview notes, that the Grievant would be changing his medication in response to this matter.

The Grievant denied that he had ever threatened TJ, but admitted that he wished he handled the situation differently. While anger is a natural emotion, he understood that he needed to channel it more carefully. He said he had learned a great deal as a result of this, and through his therapy, and committed to being a better teacher in the future.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

A. The Arguments of the District

The District takes the position that the Grievant was terminated for cause under the collective bargaining agreement. The District notes that the Grievant was on a probationary status as of the time of this incident, one which the Union had clarified, but had not challenged. By the terms of that probation, any incident warranting a disciplinary suspension would lead to termination. The Grievant's conduct towards TJ warranted at least a suspension, and Human Resources Director Mueller reasonably determined that five days would be an appropriate penalty for threatening a student. Given this, termination is demanded under the conditions by which the Grievant avoided non-renewal only months earlier.

The Grievant threatened TJ verbally, by saying, in effect, he should "kick his butt" and physically, by storming up to him, standing inches away, shouting and gesturing in a menacing manner. All of this is wholly inappropriate conduct for a teacher. The wrongfulness is spotlighted by the Grievant's effort to minimize it – he claims that all he said was "you're lucky I don't beat the stuffing out of you." That is his defense, and it is itself an admission to making a threat of physical violence to a student.

The Grievant's behavior, even his admitted behavior, warrants a disciplinary suspension of some sort. Even if the arbitrator felt that something shorter than five days would be appropriate, it is clear that the Grievant and the District both understood that this conduct would result in unpaid time off. The Grievant was suspended for three days in 2004 for a very similar incident, in which he grabbed a student after being hit by a ball and asked how he would like it if he punched him. That suspension was not grieved. Since the disciplinary history of the District and this specific employee demonstrate that a suspension was called for, and since the Grievant had been placed on probation, with the specific warning that any further serious misconduct would lead to his termination, the arbitrator must uphold the discharge.

Even if the arbitrator were to determine that the probationary status of the Grievant did not automatically justify discharge, his termination would still be appropriate under a cause standard. The principles of "cause", "good cause" and "just cause" all recognize a commitment to progressive discipline. In the four years preceding this event, the Grievant has been disciplined seven times and very nearly non-renewed once. This has included three suspensions. All of these incidents have involved misconduct, not simply job performance. All have involved inappropriate behavior and angry outbursts, generally towards students. The collective bargaining agreement specifically provides that employees may be discharged for, among other things, "willful and persistent violation of reasonable regulations of the School Board." The Grievant is plainly guilty of this. He has been given repeated chances, and he had repeatedly engaged in willful misconduct. He has been warned that he was on the brink of discharge, and he nonetheless flew into a rage and threatened to kick a student's butt. Without regard to probationary status, he deserved to be discharged. In light of that status, there is simply no question of it.

The District urges the arbitrator to dismiss the Association's various attempts to create due process issues and credibility issues where none exist. The Association claims that the Grievant was denied due process, but that is nothing more than a claim. The Grievant has, in all respects, been treated fairly and given every chance. The probationary status imposed on him came after a careful examination of his work record at a full Board hearing on his proposed non-renewal. It was a reasonable compromise by the Board, allowing him one last chance. More to the point, it was not grieved. While the Board agreed that any disciplinary action would require a showing of "cause", the Association did not challenge, and the Board did not modify, the provision that called for discharge for any further serious misconduct.

The Association's due process complaints about the District's investigation of this matter are likewise without merit. The Association claims that he was denied due process because the Board of Education did not listen to testimony by him, but the fact is that his right to be heard was fully respected in the investigation. He was given every opportunity to state his version of events. He was told of the principal claims against him, all of which he was already familiar with. The claim that he should have had an opportunity to confront his accusers in some sort of trial before discipline was imposed misperceives the requirements of due process. The District gave him every opportunity to explain himself during the investigation, and his explanations simply were not accepted.

The Association also seeks to mislead the arbitrator by manufacturing factual inconsistencies in the record where they either do not exist or are so minor as to be negligible. The Association claims that TJ initially denied throwing the ball, when all of the evidence is that he admitted it when he was asked. The Association takes TJ's statement that he threw the ball to the Grievant and tries to turn it into TJ having thrown the ball at the Grievant, with the intent to harm him. The evidence is clear, though, that TJ thought the Grievant was looking. In either event, it is the Grievant's improper conduct that is in issue here. TJ's state of mind is completely beside the point. For this reason, the Association's claim that TJ did not truly feel threatened by the Grievant's statement – even if true – is completely irrelevant.

The District urges the arbitrator to give no weight to the Association's attempts to flyspeck the testimony of the student witnesses. Beyond unsupported claims that some of these students are friends who must have collaborated with one another to falsely accuse the Grievant. The Association seizes on minor wording differences between the statements given in November of 2008 and the testimony given in January 2010, some fourteen months later. Thus the Association tries to impugn the testimony of AM because he told Cady that he heard the Grievant say "I ought to kick your butt" and testified at hearing that the Grievant said "I'm going to kick your butt." The fact is that the witnesses' testimony was remarkably consistent over time, and it all portrays the Grievant as threatening and out of control.

Finally, the Association's argument that the Grievant has now gained insights into his anger management issues and can be trusted to supervise children is both irrelevant and incredible. It is irrelevant because it reflects a state of mind one year removed from the

decision to discharge him. It is incredible because the Grievant still evinces no understanding that what he did was improper. He acknowledged at hearing only that he was “upset” during this incident, even though he admitted in the investigation and to his co-workers that he was angry. Moreover, he testified that his angry response to TJ was not necessarily inappropriate, and that anger in a classroom setting is not inappropriate. Further he characterized his statement to TJ as more of a warning than a threat. A warning is a statement of certain action, while a threat may or may not be serious. His willingness to characterize his words in this way demonstrates that he has no understanding that violence and threats of violence have no place in the classroom, no matter what the situation.

The Grievant was given every opportunity. He was given clear and repeated warnings. He was afforded progressive and corrective discipline. Despite all of this, he proved incapable of conducting himself appropriately in the classroom. He threatened physical harm to a student, for the second time. He engaged in inappropriate interactions with a student for the fifth time. Following a thorough investigation, the District reasonably determined that discharge was the only appropriate response. Accordingly, the grievance should be denied.

B. The Arguments of the Association

The Association takes the position that the Grievant was terminated without good cause as required by the collective bargaining agreement, and that he should therefore be reinstated and made whole for his losses. Good cause is identical to just cause, and it requires proof of wrongdoing and proof that the chosen penalty is appropriate. In a case like this, having overtones of moral turpitude, that proof must rise to the level of clear and convincing evidence. Further, the District must show that it has afforded the Grievant the full benefit of due process before imposing penalties upon him. The District’s case fails in all of these respects.

The Association first addresses the procedural failings of the District’s actions. The most fundamental principle of due process is that an employee must be advised of the charges against him and be given a full opportunity to be heard in his own defense before any discipline can be levied. Here, the Grievant never had any meaningful opportunity to confront his accusers, or to be heard in his own defense, until the arbitration hearing. In December of 2008, the Board of Education voted to terminate the Grievant, without giving him the chance to appear and deny guilt or argue for a lesser penalty. The Board relied on its unilateral “probationary status” determination of the preceding Spring, without factoring in its concurrent agreement that the Grievant continued to be subject to the cause provisions of the contract. The Board cannot have it both ways – the Grievant cannot be covered by “good cause” and subject to summary termination. Arbitrators have consistently held that a failure to allow an employee to face and refute the charges against him will lead to the voiding of discipline, even where there is some evidence that the employee is guilty of the underlying conduct. Otherwise there is no protection of employees’ due process rights. That same principle should apply in this case.

On the merits of the grievance, the Association argues that there is no version of the Grievant's statement that constitutes a threat of physical violence. Either his version – “You're lucky I don't beat the stuffing out of you” or TJ's version – “I ought to kick your butt” – are framed as contingent statements of what could have occurred, not as threats of what will occur. This was inappropriate, but the Grievant thought he had been deliberately thrown at by a student and was understandably upset. The fact that no threat was intended or conveyed is shown by TJ's response. He did not immediately report this – he only raised it after he was told he was being suspended. When Cady asked if he felt threatened by the Grievant, he said “Maybe a little – I just thought he was really mad at me.” He was right – the Grievant was mad at him, and with good cause. He had thrown a ball at him, refused to own up to it, and never apologized. But the fact is that the Grievant never threatened him, and that is the important point in these proceedings.

TJ and the Grievant were the central actors, and their versions of events both support the proposition that the Grievant never uttered a threat. The other witnesses all had variations in their stories and in their ability to perceive events that render them less reliable. The student witnesses AM and JW were friends of TJ, and their testimony at hearing should be given little credence. The Association notes that their testimony at hearing had the Grievant variously raising his fist and saying he was going to kick TJ's butt, as opposed to their initial statements to Cady in which AM said the Grievant told TJ he would kick his butt if he did it again, and JW made no mention of any clenched fists. Even Gridley, the only adult witness, did little to support the District. He understood the Grievant's statement as intended to make an impression on the student. Taken as a whole, the evidence that any threat was uttered simply does not meet the clear and convincing standard required in a case such as this. The Grievant's language was inappropriate, but it was not threatening.

Even if the arbitrator determined that the serious due process deficiencies could be ignored, and that some measure of discipline should be imposed, the events must be viewed in context. TJ deliberately tried to harm the Grievant. His claim that he thought the Grievant was looking is not credible. It had to have been obvious that he was looking elsewhere. Any reasonable teacher would have been upset. When interviewed, the Grievant immediately conceded to Cady that he had overreacted and he apologized. He has taken steps to have his medication adjusted, which has stabilized his mood. He has engaged in intensive therapy and anger management treatment. All of these should mitigate even the minor discipline that might be warranted for his inappropriate comments.

The Association urges the arbitrator to reject the District's novel belief that the Spring 2008 “probation” decree could possibly constitute an agreement between the parties that a penalty of discharge would be appropriate for any future misconduct warranting suspension. Kraig immediately clarified that the Grievant was a permanent employee, protected by the good cause standard against any future acts of discipline. This effectively negated any notion that the Grievant was on probation. For the District to now argue that there was a preordained penalty for future misconduct ignores the very concept of good cause, which as noted before

requires the Employer to justify both the imposition of discipline and the measure of discipline. It makes no sense that Kraig would have agreed to barter away the Grievant's good cause rights in the context of an agreement that those rights still applied. It further makes no sense that such a bargain would be made in the context of an extremely weak nonrenewal case. The effort to non-renew was premised on disciplinary incidents in the past, matters that had already been disposed of and for which the Grievant had already received punishment. The District's effort was classic double jeopardy, and could not have held up if challenged.

If, as the District claims, it intended the Board resolution to function as a sort of last chance agreement, the District was bound to make that clear. Yet when Kraig summarized his understanding of the agreement, and told Mark Olson to let him know if he had omitted anything, he did not include any reference to a last chance feature, and Olson did not correct or supplement Kraig's summary. It is inconceivable that such a vital point would be left to inference, and inexcusable that the District should now attempt to enforce such an understanding against the Association. The Association could have and would have proceeded to arbitration on the feeble nonrenewal case if the District had made its intentions known. Having instead hidden its intentions until the hearing in this matter, the District should be equitably stopped from trying to enforce its understanding of the Board's edict.

The Association also observes that Kraig and Olson testified to different understanding of the Board's probationary status decree, and that Kraig's version is far more compelling and believable than Olson's. Olson's testimony was that he and Kraig agreed that the Grievant was a permanent employee with good cause protection, and that the Grievant could be discharged for something that would otherwise warrant a suspension. Those two things are irreconcilable. Olson also said he "believed" he told Kraig that the definition of probation was that contained in the Board motion itself. Had he actually done so, however, either he or Kraig would presumably have memorialized that after the conversation, and neither one did. Kraig's testimony, to the effect that he confirmed with Olson that the good cause standard still applied in full to the Grievant, makes much more sense and is more consistent with the letter he subsequently sent.

The District's constant reference to imposing a five day suspension on an employee it discharged shows just how convoluted is the argument that good cause applies to the Grievant but not to the penalty imposed on him. The Association observes that there is no record of any such suspension to be found in the documents surrounding the discharge.

The Grievant made an inappropriate comment, but it was nothing more than that. The District has attempted, through mischaracterizing what was said and what was meant, to turn that comment into a threat of violence, but the evidence simply will not support that interpretation. The District has also sought to turn just cause on its head, by suggesting that it and not the arbitrator, has the discretion to judge penalties. Neither does the evidence support that. The arbitrator should determine instead that the Grievant is entitled to reinstatement and to be made whole for his losses.

DISCUSSION

A. Due Process

The Association points to the lack of any hearing before the Board prior to the discharge as a denial of the Grievant's basic due process rights to hear the evidence, face his accusers and answer the charges against him before suffering a termination. The collective bargaining agreement does not contain any specification of procedures to be followed in the event of disciplinary charges, other than to provide for a suspension pending investigation, and make whole relief if the teacher is then cleared. In reviewing the procedures followed by the District in this case, I cannot identify the denial of due process alleged by the Association. The District engaged in what appears to have been a fair investigation, interviewing all of the available witnesses, in most cases in the presence of an FEA representative. The Grievant cannot plausibly claim to have been unaware of the focus of the District's investigation, or the allegations that triggered it. He was specifically asked about it, and was asked for his version of the events. He explained his reasons for what he had done.

The Association particularly notes that the Board of Education did not allow any presentation by Association representatives before approving the administration's recommendation for discipline. The Board acted on the basis of the administration's findings that misconduct had occurred, and their understanding of the effect of the probation Motion. The Association argues that there had been a presentation in the non-renewal process and that it had succeeded in persuading the Board not to non-renew the Grievant, and that a presentation in this instance might have yielded the same result. While that may be true, the contract distinguishes between statutory non-renewal cases and discipline cases, and recognizes that different procedures are followed in the different cases. The hearing in the spring before the Board was a consequence of the statute, not some generalized requirement of due process.

B. Good Cause for Discipline

The Grievant was terminated for a confrontation with a student after being hit with a football, in the course of which he said words that suggested the possibility of physical violence. In his telling, he said "You're lucky I don't beat the stuffing out of you." In the telling of the student and other witnesses, he said either "I'm going to kick your butt" or "I ought to kick your butt."² Counsel parsed out these different possible statements and distinguished between a threat ("I am going to...") and a non-threat ("I ought to..." or "You're lucky I don't..."). The Grievant himself distinguished between a threat and a warning, and said it was appropriate to warn a student and that that was what he meant to do in this instance. He did not offer an explanation of under what circumstances it would be appropriate to warn a student that a teacher might either beat the stuffing out of him or kick his butt.³

² Given the unanimity in all of the other witnesses' initial statement, including Gridley's, I find clear and convincing evidence that the statement was that he should kick TJ's butt.

³ The Grievant also testified that, while he was angry, his words were not an excited utterance, but rather a considered choice. Specifically, he said he initially intended to use harsher language towards TJ, but decided against it.

I do not find any material difference between these various phrasings. Each conveys the possibility that a teacher might physically assault a student. When uttered at very close range by a large and angry man, any reasonable person would view them as threatening. This is not a close case on the issue of good cause for discipline. What the Grievant did was obviously wrong, and any school district would consider it as such. Moreover, I find that he knew it was wrong, as evidenced by his apology to Gridley and his effort to substitute a slightly less vulgar phrasing in his interviews with Cady and in his testimony at the hearing.

The District had good cause to discipline the Grievant. He threatened a student, and he knew from prior discipline that this conduct was forbidden. The more substantial issue is whether he may be discharged for having done it, and this turns in large part on his prior disciplinary record and the “probation” imposed on him in lieu of non-renewal at the end of the 2007-2008 school year.

C. Good Cause for the Penalty of Discharge

In the spring of 2008, the Board of Education was presented with the administration’s recommendation that the Grievant be non-renewed based largely on his disciplinary record and history of troubled interactions with students. After hearing presentations by the administrators and the Association, a plurality of the Board voted to non-renew him. However, a majority vote was required to effect a non-renewal. In the wake of that vote, a majority of the Board elected to instead place him on “probation” for two years. The Board Motion defined probation as meaning “... he shall be subject to immediate dismissal in the event he commits any misconduct which results in disciplinary suspension.” When this was conveyed to UniServ Director Kraig, he inquired whether the Board was purporting to transform the Grievant into a probationary teacher within the meaning of the collective bargaining agreement and to deny him a cause standard for discipline. Counsel for the Board responded that he remained a permanent employee, covered by the cause provision. The Grievant did not file a grievance challenging the Board’s action.

The District now argues that the probation functions in the same way as a last chance agreement, and that the Association may not challenge its choice of discharge as the penalty for any misconduct that might plausibly have led to a suspension. The Association disagrees, and accuses the District of being disingenuous for having committed itself to a cause standard for discipline, when it apparently meant to excuse itself from the normal burden of justifying the penalty. I find the Association’s objections somewhat overstated, since a fair reading of the Board’s explanation of what it meant by “probation” clearly conveys its intentions. Specifically, the notion of “misconduct” resulting in “a disciplinary suspension” leaves with the Board the burden of proving misconduct, and of proving that the misconduct was serious enough to warrant a suspension. Thus, while I have no reason to doubt the Association’s claim that its subjective understanding was different than that of the District, it is not accurate to say that the Board sought to exempt itself from the cause standard while simultaneously claiming to embrace it, or otherwise tried to mislead the Grievant about how it meant to respond to further incidents. Having said that, I find it unnecessary to determine whether the probation imposed by the Board had some binding effect on the Grievant.

It is generally understood in the field of labor relations that a cause standard incorporates the notion that penalties must be in proportion to the conduct itself and to the prior record of the employee. Other than cardinal offenses, the purpose of discipline is to correct behavior, and in determining its response an employer will be expected to apply a progression of penalties. Thus an employee who is guilty of misconduct but has an otherwise clean record may expect a lesser sanction than one who has had prior discipline, particularly discipline for the same type of misconduct. The progression of discipline serves a cautionary purpose, driving home to the employee the need to avoid further misconduct or face more serious consequences.

In this case, the Grievant has served three disciplinary suspensions in four years, all of them related to inappropriate interactions with students. In that span, he has also had two written warnings, one for insubordination in yelling at the principal in front of students and one for inappropriate comments to a student. One of the suspensions – three days in 2004 - was for an incident virtually identical to this one, where the Grievant suggested the possibility of violence toward a student who hit him with a tennis ball. This is an extraordinary record of discipline for an educator, and it formed the backdrop for the Board of Education’s vote in the spring of 2008. Even if the Grievant and the Association believed that this vote had no binding effect, it provided unmistakable notice that, in the Board’s view, the next step in the application of progressive discipline would be termination. Notwithstanding that clear warning, this incident followed before the end of the next semester.

The incident with TJ constituted cause for discipline. Given the prior three day suspension for substantially the same conduct, at least a suspension could be expected. The goal of progressive discipline is to let an employee and an employer avoid termination. It is reasonable to ask, though, what further corrective purpose is served by a fourth suspension for inappropriate interactions with students, and at what point is the District entitled to conclude that the Grievant is not amenable to correction. Given the repeated, clear warnings to the Grievant, including an express statement one semester earlier that he was on the brink of termination, the District could reasonably have concluded that that point had been reached. It did reach that conclusion, and I cannot say that it thereby abused its discretion under the contract.

The collective bargaining agreement defines good cause for discharge as including “willful and persistent violation of reasonable regulations of the School Board.” The Grievant’s disciplinary history discloses a persistent pattern of violations, despite the application of progressive discipline and an express warning that he would be discharged for the next serious act of misconduct. I therefore conclude that the District had good cause to discharge him for his confrontation with TJ on November 14, 2008. On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The District had good cause to terminate the Grievant, Steve Landvatter. The grievance is denied.

Dated at Racine, Wisconsin, this 2nd day of November, 2010.

Dan Nielsen /s/

Daniel Nielsen, Arbitrator