

## TERMINATING PUBLIC SCHOOL TEACHERS FOR CAUSE UNDER MINNESOTA LAW

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I.	INTRODUCTION.....	304
II.	HISTORY.....	306
III.	STATUTES' COVERAGE .....	307
IV.	THE PROCESS OF DISCHARGE.....	310
	A. <i>Starting the Process</i> .....	310
	B. <i>Arbitration</i> .....	312
	C. <i>City of Brooklyn Center v. Law Enforcement Labor Services</i> .....	315
V.	REMEDIATION .....	319
	A. <i>Statutory Framework</i> .....	319
	B. <i>Kroll's Four-Factor Test</i> .....	321
	C. <i>Applying the Four-Factor Test in Kroll</i> .....	322
	D. <i>Applying Kroll's Four-Factor Test in Other Cases</i> .....	324
	E. <i>Remediation Details</i> .....	327
VI.	BASES FOR DISCHARGE.....	329
	A. <i>Statutory Overview</i> .....	329
	B. <i>Professional Performance</i> .....	332
	1. <i>Performance in the Classroom</i> .....	332
	2. <i>Licensure Issues</i> .....	340
	C. <i>Personal Behavior</i> .....	342
	1. <i>High Standard of Conduct</i> .....	342
	2. <i>Illustrative Cases</i> .....	343
	3. <i>Sexual Boundary Issues</i> .....	347
	D. <i>Off-Duty Misconduct</i> .....	358
	E. <i>The Troubled Teacher</i> .....	362
	F. <i>Medical Leaves and Disability</i> .....	367
VII.	PENALTY.....	372
VIII.	CONCLUSION .....	373

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## I. INTRODUCTION

The over 900,000 K-12 students who are enrolled in Minnesota's 2214 public schools in 347 school districts are taught by 70,000 teachers, a very small portion of whom are discharged from their positions each year because of their professional performance or personal behavior.<sup>1</sup> Among that small number of teachers, districts have little difficulty terminating teachers who are still within their three-year probationary periods for they, like any at-will employee, can typically be discharged for any reason or no reason at all.<sup>2</sup> However, school districts face a far more daunting challenge when they attempt to terminate teachers who are past their probationary periods because non-probationary teachers enjoy significant job protections under Minnesota law.<sup>3</sup>

Critics of public education in general, and the teachers' statutory protections in particular, complain that it has become virtually impossible to fire bad public school teachers in Minnesota.<sup>4</sup> However, others who disagree with those critics argue that teachers sometimes need to be protected from unfair, even vindictive, administrators and school boards, and that when it is genuinely necessary to remove a teacher from the classroom, there are ways to do so quietly and respectfully.<sup>5</sup>

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1. Debra O'Connor & Theresa Monsour, *Rewarding The Best Teachers, Replacing Bad Apples Not So Easy Training*, ST. PAUL PIONEER PRESS, Sept. 1, 1997, at A1. "While no one tracks teacher firings specifically, educators estimate there are from 50 to 100 each year in Minnesota." *Id.*

2. *See infra* Part III (discussing probationary teachers).

3. *See* MINN. STAT. § 122A.40 (2002) (originally enacted as MINN. STAT. § 125.12 (1941)); MINN. STAT. § 122A.41 (2002) (originally enacted as MINN. STAT. § 125.17 (1953)). Contracts of tenured teachers that do not expressly incorporate provisions of tenure law are deemed to impliedly incorporate such provisions including all amendments to law as they are made. *Minn. Ass'n of Pub. Sch. v. Hanson*, 287 Minn. 415, 423, 178 N.W.2d 846, 852 (1970).

4. O'Connor & Monsour, *supra* note 1, at A1 ("Minnesota's laws, traditions and bureaucracy make it difficult both to fire inept teachers and to reward exceptionally good ones.").

5. *Id.* Judy Schaubach, President of the then Minnesota Education Association teacher organization, stated, "There's a huge misconception that the union is about protecting bad teachers. We do routinely counsel people out of the profession if they can't make those changes. It's a reflection on all of us." *Id.* However, the union has endorsed taking an active role in keeping quality teachers—supporting mentorship programs for new teachers, for example—and helping others, even if it means helping them out the door. *Id.* On the other hand, James Knutson, of Knutson, Flynn and Deans (a Mendota Heights law firm specializing in school law and representing many school districts in the state) stated, "It is not impossible (to fire a teacher), ([b]ut) a difficulty is who is going

This debate is among the most heated in public education. Unfortunately, perceptions often drive reality. Stories abound of teachers who have unfairly been driven from the profession, protesting little because of the perception that it is futile to fight the district. At the same time, stories circulate of school districts—similarly overwhelmed by a sense of helplessness—that continue to tolerate poor, even harmful, teachers, or that manage to foist them on other unsuspecting districts.<sup>6</sup> The public is also affected by conflicting perceptions that even good teachers are at risk or that bad teachers successfully hide behind tenure. These perceptions can play a powerful role in determining the extent to which voters are willing to support funding requests for public education.

It is important to understand the realities that surround the discharge of a teacher, for embarking upon this path promises to be painful for everyone involved. Teachers who challenge allegations that they are personally or professionally unworthy of continuing to teach in their districts—or perhaps to continue to teach at all—understandably experience extraordinary trauma and anxiety. By the same token, districts that ultimately fail to prove the case for discharge can face significant financial liability and may even be forced to reinstate teachers who have been found to be deficient. Finally, these efforts often divide schools and communities because teachers, students, and parents are called to testify for and against a teacher.

This article seeks to shed some light on this challenging subject by examining Minnesota law concerning teacher discharges, as Minnesota's courts and arbitrators have interpreted it. It is hoped that this guide will assist everyone who must deal with the difficult issues that surround the proposed discharge of a teacher for cause.

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to come forward . . . . School districts can't fish out all of the problems teachers are having because of the limited number of administrators we have to conduct observations and evaluations." *Id.*

6. *See id.* Only since 1989 have school districts been required to report terminations to the State Board of Teaching. Knutson said years ago that teachers could be fired in one district and go to another to teach: "Years ago, I terminated the same chap in four or five school districts. He went from one district to another. We were like friends." *Id.*

## II. HISTORY

Minnesota law concerning teacher discharges can be traced in large part to nationwide debates that took place throughout the 1920s during a period of very high teacher turnover in many school districts.<sup>7</sup> Investigation revealed that much of this turnover was the result of boards firing teachers for non-job-related reasons such as: local politics, a teacher's residing outside the district, favoritism to friends and relatives, undercutting opposition to board policies, or seeking to hire lesser-paid, new teachers.<sup>8</sup>

Two competing philosophies arose in response to these findings.<sup>9</sup> One philosophy supported creating tenure for teachers.<sup>10</sup> Tenure would mean that teachers who successfully completed a probationary period of one to five years would thereafter retain their positions unless discharged for cause, and then only after being given various due process protections including notice and an opportunity to be heard.<sup>11</sup> In contrast, a competing school of thought urged adopting a continuing contract philosophy, whereby a teacher's contract would be automatically renewed each year unless the school district terminated it by a certain deadline set by statute.<sup>12</sup> The continuing contract approach would obviously give a school district more discretion than would a tenure system.

In 1927, the Minnesota Legislature took its first foray into this arena by passing a tenure law for teachers in Duluth, Minneapolis, and St. Paul—cities referred to in the statute as “cities of the first class.”<sup>13</sup> Ten years later, the legislature passed a continuing contract law, the Lager Bill, for all other teachers in the state.<sup>14</sup> The

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7. Harley M. Ogata, *History of Continuing Contract and Tenure Law in Minnesota*, in MINNESOTA CONTINUING LEGAL EDUCATION: FOURTH ANNUAL CONFERENCE ON SCHOOL LAW & LIABILITY § 1 (1995) [hereinafter *History*]; Telephone Interview with Harley M. Ogata, General Counsel, Education Minnesota (April 14, 2004) [hereinafter *Ogata Interview*].

8. *History*, *supra* note 7, at 1; *Ogata Interview*, *supra* note 7.

9. *See History*, *supra* note 7, at 2.

10. *Id.*

11. *Id.*; *Ogata Interview*, *supra* note 7.

12. *History*, *supra* note 7, at 2; *Ogata Interview*, *supra* note 7, at 2.

13. 1 MINN. STAT. §§ 2935-1 to -14 (Mason 1927) (referring to the section laws named “Teachers - Employment in First Class Cities”); *History*, *supra* note 7.

14. 3 MINN. STAT. § 2903 (Mason Supp. 1940) (this statute codified the Lager Bill); *see History*, *supra* note 7, at 3.

curious consequence of these two statutes was that teachers in Minnesota's three largest cities could be fired only for cause and only after being accorded basic due process protections.<sup>15</sup> In contrast, all other districts in the state could discharge their teachers after each school year simply by giving notice by the statutory deadline.<sup>16</sup> It wasn't until forty years later, in 1967, that the legislature formally added the same due process protections to the continuing contract law that the tenure law had included from the beginning.<sup>17</sup>

Thus, the Minnesota law that governs the discharge of non-probationary teachers is in fact a compilation of two statutes.<sup>18</sup> Minnesota Statutes section 122A.41,<sup>19</sup> also known as the Teacher Tenure Act, governs the discharge of tenured teachers in the "first class" cities of Duluth, Minneapolis, and St. Paul. Minnesota Statutes section 122A.40,<sup>20</sup> also known as the Continuing Contract Act, governs the discharge of "continuing contract" teachers in all other cities. However, as the following discussion will demonstrate, as a practical matter, both statutes' substantive and procedural protections are in many ways the same in their terms and in how they have been applied by the courts and in arbitration.<sup>21</sup>

### III. STATUTES' COVERAGE

Given the significant protections that Minnesota education law provides to teachers, it is important to understand who is and who is not covered by its provisions.

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15. See 3 MINN. STAT. § 2903 (Mason Supp. 1940); 1 MINN. STAT. §§ 2935-1 to -14 (Mason 1927); *History, supra* note 7, at 3.

16. 3 MINN. STAT. § 2903 (Mason Supp. 1940); see also *History, supra* note 7, at 3.

17. See Ogata Interview, *supra* note 7, at 3; MINN. STAT. § 125.12, subd. 6(e) (1967) (formerly codified as 3 MINN. STAT. § 2903 (Mason Supp. 1940), later codified as MINN. STAT. § 130.18 (1941), now codified at MINN. STAT. § 125.12 (1961)).

18. See MINN. STAT. §§ 125.12, 125.17 (1967).

19. *Id.* § 122A.41 (2002).

20. *Id.* § 122A.40 .

21. See *infra* Part III; *Jurkovich v. Indep. Sch. Dist. No. 708, Tower-Soudan*, 478 N.W.2d 232 (Minn. Ct. App. 1991). "Tenure rights" under the Teacher Tenure Act (MINN. STAT. § 122A.41 (2002)) are equivalent to "continuing contract rights" under statute providing procedural protections for teachers (MINN. STAT. § 122A.40 (2002)), and the two terms are used interchangeably. *Jurkovich*, 478 N.W.2d. at 233 n.1 (citing *Westguard v. Indep. Sch. Dist. No. 745*, 400 N.W.2d 341, 344 (Minn. Ct. App. 1987), *pet. for review denied* (Minn. Apr. 17, 1987)).

The Teacher Tenure Act, which covers teachers in Duluth, Minneapolis, and St. Paul—collectively referred to as “cities of the first class”—broadly defines a teacher as

[e]very person regularly employed, as a principal, or to give instruction in a classroom, or to superintend or supervise classroom instruction, or as placement teacher and visiting teacher. Persons regularly employed as counselors and school librarians shall be covered by sections as teachers if licensed as teachers or as school librarians.<sup>22</sup>

Likewise, the Continuing Contract Act, which applies to teachers in cities other than the first class, defines a teacher as “[a] principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department.”<sup>23</sup>

Probationary teachers receive virtually no protection under these provisions. The vast majority of cases that raise coverage issues have involved teachers denied statutory protection on the grounds that they were still in their three-year probationary periods.<sup>24</sup> Interestingly, neither the Teacher Tenure Act nor the Continuing Contract Act sets a minimum number of hours a teacher must work to receive credit for one year toward the three years of probation. Thus, the Minnesota Court of Appeals has found that a teacher who worked only seventy-nine hours during a school year nevertheless had served one year of probation.<sup>25</sup> A Minnesota Attorney General’s Opinion also agrees that

[a] contract between the school board and a teacher who is serving his probationary period is an “annual contract . . . . Therefore, it is our opinion that an annual contract satisfied one year of the required probationary period . . . . regardless of the length of actual teaching services rendered during such period.”<sup>26</sup>

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22. MINN. STAT. § 122A.41, subd. 1(a) (2002).

23. *Id.* § 122A.40, subd. 1.

24. See Kevin J. Rupp, *Probationary Teachers*, in MINNESOTA CONTINUING LEGAL EDUCATION: THE EIGHTH ANNUAL SCHOOL LAW CONFERENCE § 6 (1999) for a more detailed examination of teacher probation in Minnesota.

25. *Flaherty v. Indep. Sch. Dist. No. 2144, Chisago Lakes Sch.*, 577 N.W.2d 229, 235-36 (Minn. Ct. App. 1998).

26. 5 Minn. Op. Att’y Gen. 90 (1972). This opinion does not extend to a substitute teacher who is hired to replace an absent regular teacher or a regular teacher on a leave of absence. *See id.*

More recently, the Minnesota Court of Appeals found that a school district's failure to comply with the statutory requirement that districts evaluate their probationary teachers at least three times a year did not invalidate St. Louis Park's discharge of a probationary teacher for budgetary reasons.<sup>27</sup> The court observed that because the provision that mandated these evaluations did not identify any consequences for failure to comply, this could be construed as a directory statute, and failure to comply with directory statutes does not necessarily invalidate actions taken with respect to them.<sup>28</sup> As the district had otherwise substantially complied with the statute by giving the teacher timely notice that her contract would not be renewed at end of the school year (despite never having evaluated the teacher once in her three years of teaching), the court held she had no right to a hearing to challenge the district's discretionary right to discharge her.<sup>29</sup>

A case not involving issues of probation, which explored the coverage of both the Teacher Tenure Act and the Continuing Contract Act, established that only persons who specifically fall within the express definitions of "teacher" qualify for these protections.<sup>30</sup> The Minnesota Supreme Court stated that the definition of "teacher" under the Teacher Tenure Act is exclusive and the courts will not seek guidance from other education statutes that define that term.<sup>31</sup> Given this unwillingness to look outside the statutes for help in applying the not always clear meaning of "teacher," the courts have thus been obliged to tackle the task directly.

In *Board of Education v. Sand*, the Minnesota Supreme Court declined to extend the statutory protections to a school superintendent's administrative assistant whose duties involved research and statistical work incidental to school administration.<sup>32</sup> Since the position involved little or no superintending or supervising of classroom instruction and no classroom teaching, the assistant was not a "teacher" within the statutes' definitions, regardless of how the term was defined in other statutes relating to

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27. *Savre v. Indep. Sch. Dist. No. 283, St. Louis Park*, 642 N.W.2d 467, 471-72 (Minn. Ct. App. 2002).

28. *Id.* at 472.

29. *Id.* at 472-73.

30. *Bd. of Educ. v. Sand*, 227 Minn. 202, 34 N.W.2d 689 (1948).

31. *Id.* at 210, 34 N.W.2d at 694.

32. *Id.* at 212, 34 N.W.2d at 695.

school matters.<sup>33</sup> The thrust of this case has been clear: the closer a person is to the classroom the more likely he or she will qualify as a “teacher” and thus fall within the statutory protections.

#### IV. THE PROCESS OF DISCHARGE

A teacher who protests his or her discharge (or demotion, as well, if in a “city of the first class”)<sup>34</sup> has two possible bases for challenge: (1) the process the district followed in undertaking the discharge, or (2) the evidence upon which the district relied to support the discharge. This section describes the process that a district must strictly follow<sup>35</sup> to comply with the statutory requirements.<sup>36</sup>

##### A. *Starting the Process*

Both the Teacher Tenure Act and Continuing Contract Act prescribe the process a district must follow in proposing a teacher for discharge. Although the process for both is similar, one very significant difference is the Continuing Contract Act’s requirement that school districts within its coverage must meet an April 1 deadline in order to propose the discharge of a continuing contract teacher for professional incompetence.<sup>37</sup> A district that fails to give a teacher notice of his or her deficient performance, an opportunity to remedy that performance, and the entire hearing process (notice, hearing, and decision) by the April 1 deadline must wait another year to initiate this process.

The process of discharge is triggered when charges against an individual teacher are presented to a school board, and a majority of the board members vote to propose termination.<sup>38</sup> Although a district administrator typically presents these charges, the Teacher

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33. *Id.* at 209, 34 N.W.2d at 694.

34. MINN. STAT. § 122A.41, subd. 6 (Supp. 2003).

35. Both the Minnesota Supreme Court and the Minnesota Court of Appeals have stated that a school district must strictly comply with the statute’s requirements. *See, e.g.*, *Shell v. Indep. Sch. Dist. No. 811, Wabasha*, 301 Minn. 442, 444, 223 N.W.2d 774, 775 (1974); *In re Peterson*, 472 N.W.2d 687, 690 (Minn. Ct. App. 1991).

36. At the outset, however, it is important to note that this process applies only to district personnel who are specifically covered by the statute. 5 Minn. Op. Atty. Gen. No. 89 (1972).

37. MINN. STAT. § 122A.40, subd. 7(a) (2002).

38. *Id.*

Tenure Act specifically acknowledges the right of a person outside of the district to bring charges to the board's attention, which the board may choose to pursue or disregard.<sup>39</sup> Written notice must be given to a teacher proposed for discharge for cause. Such a written notice must set forth in reasonable detail the grounds for the action and specifically advise the teacher of his or her right to elect a full hearing on the matter before either the board or an arbitrator.<sup>40</sup>

The board's notice to the teacher must also indicate the deadline for requesting this hearing. The deadline is typically ten to fourteen days from the date of the notice, although timeframes can vary depending upon the basis for the discharge.<sup>41</sup> A teacher who fails to request a hearing within the mandatory time limits is deemed to have acquiesced to the board's proposed action,<sup>42</sup> and a teacher who requests a hearing but does not specifically direct that it should be before an arbitrator is considered to have requested a school board hearing.<sup>43</sup> A district that receives a teacher's timely request for a hearing must schedule one and provide the teacher with notice of its time and location, making sure to give the teacher a reasonable time to prepare.

Throughout this process it is essential that a district remain mindful of the teacher's privacy rights under the Minnesota Government Data Practices Act (MGDPA).<sup>44</sup> The Minnesota Supreme Court's 2002 decision in *Navarre v. South Washington County Schools*<sup>45</sup> is particularly instructive on the ways in which things can go horribly wrong when district officials reveal private

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39. *Id.*

40. *Id.*; MINN. STAT. § 122A.41, subd. 7 (2002).

41. Minnesota Statutes section 122A.40 has specific calendar deadlines for giving notice to a teacher who is proposed for termination on grounds set forth in subdivision 9. A teacher proposed for termination on this basis must be so notified by April 1 and has fourteen days to request a hearing, which must take place in time to ensure final decision on the matter so that the termination is effective at the close of that school year. In contrast, a district can propose a teacher's discharge pursuant to the more serious immediate termination provisions of subdivision 13 at any time. However, a teacher proposed for immediate discharge under subdivision 13 of the Teacher Tenure Act is given only ten days within which to request a hearing on that matter. Minnesota Statutes section 122A.41, subdivision 7 provides a ten-day period for a teacher in a city of the first class to request a hearing.

42. MINN. STAT. § 122A.40, subd. 7(a) (2002).

43. *Id.* § 122A.40, subd. 15(a).

44. MINN. STAT. §§ 13.01-.99 (2002 & Supp. 2003).

45. 652 N.W.2d 9 (Minn. 2002).

personnel data before there has been a final disposition concerning a teacher's discipline. In *Navarre*, the district broadly released private data concerning a teacher's classroom management and instruction, even sharing that information with the *St. Paul Pioneer Press*.<sup>46</sup> The teacher won a jury verdict of \$200,000 for loss of reputation, \$250,000 for emotional distress, and \$70,000 for loss of income or earning capacity.<sup>47</sup> When the Minnesota Court of Appeals reversed and remanded the case, the teacher appealed to the Minnesota Supreme Court.<sup>48</sup>

In a decision that largely favored the teacher, the Minnesota Supreme Court discussed the MGDPA at length and found that the district had violated the MGDPA's clear terms when it released information concerning the complaints against the teacher while her discipline was still pending.<sup>49</sup> The court emphasized that before final disposition, districts can disclose only the existence and status of complaints against the employee; they cannot provide more detailed information concerning the nature and types of those complaints.<sup>50</sup> Because the district had indeed violated the statute on several different occasions, the court upheld its liability for emotional distress and loss of reputation damages.<sup>51</sup> Although the court remanded the case for a new trial, it did so because the district court had committed several evidentiary errors.<sup>52</sup> The underlying message remains clear and sobering: districts must maintain strict confidentiality while progressing through the discipline process.

### *B. Arbitration*

Before 1991, a teacher who exercised his or her right to a hearing was given one before the very school board that had issued the notice of proposed termination. For many years teachers and their representatives protested that this method of review—one in which the board was arguably prosecutor, judge, and jury—was fundamentally unfair. Protests continued even after Minnesota

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46. *Id.* at 17.

47. *Id.* at 20-21.

48. *Navarre*, 633 N.W.2d 40, 48 (Minn. Ct. App. 2001), *rev'd*, 652 N.W.2d 9 (Minn. 2002).

49. *Navarre*, 652 N.W.2d at 21.

50. *Id.* at 22-23.

51. *Id.* at 30.

52. *Id.* at 32.

courts began directing school boards to hire independent examiners to conduct the proceedings. Ultimately, in 1991, the legislature amended Minnesota Statutes section 122A.40 and Minnesota Statutes section 122A.41 to grant Minnesota teachers the right to choose between a hearing before the board or before an arbitrator.<sup>53</sup> Since that time, virtually all teacher termination hearings have been held before an arbitrator.

There are several reasons why teachers prefer arbitration to a board hearing and why the switch to arbitration has had a significant impact on teacher discharges. First, arbitration addresses the concern that prompted its adoption in the first place: the perception that the board hearing system was unfair to teachers, even when presided over by hearing examiners. Arbitration gives teachers the right to participate in selecting the arbitrator, a person who is a recognized professional neutral and whose fee is shared equally by the parties.<sup>54</sup>

In addition, before the 1991 amendments, the “substantial evidence” standard of proof was adopted in board hearings. Similarly, in hearings before a school board the Continuing Contract Act applies “substantial and competent evidence”<sup>55</sup> and “competent evidence”<sup>56</sup> standards while the Teacher Tenure Act applies a “best interest of the school” standard.<sup>57</sup> These standards are typically viewed as less burdensome than the “preponderance” standard arbitrators must apply under the Continuing Contract Act<sup>58</sup> and Teacher Tenure Act.<sup>59</sup>

Perhaps even more important is the quite different role arbitration plays as contrasted with a court’s role. When a board of education’s decision to discharge a teacher is appealed to the courts, discharge is already a *fait accompli* and the court sits as an appellate body to decide the appeal. The question before the court is whether the board’s action was supported by “substantial evidence” in the record. Within this framework, the courts have been guided by the principle that the board of education is acting in an administrative role when deciding to hire or fire a teacher:

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53. MINN. STAT. §§ 122A.40, subd. 15, 122A.41, subd. 7 (2002).

54. *Id.* § 122A.40, subd. 15(b).

55. *Id.* § 122A.40, subd. 14.

56. *Id.* § 122A.40, subd. 16.

57. *Id.* § 122A.41, subd. 10.

58. *Id.* § 122A.40, subd. 15(c).

59. *Id.* § 122A.41, subd. 13(c).

“On appeal to this court, a school board’s decision to terminate a teacher will be set aside only if the decision is ‘fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the school board’s jurisdiction, or is based on an erroneous theory of law.’”<sup>60</sup>

The predictable result of this perspective is that the courts have overturned very few teacher discharges. In contrast, arbitration is a *de novo* rather than an appellate process; arbitrators do not review discharge as a *fait accompli* as do the courts, but instead conduct a *de novo* inquiry to determine whether a district has supported its proposed discharge of the teacher by a preponderance of the evidence in the record. Another significant aspect of both Acts’ characterization of the discharge as a “proposed discharge” is that under the Continuing Contract Act, a suspended teacher continues to be paid throughout the process,<sup>61</sup> and although the Teacher Tenure Act does not contain the same requirement, if the teacher wins, the district must fully reimburse his or her back wages.<sup>62</sup>

There is evidence that obtaining the right to go to arbitration has significantly affected the outcome of many teacher discharge cases. True, it is difficult to track the actual results of all teacher terminations, for most are not appealed and the results of those that do go to a hearing are not necessarily widely reported. Nevertheless, it is revealing that attorneys at Education Minnesota—an organization that represents virtually every K-12 public school teacher in the state—always elect arbitration rather than a board hearing when a teacher is proposed for discharge.<sup>63</sup>

Moreover, although there is no concrete statistical data, these same advocates have expressed the sense that there have been more settlements since the Minnesota Legislature amended the Teacher Tenure and Continuing Contract Acts. It is possible that the threat of arbitration now encourages at least some school districts to modify what before would have been all-or-nothing positions that gave teachers no choice but to resign or to litigate.<sup>64</sup>

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60. Ostlund v. Indep. Sch. Dist. No. 47, Sauk Rapids, 354 N.W.2d 492, 496 (Minn. Ct. App. 1984).

61. MINN. STAT. § 122A.40, subd. 13(a) (Supp. 2003).

62. *Id.* § 122A.41, subd. 12 (2002).

63. Ogata Interview, *supra* note 7.

64. William Garber, *The Effects of Arbitration on Teacher Termination*, in MINNESOTA CONTINUING LEGAL EDUCATION: THE FIFTH ANNUAL CONFERENCE ON SCHOOL LAW & LIABILITY § 10 at 16 (1996).

For example, because suspensions are not subject to arbitration under statute, some districts might now more often suspend a teacher rather than proceed directly to discharge. However, it is noteworthy that suspensions are nevertheless subject to arbitration under collective bargaining agreements and also often result in reports to the Board of Teaching.

Another reason the move to arbitration has been significant can be found in the courts' diminishing role with respect to developing and refining the law concerning teacher discharges. Arbitration decisions are, with rare exception, "final and binding."<sup>65</sup> This means that with most teacher discharges now decided in arbitration, the courts are no longer being called upon to interpret and apply the statutes' provisions to the same extent as they did for so many years. Thus, since 1991, there have been very few judicial pronouncements regarding the two statutes. Certainly there have been no landmark decisions comparable to the guidance the courts provided in the cases of *Kroll v. Independent School District No. 593*<sup>66</sup> in 1981 and *Downie v. Independent School District No. 141*<sup>67</sup> in 1985, both of which are discussed below.

### C. City of Brooklyn Center v. Law Enforcement Labor Services

To the extent the courts were historically reluctant to overturn what they viewed as school board discretion to discharge a teacher for cause, they have been even less eager to overturn an arbitration award on the subject. Minnesota has long maintained a strong policy that favors arbitration as a means of resolving labor disputes.<sup>68</sup> Moreover, Minnesota's Uniform Arbitration Act (UAA) makes clear that an arbitrator's decision can be overturned only on exceptional grounds.<sup>69</sup> The UAA specifically identifies only five narrow reasons that will permit vacating an arbitrator's award:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed

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65. MINN. STAT. §§ 122A.40, subd. 15(e), 122A.41, subd. 13(e) (2002).

66. 304 N.W.2d 338 (Minn. 1981).

67. 367 N.W.2d 913 (Minn. Ct. App. 1985).

68. *Jerviss v. Indep. Sch. Dist. No. 294*, 273 N.W.2d 638, 645-46 (Minn. 1978); *see also Cianflone v. Indep. Sch. Dist. No. 112, Chaska*, 2002 WL 1364247, at \*2 (Minn. Ct. App. 2002) (articulating the deferential standard an arbitrator's decision related to a labor dispute decision is given by the reviewing court).

69. MINN. STAT. § 572.19 (2002).

as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 572.12, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 572.09 and the party did not participate in the arbitration hearing without raising the objection . . . .<sup>70</sup>

The UAA also specifically rejects an arbitrator's error of fact or law as a reason to vacate the award.<sup>71</sup> Thus, even "incorrect" arbitration awards are understood to be final and binding.<sup>72</sup> Very few are appealed; virtually none are vacated. This is yet another way by which the 1991 amendments limited the courts' involvement in teacher discharge decisions.

It was against this backdrop that the Minnesota Court of Appeals issued its 2001 decision in the closely watched case of *City of Brooklyn Center v. Law Enforcement Labor Services, Inc.*,<sup>73</sup> a decision that the Minnesota Supreme Court later declined to review. Despite the courts' long-standing reluctance to review arbitration decisions, *City of Brooklyn Center* is noteworthy because it may have altered this presumption, at least in the public sector and perhaps in public education.<sup>74</sup>

In *City of Brooklyn Center*, the city had discharged a police officer for engaging in a pattern of misconduct against young women over a ten-year period.<sup>75</sup> The matter went to arbitration and the arbitrator found that the police officer had in fact engaged in the alleged misconduct.<sup>76</sup> In unusually strong language, the arbitrator opined that the officer's conduct was "predatory and

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70. *Id.*

71. *Id.*

72. *Id.*

73. *City of Brooklyn Ctr. v. Law Enforcement Labor Servs., Inc.*, 635 N.W.2d 236 (Minn. Ct. App. 2001), *review denied* (No. C5-01-414) (Dec. 11, 2001).

74. *See id.*

75. *Id.* at 238-40.

76. *Id.* at 240.

intolerable” and “may have” violated Minnesota criminal law.<sup>77</sup> The arbitrator noted that the city had both the legal and moral obligation to keep “out of control” police officers like the grievant from harassing the public.<sup>78</sup> Perhaps most significantly, the arbitrator found that if reinstated, the officer would be an ineffective officer and an unbelievable witness.<sup>79</sup>

Nevertheless, the arbitrator overturned the officer’s discharge.<sup>80</sup> He did so on the grounds that much of the alleged conduct was time-barred for disciplinary purposes and that the remaining conduct, while serious, did not warrant outright dismissal.<sup>81</sup> After expressing the “hope” that the officer would not re-offend because he was “passing out of the dating scene,”<sup>82</sup> the arbitrator reinstated the officer without back pay.<sup>83</sup>

The city moved to vacate this decision, arguing that it was against public policy and that the arbitrator had exceeded his powers.<sup>84</sup> After the district court denied that motion, the city appealed to the Minnesota Court of Appeals.<sup>85</sup> In deciding this case, the court reiterated that it favors arbitration and ordinarily upholds such awards.<sup>86</sup> Nevertheless, the court also recognized that public policy may at times require setting aside an arbitration award and found this to be one of those cases.<sup>87</sup>

The court appears to have reached this determination cautiously by repeatedly emphasizing that this holding turned on the exceptional facts in this case and should be narrowly construed.<sup>88</sup> Nevertheless, *City of Brooklyn Center* now stands for the proposition that courts may overturn arbitrators’ awards when (1) the labor agreement contains terms that violate public policy, or (2) the arbitration award explicitly conflicts with other laws and

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77. *Brooklyn Ctr. v. Law Enforcement Labor Servs.*, BMS Case No. 00-PA-696, 46 (2000) (S. Bard, Arb.).

78. *Id.* at 43.

79. *Id.* at 50.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *City of Brooklyn Ctr. v. Law Enforcement Labor Servs., Inc.*, 635 N.W.2d 236, 240 (Minn. Ct. App. 2001), *review denied* (No. C5-01-414) (Dec. 11, 2001).

85. *Id.*

86. *Id.* at 241.

87. *Id.* at 244.

88. *Id.*

legal precedent.<sup>89</sup>

It is not entirely clear what this decision means for future cases. In a discussion undoubtedly designed to deflect criticism that it was second guessing the arbitrator on the merits, the court explained that the relevant consideration was not whether the officer's conduct violated some public policy, but rather whether the arbitrator's decision to reinstate him did so. To be more precise, the court framed the relevant question to be: Did the arbitrator's interpretation of the agreement violate or interfere with public policies that require affirmative steps to prevent sexual harassment?<sup>90</sup> After reviewing the public policy against sexual harassment, the court concluded that given the "extreme facts" of this "extreme and unique" case the arbitrator's award did violate public policy and must be vacated.<sup>91</sup>

In reaching this decision, the court could not have been oblivious to the intense interest this matter had generated both among members of the general public because of considerable media attention,<sup>92</sup> and more specifically within the labor relations community. Thus, it is not surprising that *City of Brooklyn Center* continues to provoke controversy. One enduring concern is that the decision may open the "floodgates" to other appeals of arbitration awards.<sup>93</sup> The court sought to assuage this concern by reiterating the narrow bases upon which it will vacate arbitration awards and by emphasizing the exceptional nature of the facts in

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89. *See id.*

90. *Id.* at 242.

91. *Id.* at 244.

92. This is certainly not the first time that the arbitration process has come to the public's attention and provoked media examination and criticism. In 1996, the St. Paul Pioneer Press' series entitled "Firing Public Employees" bemoaned the "messy, everyday reality of labor arbitration" and "the consistently difficult and unpredictable process through which government managers must attempt to discipline or discharge troublesome employees." D.J. Tice, *Firing Public Employees*, ST. PAUL PIONEER PRESS, Feb. 4, 1996, at 10A (noting that most workers who have an option chose to appeal their discharges through arbitration). The article characterizes as "troubling" the fact that protections developed largely in the private sector now comprise "a central influence on the standards to which public servants are held."). *See id.* Concerns were raised that arbitrators are "in effect empowered to make important public policy through their unguided judgment calls," the policy about standards of conduct that the authors note applies to employee groups who hold sensitive positions of public trust, including teachers. *Id.*

93. *City of Brooklyn Ctr.*, 635 N.W.2d at 244.

this case.<sup>94</sup> The court predicted that few, if any, other future cases would present such “protracted outrageous behavior by a person granted special powers and who is held out by his employer as a person whom the public can trust, and who has unique opportunities to engage in misconduct.”<sup>95</sup> Despite these efforts, critics have difficulty viewing this case as anything other than second guessing the arbitrator, which is in direct contradiction to the UAA’s express rejection of error as a basis for vacating an award.

Thus, questions remain. Does *City of Brooklyn Center* actually reflect a narrow application of a long-standing rule to particularly egregious facts, or does it instead misapply the law regarding arbitration awards and public policy so that the “floodgates” are now open for appealing unpopular arbitration awards? Despite the court’s efforts to emphasize that its decision “does not threaten the general rule regarding arbitration awards,” it is easy to see how it may risk doing so for public employees generally and for public educators in particular.<sup>96</sup> Teachers, like police officers, are persons “granted special powers” who are held out “as a person whom the public can trust,” and who have “unique opportunities to engage in misconduct.”<sup>97</sup> It will not be surprising if a school district seeks to appeal an arbitrator’s decision that reinstates a teacher whom the district alleges poses an ongoing threat in the classroom. Time will tell whether *City of Brooklyn Center* remains as limited as the court intended.

## V. REMEDIATION

### A. *Statutory Framework*

As discussed above, two different statutes govern the discharge of a non-probationary teacher.<sup>98</sup> Teachers employed in Minneapolis, St. Paul, and Duluth—the cities of the first class—are tenured teachers and their proposed discharges are directed by Minnesota Statutes section 122A.41 (Teacher Tenure Act). Teachers in all other Minnesota school districts are continuing

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See supra* Part II.

contract teachers whose proposed discharges are governed by Minnesota Statutes section 122A.40 (Continuing Contract Act).

The two statutes parallel each other in many respects, and there is rarely reason for the courts and arbitrators to analyze cases brought under them differently. However, one important distinction concerns a continuing contract teacher's right in many cases to be given notice and an opportunity to correct deficiencies before being proposed for discharge. The Teacher Tenure Act does not expressly provide tenured teachers with this right.<sup>99</sup>

More specifically, the Continuing Contract Act identifies two processes for discharging a continuing contract teacher for cause.<sup>100</sup> A district governed by this statute can elect one of two paths upon which to proceed. One path—described in subdivision 9—requires the district to first notify the teacher of his or her deficiencies and give that teacher a reasonable opportunity to correct them.<sup>101</sup> In essence, this subdivision specifically focuses on the remediability of the teacher's conduct.<sup>102</sup> In contrast, subdivision 13 enumerates more serious conduct and permits a district to discharge a tenured teacher immediately for such conduct.<sup>103</sup> The district is not required to give the teacher notice or an opportunity to remedy his or her deficient conduct.<sup>104</sup> A district that chooses the latter course assumes a heavier burden of proof if the action is challenged.<sup>105</sup>

In contrast, the statutory provisions that govern the remaining school districts—the three cities of the first class (Minneapolis, St. Paul, and Duluth)—do not expressly reference giving a teacher the opportunity to remedy deficiencies.<sup>106</sup> Nevertheless, most court and arbitration decisions in which this issue arises suggest that unless immediate discharge is warranted pursuant to the statutory guidelines, teachers in those cities should also be given notice and an opportunity to remedy their deficiencies before being proposed for discharge. The decisions that extend this right to “tenured teacher” cases, notwithstanding the Teacher Tenure Act's silence on the matter, are probably influenced by both the Continuing Contract Act's specific provisions as well as long-standing and

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99. See MINN. STAT. § 122A.41 (2002).

100. See *id.* § 122A.40 (2002 & Supp. 2003).

101. *Id.* § 122A.40, subd. 9.

102. See *id.*

103. *Id.* § 122A.40, subd. 13.

104. *Id.*

105. See *id.*

106. See *id.* § 122A.41.

broadly applied general principles of progressive discipline.

*B. Kroll's Four-Factor Test*

In 1981, the Minnesota Supreme Court provided the most definitive statement to date concerning a district's ability to immediately discharge a teacher rather than first provide an opportunity to remediate performance or behavior. In *Kroll v. Independent School District No. 593*, the school board found an elementary school teacher's disciplinary methods to be "cruel, excessive, and contrary to the standard of professional conduct established for certified classroom teachers" and voted for her immediate discharge.<sup>107</sup>

The central issue the court faced in *Kroll* was how to decide which termination procedure to follow.<sup>108</sup> In this case of first impression, the court considered the difference between focusing on the "remediability" of a teacher's conduct versus focusing on its "detrimental impact" on the school district. Specifically, a remediability analysis stresses giving a teacher notice of and a reasonable time to correct deficient conduct, while a detrimental impact analysis gives greater weight to the "severity of the conduct's impact upon the class and the teacher's ability to teach . . . ." <sup>109</sup>

In *Kroll*, the court rejected the detrimental impact analysis in favor of the remediability approach, concluding that the latter "best serves the purpose of the legislature in creating two termination procedures."<sup>110</sup> The court found that the legislature had intended to balance a school board's need to make discretionary administrative decisions with a teacher's need to be protected from arbitrary dismissals, and concluded that the remediability analysis achieved the best balance.<sup>111</sup> Therefore, the final decision concerning a teacher's discharge depends a great deal upon whether the offensive conduct is remediable.<sup>112</sup>

In then considering the standards by which to judge whether conduct is remediable, the Minnesota Supreme Court favorably cited a test announced in an Illinois Supreme Court case: "[T]he test . . . 'is whether damage has been done to the students, faculty

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107. *Kroll v. Indep. Sch. Dist. No. 593*, 304 N.W.2d 338, 341 (Minn. 1981).

108. *Id.* at 345.

109. *Id.* at 344.

110. *Id.* at 345.

111. *Id.* at 344-45.

112. *Id.* at 346.

or school, and whether the conduct resulting in that damage could have been corrected had the teacher's superiors warned her."<sup>113</sup> *Kroll* then built upon that test by identifying additional factors that must be considered during any termination proceeding.<sup>114</sup>

First, "[t]he prior record of a teacher . . . must always be considered under either termination procedure."<sup>115</sup> In this case, *Kroll* had a twenty-three-year unblemished record before the single incident that led to her dismissal.<sup>116</sup> The district's refusal to consider that demonstration of fitness over so many years was found to negate any advantage inherent in the tenure system and thus, the district did not meet that test.<sup>117</sup> Next, the finder of fact must consider the severity of the conduct "in light of the teacher's record as a whole."<sup>118</sup> This requires considering whether a teacher's misconduct has been ongoing or whether—as was the question in *Kroll*—a single incident "is so outrageous that it cannot be remedied in light of the danger the teacher's presence in the classroom would present."<sup>119</sup> Third, did the conduct result in actual harm or threatened harm?<sup>120</sup> Although districts need not wait for harm—either physical or psychological harm—to come to students before dismissing a teacher, absence of harm should be considered in determining whether conduct is remediable.<sup>121</sup> Finally, the fourth factor is "whether the conduct . . . could have been corrected had the teacher been warned by superiors."<sup>122</sup>

### C. *Applying the Four-Factor Test in Kroll*

The facts upon which the district relied in *Kroll* did not meet this four-factor test. *Kroll* was a third grade teacher who at the time of the incident had served twenty-three years with an unblemished record.<sup>123</sup> A recent evaluator had noted the atmosphere in her classroom was "condusive [sic] to good learning," and the evaluator

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113. *Id.* at 345 (quoting *Gilliland v. Bd. of Educ. of Pleasant View Consol. Sch. Dist. No. 622*, 365 N.E.2d 322, 326 (Ill. 1977)).

114. *Id.* at 345-46.

115. *Id.* at 345.

116. *Id.* at 340.

117. *Id.* at 345.

118. *Id.* at 346.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 345.

123. *Id.* at 340.

observed that Kroll gave “special attention to a new student experiencing adjustment problems. The teacher is concerned about the health and safety of students.”<sup>124</sup> It is against this backdrop that the critical event occurred.

On the day in question, Kroll was apparently having discipline problems. After one student denied throwing an object on the floor, she told him “to stand beside his desk and extend his arms to [his] side in ‘airplane’ fashion.”<sup>125</sup> The class then jeered when the student failed to keep his arms raised.<sup>126</sup> As Kroll returned to her desk, she picked up several pins lying in the chalk tray, whereupon one of the children cried out, “She has pins!”<sup>127</sup> Accounts of what happened next differ sharply.<sup>128</sup> Although the student and two other children testified that Kroll placed a pin approximately one inch under each elbow to force the student to hold them straight, Kroll testified that she simply pointed with the hand that did not have the pins and that the student held his arms out for a very short time.<sup>129</sup>

On appeal, the Minnesota Supreme Court’s first challenge was to decide whether the evidence supported the school board’s findings.<sup>130</sup> Then the court had to decide whether the board’s decision to terminate Kroll immediately, rather than give her an opportunity to correct her behavior, had been “arbitrary, unreasonable, or contrary to law.”<sup>131</sup> The court’s review of the record as a whole convinced it that there was no substantial evidence that Kroll had, in fact, held pins under the student’s arms to prevent him from lowering them.<sup>132</sup> In accepting Kroll’s account over the students’, the court acknowledged:

We do not take our decision regarding the competency and probative value of the child testimony lightly. Often student testimony may be the only source of evidence contrary to the possibly self-serving explanation from the teacher. However, under these unique facts, when the discrepancies in the testimony are both numerous and

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124. *Id.*

125. *Id.*

126. *Id.* at 341.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 342.

132. *Id.*

highly variable, reasonable minds cannot rely upon the testimony to arrive at a precise conclusion regarding the purpose for which appellant was holding pins in her hand.<sup>133</sup>

Here, the students' testimony was so "fraught with inconsistencies" that it effectively had no probative value.<sup>134</sup> It was particularly noteworthy that the alleged victim had difficulty recalling the incident, and not one student in the class, including the victim, had expressed a fear of returning to the classroom or had even reported this incident to their parents.<sup>135</sup> Thus, the court found that to the extent Kroll had done anything wrong, she should have been given notice and an opportunity to correct any behavior the district found objectionable.<sup>136</sup> There was no indication that, given a proper warning, she could not have adapted her disciplinary approach to fit the district's unwritten policy.<sup>137</sup> Accordingly, the court reversed the board's action and directed the district to reinstate Kroll with back pay.<sup>138</sup>

*D. Applying Kroll's Four-Factor Test in Other Cases*

An argument can be made that because arbitration proceedings are de novo, and because the statutes do not mention the *Kroll* test, arbitrators are not obliged to apply the above standards. Moreover, *Kroll* was decided under the earlier "substantial evidence" test, while arbitrators now apply the "preponderance" test. Nevertheless, the reality is that arbitrators have decided, and continue to decide, discharge cases under *Kroll's* analysis where it applies. Thus, *Kroll* and the subsequent cases that have applied and further refined the *Kroll* standards remain highly relevant in arbitration.

Minnesota courts following *Kroll* had no difficulty upholding the immediate discharges of teachers shown to have sexually or physically abused students. For example, in *In re Etienne*,<sup>139</sup> a district began termination proceedings after it received a letter from a former student twelve years after her graduation alleging she had

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133. *Id.* at 343.

134. *Id.* at 342.

135. *Id.* at 342-43.

136. *Id.* at 345.

137. *Id.* at 346.

138. *Id.*

139. 460 N.W.2d 109 (Minn. Ct. App. 1990).

sexual relations with a teacher while in high school.<sup>140</sup> Although the hearing examiner recommended that the teacher be issued a one-year suspension—presumably because so many years had passed—the board rejected that recommendation and terminated the teacher effective immediately.<sup>141</sup> The court of appeals affirmed that decision.<sup>142</sup>

Similarly, in 1996 the Minnesota Supreme Court affirmed a teacher's discharge for improper sexual contact with a student, even though the teacher died during the pendency of the appeal.<sup>143</sup> Observing that the case nevertheless involved an "issue of public concern that was capable of repetition," the court refused to disturb the findings of fact.<sup>144</sup>

The Minnesota Court of Appeals' widely cited decision in *Downie v. Independent School District No. 141*<sup>145</sup> was unique in that it upheld a junior high school guidance counselor's immediate discharge on charges other than sexual or physical abuse. Downie was a four-year junior high school guidance counselor with good evaluations and no prior discipline when the district immediately discharged him on charges of:

1. [B]eing involved in a weight-loss bet with two ninth-grade female students, the terms of which included sexual activities with Downie;
2. [T]elling two male teachers in the teachers' lounge about entering into the bet;
3. [S]ending a handwritten note to a ninth-grade female student which stated: "Stay out of my fucking business;"
4. [R]epeatedly administering an oral survey to individuals and groups of junior high school students regarding their personal sexual activities;
5. [U]sing vulgar, crude, and inappropriate language and stories when speaking to students;
6. [S]exually harassing staff and students by making inappropriate remarks and staring at their bodies; and
7. [B]reaching the confidentiality of students whom he

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140. *Id.* at 110.

141. *Id.* at 111.

142. *Id.* at 110.

143. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901 (Minn. 1996).

144. *Id.* at 903.

145. 367 N.W.2d 913 (Minn. Ct. App. 1985).

counseled.<sup>146</sup>

The court of appeals found that these were sufficient grounds to support Downie's immediate discharge.<sup>147</sup> After first noting and adopting the hearing examiner's detailed explanation why the allegations were true, the court highlighted one feature of the case that it deemed particularly important:

Downie was a junior high school counselor who counseled students on a one-to-one basis. His was in a very influential and sensitive position. Because of his role as counselor, students confided in Downie to a much greater extent than they would in a teacher of English or math. The potential for students to be greatly harmed or greatly aided by their relationship with Downie was substantial. His impact on the lives of impressionable young people of junior high school age was great. Arguably, he should be held to an even greater standard of care and sensitivity than teachers in other disciplines.<sup>148</sup>

It is noteworthy that the court found the counselor's breach of confidence to be even more serious than his sexual bantering with the students:

We find particularly offensive Downie's disclosure of an incest victim's confidences to teachers in a social setting who had no compelling professional need for such information. The school nurse's testimony supports that such a disclosure could have devastating psychological consequences for the victim should she ever discover that Downie made such a disclosure. Furthermore, the record supports that such breaches of the confidential relationship between counselee and counselor were not uncommon for Downie. Testimony indicates that some teachers even stopped referring students to Downie due to their concerns regarding his professional competency and ethics.<sup>149</sup>

In summary, it is clear from *Kroll* and *Downie* that districts that attempt to immediately discharge a teacher, instead of first giving the teacher notice and an opportunity to improve, face demanding standards of proof. Those standards are most easily met when there is proof of sexual contact or physical abuse. However, *Downie*

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146. *Id.* at 915.

147. *Id.* at 918.

148. *Id.* at 917.

149. *Id.* at 917-18.

demonstrates that other conduct, if sufficiently egregious, can also meet that burden.

*E. Remediation Details*

Broad pronouncements that a teacher should be given an opportunity to remedy deficient performance do not address several concrete questions that surround this prerequisite to discharge. Questions include: What qualifies as a remediation plan, and how is one to be implemented? For example, sometimes the parties disagree whether a teacher was given remedial opportunities in the first place. This presents a different question than determining whether a teacher has successfully corrected identified deficiencies.

A recent arbitration involving the proposed discharge of a St. Paul elementary teacher presented this issue squarely to the arbitrator.<sup>150</sup> When the teacher protested her discharge, in part because the district had not given her a formal Performance Improvement Plan (PIP), the superintendent responded to that argument with two assertions of her own.<sup>151</sup> First, the superintendent testified that PIPs are designed to improve teaching *effectiveness* in the classroom.<sup>152</sup> PIPs do not address matters of mistreatment of students or tardiness or insubordination, and are not necessary prerequisites to discharging a teacher for personal misconduct.<sup>153</sup> The superintendent testified that here the bases for discharge—inappropriate student discipline, excessive tardiness and insubordination—were all-or-nothing matters for which there is no such thing as gradual improvement.<sup>154</sup> Second, the superintendent pointed to the countless directives and discipline issued to the teacher over many years and argued that, in any event, those did constitute a performance improvement plan.<sup>155</sup> They had informed the teacher of the district's expectations of her performance and provided a measure by which to ultimately conclude she would not or could not meet those expectations.<sup>156</sup>

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150. Barnes-Griswold v. Indep. Sch. Dist. No. 625, St. Paul, BMS Case No. 03-TD-6 (2003) (Ver Ploeg, Arb.).

151. *Id.* at 21-22.

152. *Id.* at 21.

153. *Id.*

154. *Id.*

155. *Id.* at 22.

156. *Id.*

The arbitrator accepted both arguments, concluding that the school district had met its burden of proving proper discharge of the teacher.<sup>157</sup>

Another issue surrounding the question of remediation concerns the number of times a teacher must be given an opportunity to remedy his or her deficiencies. In 2002, the Minnesota Court of Appeals provided some helpful guidance on this question in *Cianflone v. Independent School District No. 112*.<sup>158</sup> In *Cianflone*, the Chaska School District had suspended an elementary school music teacher in 1993 “for making unacceptable physical contact with students and using inappropriate and demeaning methods of discipline.”<sup>159</sup> An arbitrator upheld the ten-day suspension and affirmed a board directive that prohibited the teacher “from touching students, from allowing his anger to affect his interaction with students, and from making any statements to students that could be reasonably interpreted as threats.”<sup>160</sup>

The next five years passed without incident.<sup>161</sup> However, in early 1998, two incidents occurred.<sup>162</sup> In February, the teacher “shouted ‘shut up already’ at two disruptive students and threw a hand drum across the room for what he characterized as ‘dramatic effect.’”<sup>163</sup> Two months later, as the teacher took a disruptive student by the arm and escorted him to the principal’s office, the classroom door swung shut and made contact with both student and teacher.<sup>164</sup>

Based upon these two incidents, the school board proposed to terminate the teacher’s employment as of June 1998.<sup>165</sup> After a five-day hearing, the arbitrator found that the conduct was not sufficiently severe to warrant termination under Minnesota Statutes section 125.12, subdivision 8,<sup>166</sup> the immediate discharge section, but did uphold the termination under subdivision 6<sup>167</sup> on the

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157. *Id.* at 24.

158. No. CX-01-2269, 2002 WL 1364247 (Minn. Ct. App. 2002).

159. *Id.* at \*1.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* See MINN. STAT. § 125.12, subd. 8 (1996) (now codified at MINN. STAT. § 122A.40, subd. 13 (2002)).

167. *Cianflone*, 2002 WL 1364247, at \*1. The court of appeals upheld the termination under Minnesota Statutes section 125.12, subdivision 6 (1996) (now

grounds that the teacher had engaged in a persistent pattern of inappropriate behavior.<sup>168</sup>

In attempting to overturn that decision, the teacher argued that the arbitrator had exceeded his power because he denied the teacher his subdivision 6 right to an opportunity to correct any deficiency.<sup>169</sup> However, the court rejected that argument, finding that the board's 1993 directive had given the teacher five years to do so.<sup>170</sup> The Court noted that if, as the teacher asserted, a district "was required to wait a reasonable time after every additional deficiency occurred, no teacher could ever be terminated for improper conduct."<sup>171</sup>

Other interesting questions can arise when remediation plans contain counseling requirements. Arbitrators who issue such directives in education and other labor cases often fail to identify which party must assume that expense. However, in 2002 Arbitrator Olson reduced a proposed immediate discharge to a one-semester suspension, while also directing a "remediation plan that includes psychological evaluation and counseling by a qualified professional of the District's choosing and at the teacher's expense."<sup>172</sup> Another difficult question is who decides whether such counseling has been successful.

## VI. BASES FOR DISCHARGE

### A. *Statutory Overview*

Districts that attempt to discharge a teacher (or, in the case of a city of the first class, discharge or demote) can do so only upon evidence of deficient performance or personal behavior that fits within categories identified within the pertinent statute. The Teacher Tenure Act lists "grounds for discharge or demotion" within a single provision<sup>173</sup> that is sufficiently general to embrace virtually any type of professional or personal conduct. Similarly,

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codified at MINN. STAT. § 122A.40, subd. 9 (2002)). *Id.* at \*1.

168. *Id.* at \*1.

169. *Id.* at \*3.

170. *Id.*

171. *Id.*

172. *Educ. Minn. v. Indep. Sch. Dist. No. 622, N. St. Paul-Maplewood-Oakdale, BMS Case No. 02-TD-8, 13 (2002) (Olson, Arb.)*.

173. MINN. STAT. § 122A.41, subd. 6 (2002).

the Continuing Contract Act lists categories broad enough to embrace almost all conduct perceived as detrimental to the educational process.<sup>174</sup> The Continuing Contract Act is noteworthy in that the statute is further divided into two different provisions.<sup>175</sup>

Subdivision 9 of the Continuing Contract Act, which applies to continuing contract teachers, identifies four broad categories of deficiency: inefficiency, neglect of duty, unbecoming conduct, and “other good and sufficient grounds.”<sup>176</sup> A district that attempts to discharge a continuing contract teacher pursuant to this provision cannot do so unless it has first given the teacher notice of his or her deficiencies and a reasonable plan and time-frame within which to remedy them.<sup>177</sup> As was discussed in the preceding section, a district can discharge a teacher only upon showing that it made these efforts and that these efforts have failed.<sup>178</sup> Even then, the district can propose the teacher’s discharge only at the end of the school year and only after meeting the Continuing Contract Act’s April 1 deadline for completing the entire process of discharge: giving notice and opportunity to remedy, notice of hearing and hearing, and receipt of final decision.<sup>179</sup>

In contrast, subdivision 13 identifies separate bases to support the *immediate* discharge of a teacher.<sup>180</sup> Those grounds generally parallel those in subdivision 9, but they address more serious forms of that conduct.<sup>181</sup> For example, the subdivision 9 reference to inefficiency becomes “gross” inefficiency under subdivision 13.<sup>182</sup> Similarly, neglect of duty provides the basis for a section 13 immediate discharge only if it is “willful.”<sup>183</sup> Other conduct that warrants immediate discharge includes immoral conduct, serious insubordination, a felony conviction, unbecoming conduct that requires immediate removal from the classroom, failure to teach, and a twelve-month disability.<sup>184</sup>

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174. *Id.* § 122A.40, subd. 9.

175. *Id.*

176. *Id.*

177. *Id.*

178. *See supra* Part V.

179. MINN. STAT. § 122A.40, subd. 16 (2002).

180. *Id.* § 122A.40, subd. 13 (emphasis added).

181. *Compare* MINN. STAT. § 122A.40, subd. 9 (2002), *with* MINN. STAT. § 122A.40, subd. 13 (2002).

182. *Compare* MINN. STAT. § 122A.40, subd. 9 (2002), *with* MINN. STAT. § 122A.40, subd. 13 (2002).

183. MINN. STAT. § 122A.40, subd. 13 (2002).

184. *Id.* § 122A.40, subd. 9.

Regardless of whether the path a district takes to propose discharge follows remediation efforts or immediate discharge, challenges require arbitrator to review the record as a whole to determine whether the district has (1) met its burden of proving the conduct complained of actually occurred, and (2) demonstrated that the proven conduct has been sufficiently egregious to discharge the teacher either immediately after the hearing<sup>185</sup> or effective at the end of the school year.<sup>186</sup>

Some conduct is so outrageous that if the fact of its occurrence is not challenged, then no one would seriously question the teacher's removal from the classroom. However, those cases rarely go to hearing. Rather, such cases are often resolved quietly in ways that the teacher, represented by Education Minnesota, and the district agree are in everyone's best interests. Cases that do go to hearing and thus become a matter of public record are typically the problematic cases for which the statutory guidelines provide little clear guidance.

The following discharge cases are grouped into those that involve issues of performance and those that involve personal behavior. Performance-based discharges and demotions typically use the statutory terminology of failure to teach,<sup>187</sup> inefficiency in teaching or school management,<sup>188</sup> or neglect of duty,<sup>189</sup> and almost always include allegations that the teacher was given notice and an opportunity to improve performance but failed to do so. In contrast, discharges or demotions based on a teacher's personal behavior are typically characterized by the statutory terms "immoral character" or "conduct unbecoming a teacher"<sup>190</sup> and have less often involved remediation efforts. In addition, to the extent that the preceding categories might fail to embrace the conduct complained of, a district not of the first class can seek to discharge a non-probationary teacher based upon the Act's catch-all phrase: "other good and sufficient grounds"<sup>191</sup> that render the teacher unfit to perform his or her duties.

The following discussion explores these two broad categories.

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185. *See id.* §§ 122A.40, subd. 13; 122A.41, subd. 4.

186. *Id.* § 122A.40, subd. 9.

187. *See id.* §§ 122A.40, subd. 13(a)(3); 122A.41, subd. 6(a)(2).

188. *See id.* §§ 122A.40, subd. 9(a); 122A.41, subd. 6(a)(3).

189. *See id.* § 122A.40, subd. 9(b), subd. 13(a)(5) (2002).

190. *See id.* §§ 122A.40, subds. 9(c), 13(a)(1)-(2); 122A.41, subd. 6(a)(1).

191. *Id.* § 122A.40, subd. 9(d).

In addition, it also examines cases that involve a teacher's inability to teach because of licensure issues or health and disability reasons.

*B. Professional Performance*

Despite the broad reach of the statutory categories, recorded cases reveal a few recurring types of performance-related allegations that have caused districts to propose a teacher's discharge. The following three cases illustrate several of the most common performance-based themes.

*1. Performance in the Classroom*

In 1981, the Minnesota Supreme Court examined issues of teacher performance in *Ganyo v. Independent School District No. 832*.<sup>192</sup> *Ganyo* involved a high school teacher with seventeen years in the district, plus eight years previous teaching experience, who received a notice of deficiency after her assistant principal and assistant superintendent evaluated her and identified two incidents that allegedly demonstrated ineffective communication with students' parents.<sup>193</sup> The notice of deficiency identified eight concerns and specifically directed Ganyo as to how she was to correct those behaviors.<sup>194</sup> For example, with respect to her "lack of clear directions to the students," she was instructed that

[v]erbal directions should be given slowly and clearly. Long and complex directions are to be avoided. Written directions, whether on the blackboard or on paper should be clear, neat, concise and grammatically correct. You should make sure each direction has been understood before proceeding with the lesson.<sup>195</sup>

The seven other areas of deficiency, all of which were also accompanied by specific directives, were: classroom control, listening, record keeping, parent communications, instructional criteria and student evaluations, discussion of personal matters, and relations with staff and supervisors.<sup>196</sup>

The assistant principal who issued the notice of deficiency on January 2, 1979 told the teacher that she would be expected to

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192. 311 N.W.2d 497 (Minn. 1981).

193. *See id.* at 498.

194. *Id.* at 498-99.

195. *Id.* at 498.

196. *Id.* at 498-99.

show improvement during a second round of formal observations on February 1, 1979.<sup>197</sup> The assistant principal did observe Ganyo twice in her classroom in early February.<sup>198</sup> On February 26, 1979, the school board passed a resolution proposing her discharge effective at the end of the school year.<sup>199</sup> That resolution classified the eight areas listed in the notice of deficiency as: “[i]nefficiency, neglect of duty, persistent violation of school rules, regulations and directives, and other good and sufficient grounds rendering you unfit to perform your duties.”<sup>200</sup> Ganyo requested and was given a hearing before the school board at the end of March 1979.<sup>201</sup> Immediately after that hearing, the board met for forty-five minutes and passed a motion to terminate her at the end of the school year based upon the recited deficiencies (except for the charge of inadequate record keeping, which was stricken).<sup>202</sup>

Ganyo appealed the board’s decision to the Minnesota Supreme Court, which reviewed the evidence and concluded that the record contained “little probative evidence to substantiate that each of the alleged deficiencies existed or was not cured.”<sup>203</sup> The court reached this conclusion despite its assurance that it does not set aside board decisions to terminate unless they are “fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the school board’s jurisdiction or . . . based on an erroneous theory of law.”<sup>204</sup> The court’s explanation of why the evidence in this case was not worthy of the deference typically given to board decisions serves as a helpful guide in designing and implementing a fair process in other cases.

First, it is apparent that the court expected the district to support its allegations of unsatisfactory teaching performance with more than a single supervisor’s observations. In this case, only the assistant principal observed Ganyo’s teaching before and after the notice of deficiency.<sup>205</sup> Although the court stopped short of requiring that districts use more than one evaluator, it not so subtly

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197. *Id.* at 498.

198. *Id.* at 499.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 499-500.

203. *Id.* at 500.

204. *Id.* See also *Kroll v. Indep. Sch. Dist. No. 593*, 304 N.W.2d 338, 342 (Minn. 1981).

205. *Ganyo*, 311 N.W.2d at 500.

observed that “the severity of termination for a tenured teacher suggests that such a course would be wise.”<sup>206</sup> This is especially true where, as it appeared here, the teacher was in fact making efforts and had improved in several areas.<sup>207</sup>

Furthermore, the court found that the record failed to demonstrate “substantial evidence” of poor teaching performance given the assistant principal’s acknowledgement that Ganyo had improved with respect to two of the charges against her and the fact that the district had dropped another charge before the hearing.<sup>208</sup> It was noteworthy that the final record cited only two alleged incidents concerning parental communication, neither of which seemed particularly blameworthy.<sup>209</sup> As for Ganyo’s alleged resistance to criticism and supervision from the administration, the court found that

the English Department as a whole had a problem in dealing with one administrator, and that Ganyo, as a long-term tenured teacher reacted in an understandably defensive manner to a deficiency notice which she neither understood nor felt was warranted. The record indicates that Ganyo was making efforts to improve her teaching; she had improved in several areas by her own testimony and by that of students and her supervisor, Moran.<sup>210</sup>

Thus, the Minnesota Supreme Court ordered Ganyo reinstated and compensated for her lost wages.<sup>211</sup>

One year after *Ganyo*, the court reached a different conclusion concerning a teacher’s performance in *Whaley v. Anoka-Hennepin Independent School District No. 11*.<sup>212</sup> Before his discharge, Whaley “had served for nineteen consecutive years as a teacher and a principal in the . . . [d]istrict, the last three of these years as a reading teacher [in the elementary school].”<sup>213</sup> In May 1980, the district gave him a notice of deficiency, which supplemented a similar notice he had been given two years earlier.<sup>214</sup> The May 1980 notice alleged the following deficiencies: (1) poor rapport with

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 501.

210. *Id.*

211. *Id.* at 502.

212. 325 N.W.2d 128 (Minn. 1982).

213. *Id.* at 129.

214. *Id.*

students; (2) insufficient communications with parents and fellow staff members; (3) inappropriate use of class time; (4) failure to be punctual or appear at appointments; (5) failure to follow the school board's adopted reading program; (6) irrational grading of students; and (7) lack of student progress.<sup>215</sup>

The following school year, administrators observed Whaley's classroom performance on six separate occasions between September and January, and the administrators met with him to apprise him of his teaching performance.<sup>216</sup> Despite these efforts, that February the board—presumably having concluded that Whaley could not or would not improve his performance—issued him a notice of proposed termination.<sup>217</sup> After a hearing before the board, presided over by a hearing officer, Whaley appealed his discharge and the district court reinstated him.<sup>218</sup> The district court found that there was no evidence that Whaley's frequent use of worksheets had adversely affected his students and there was no evidence that his disciplinary methods were inappropriate.<sup>219</sup>

The school district then appealed the case to the Minnesota Supreme Court.<sup>220</sup> In undertaking this review the court reiterated its limited role in reviewing board decisions:

When deciding whether to hire or to terminate a teacher, a board of education is acting in an administrative capacity. On appeal to this court, a school board's decision to terminate a teacher will be set aside only if the decision is "fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the school board's jurisdiction, or is based on an erroneous theory of law."<sup>221</sup>

However, the court made it clear that although it accepted a limited judicial role vis-à-vis a board's fact finding processes,<sup>222</sup> it did not similarly defer to trial court determinations.<sup>223</sup> In reversing the

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215. *Id.*

216. *Id.* at 129-30.

217. *Id.* at 130.

218. *Id.*

219. *Id.* at 129-31.

220. *Id.*

221. *Id.* at 130 (citing *Ganyo v. Indep. Sch. Dist. No. 832*, 311 N.W.2d 497, 500 (Minn. 1981)).

222. *Id.* at 130-31 (citing *Anderson v. Consol. Sch. Dist. No. 144*, 196 Minn. 256, 257-58, 264 N.W. 784, 784-85 (1936)). *Cf.* *City of N. St. Paul v. Minn. Water Res. Bd.*, 260 N.W.2d 584, 586-87 (Minn. 1977).

223. The court stated that it "owes no deference to the trial court's

district court's findings in favor of Whaley, the court found "substantial evidence in the record" of four major deficiencies that justified his discharge.<sup>224</sup>

First, the Minnesota Supreme Court shared the school district's concern that Whaley had used worksheets in the classroom more often and more extensively than other instructors, and that this had caused much student confusion and frustration.<sup>225</sup> An outside instruction consultant who had visited the classroom confirmed the school principal's testimony that Whaley used worksheets so much that it produced a poor learning environment and inhibited student progress.<sup>226</sup>

Because this discharge was brought under statutory provisions that first called for notice and an opportunity to correct behavior,<sup>227</sup> it can be assumed that Whaley had been told to alter his use of the worksheets but had failed to do so. Whether this issue alone would have warranted Whaley's discharge is unclear. The court's surprisingly strong assertion that Whaley had "used worksheets improperly and to such excess that it justified the termination of his contract . . . ." <sup>228</sup> suggests that this allegation in and of itself could have supported discharge. However, the court then tempered this observation by noting that its holding in the district's favor relied not only on "the probative force of this evidence" (the worksheet allegation), but also the "related evidence through the record."<sup>229</sup> Thus, this tantalizing question remains unresolved.

Next, the court observed that the evidence that Whaley's students had failed to make appropriate progress was "the most closely related to the statutory grounds for discharge and the most

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determination." *Kroll v. Indep. Sch. Dist. No. 593*, 304 N.W.2d 338, 342 (Minn. 1981). "Because this court conducts an independent review of the entire record before the School Board without according deference to the same review conducted by the court below, the question of whether the District Court utilized the correct standard of review has no bearing on our disposition of this matter." *Whaley*, 325 N.W.2d at 130 (citing *Urban Council on Mobility v. Minn. Dept. of Natural Res.*, 289 N.W.2d 729, 732-33 (Minn. 1980); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)).

224. *Whaley*, 325 N.W.2d at 131.

225. *Id.*

226. *Id.*

227. MINN. STAT. § 122A.40, subd. 9 (2002). The *Whaley* court cited to the formerly codified version at MINN. STAT. § 125.12, subd. 6 (1980). *Whaley*, 325 N.W.2d at 131.

228. *Whaley*, 325 N.W.2d at 131.

229. *Id.*

clearly supported by substantial evidence in the record.”<sup>230</sup> Administrators had reached this conclusion based upon in-class observations and student performance on district-wide skills, tests, and worksheets.<sup>231</sup> They also considered evaluations of a reading curriculum consultant and three other teachers who reviewed the records or worked with the students and found that the students had not made satisfactory progress.<sup>232</sup> In contrast, no teachers testified on Whaley’s behalf, although a few students did testify that they were satisfied with their progress.<sup>233</sup> Agreeing that students had made unsatisfactory progress because of Whaley’s poor teaching performance, the court found that “lack of student progress is sufficient to trigger the grounds for discharge under [the terms of the statute].”<sup>234</sup>

With these findings, the court did not then discuss the evidence concerning the remaining two of the four major deficiencies it had cited: the teacher’s lack of rapport with students and his lack of appropriate student discipline.<sup>235</sup> Apparently, the two deficiencies that the court did comment upon, particularly the evidence of lack of student progress, were so compelling that the court found it unnecessary to bolster what it had already determined was “substantial evidence on the record” to uphold the discharge.<sup>236</sup>

*Whaley* may be thought of as a forerunner of the heightened attention that has more recently been given to assessing teacher competencies. In the past, teacher competence assessments had largely been confined to new or prospective teachers. Districts that have attempted to discharge veteran teachers based upon allegations of unsatisfactory student performance have often been stymied by the courts’ reluctance to link student progress and teacher behavior because of the difficulty, even impossibility, of isolating a teacher’s performance from the many other variables that affect learning and over which a teacher has no control.<sup>237</sup>

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230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 130.

236. *Id.*

237. For example, in *Peter W. v. S. F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 861 (Ct. App. 1976) the court observed:

Substantial professional authority attests that the achievement of literacy

Thus, *Whaley* is open to criticism from those who question whether teachers should ever be discharged because of their students' performances. Others who might be willing to link student progress to questions of competence may also question this decision because the district had not established any specific standards concerning teacher performance against which *Whaley* could be assessed; there was only evidence that his students did not measure up to other students.<sup>238</sup> There is also concern that the index used to make that determination appears to have been subjective. In any event, *Whaley* appears unique in its acceptance of generalized charges of incompetence, such as poor teaching results, limited pupil progress, and slow progress.

Turning to arbitration, the following case provides an interesting contrast to the preceding judicial decisions. In *Zwaschka v. Independent School District No. 84, Sleepy Eye*,<sup>239</sup> a special education teacher who had been with the district for over twenty years was proposed for discharge based on allegations that included his failure to comply with the due process requirements of students' individual education plans (IEPs).<sup>240</sup> The teacher's negligence was described as "pervasive, persistent, and numerous."<sup>241</sup> In fact, one person who reviewed the records was quoted as saying, "[T]his was way beyond the most severe, the deepest, the largest, the most enormous mess they had ever seen, way beyond anything they had ever been involved in . . . . The problem was profound."<sup>242</sup> The district alleged that *Zwaschka's* failure to complete the IEPs had resulted in its forfeiting federal money for seven students and had put it at significant risk of liability under the Individuals with Disabilities Education Act.<sup>243</sup>

Although Arbitrator Olson agreed that the evidence supported discipline, she identified two reasons why the district did not have just cause to discharge. First, she was persuaded that the district

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in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

238. *Whaley*, 325 N.W.2d at 128.

239. BMS Case No. 99-TD-6 (1999) (Olson, Arb.).

240. *Id.* at 3.

241. *Id.* at 13.

242. *Id.*

243. *Id.*

itself was dilatory in meeting the special education standards and that “this inequitable treatment should tend to soften the severity with which Zwaschka’s conduct was judged.”<sup>244</sup> Disparate treatment is a well-accepted basis for overturning otherwise appropriate discipline, and in this case Arbitrator Olson concluded that “[i]f the district holds the standard of complete, current IEPs to one teacher’s conduct, that standard must also be held against the district.”<sup>245</sup> Second, Olson found it “[e]qually curious” that the school district, in effect the high school principal, had long known about the teacher’s lagging paperwork yet had done nothing about it.<sup>246</sup> Despite the district’s assertion that “[w]e try to track down anything that appears out of the usual,” no one had approached the teacher to help or to warn him.<sup>247</sup> Thus, the district was once again found not to have come to the hearing with “clean hands,” and therefore could not use a standard in one instance that it ignored in another.<sup>248</sup>

Another matter of concern to school districts, and ultimately to the courts and the arbitrators, is the issue of student discipline. In 1974, the Minnesota Supreme Court reviewed a case in which a seven-year elementary education teacher was discharged based on her “inability to maintain consistent discipline and appropriate rapport necessary in teaching children.”<sup>249</sup> In reinstating the teacher to her position, the court noted that during the teacher’s previous seven years with the district she had “practically no problems with discipline and no other teaching problems of note.”<sup>250</sup> While acknowledging that immediately before her discharge the teacher had encountered many discipline problems, the court also observed that “[i]t also seems clear that some parents were looking for something to complain about.”<sup>251</sup> From these observations, it is apparent that the courts will be skeptical of allegations raised for the first time well into a teacher’s long and previously unblemished career.

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244. *Id.* at 27.

245. *Id.*

246. *Id.*

247. *Id.* at 28.

248. *Id.*

249. *Hardy v. Indep. Sch. Dist. No. 694*, 301 Minn. 373, 374, 223 N.W.2d 124, 125 (1974).

250. *Id.* at 376, 223 N.W.2d at 127.

251. *Id.* at 377, 223 N.W.2d at 127.

## 2. *Licensure Issues*

Discharging a teacher whose licensing status prevents him or her from teaching raises related performance questions. Two arbitration cases that preceded the discharge of a Lake Benton teacher illustrate the complicated issues that can arise. In the first arbitration, Arbitrator Olson weighed the evidence concerning allegations of child abuse and reduced the teacher's ninety-day suspension to a sixty-day suspension.<sup>252</sup> After serving this suspension, the teacher returned to the classroom.<sup>253</sup> However, because of the nature of these charges, Minnesota law required the district to report the matter to the State Board of Teaching.<sup>254</sup> In turn, the Board of Teaching notified the teacher on December 15, 1999, that on December 10 it had suspended her license until August 5, 2000.<sup>255</sup>

The teacher, who had known of the state board's pending action and that it would mean she could no longer legally teach, stopped coming to school on December 10.<sup>256</sup> However, her attorney did not explain her absence to the superintendent until receiving the formal suspension notice from the Board of Teaching on December 15.<sup>257</sup> Based upon this information, the school board proposed the teacher's immediate discharge.<sup>258</sup> The notice cited the statutory grounds of insubordination, failure without justifiable cause to teach without first securing a written release of the school board, and willful neglect of duty.<sup>259</sup> In addition, the notice described the factual basis for the action:

Suspension of your teaching license from December 10, 1999, to August 15, 2000, by the Board of Teaching (as evidenced by the attached Stipulation Agreement), making it impossible for you to fulfill your teaching duties and resulting in the School District having to hire another teacher to replace you.<sup>260</sup>

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252. *Educ. Minn. v. Indep. Sch. Dist. No. 404, Lake Benton, BMS Case No. 99-PA-1050, 2 (1999) (Olson, Arb.)*.

253. *Christenson v. Indep. Sch. Dist. No. 404, Lake Benton, BMS Case No. 00-TD-3, 2 (2000) (Ver Ploeg, Arb.)*.

254. *Id.*

255. *Id.* at 3-4.

256. *Id.* at 4.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

At the second arbitration, this dispute presented the rather technical question: Whether Minnesota law—with its “cause” requirement for discharge—applied to licensure questions such as this and, if so, whether the district had proven that such cause existed.<sup>261</sup> This case also presented a very human dilemma in that the teacher was now losing her job for conduct that neither the school district nor Arbitrator Olson had ever viewed as supporting discharge.<sup>262</sup>

Although the outcome in this case was “deeply troubling,” the arbitrator who presided over the discharge hearing was unable to find that the district had either a legal or a contract obligation to ameliorate that harsh result in order to preserve an employment relationship in which the teacher was legally unable to uphold her end of the bargain.<sup>263</sup> Looking beyond the Continuing Contract Act, the arbitrator concluded that when the teacher lost her teaching license, albeit temporarily, by law she became “unqualified” to teach.<sup>264</sup> The arbitrator could not distinguish this situation from the Minnesota Court of Appeals’ decision in *Schumacher v. Independent School District No. 25*,<sup>265</sup> a 1990 case in which a teacher’s teaching contract was found to have been void at the time it was signed because he did not have a Minnesota teaching license before he began teaching. Just as Schumacher had “no right to entitlement to continued employment,”<sup>266</sup> in the Lake Benton case the arbitrator found that when this teacher became unable to fulfill her responsibilities in the employment relationship, her teaching contract became void.<sup>267</sup> Thus, the district had no obligation to undertake unilateral efforts to preserve her job throughout her suspension.<sup>268</sup>

In contrast, in an arbitration involving the Red Lake School District, the board proposed the superintendent for immediate

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261. *Id.* at 8.

262. *Id.* at 12.

263. *Id.*

264. *Id.* at 9.

265. No. CX-90-1233, 1990 WL 163042 (Minn. Ct. App. 1990).

266. *Id.* at \* 2.

267. *Christenson*, BMS Case No. 00-TD-3 at 12.

268. *Id.* at 10. In addition, the arbitrator agreed with the district that even if a “cause” standard were applied to this case under the Continuing Contract Act, there was cause to immediately discharge a teacher who was shown unable to teach “without justifiable cause without first securing the written release of the school board.” *Id.*

discharge on the grounds that he had failed to renew his five-year license.<sup>269</sup> Arbitrator Reynolds reinstated the superintendent based upon evidence that the lapse had been inadvertent.<sup>270</sup> It had lapsed at a time when the superintendent thought he was going to be retiring, and he had re-instated it prior to his discharge.<sup>271</sup> Moreover, it was significant that the superintendent had never misrepresented the situation.<sup>272</sup>

Similarly, Arbitrator Gallagher rejected an argument that a teacher had been insubordinate in failing to obtain a license to teach in the area for which she had been hired.<sup>273</sup> He reinstated the teacher based upon the fact that the teacher was licensed in other subject areas, although not in the area where she had been teaching under a one year variance.<sup>274</sup>

### C. *Personal Behavior*

While the preceding cases have explored questions of a teacher's professional competence and its effect on the educational process, another even larger group of cases involves a teacher's personal behavior both at and away from school. The line between these two categories of cases is often unclear. Certainly personal behavior can have a direct impact upon the educational process, and questions of professional competence sometimes stem from personal difficulties. Moreover, notices of proposed discharges often contain multiple charges that incorporate criticisms of both professional competence and personal behavior. Nevertheless, for purposes of this examination, the following cases are used to explore more personal conduct, such as insubordination, dishonesty, and both verbally and physically abusive behavior.

#### 1. *High Standard of Conduct*

In embarking upon this examination it is important to recognize that Minnesota courts and arbitrators, like much of society, tend to hold teachers to a high standard of conduct.

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269. Indep. Sch. Dist. No. 38, Red Lake v. Kroenke, BMS Case No. 95-VP-342, 4-5 (1994) (Reynolds, Arb.).

270. *Id.* at 12.

271. *Id.* at 4-5.

272. *Id.* at 9.

273. Indep. Sch. Dist. No. 284, Wayzata v. Minn. Educ. Ass'n, BMS Case No. 03-TD-5, 16-17 (2002) (Gallagher, Arb.).

274. *Id.*

Arbitrator Miller spoke for many when he explained:

There is no doubt . . . that a teacher is placed in a position of great responsibility by the District. The citizens of the District place their faith and trust in this teacher to nurture their children academically while at the same time safeguarding their physical and mental well-being. Thus, society has traditionally set high standards of moral and legal behavior for teachers, often higher than in other professional settings. On one hand, the teacher who fulfills these responsibilities rightfully earns the admiration and respect of the District, students, parents, and community. On the other hand, the teacher who abuses this trust by having sex with a student while in school deserves not only scorn but swift removal from his position.<sup>275</sup>

This widely accepted view provides an important backdrop for the following cases.

## 2. *Illustrative Cases*

Minnesota law recognizes insubordination as a specific ground for termination,<sup>276</sup> and insubordinate behavior also easily falls within the statutory categories of “conduct unbecoming a teacher”<sup>277</sup> and “other good and sufficient grounds.”<sup>278</sup> In the case of *Ray v. Minneapolis Board of Education, Special School District No. 1*,<sup>279</sup> the Minnesota Supreme Court upheld the decision of appellant school district, which found that a tenured teacher’s refusal to participate in a review of the district’s educational program constituted insubordination for which he could be discharged.<sup>280</sup> In reaching this conclusion, the court noted that there is no Minnesota statutory or common law definition of insubordination and adopted the definition upon which the parties had agreed: “Insubordination is a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.”<sup>281</sup> Applying this definition, the court

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275. *Indep. Sch. Dist. No. 741, Paynesville v. Minn. Educ. Ass’n & Brad Hanson*, BMS Case No. 94-TD-12, 37 (1994) (Miller, Arb.).

276. MINN. STAT. §§ 122A.40, subd. 13(1), 122A.41, subd. 6(1) (2002).

277. *See id.* §§ 122A.40, subds. 9(c), 13(2), 122A.41, subd. 6(1).

278. *See id.* § 122A.40, subd. 9(d).

279. 295 Minn. 13, 202 N.W.2d 375 (1972).

280. *Id.* at 378.

281. *Id.*

found that “[t]here is no question but that appellant had ample opportunity to fill out the evaluation forms and that his responses were purposely and intentionally incomplete, uncooperative, unresponsive, and argumentative.”<sup>282</sup>

Discharges based upon claims of insubordination typically involve teachers who refuse bona fide orders from management or otherwise challenge management’s proper exercise of its authority. The general principle of “work now, grieve later,” which is so central in the broader arena of labor relations, also applies in education. A charge of insubordination requires proof that the directive at issue was clear and that it was reasonable.<sup>283</sup> A 1994 decision by Arbitrator Flagler provides an interesting illustration of a proposed discharge that failed because of these requirements.<sup>284</sup>

In Arbitrator Flagler’s case, the Eden Prairie School District argued that the teacher had been insubordinate when he failed to refrain from physical contact with students as directed.<sup>285</sup> However, the evidence failed to prove an essential underlying element: that the teacher had been given clear and effective notice of the behaviors he was directed to avoid or correct.<sup>286</sup> For example, when the teacher asked the principal what he was doing wrong, he was told in effect that “if you don’t already know, I can’t tell you.”<sup>287</sup> Flagler was also willing to take “arbitral notice,” based upon his own many years of experience in education, that it is virtually impossible to obey a directive to avoid physical contact with students under any circumstance because students often initiate that physical contact.<sup>288</sup> Thus, the teacher’s behavior could not be found insubordinate when the directions given to him had been either vague or unrealistic.<sup>289</sup> It was also relevant that where conduct guidelines were clear and specific, the teacher rarely, if ever, violated those guidelines.<sup>290</sup> Thus, none of the actions charged against the teacher met the widely accepted arbitral definition of insubordination: “A willful refusal to carry out a clear and proper

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282. *Id.*

283. *See* Indep. Sch. Dist. No. 272, *Eden Prairie v. Minn. Educ. Ass’n*, BMS Case No. 94-TD-6, 12 (1994) (Flagler, Arb.).

284. *Id.*

285. *Id.* at 2.

286. *Id.* at 12.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

work directive, or any overt act to undermine or treat with contempt, the authority of the employer and its agents.”<sup>291</sup>

Evidence of verbal or physical abuse—whether labeled insubordination or otherwise—will typically support a teacher’s immediate discharge. This is true even if the teacher claims unlawful discrimination. In *Villarreal v. Independent School District No. 659*,<sup>292</sup> a Mexican-American teacher who had been with the Northfield School District for twenty-one years, and who had often been described as a “good teacher,” was nevertheless discharged based upon multiple occasions of verbal and physical abuse.<sup>293</sup> The teacher then filed a lawsuit alleging that the district had violated Minnesota’s Human Rights Act<sup>294</sup> by illegally and discriminatorily discharging him.<sup>295</sup>

In upholding the teacher’s discharge, the Minnesota Supreme Court reviewed the charges and found that summary judgment in favor of the school district was appropriate.<sup>296</sup> The court concluded that as the evidence had been sufficient to support Villareal’s immediate discharge, he was precluded from making a *prima facie* showing of racial discrimination, for an essential element of such a claim is proof that one is qualified for the position in the first place.<sup>297</sup> Similarly, arbitrators have not tolerated physical and verbal abuse despite a teacher’s efforts to justify that behavior based upon his cultural background,<sup>298</sup> nor have they been accepting of teachers who fail to acknowledge the inappropriateness of

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291. *Id.*

292. 520 N.W.2d 735 (Minn. 1994).

293. *Id.* at 736.

294. MINN. STAT. § 363A.08, subd. 1(d) (Supp. 2003).

295. *Villarreal*, 520 N.W.2d at 737.

296. *Id.* at 739.

297. *Id.* at 738 (citing *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 442 (Minn. 1983)). The Supreme Court’s formulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) of the plaintiff’s *prima facie* case of discriminatory hiring slightly modified to fit a claim of discriminatory discharge:

The discharged employee carries the initial burden of establishing a *prima facie* case by showing (1) he is a member of a protected class; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work.

*Hubbard*, 330 N.W.2d at 442.

298. See *Minneapolis Pub. Sch. Special Sch. Dist. No. 1, Minneapolis v. Minneapolis Fed’n of Teachers, Local 59, AFT, AFL-CIO*, BMS Case No. 95-TD-2 (1996) (Jacobowski, Arb.); *Barnes-Griswold v. Indep. Sch. Dist. No. 625, St. Paul, BMS Case No. 03-TD-6 (2003)* (Ver Ploeg, Arb.).

blameworthy behavior.<sup>299</sup>

A teacher shown to be dishonest also has little latitude to protest a discharge, especially if there has been a prior warning.<sup>300</sup> For example, in *Anderson v. Independent School Dist. No. 623*,<sup>301</sup> the Minnesota Supreme Court affirmed the discharge of a school teacher who lied about being sick in order to attend to personal matters on a school day. In her appeal, the teacher relied upon an earlier decision in which a district had been prevented from discharging a teacher for taking one unauthorized day of sick leave.<sup>302</sup> Anderson argued that her case was “virtually identical” and dictated the same result.<sup>303</sup> The court rejected that argument, explaining that here the teacher had misused sick leave not once, but twice, and had done so after being warned that such conduct could be grounds for immediate discharge.<sup>304</sup> Although the court agreed that discharge was a severe penalty, it apparently saw no way to overturn the board’s discretion when the plain language of the statute authorized a teacher’s immediate discharge when there was a proven “[f]ailure without justifiable cause to teach without first securing the written release of the school board . . . .”<sup>305</sup>

Despite the harshness of this penalty, it is also true that giving false information is viewed differently when it is not intentional.<sup>306</sup> For example, in *Liffrig v. Independent School District No. 442*, the district discharged a seventeen-year high school principal immediately for “immoral conduct” and “conduct unbecoming a principal” based on evidence that he had (1) charged the school district for hours of behind-the-wheel driver’s training that were not given to the students, and (2) falsely certified to the State of Minnesota and to various insurance companies that students had completed the state mandated six hours of behind-the-wheel driver’s training.<sup>307</sup>

Agreeing that the principal’s records were by his own

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299. *Indep. Sch. Dist. No. 112, Chaska v. Dr. Mario Cianflone*, BMS Case No. 99-TD-2, 21 (1999) (Vernon, Arb.).

300. *See Anderson v. Indep. Sch. Dist. No. 623*, 292 N.W.2d 562 (Minn. 1980).

301. 292 N.W.2d 562 (Minn. 1980).

302. *Id.* at 563.

303. *Id.*

304. *Id.*

305. *Id.* at 563-64.

306. *See Liffrig v. Indep. Sch. Dist. No. 442, Oslo*, 292 N.W.2d 726 (Minn. 1980).

307. *Id.* at 727.

admission “shabby,”<sup>308</sup> the Minnesota Supreme Court reviewed the extent of the records that he did keep, many of which were in his head, as well as the principal’s numerous responsibilities, and concluded that his omissions had been unintentional.<sup>309</sup> The court defined “intent” as a “subjective state of mind usually established by reasonable inference from surrounding circumstances.”<sup>310</sup> Thus, although “the school board’s findings are entitled to respect, they must be reversed when unsupported by substantial evidence in the record.”<sup>311</sup> Given the principal’s lack of intent to defraud, the court overturned the discharge.<sup>312</sup>

### 3. *Sexual Boundary Issues*

No group of cases commands more public attention and strong feeling than those that involve charges of improper touching or sexual contact with students. It is difficult both to pursue and to defend charges of this type because of their sensitive nature and problems of proof. The growing numbers of these cases illustrate their many complexities. For example, in cases that typically pit a student’s charge against a teacher’s unequivocal denial, how is credibility to be evaluated? Can a district choose not to subject its students to the stress of testifying on these sensitive matters and still meet its burden of proof? To what extent is there a difference between verbal misconduct and physical misconduct? Are there gradations of misconduct and, if so, at what point has a teacher crossed permissible boundaries? What if the student involved is a former student, now graduated?

The many Minnesota court and arbitration decisions that have grappled with these issues have virtually unanimously upheld a teacher’s immediate discharge when a district has proven that the conduct complained of did in fact occur. This is not surprising given the nature of these cases, the high standards to which a teacher is held, and the unique nature of the teacher-student relationship. Thus, as the following cases demonstrate, once evidence is found to support the charges, the teacher’s immediate

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308. *Id.* at 728.

309. *Id.* at 729.

310. *Id.* (citing *State v. Schweppe*, 306 Minn. 395, 401, 237 N.W.2d 609, 614 (1975)).

311. *Id.* at 730.

312. *Id.*

discharge is never in real doubt.<sup>313</sup> That is why these cases typically turn on the quality and quantity of evidence concerning the essential question: Did the events charged actually occur? The following cases illustrate the type of evidence that has been found sufficient to meet a district's burden of proof.

In one case, a twenty-two-year district employee was discharged based on charges that many years earlier he had sexually molested an elementary student over a four-year period.<sup>314</sup> At the hearing, the student provided the only testimony concerning his claims that he had been called "to the principal's office once or twice a month for visits that included sexual contact with the principal."<sup>315</sup> The student corroborated his testimony by diagramming the general layout of the principal's office and the adjoining general office.<sup>316</sup> This raised two fact issues: (1) was it physically possible for the principal to have achieved the necessary privacy with the student, and (2) was it possible that others would have failed to notice such frequent visits?<sup>317</sup>

Although the first question was easily resolved with evidence that simply closing one door and lowering the window shades would have provided the necessary privacy, the second was more difficult.<sup>318</sup> Two teachers and the principal's secretary each testified that they did not recall such frequent visits by the student.<sup>319</sup> However, they also admitted that it was difficult to recall anything about incidents alleged to have occurred thirteen or more years ago.<sup>320</sup> Given the uncertain nature of this evidence, the court of appeals was obliged to directly consider whether the student or the principal was more credible.

After first acknowledging its obligation to defer to the judgment of fact finders who have seen and heard the witnesses

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313. It is also important to note that Minnesota's teacher organizations have been very proactive in educating their members on boundary issues and where there is compelling evidence that a teacher has violated those boundaries, they often play an important role in quietly and privately facilitating the teacher's removal not only from the district, but sometimes also from the profession.

314. *Fisher v. Indep. Sch. Dist. No. 622, N. St. Paul/Maplewood*, 357 N.W.2d 152 (Minn. Ct. App. 1984).

315. *Id.* at 154.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

and judged their credibility,<sup>321</sup> the court explained why it agreed that the student was more credible. First, as in any case, it was highly relevant that the student's testimony about the abusive behavior had been detailed and consistent. The court was also impressed that the victim had accurately diagrammed both the principal's inner and outer offices, including the location of furniture within the office and photographs of the principal's children, even though he had not been there for thirteen years.<sup>322</sup> Moreover, other witnesses' testimony, "although not nearly as critical," established that the incidents could have taken place without being observed.<sup>323</sup> It was undisputed that while children were frequently called to the office, no records were kept of those visits.<sup>324</sup> The principal's secretary also testified that she could not recall ever interrupting him when his door was closed.<sup>325</sup>

It is rare for any employee, including teachers, to be disciplined for "old" events. Memories fade and evidence is no longer available. Certainly remoteness was a relevant concern in this case, for here the essential question involved events that allegedly occurred between thirteen and seventeen years earlier.<sup>326</sup> Despite this concern, the court found that the passage of time alone did not mean the teacher was denied due process.<sup>327</sup> Noting that Minnesota law has no time limits for immediately discharging a teacher, the court found that the student's twelve-year silence on this matter did not render the incidents so remote as to have unfairly prejudiced the principal.<sup>328</sup> Although it was true that witnesses were unable to recall how often the student had visited the principal's office, that evidence was relatively unimportant when compared with that of the only two "real witnesses."<sup>329</sup> The court explained that

[t]he sexual contact alleged here occurred in the private confines of the principal's office. It was not likely to produce any corroborating evidence, nor is any required.

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321. *Id.* at 155 (citing *Estate of Serbus v. Serbus*, 324 N.W.2d 381, 385 (Minn. 1982)).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 156.

328. *Id.*

329. *Id.*

Appellant had a lengthy hearing on the charges, conducted by an impartial hearing examiner, with every opportunity for cross-examination. We believe that these procedures were fundamentally fair and satisfied the requirements of due process.<sup>330</sup>

Providing further insight into its reasoning, the court cited with favor a 1980 district court memorandum concerning a teacher discharged for having sexual relations with a sixteen-year old student three to four years earlier:

The fortuitous fact that the school board did not have immediate knowledge of the alleged sexual relationship with the sixteen-year old minor student is not the Board's fault. There is no showing that the Board unduly delayed in bringing this termination action after it had received knowledge of the alleged occurrence. *By virtue of the nature of the offense—sexual intercourse with a minor student of the district—it may be considered doubtful whether such conduct could ever be too remote in time.*<sup>331</sup>

Since 1991, when the legislature amended Minnesota law to permit teachers to appeal their proposed discharges to arbitrators rather than school boards and independent hearing examiners,<sup>332</sup> virtually all contested teacher discharges have been taken to arbitration. Although arbitration decisions are not given the same precedential weight as appellate court decisions, arbitration itself has developed a body of common law that has guided the decision-making process in labor relations for many years and has added to the earlier guidance provided by Minnesota courts.<sup>333</sup> In addition, arbitrators' decisions typically provide more detailed discussions of the evidence than do published judicial decisions.

One of the first cases taken to arbitration involved a thirty-two-year counselor who had been employed in the Austin School District for fifteen years.<sup>334</sup> Although the counselor had previously

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330. *Id.*

331. *Id.* (citing *Johnson v. Indep. Sch. Dist. No. 294*, No. 12305 (Minn. 3d Dist. Ct. Feb. 12, 1980) (mem.), in which "a teacher was discharged for having sexual relations with a 16-year-old student despite the hearing taking place three to four years after the incident").

332. See MINN. STAT. § 122A.40, subd. 15 (2002).

333. See generally THE COMMON LAW OF THE WORKPLACE: THE VIEW OF ARBITRATORS § 6.6 (Theodore J. St. Antoine ed., 1998) [hereinafter THE COMMON LAW].

334. *Indep. Sch. Dist. No. 492, Austin v. Minn. Educ. Ass'n*, BMS Case No. 92-TD-3 (1992) (Fogelberg, Arb.).

been warned about complaints against him, additional complaints arose in 1991 that triggered his proposed discharge.<sup>335</sup> Charges included claims that the counselor had improperly disclosed private data and had failed to file a mandatory report regarding an incident or incidences of maltreatment.<sup>336</sup> However, the heart of the case characterized as the “pivotal charge,” centered on the events of a single day, when the counselor was alleged to have had inappropriate sexual contact with his former counselee.<sup>337</sup> The counselor vehemently denied the charges, and nearly 80 percent of the hearing was devoted to evidence concerning that disputed event.<sup>338</sup> In his award, Arbitrator Fogelberg recognized that charges of improper physical conduct are so self-evidently serious that “[i]f the [e]mployer can meet their [sic] burden of proof concerning this particular claim, then there is truly little need to consider the balance of the evidence. Plainly it is a most serious charge and one that under statute, allows the Board to terminate a tenured teacher ‘immediately.’”<sup>339</sup> Indeed, the association’s brief acknowledged that if the counselor had assaulted the student in the manner asserted, “he should not be teaching in the District.”<sup>340</sup>

After a lengthy discussion of the evidence concerning the student’s and the counselor’s credibility, including expert witness testimony which the arbitrator described as “critical,” Arbitrator Fogelberg accepted the student’s testimony and found that “the preponderant evidence supports a finding that it is more probable than not that the [g]rievant’s conduct on the day in question was immoral and unbecoming a person who occupies a very influential and sensitive position of trust within the school system.”<sup>341</sup> The arbitrator was particularly persuaded that the student’s testimony had largely been consistent, at least to an acceptable degree, and other witnesses reported that the counselor had overstepped his professional boundaries in dealing with other students.<sup>342</sup>

In an equally interesting case that same year, the Paynesville School District issued a notice of deficiency to a twelve-year band

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335. *Id.* at 3.

336. *Id.*

337. *Id.* at 15.

338. *Id.*

339. *Id.* See also MINN. STAT. § 125.12, subd. 8 (1990) (recodified by 1998 Minn. Laws 397 as MINN. STAT. § 122A.40, subd. 13 (2002)).

340. *Indep. Sch. Dist. No. 492, Austin*, BMS Case No. 92-TD-3 at 15.

341. *Id.* at 38.

342. *Id.*

director after a student filed a sexual harassment complaint against him.<sup>343</sup> The student's parents were dissatisfied with this handling of their daughter's complaint and proceeded to conduct their own investigation, telephoning former students to determine whether the band director might have sexually harassed them as well.<sup>344</sup> One student who initially denied having been sexually harassed later retracted her statement and alleged that she had had sex with the band director several times when she had been in high school.<sup>345</sup> In addition, the parents learned that yet another former student had recently filed sexual harassment charges against the band director, who in addition to his job at the high school, was giving music lessons at the college she was currently attending.<sup>346</sup> After the parents brought this additional information to the district's attention, the board adopted a resolution proposing the band director's immediate discharge based upon twelve specific factual grounds that Arbitrator Miller later grouped into three broad categories.<sup>347</sup>

The first group of allegations involved the student who had graduated from high school the prior year.<sup>348</sup> She complained that since that time the band director, who gave music lessons at the college she was attending, had inappropriately complimented her physical appearance and had made sexually provocative comments.<sup>349</sup> The band director did not deny that he had given her presents or hugged her and kissed her under the mistletoe.<sup>350</sup> A college investigation of the matter found the band director's actions to be inappropriate, and he was warned that similar future behavior could lead to further discipline including termination.<sup>351</sup> Although the band director claims he was never notified of this report, he nevertheless resigned his position at the college.<sup>352</sup>

It was not until the arbitration hearing that this student for the

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343. *Indep. Sch. Dist. 741, Paynesville v. Minn. Educ. Ass'n, BMS Case No. 94-TD-12 (1994) (Miller, Arb.)*.

344. *Id.* at 3.

345. *Id.*

346. *Id.* at 3-4.

347. *Id.* at 4.

348. *Id.* at 9.

349. *Id.*

350. *Id.* at 10.

351. *Id.* at 11-12.

352. *Id.* at 12.

first time alleged that the director had also sexually touched her.<sup>353</sup> However, Arbitrator Miller indicated he would not consider those belated allegations as they had not been included in the proposed notice of discharge.<sup>354</sup> Moreover, he held that because this alleged conduct occurred off school premises on the band director's own time the district had failed to prove a connection to his position in the high school.<sup>355</sup>

The second group of allegations involved the student whose parents had pursued this investigation. This student—who had been a high school junior and suffered from a serious heart condition—became uncomfortable when the band director showered her with attention, including giving her sentimental gifts, hugs, joking with her in a sexual fashion, tickling her, and having their picture taken together.<sup>356</sup> Arbitrator Miller indicated that had these been the only charges against the band director he would have found the district's initial notice of deficiency to have been appropriate.<sup>357</sup> This is particularly interesting, as it was these parents' dissatisfaction with that very notice that had caused them to undertake their own investigation that led to the proposed discharge at issue.

The third and most damning complaint concerned a third accuser's allegations that she and the director had sexual intercourse four times and oral sex once when that witness had been a senior at the high school ten years earlier.<sup>358</sup> Everyone understood that the credibility of these allegations would determine whether the band director retained his job.<sup>359</sup> In an apparently riveting "she said, he said" fashion, the band director challenged the allegations by asking why, if the allegations were true, did the woman thereafter invite him to her wedding?<sup>360</sup> Why did she and her husband both take golf lessons from him, and why would they have invited the director and his family to visit them when they vacationed in North Dakota?<sup>361</sup>

Arbitrator Miller looked to the victim's husband for the

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353. *Id.*

354. *Id.*

355. *Id.* at 14.

356. *Id.* at 15-17.

357. *Id.* at 18.

358. *Id.* at 20-21.

359. *Id.* at 20.

360. *Id.* at 29-30.

361. *Id.* at 30.

answers to these questions.<sup>362</sup> The husband was a minister, and as such was someone who “preaches forgiveness of sin.”<sup>363</sup> His “very forthright” testimony and his rationale for his and his wife’s decision to forgive was described as totally believable:<sup>364</sup>

Given his strong religious beliefs, their decision, and especially his decision, was based on the teachings of their religion, which mandates to forgive and befriend their enemies. It therefore should come as no surprise to anyone that [the husband] was willing to forgive Mr. Hanson for his transgressions against his wife and still be cordial to Mr. Hanson and his family.<sup>365</sup>

Other evidence supported the district. For example, an experienced licensed psychologist explained how the former student had been raised to be submissive and to obey authority figures and that she was “not in a position to say no” to the band director’s sexual advances.<sup>366</sup> Arbitrator Miller took special note of the fact that there had been no expert witness to testify for the band director.<sup>367</sup> The expert who did interview him, and who administered three separate personality tests (MMPI-II, California Personality Inventory and a Rorschach) did not testify to the truth of the director’s denials.<sup>368</sup> It was also noteworthy that the director had absolutely every reason to lie, for “his reputation, career and even his marriage are at stake.”<sup>369</sup> In contrast, the complainant had

nothing to gain and everything to lose from testifying against Mr. Hanson. In order to testify in this hearing, she was forced to disclose her extramarital affair. This disclosure was painful to her husband and their marriage. It could also damage his career in the clergy and their family’s reputation in the community and church. It is difficult to imagine that anyone would subject herself to this type of scrutiny,<sup>370</sup> in order to make false accusations against someone.

The psychologist confirmed this observation, testifying that the

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362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 31.

367. *Id.* at 35.

368. *Id.*

369. *Id.* at 34.

370. *Id.*

woman's personality and upbringing as a "good Christian girl" made it very unlikely that she would fabricate a story concerning having sex with the band director if that were not true.<sup>371</sup> For these reasons the arbitrator concluded that the band director had committed a "heinous act" when he had sex with a high school student,<sup>372</sup> and he deserved no leniency whatsoever. Arbitrator Miller stated, "A teacher does not need to be warned that it is wrong to have sexual intercourse with a student. In fact, proof of a teacher's sexual acts with a student is sufficient grounds for immediate discharge."<sup>373</sup>

One difficulty that often arises in these cases is a lengthy time period between alleged incidents of improper behavior and a district's response. This is, of course, often due to victims' not-uncommon reluctance to report such sensitive incidents because of embarrassment, guilt, intimidation, or ignorance that the conduct was wrongful. Sometimes, incidents dealt with at the time later resurface in the context of a larger pattern of behavior. For example, in 1998 Arbitrator Imes heard evidence that approximately seven years earlier a fifteen-year-old female student had joined her music teacher and his wife at their home to watch television, at which time the teacher had put his hand under her sweatshirt and touched her "bra-covered breasts."<sup>374</sup> The student recorded this incident in her diary and eventually told her friends and her parents.<sup>375</sup> When she also told two teachers and the school counselor, the superintendent reported the matter to the police (who did not file charges) and told the teacher that he would be discharged if there was another similar incident.<sup>376</sup> The teacher eventually apologized to the student and they were still friends at the time of the hearing.<sup>377</sup>

Five years after the incident, the district hired a new superintendent who eventually learned of this incident from the president of the local union who was seeking to protect other teachers who were being laid off for budgetary reasons.<sup>378</sup> In the

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371. *Id.* at 35.

372. *Id.* at 37.

373. *Id.* at 39.

374. *Gillson v. Indep. Sch. Dist. No. 116, Pillager, BMS Case No. 98-TD-13, 2 (1998) (Imes, Arb.)*.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

course of following up on this report, the superintendent also discovered that the teacher was spending many late nights at school on his computer.<sup>379</sup> Further investigation revealed that he was visiting sites with pictures of nude and partially undressed women, some of which he downloaded, and that he had also downloaded two short movie clips the district described as pornographic.<sup>380</sup>

Arbitrator Imes reviewed the evidence and found the allegations to be true.<sup>381</sup> Nevertheless, she concluded that with respect to the initial incident that had occurred in the early 1990s, for which the teacher had been given what was characterized as an “oral warning,” discipline now would constitute double jeopardy.<sup>382</sup> Rejecting the argument that double jeopardy only applies to criminal proceedings, Imes held that the teacher could not now be punished a second time for the same behavior.<sup>383</sup>

This case is also an interesting forerunner of what has come to be a growing number of workplace “internet abuse” cases. It arose at a time when employers were only starting to recognize the extent to which some employees were abusing their internet privileges, with much of that activity involving sexual content so that claims of sexual harassment began to emerge as a real concern. With this growing risk, many employers have now adopted formal policies that restrict employee use of the computers, especially with respect to sexually oriented sites. However, at the time of this hearing it is not surprising that this district did not have such a policy.

Although Arbitrator Imes acknowledged that one could credibly argue that it should be unnecessary to advise employees not to view and download material of such questionable taste, she nevertheless found that “an incident of this nature does not rise to a level that sustains immediate discharge.”<sup>384</sup> Declining to find that this action, “while incredibly stupid,” was so harmful as to warrant immediate discharge, Imes did express her opinion that the teacher’s conduct did warrant some type of discipline.<sup>385</sup> However, because neither party had proposed a lesser penalty at the hearing, she lacked the authority to issue a lesser penalty on her own

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379. *Id.*

380. *Id.* at 3.

381. *Id.* at 5.

382. *Id.* at 7.

383. *Id.* at 7-8.

384. *Id.* at 8.

385. *Id.* at 9.

initiative.<sup>386</sup>

In contrast, in a more recent case Arbitrator Fogelberg upheld the discharge of a high school instructor found to have downloaded approximately seventy-five to eighty pages of pornographic material from his computer at school during his prep time.<sup>387</sup> In addition, the instructor had accumulated hundreds of pages of anarchist material on a variety of subjects such as how to bomb a building, make explosives, tap into telephones, steal credit card numbers, make firecrackers, use dynamite and more.<sup>388</sup> Fogelberg rejected each of the instructor's three lines of defense: (1) that he had been given no clear policy, (2) that he had insufficient warning that his behavior was not acceptable, and (3) that there had been no harm.<sup>389</sup> In doing so, he reiterated the widely-held view that some conduct is so clearly objectionable that specific directives and warnings of consequences are unnecessary: "A teacher viewing and downloading pornography in a high school setting, while 'on the job' would know, or should have known, that accessing such materials was highly inappropriate and not without serious consequences if discovered."<sup>390</sup>

More recently, Arbitrator Olson ordered a one-semester suspension without pay and a psychological evaluation with counseling by a qualified professional of the District's choosing and at the teacher's expense, after finding that a teacher had shown one objectionable computer image to young students and had kept other inappropriate images on a district computer.<sup>391</sup> Although Arbitrator Olson was unwilling to uphold the teacher's immediate discharge based upon this evidence, she was also unwilling to give a mere "slap on the wrist" with a written reprimand or a short suspension.<sup>392</sup> In striking this balance, Arbitrator Olson itemized the evidence that had been important to her decision:

I consider this teacher's audience of vulnerable adolescents and their emerging response to sexuality; the teacher's admission that he was familiar with the two

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386. *See infra* Part VII.

387. Educ. Minn. v. Special Sch. Dist. No. 1, Minneapolis, BMS Case No. 00-TD-4 (2000) (Fogelberg, Arb.).

388. *Id.* at 4.

389. *Id.* at 10.

390. *Id.* at 16.

391. Educ. Minn. v. Indep. Sch. Dist. No. 622, N. St. Paul-Maplewood-Oakdale, BMS Case No. 02-TD-8 (2002) (Olson, Arb.).

392. *Id.* at 13.

relevant District policies and knew his computer images would violate them; the possibility of unwanted and unexpected intrusion of sexual images on District staff whose duties are to monitor the District's computers; the apparent appeal of vulgar sexual images for the teacher; his lack of understanding, even at hearing, of his misconduct; parental concerns about returning this teacher to the classroom.

Balanced against those matters are these facts: only one student complained about the cactus picture and then only to her friends, not to the District; the four images found on his computer were not seen by the students; no witness refuted his denial about the cartoons; the teacher's ten-year record of service without incident; the relative ease with which the teacher's inappropriate computer use can be rectified; the reluctance of the courts to uphold termination if behavior can be changed; the willingness of the District to propose a lesser penalty than discharge.<sup>393</sup>

Arbitrator Olson's list illustrates the extent to which the growing number of "on-line pornography" cases has now developed widely accepted guidelines, and can provide helpful guidance in similar cases.

#### *D. Off-Duty Misconduct*

The larger arena of labor relations has long presumed that an employee's private life is beyond an employer's control and that employers are not society's enforcers. Only when an employer can show a connection—a "nexus"—between off-duty misconduct and an adverse effect on the business, does the employer have a legitimate interest in what would otherwise be considered the employee's personal activities.

Sometimes, a collective bargaining agreement will specify the type of off-duty conduct for which an employer can discipline an employee and there will be no need to prove nexus. However, most often an employer will be forced to demonstrate a causal connection between that conduct and the workplace. The National Academy of Arbitrators has identified the four most common ways to show nexus:

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393. *Id.*

- (a) Misconduct involving harm or threats to supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer;
- (b) Misconduct that could seriously damage an employer's public image;
- (c) Misconduct that reasonably makes it difficult or impossible for co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee; or
- (d) Public attacks on the employer, supervisors or the employer's product.<sup>394</sup>

Nexus raises special considerations in education because many courts and arbitrators hold teachers to a higher standard of behavior. This higher standard of behavior is not only applied to teachers' duties at school, but also to their private lives away from school. There are occasions when doing so is reasonable. For example, it would not be difficult to find a harm, or threat of harm, to students when a teacher has abused a child outside of the school. In fact, the Academy expressly cites the examples of a "teacher convicted of child abuse away from work and a drug counselor convicted of selling drugs away from work" as "clear examples of situations in which the employer's image might be irreparably harmed if it retained the offending employee."<sup>395</sup> A teacher arrested for immoral behavior or drug-related activities, whose arrest is widely reported, may have difficulty continuing to function effectively in the classroom.

Thus, education cases add unique dimensions to the question of nexus. The Minnesota Court of Appeal's 1987 decision *In re Proposed Discharge of Donald Lee Shelton*<sup>396</sup> illustrates some of these considerations. In *Shelton*, three district teachers formed a computer corporation.<sup>397</sup> One served as secretary/treasurer and was the sole signatory for all corporate bank accounts.<sup>398</sup> Six years into the venture the two other teachers confronted the secretary/treasurer with evidence of his unauthorized withdrawal of corporate funds.<sup>399</sup> The teacher admitted that he had been

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394. THE COMMON LAW, *supra* note 333, at 168.

395. *Id.* at 169.

396. 408 N.W.2d 594 (Minn. Ct. App. 1987).

397. *Id.* at 595.

398. *Id.*

399. *Id.*

stealing funds for over two years and had also forged the others' signatures on personal bank guarantees.<sup>400</sup> They reported this theft to the sheriff's department, and the teacher agreed to return his shares of stock to the corporation and pay restitution.<sup>401</sup>

That fall the teacher returned to his seventh and twelfth grade social studies classrooms.<sup>402</sup> Later, when his theft became common knowledge throughout the community, staff members were divided concerning his continued teaching.<sup>403</sup> A substitute teacher who covered the teacher's social studies classes during a seven-week medical leave that January reported difficulty controlling those classes, and there was evidence that the senior class was unusually disruptive throughout the year.<sup>404</sup> In March, the teacher was charged with theft by swindle and on May 30, he pled guilty to one count of theft as full prosecution for his offenses.<sup>405</sup> At the end of the school year the school board proposed the teacher's immediate discharge, citing his theft as immoral conduct and conduct unbecoming a teacher.<sup>406</sup> Before this incident, his teaching record had been unblemished.<sup>407</sup>

After hearing this matter, the hearing examiner recommended that the board rescind the proposed discharge because "no evidence exists to suggest that the teacher is not fully remediated or that there is a likelihood that he will commit a similar crime in the future."<sup>408</sup> Nevertheless, the school board voted unanimously to discharge the teacher, having concluded that his stealing over \$35,000 had "resulted in an irremediable deterioration of faculty relations, inability to effectively teach because of lack of credibility and adverse relationship with the community."<sup>409</sup>

On appeal, the Minnesota Court of Appeals considered the teacher's argument that he should be given the opportunity to demonstrate his ability to continue teaching because there was no

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400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* In August, the trial court sentenced the teacher to a ninety-day misdemeanor sentence and ordered him to complete his restitution to the corporation by May 1, 1987 by paying \$2571.73. The court stayed sixty days of his sentence and placed him on one-year probation. *Id.* at 596.

406. *Id.* at 596.

407. *Id.*

408. *Id.*

409. *Id.*

direct relationship between his conduct and his fitness to teach.<sup>410</sup> Shelton insisted that he had not lost his credibility in the classroom, citing the testimony of students who had welcomed his return from surgery and respected his ability to face his mistakes.<sup>411</sup> However, the district argued that the teacher, who taught in the area of business ethics and social studies, had lost his credibility to teach such values and that his presence created turmoil within the faculty.<sup>412</sup> The teacher countered by arguing that he should not be held responsible for turmoil incited by others, particularly by his two former partners who were leading the opposition against him.<sup>413</sup>

The court considered these arguments and, after noting the paucity of evidence or findings concerning student reaction to the teacher's continued presence, nevertheless agreed that it had been a "strongly emotional" school year for the faculty and that "[w]hile relator may be genuinely sorry for, and may be unlikely to repeat, his conduct, the record does support the school board's conclusion that relator's continued presence in this small school district will result in faculty disorder and an unsatisfactory learning environment."<sup>414</sup>

One interesting aspect of the court's discussion of this case is the observation that although the teacher's misconduct rendered him unable to continue teaching in Blooming Prairie, apparently he was still well qualified to teach in any other district:

Relator still has his teaching license and can continue in his profession. Faculty members testified relator is well qualified to teach in any other district. Had this matter arisen in a larger school district, it is likely reassignment of relator to another school within the district would suffice as a remedy. But given the small size of the Blooming Prairie school district and the high school which houses grades 7-12, it is not error to conclude relator's 'conduct can only be remedied by his removal as a teacher in the Blooming Prairie Schools.'<sup>415</sup>

Similarly, in a case involving the Duluth School District,<sup>416</sup>

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410. *Id.* at 598.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Indep. Sch. Dist. No. 709, Duluth & Grievant, BMS Case No. 99-TD-5*

Arbitrator Berquist reviewed the proposed demotion of a school principal to the rank of teacher for shoplifting six items of clothing with a total value of \$311.<sup>417</sup> The principal sought to explain her conduct with evidence that at the time of the incident she had been on pain relievers, and this had left her “confused” and “spacey.”<sup>418</sup> Demoting the principal to the rank of teacher would have placed her at the bottom of the seniority list, with a loss of \$11,000 a year and over twenty years’ seniority.<sup>419</sup>

In weighing the evidence, Arbitrator Berquist was persuaded that the principal sincerely believed that her medications had played a part in this unfortunate event, and he found that “the record does not support a finding of dishonesty” on her part.<sup>420</sup> In addition, he specially noted that this incident had occurred off-duty on a Sunday, and that it “had no connection with the District.”<sup>421</sup> He accepted that an employer can discipline for otherwise private conduct if that conduct “(1) harms the employer’s business; (2) adversely affects the employee’s ability to perform his or her job; or (3) leads other employees to refuse to work with the recalcitrant.”<sup>422</sup> However, he concluded that those exceptions did not apply in this case, where the only apparent linkage was a press release concerning the matter.<sup>423</sup> This was not enough to support discipline for “such private conduct.”<sup>424</sup>

#### *E. The Troubled Teacher*

Difficult issues arise when a district proposes to discharge a teacher whose misconduct relates to psychological problems or chemical dependency. Recent years have seen a growing acceptance of the medical dimensions of these cases. This has led to an increased willingness to give a teacher a second chance (often characterized as a “last chance”) if the condition has been or probably can be treated and the misconduct is not likely to be repeated. However, a discharge will be directed if it appears that

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(1999) (Berquist, Arb.).

417. *Id.* at 1.

418. *Id.* at 11.

419. *Id.* at 18.

420. *Id.* at 22.

421. *Id.* at 28.

422. *Id.*

423. *Id.*

424. *Id.*

remedial efforts are not likely to succeed, or the teacher can no longer be an effective peer for colleagues or role model for students.

An arbitration involving the Moorehead School District illustrates many of these issues.<sup>425</sup> In that case, a tenured teacher with no prior discipline had called in sick and then gone on a drinking binge.<sup>426</sup> After he urinated and exposed himself in public, and nearly caused a car accident, police apprehended the teacher and put him in jail.<sup>427</sup> After learning of these events, the Moorehead School Board weighed the egregious nature of this conduct, the fact that it occurred during the school day, and the widespread publicity that followed. The school board proposed the teacher's immediate discharge on the grounds of "immoral conduct . . . conduct unbecoming a teacher which requires the teacher's removal from the classroom . . . and/or willful neglect of duty."<sup>428</sup> The arbitrator discussed each of these grounds in detail.<sup>429</sup>

First, the arbitrator agreed while the teacher's conduct had been "unbecoming," it could not be characterized as "immoral."<sup>430</sup> Relying on *Webster's Dictionary* to equate immorality with "wickedness" or "vice," the arbitrator found that this behavior, "although truly inappropriate, embarrassing and illegal, lacked sufficient volition and malice to be deemed 'immoral.'"<sup>431</sup> Similarly, the arbitrator defined "willful" as "deliberate" and "intentional," and found that such was not the case given the evidence that the teacher's conduct was entirely attributable to his alcoholism and his then-undiagnosed depression, both recognized as diseases.<sup>432</sup>

With the above findings, the essential question then became: Was the teacher's undisputed conduct so egregious that it required the teacher's "immediate discharge" from the classroom?<sup>433</sup> The district argued that his conduct was so egregious, he could no longer be a "positive role model" and he had violated the "very

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425. *Daly v. Indep. Sch. Dist. No. 152, Moorhead, BMS Case No. 00-TD-2 (2000) (Ver Ploeg, Arb.)*.

426. *Id.* at 2-3.

427. *Id.*

428. *Id.* at 5-6.

429. *Id.* at 6-9.

430. *Id.* at 7-8.

431. *Id.* at 7.

432. *Id.* at 8-9.

433. *Id.* at 9-10.

principles” he was expected to impart to his tenth grade health students, as expressly directed in their curriculum.<sup>434</sup> In considering this argument the parties agreed that “teachers are viewed as role models for students.”<sup>435</sup> Nevertheless, the teacher was reinstated after the arbitrator applied the criteria first articulated by the Minnesota Supreme Court in *Kroll v. Independent School District No. 593*.<sup>436</sup>

*Kroll* directed fact-finders to first consider a teacher’s prior record.<sup>437</sup> However, here the parties had staked out very different positions concerning what constituted the teacher’s “prior record.”<sup>438</sup> The district acknowledged that it had never disciplined or otherwise directed the teacher concerning his use of alcohol, and there was no evidence that he ever taught or was even on school premises while impaired.<sup>439</sup> Nor was his classroom performance at issue.<sup>440</sup> Thus, if the teacher’s prior record was limited to his employment record, this factor would weigh against discharge. However, the district countered that the “record” should be defined more expansively to embrace the teacher’s public and private life, based on evidence that

[s]ince junior high the Teacher has experienced sobriety for a period of only three and one-half years. He was in treatment three previous times, and arrested and convicted three times for alcohol related crimes, two of which were DUI’s. Notwithstanding his prior treatment and his lengthy participation in AA, the Teacher’s lack of control has only worsened.<sup>441</sup>

Thus, the question was whether the teacher’s “prior record” extended to his entire life history, including his off-duty conduct, or whether inquiry was limited to his “employment record with the District.”<sup>442</sup> The arbitrator decided this question by stating, “Without denying the relevance of a teacher’s entire course of conduct, in this case I find the lack of any evidence of alcohol

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434. *Id.* at 7-8.

435. *Id.* at 8.

436. *Id.* at 10-20 (citing *Kroll v. Indep. Sch. Dist. No. 593*, 304 N.W.2d 338 (Minn. 1981), also discussed *supra* Part V).

437. *Id.* at 11 (citing *Kroll*, 304 N.W.2d at 345).

438. *See id.* at 12-17.

439. *Id.* at 16.

440. *Id.*

441. *Id.*

442. *Id.* at 17.

related use or impairment associated with the Teacher's teaching duties to be highly relevant. This evidence falls short of *Kroll's* first factor."<sup>443</sup>

Next it was necessary to consider how serious the teacher's conduct had been.<sup>444</sup> The teacher's attorney argued that immediate discharge cases typically involve "teachers accused of 'bad acts' such as sexual or physical abuse of students," and urged that this was not so serious a case.<sup>445</sup> The teacher had never been under the influence or "in any way impaired . . . while teaching or otherwise on school property."<sup>446</sup> Nor had he ever been disciplined or otherwise directed concerning his alcohol use.<sup>447</sup> The arbitrator considered, but ultimately did not accept this argument by reasoning that even though these events had not occurred on school premises or with students, they "did occur during the school day."<sup>448</sup> Moreover, it could be assumed that all of the students were aware of what had happened and that this knowledge had consequences:

The District has had to deal with the very real—although perhaps intangible—consequences of having someone who should have been a role model and authority figure demonstrate the very behavior that adults fear most on the part of impressionable teens. The fallout from the Teacher's behavior should not be underestimated.<sup>449</sup>

For many of the same reasons the arbitrator found the teacher's conduct to be serious, that conduct was also found to pose "actual or threatened harm" and thus met *Kroll's* third factor.<sup>450</sup> Nevertheless, the arbitrator tempered that conclusion with the observation that

[h]owever, it may also be true that the enormity of these events, of which all the students must surely be aware, may also serve to impress upon them the power of chemical dependency and the fragility of the human condition. If the Teacher returned to the classroom and maintained a successful fight against his disease—a battle which he

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443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.* at 17-18.

450. *Id.* at 18.

must fight for the rest of his life for there is no “cure” for alcoholism—the courage of his fight could well permit him to regain, and perhaps even surpass, his earlier positive influence on students.<sup>451</sup>

Finally, the arbitrator had to determine whether the teacher’s conduct could have been corrected with a warning.<sup>452</sup> The greatest portion of the award was devoted to weighing the competing evidence and arguments concerning the teacher’s future ability to overcome his alcoholism and depression.<sup>453</sup> The district argued that if the teacher had been able to control his drinking, then he would have done so following his three earlier efforts in treatment and after his three convictions for alcohol-related crimes.<sup>454</sup> In essence, the district’s position was, “[t]he buck must stop sometime, and that time is now.”<sup>455</sup> The teacher’s representative was more optimistic, offering evidence that the teacher had accepted responsibility for his actions, was following “every medical recommendation” and that his prognosis was good.<sup>456</sup>

There is no guarantee that a person will avoid a future relapse.<sup>457</sup> “The question is whether there are enough promising indicators to warrant” giving a teacher a chance to save his or her career.<sup>458</sup> Here the arbitrator relied upon three promising indicators to give the teacher that chance.<sup>459</sup> First, it was “evident that the Teacher’s misconduct had been the product of not only his life-long alcoholism, but also a closely linked depression.”<sup>460</sup> Until shortly before the arbitration, that depression had never been recognized or treated.<sup>461</sup> The teacher had been on medications that appeared to be making a difference, and the arbitrator determined that “[t]his treatment deserves an opportunity to prove itself.”<sup>462</sup>

Second, the district had neither challenged the teacher’s classroom performance nor claimed until now that his alcoholism

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451. *Id.*

452. *Id.* at 18-20.

453. *See id.*

454. *Id.* at 18-19.

455. *Id.* at 19.

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

ever “infringed upon his teaching duties.”<sup>463</sup> Thus, although the teacher had been unable to deal with his alcoholism in his private life, the district itself had “never been called upon to give him a ‘second chance.’”<sup>464</sup> The arbitrator held that it should at least give the teacher a “last chance” now.<sup>465</sup>

Third, accepting the conventional wisdom that many alcoholics must “hit bottom” before they can improve, the arbitrator concluded that these events must surely represent the “bottom” for the teacher and if ever he were to understand the enormity of his illness and its consequences, “surely now is the time.”<sup>466</sup>

Thus, the arbitrator did not order the teacher’s immediate discharge. However, in recognition of the seriousness of this misconduct, he was issued a sixty-day unpaid suspension.<sup>467</sup> That suspension was to be served at the district’s discretion and scheduled to “best accommodate its curricular needs.”<sup>468</sup> In issuing this suspension, the arbitrator warned the teacher that he was “now on notice that he will be held to a very high standard of conduct.”<sup>469</sup> He had been given what might be characterized as a “last chance,” and “[a]ny future relapse and subsequent claim of remediability will surely be viewed with a much more jaundiced eye than has now been the case.”<sup>470</sup> However, the arbitrator also expressed the sincere hope “that the Teacher will fulfill the pledge he has made in this proceeding to commit himself to a life of sobriety. If he does so, he will win the admiration of his students, colleagues, family and community.”<sup>471</sup>

#### *F. Medical Leaves and Disability*

The discharge of a teacher for disability related reasons also raises difficult issues. While the Teacher Tenure Act<sup>472</sup> is largely silent on the subject, subdivision 12 of the Continuing Contract Act

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463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.* at 20.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. MINN. STAT. § 122A.41 (2002).

contains detailed provisions that govern the treatment of a teacher while on disability, and subdivision 13 provides that a district may immediately discharge a teacher who has been on disability for twelve months and is unable to qualify for reinstatement under the procedures of subdivision 12.<sup>473</sup> In select cases, discharge for medical or disability reasons can provide a mutually beneficial way to tactfully remove a teacher who might otherwise be discharged for performance problems or personal misconduct.

The Continuing Contract Act provides that a teacher may be placed on a leave of absence when he or she is shown to have "active tuberculosis or other communicable disease, mental illness, drug or alcohol addiction, or some other serious incapacity."<sup>474</sup> During that leave the teacher must be given his or her accumulated sick leave benefits, and a district may in its discretion also grant additional benefits.<sup>475</sup> A teacher who protests being placed on medical leave has the right to a district-paid medical examination by a doctor that he or she may select from a list of three names provided by the board, and failure to submit to the exam in the prescribed time subjects the teacher to immediate discharge.<sup>476</sup> The doctor's report concerning the teacher's medical condition is then presumably binding, with one exception.<sup>477</sup> If mental illness is claimed, then the teacher and the board convene a panel of three physicians or psychiatrists who will examine the teacher and submit their findings and conclusions, which are also presumably binding.<sup>478</sup> The district must reinstate a teacher following a medical leave after receiving medical verification within one year that he or she has sufficiently recovered to return to teaching.<sup>479</sup>

Aside from these requirements a district can place a teacher on medical leave without providing a hearing, for such leave is neither a discharge nor a demotion under the statute. For example, in *Palmer v. Independent School District No. 917*,<sup>480</sup> a teacher was found to have properly been placed on a medical leave of absence when her physician, with her approval, reported that she should have no more than four hours of student contact time per

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473. MINN. STAT. §§ 122A.40, 122A.41 (2002).

474. *Id.* § 122A.40, subd. 12.

475. *Id.*

476. *Id.*

477. *See id.*

478. *Id.*

479. *Id.*

480. 547 N.W.2d 899 (Minn. Ct. App. 1997).

day. When the district reduced her schedule to a .75 full-time equivalency to accommodate those restrictions, the teacher protested that she was entitled to have the balance of her hours instead assigned to non-student activities, in effect, paperwork and meetings scheduled to suit her needs.<sup>481</sup> The court did not agree.<sup>482</sup>

As a related matter, a teacher who is otherwise subject to discharge for cause cannot alternatively assert a right to take a leave of absence for medical reasons. In *Obermeyer v. School Board, Independent School District No. 282*,<sup>483</sup> the Minnesota Supreme Court resolved possible confusion between the discharge for cause provisions<sup>484</sup> and the medical leave provisions.<sup>485</sup> In *Obermeyer*, one week after the teacher requested a leave of absence to obtain treatment for alcoholism he pled guilty to having taken indecent liberties with a minor male student one month earlier.<sup>486</sup> After a hearing, the board discharged the teacher for immoral conduct and at the same time determined that his request for a leave of absence was moot because he was no longer a district employee.<sup>487</sup> The teacher appealed to the district court, arguing that he should have been given a disability hearing before the discharge hearing.<sup>488</sup>

In affirming the district court's rejection of this claim, the Minnesota Supreme Court observed that "[a] mere reading of the statute makes clear that appellant is reading into it something which it does not provide."<sup>489</sup> A teacher does not have a right to a suspension and leave of absence.<sup>490</sup> Rather, the language clearly demonstrates that the legislature's intent was to prevent a district from discharging a teacher solely on the ground of serious mental or physical disability until twelve months passed.<sup>491</sup> However, this does not prevent a district from discharging a teacher for other statutory reasons.<sup>492</sup>

Other disability issues arise when a teacher returns to work

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481. *Id.* at 901.

482. *Id.* at 906.

483. 311 Minn. 232, 247 N.W.2d 919 (1976).

484. MINN. STAT. § 122A.40, subd. 13 (2002).

485. *Id.* § 122A.40, subd. 12.

486. *Obermeyer*, 247 N.W.2d at 919.

487. *Id.*

488. *Id.* at 920.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

under medical restrictions and then claims that the district has failed to honor those restrictions. For example, in a case involving the Red Lake School District,<sup>493</sup> a teacher who missed two years of work following a work-related car accident returned to teaching under the following restrictions: no prolonged posturing, no lifting or carrying over twenty pounds, needs semi-sedentary work that allows frequent change in body position, and full-time classroom work only.<sup>494</sup>

In the fall of 1998, the district assigned the teacher to the position of High School In-School Suspension (ISS) Supervisor.<sup>495</sup> Despite the district's extensive efforts to accommodate that position to the teacher's medical restrictions and personal concerns,<sup>496</sup> the teacher questioned his ability to deal with students whose behavioral problems caused them to be assigned to ISS in the first place.<sup>497</sup> Thus, he refused to work the assignment, claiming that his doctor and his qualified rehabilitation consultant (QRC) had both advised him that if he thereafter suffered another on-the-job injury, his current "generous level of Workers Compensation benefits could be jeopardized."<sup>498</sup> In light of this continued refusal to accept the ISS assignment, the district proposed the teacher's immediate discharge for insubordination, failure to teach, and willful neglect of duties.<sup>499</sup>

The teacher candidly admitted that the ISS position technically accommodated his restrictions, as it would permit him to move freely at any time and required no lifting.<sup>500</sup> His sole concern was that he could not handle the students assigned to

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493. *Indep. Sch. Dist. 38 & Grievant, BMS Case No. 99-TD-4 (1999) (Ver Ploeg, Arb.)*.

494. *Id.* at 2.

495. *Id.* at 3.

496. *Id.*

There is undisputed evidence that in making this assignment the District altered the ISS room and surrounding area to accommodate the Teachers medical restrictions and perceived concerns. The District provided a special parking space for him immediately outside the ISS room; it stationed a security guard who would otherwise be in that wing of the building outside of the ISS room; and it installed several security and communications devices in the ISS room: a video camera, walkie talkie, and telephone.

*Id.*

497. *Id.* at 3.

498. *Id.*

499. *Id.* at 4.

500. *Id.* at 7.

ISS.<sup>501</sup> The arbitrator did not accept this argument, agreeing with the district that to the extent that any student might pose a physical threat, that threat also exists in any other classroom.<sup>502</sup> Moreover, the district had provided exceptional security measures for the ISS room.<sup>503</sup>

Nevertheless, the arbitrator declined to order the teacher's discharge on the grounds that his refusal to accept the assignment had been reasonable, given that "doing so without formal medical authorization could jeopardize his workers' compensation benefits if he suffered a future on-the-job injury."<sup>504</sup> The arbitrator rejected the district's claim that the teacher had "drawn a line in the sand" and unreasonably infringed upon its management rights.<sup>505</sup> Instead, the teacher had been forced into a "Catch-22" situation in which "he felt forced to choose between potentially jeopardizing his Workers' Compensation benefits and losing his job."<sup>506</sup> Thus, the district was ordered to reinstate the teacher and to have the ISS supervisor position evaluated.<sup>507</sup>

In contrast, in a more recent case that also involved the Red Lake School District,<sup>508</sup> Arbitrator Fogelberg found that an industrial arts teacher whose position was cut for budgetary reasons had "abandoned" his employment when he failed to report for his new teaching assignment.<sup>509</sup> The teacher had filed for workers compensation benefits before the school year had started and then protested his fall assignment for medical reasons.<sup>510</sup> After he

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501. *Id.*

502. *Id.*

503. *Id.*

504. *Id.*

It is undisputed that such benefits are based upon those available upon date of injury. In 1990, when the Teacher suffered his back and neck injury, Minnesota law provided for virtually unlimited Workers Comp[ensation] benefits. However, 1992 and 1995 legislation has substantially reduced those benefits so that any future injury that the Teacher might suffer would provide far less than he currently enjoys. Thus, it was reasonable for the Teacher to insist upon a formal evaluation of the ISS assignment before he exposed himself to its risks, real or imagined.

*Id.*

505. *Id.* at 8.

506. *Id.*

507. *Id.*

508. Educ. Minn., Red Lake Local 2007 v. Indep. Sch. Dist. No. 38, Red Lake, BMS Case No. 02-TD-10 (2002) (Fogelberg, Arb.).

509. *Id.* at 15.

510. *Id.* at 3.

exhausted his sick and personal leave and still failed to return to work, despite repeated communications urging him to do so, the district placed the teacher on leave without pay and ultimately proposed his discharge for “job abandonment.”<sup>511</sup> Arbitrator Fogelberg ordered that termination on the grounds that the teacher never provided the appropriate medical documentation to verify that he was unable to work.<sup>512</sup>

## VII. PENALTY

Minnesota law denies an arbitrator the authority to order a lesser penalty than termination or discharge except “to the extent that either party proposes such lesser penalty in the proceeding.”<sup>513</sup> Thus, an arbitrator who finds that the evidence would have supported some form of discipline—even if insufficient to support the discharge now at issue—cannot impose a lesser penalty if the parties have not granted him or her the right to do so.<sup>514</sup> For example, in a case involving the Pillager School District, Arbitrator Imes found that the evidence did not support discharging the teacher because he abused his internet privileges.<sup>515</sup> Although she did find that the evidence would have supported a lesser form of discipline, Imes could not order it because the parties had not given her the authority to do so.<sup>516</sup>

Similarly, in a case involving the Duluth School District, the parties did not give Arbitrator Berquist the option of imposing a lesser penalty.<sup>517</sup> Thus he was forced to choose between the district’s proposal to suspend and demote the principal—causing her to forfeit years of seniority and \$12,000 annual pay—or to adopt the principal’s proposal of no more than a four-week suspension.<sup>518</sup> Arbitrator Berquist selected the latter penalty.<sup>519</sup> In contrast, in *Daly*<sup>520</sup> the parties agreed beforehand to give the

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511. *Id.* at 5-6.

512. *Id.* at 12-13.

513. MINN. STAT. §§ 122A.40, subd. 15(c), 122A.41, subd. 13(c) (2002).

514. *See id.* §§ 122A.40, subd. 15(c), 122A.41, subd. 13(c).

515. *Gillson v. Indep. Sch. Dist. No. 116, Pillager*, BMS Case No. 98-TD-13 (1998) (Imes, Arb.).

516. *Id.* at 10.

517. *Indep. Sch. Dist. No. 709 & Grievant*, BMS Case No. 99-TD-5, 6 (1999) (Berquist, Arb.).

518. *Id.* at 28-29.

519. *Id.* at 32.

520. *Daly v. Indep. Sch. Dist. No. 152, Moorhead*, BMS Case No. 00-TD-2

arbitrator authority to order a lesser penalty if she concluded the evidence did not support discharge.<sup>521</sup> With this authority, the arbitrator reduced the discharge to a sixty-day unpaid suspension and gave the district the discretion to schedule that suspension to accommodate its curricular needs.<sup>522</sup>

Thus, the parties have three choices concerning penalty: (1) go for broke and force the arbitrator to an all-or-nothing decision typically between discharge versus reinstatement and a make-whole award; (2) modify the all-or-nothing approach by proposing an alternative lesser penalty, thereby giving the arbitrator more options from which to choose; or (3) agree to grant the arbitrator authority to craft an appropriate penalty, should the evidence support discipline short of discharge.

#### VIII. CONCLUSION

Minnesota education law, as set forth in the Continuing Contract Act and the Teacher Tenure Act, has had a profound impact on Minnesota's educational system and will continue to do so. When these statutes are used to govern a teacher's discharge "for cause," the issues are complex and the stakes are high for everyone involved. However, for all of the difficulties that surround this painful process, these statutes provide sound guidance to courts and arbitrators called upon to decide these matters. Their thoughtful decisions have produced a body of authority and a system that, despite criticism of individual cases, most could agree is sound and workable.

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(2000) (Ver Ploeg, Arb.).

521. *See id.* at 13-15.

522. *Id.* at 20.