AMERICAN ARBITRATION ASSOCIATION

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **Matanuska-Susitna Education Association,** and **Matanuska-Susitna Borough School District.**	AAA Case No. 75 390 00459 09 Employee Grievance

DECISION

PRELIMINARY STATEMENT

Kim Dunn, Landye, Bennett Blumstein, LLP, appeared on behalf of the Matanuska-Susitna Education Association.

Theresa Hennemann, Farley & Graves, P.C., appeared on behalf of the Matanuska-Susitna Borough School District.

The Matanuska-Susitna Borough School District, hereinafter the "School District" and the Matanuska-Susitna Education Association, hereinafter the "Association", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. James M. Paulson was selected to arbitrate the matter and his decision will be final and binding as described in the Agreement.

On May 18 and 19, 2010, a hearing was held at Matanuska-Susitna College building in Palmer, Alaska. On May 25, 2010 a telephone conference call hearing took place. At the hearings the parties were each permitted to present testimony and documentary evidence. The

[1]Joint Exhibit No. 1.

School District called as it witnesses: Wolfgang Winter, High School Principal; Leigh Stanton, Assistant High School Principal; Katherine Gardner, Human Resources Director. The Association called as its witnesses: Ms. Employee, Grievant; Joseph Boyle, English Teacher and Association Rights Chairperson.

At the close of the hearing and with the agreement of the parties, the Arbitrator ruled that briefs were to be electronically sent on or before June 28, 2010. The Arbitrator will issue his Decision and Award on or before July 28, 2010.

STATEMENT OF THE ISSUES

The parties stipulated to the following statement of the issues:

"Was Ms. Employee dismissed on October 23, 2009 for just cause? If not, what shall the remedy be?"

RELEVANT CONTRACT PROVISIONS

ARTICLE I

RECOGNITION, DEFINITIONS, NEGOTIATIONS AND GENERAL PROVISIONS

Section 4.

C. Just Cause: No teacher shall be disciplined, reprimanded, reduced in rank, or compensation, or deprived of a professional advantage without just cause. Just cause shall include the following seven tests:

1. Did the District give the teacher forewarning or foreknowledge of the possible or probable disciplinary consequences for the teacher's conduct?

2. Was the district's rule or order reasonably related to the orderly, efficient, and safe operation of the school district's business?

3. Before administering discipline to the teacher, did the District investigate to discover whether the teacher did in fact violate or disobey a rule or order of management?

4. Was the district's investigation conducted fairly and objectively?

5. At the investigation, did the supervisor obtain evidence or proof that the teacher

was guilty as charged?

6. Has the district applied its rules, orders and penalties evenhandedly and without discrimination to all teachers?

7. Was the degree of discipline administered by the district in this particular case related to the seriousness of the teacher's proven offense and the record of the teacher in his/her past service to the district?

STATEMENT OF FACTS[2]

Background Facts[3]

Palmer High School is part of the Matanuska-Susitna Borough School District. For the 2009-2010 school year it had approximately 750 students in grades 9-12. Of the forty certified teachers on the staff seven are English teachers.

Ms. Employee was a tenured English teacher scheduled to teach at Palmer High School for the 2009-2010 school year. Ms. Employee was in her twelfth year of teaching at Palmer. The first day of class was Monday, August 17th.[4]

Due to a reduction in actual enrollment from earlier estimates, Palmer High School was to lose two teachers—one of the two was in English. Neighboring Colony High School[5] was to absorb Palmer's extra English teacher for the school year. Under the collective bargaining agreement, if no teacher voluntarily agreed to a transfer to Colony, the least senior qualified teacher would be involuntarily transferred. In lieu of having a non-tenured English teacher involuntarily transferred to Colony, Ms. Employee offered to transfer.

On the afternoon of Wednesday, August 19th Ms. Employee arrived at Colony to move her things into her new classroom. Shortly after arriving she had a conversation with the principal of Colony. During the conversation it became clear to Ms. Employee that she was not welcome—indeed, she felt that her transfer was resented. She related her conversation to the District Human Resources Director, Katherine Gardner. The decision was made that Ms. Employee was to return to Palmer High School. The non-tenured English teacher was involuntarily transferred.

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[2] This Statement of Facts is an overview discussion and does not attempt to resolve factual disputes. To the extent necessary to render this Decision, factual disputes are addressed later.

[3] The parties, particularly the Association, put in a substantial amount of "background" information. This description will be simply an overview.

[4] District Exhibit No. 1.

[5] Colony High School was approximately seven miles from Palmer High School.

By Friday, August 21st, Ms. Employee had returned her things to her classroom at Palmer and she was to resume teaching on Monday, August 24th. On the afternoon of August 21st a staff meeting was held after school so that District and Palmer High School Administrators could answer questions as to why Ms. Employee was returning to Palmer. There was concern that Ms. Employee had elected to turn down the transfer voluntarily and that she had reneged on her commitment to transfer. While the Administration refused to give the details of the reason for Ms. Employee's return, it simply said that the return was not "the fault" of any member of Palmer's staff. E-mails to that effect were sent to the staff[6] and to parents[7].

Over the weekend of August 22nd and 23rd, Ms. Employee learned of the staff meeting and the e-mails. She contacted the head of Palmer's English Department to gain more information. This communication left Ms. Employee with concerns that her resumption of teaching at Palmer may not go smoothly and that she was being blamed for the disruption caused by her return to Palmer[8].

On August 24th Ms. Employee resumed teaching. She taught four sections of English 1. This course was designed primarily for freshman but could by attended by upper classmen who were repeating the course. She began to hear whispers from students that she believed to be about her return to Palmer, the quality of her teaching and her possible dismissal. Ms. Employee felt these whispers continued on the next two days. In order to do what she could to smooth her return with the faculty, on Wednesday, August 26th she sent an e-mail[9] to the staff thanking them for their flowers and expressing her pleasure at returning to Palmer.

Conduct Giving Rise to Discipline[10]

The Grievant's Version

Ms. Employee's study notes[11] to be used with her lesson plan for her four English 1 classes (taught in Periods 1, 3, 4 and 6) on August 27th reflect that she was to discuss, among other things, the painter Georgia O'Keefe. Part of the discussion on Ms. O'Keefe was to focus on her perseverance in overcoming obstacles in her career. This discussion was to lead into Ms. Employee's advice to students "not to pass around untruths" and a warning that "[r]umors can be tracked down and disciplined."[12] Ms. Employee's notes indicate that she was to urge students to "keep [the] environment positive and healthy and you will ultimately be successful and have a

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[6] Association Exhibit No. 10.

[7] Association Exhibit No. 7.

[8] Association Exhibit No. 8.

[9] District Exhibit No. 2.

[10] The parties have significant disagreements as to what Ms. Employee actually said in each of the four English 1 classes that she taught on August 27th.

[11] Association Exhibit No. 13.

[12] *Ibid.*

lot more friends than gossips and naysayers. You may be like O'Keefe and have a lot of struggles and you wouldn't want others tearing you down." Her notes indicate that she then was to discuss her "experience, jobs, schools, qualifications, etc.[,] perseverance, setbacks [and] common/culture."

Ms. Employee's testimony indicated that she followed her study notes in all four classes. However, in one class (taught in Period 4) she responded to a student's question about what she would do if someone spread rumors about her. After lengthy dialogue with the student, she eventually said that she would sue that person and that the amount would be $4.2 million. She testified that she made this remark in jest and was not serious. She testified that in her three other classes that day, there was no mention of suing students who spread rumors.

The Administration's Understanding and Investigation

Beginning the morning of Friday, August 28th Palmer High School Principal Winter and/or Vice Principal Stanton received verbal[13] and written[14] complaints from some parents of students in Ms. Employee's English classes from the previous day. These complaints including claims that Ms. Employee allegedly threatened students if they spread rumors about her; wasted teaching time by discussing her personal problems; warned students that they should not believe what they hear about her; and that she would sue any student that started a rumor about her.

Based on these complaints Principal Winter asked Vice Principal Stanton to conduct an investigation. Also on the 28th Ms. Employee was told that a complaint had been made about her "misuse of class time" in her classes on the 27th that might result in disciplinary action. She was told that a meeting would be held on the matter and she should have an Association representative present.

Starting on Friday, August 28th and continuing on Monday, August 31st, Ms. Stanton and the other Palmer Vice Principal, Garth Morgan, interviewed eleven students in either Period 4 or Period 6 to determine what they observed in Ms. Employee's English 1 class on the 27th. No students from Periods 1 or 3 were interviewed. The students were randomly selected but intentionally included both males and females. Uniform questions were developed in advance for the students and notes[15] were made of their answers. The interviews took place in the offices of the Vice Principals. There were no other witnesses.

As to the seven students interviewed in Period 4, the students generally recalled that Ms. Employee did reference rumors and her suing students who spread rumors. A couple of students particularly mentioned that Ms. Employee's reference to suing students who spread rumors was precipitated by a student asking questions. Some mentioned her using the figure of $4.2 million

[13] District Exhibit No. 6, p. 3.
[14] District Exhibit Nos. 3, 10 and 11.
[15] District Exhibit No. 13.

and that the student's families could lose their homes. While only one student used the word "threatening", the tone of the conversation as related by a few others could be viewed as threatening students with a lawsuit if they spread rumors about her. No one stated that she made her statement about suing in jest.

Of the four students in Period 6 who were interviewed, none referenced her suing students who spread rumors. Several did mention that Ms. Employee gave a "lecture" or "speech" on spreading rumors, talking about her achievements in life and who she knows in government. Some stated that she told students not to believe rumors about her and to not start or pass on rumors generally. One student indicated that Ms. Employee was "mad" when she initiated the lecture.

On Thursday, September 3rd, Administrators Winter and Stanton met with Ms. Employee and Association Rights Committee member Justin LaCoss. Ms. Stanton and Ms. Gardner had prepared in advance of the meeting written questions. Ms. Stanton made notes[16] of Ms. Employee's answers to the questions on the document containing the questions. According to the testimony of Mr. Winter and Ms. Stanton, Ms. Employee admitted the following: (1) In all four of her classes on August 27th, she threatened to sue students who spread rumors about her. (2) She thought her threat to sue students was "appropriate". (3) She started the discussion in all four of her classes. (4) While her technique was a "bull in the china shop" approach, it was effective as the rumors subsided.

On September 4, 2009 Ms. Employee was "placed on paid Administrative Leave pending the outcome of an investigation." Mr. Winter's letter[17] to Ms. Employee went on to state that she "may" be contacted during the investigation and that a "follow up meeting" would be held at the end of the investigation. There is no evidence that Ms. Employee was ever contacted again or that a follow up meeting was held.

District Action

Mr. Winter concluded that Ms. Employee's conduct was "inappropriate", "outrageous" and "inexcusable". He characterized her behavior as "gross misconduct" and recommended her dismissal. In drawing his conclusions, he relied on her admissions and her failure to show any remorse for her actions. Ms. Stanton also characterized Ms. Employee's conduct as "inappropriate" and that she had "destroyed the trust" she needed to have with her students. Ms. Stanton also recommended dismissal.

On September 11, 2009 Human Resources Director Gardner sent a letter[18] to Ms. Employee indicating that the District was "proposing [her] dismissal as a teacher." As grounds for this action, the letter stated, in part, "you misused instructional time by addressing personal

[16] District Exhibit No. 5.
[17] Joint Exhibit No. 4.
[18] Joint Exhibit No. 2.

issues with students and threatening a lawsuit for 4.2 million dollars for any student who 'who spread rumors about you.'" The letter went on to state that Ms. Employee's conduct violated School Board Policy and the code of ethics of the Teaching Profession. A predetermination hearing was scheduled for September 29th.

The Predetermination Hearing and Decision

The predetermination hearing was held before Superintendent Troxel on October 1, 7 and 21. Only Mr. Winter and Ms. Stanton were called as witnesses. The Association argued that the District had not met its burden of proving just cause. The District argued that Ms. Employee had admitted to conduct warranting dismissal under Alaska state law.

On October 23, 2009 Superintendent Troxel issued his decision[19] "ruling that Ms. Employee be dismissed as a teacher . . . effective immediately." In support of his decision, Superintendent Troxel made the following statements: (1) Ms. Employee admitted that she spent time in all four of her classes on August 27th discussing her personal situation. (2) Ms. Employee admitted she threatened to sue students who started or spread rumors about her in all four of her classes. (3) The Association claimed that Ms. Employee had to engage in her behavior in order to gain control in her classroom by stopping whispers and gossip but provided no evidence of any specific student starting or spreading rumors. (4) Ms. Employee's behavior violated specific provisions of the Alaska Administrative Code including, *inter alia*, those related to protecting students from conditions harmful to learning and exposing students to unnecessary embarrassment or disparagement. (5) Ms. Employee's threats were intended to frighten students. (6) Her actions resulted in "harm" to her students and caused "irreparable damage". (7) There is no indication Ms. Employee can build a productive learning environment after her "egregious behavior."

Arbitration Demand

On November 2, 2009 the Association expressed[20], on behalf of Ms. Employee, its choice to "move directly to arbitration."

[19] Joint Exhibit No. 3.
[20] Joint Exhibit No. 6.

CONTENTIONS OF THE PARTIES[21]

School District's Contentions

Seven Factor Analysis

The District first deals with the seven factor analysis set forth in the Agreement in light of arguments from the Association.

Knowledge of Rule Violated

The District first responds to the Association argument that just a year before the incident for which she was dismissed, she had alerted Principal Winter that she had used the threat of a lawsuit to control a student's behavior without any indication from him that her action was improper.[22] The District distinguishes this situation from the basis for her dismissal as that constituted a premeditated plan to take class time to threaten all students. The District also notes that when Ms. Employee signed her teaching contract she agreed to abide by relevant state laws and that her violation of them could cause her dismissal. Finally, the District distinguishes the suit by the Colony High School Principal against an internet company by noting that her suit was against the company and not students.

Relation of Rule to Educational Process

The District points out that requiring teachers to engage in ethical conduct is without a doubt related to the fostering of proper functioning of the educational process.

Completeness, Fairness and Competence of the Investigation

The District contends that the Association presented no evidence that either Mr. Winter or Ms. Stanton acted unfairly or without objectivity. Indeed, Ms. Employee's admissions constitute substantial evidence that she improperly used her position of authority to threaten and intimidate students. Nothing more was needed to establish grounds for dismissal.

Evenhanded Treatment

The District states that it is aware of no comparable situation to that for which it dismissed Ms. Employee. Accordingly, there is no basis for a claim of disparate treatment. The Association attempt to analogize the situation to that of the Colony High School Principal is not

[21] This abbreviated summary of the contentions of the parties is drawn primarily from their respective Post Hearing Briefs. As may be necessary, a more detailed analysis of their arguments will be made later in this Decision.

[22] Association Exhibit No. 1.

valid.

Appropriateness of the Penalty

The District claims that Ms. Employee's lack of remorse about threatening to sue students who disparage her shows that it is highly unlikely that she will change her ways. Accordingly, dismissal is the only appropriate penalty.

Remedy

Back Pay

The District argues, in the alternative, that if the Arbitrator finds there was not just cause for the dismissal, he should not award back pay. Reference is first made to decisions under the National Labor Relations Act to the effect that post discharge misconduct can reduce or eliminate a person's right to back pay. Here, the District notes, Ms. Employee did not come forward with either her testimony or her study notes to be used in conjunction with her lesson plan until the arbitration hearing even though she knew that this evidence was contrary to the belief of administrators in the District. Had the District been able to evaluate this evidence eight months earlier, it might have made a different decision. Accordingly, the District argues, her silence constitutes a failure to fulfill her obligation to mitigate damages.

Reinstatement

Also in the alternative, the District urges that if reinstatement is ordered, the Arbitrator not order Ms. Employee to be reinstated to Palmer High School. The District feels that the relationship between Ms. Employee and the administration at Palmer has deteriorated to the point that it cannot be salvaged. Finally, the District suggests that the placement of Ms. Employee be left to the District should reinstatement be ordered.

Association's Contentions

Seven Factor Analysis

The Association argues that the District did not have just cause to dismiss Ms. Employee because it failed to satisfy several critical tests of the seven factor analysis. Specifically, the Association contends that: (1) Ms. Employee was not given fair warning that her actions would have disciplinary consequences. (2) The District failed to conduct a fair and objective investigation. (3) The District failed to establish that its rules were evenhandedly applied. (4) The District failed to take into consideration Ms. Employee's past history and record of service with the District.

Failure to Give Fair Warning

In support of its argument that Ms. Employee was not given fair warning that her conduct would result in discipline, the Association points to Mr. Winter's knowledge that in 2007 she threatened a student and his parents with a suit for $4.3 million. Ms. Employee was lead to believe that this was a proper way to deal with inappropriate student behavior. Moreover a couple of weeks before she was dismissed, she had sent an e-mail to Mr. Winter threatening to sue anyone spreading rumors. Again, there was no warning from Mr. Winter. The Association then references a leading text[23] on arbitration indicating that it is unfair to punish an employee for conduct where the employee has no reason to know that conduct is unacceptable.

Biased Investigation

The Association makes the overview observation that the investigation performed by Ms. Stanton was designed to confirm preconceived beliefs rather than to ascertain facts. A detailed analysis is then made of the information available to Mr. Winter and Ms. Stanton to show that their conclusion that Ms. Employee threatened a lawsuit in all four periods was not confirmed by the evidence. Moreover, Mr. Winter's and Ms. Stanton's conclusion that Ms. Employee admitted she did so in all four periods was based on a misunderstanding of what Ms. Employee was acknowledging. She was only acknowledging that she delivered her planned lesson in all four classes. The Association makes a detailed analysis of earlier discipline given by Ms. Stanton to Ms. Employee and claims that it was unfair and can only be explained by Ms. Stanton's personal bias against Ms. Employee.

Unfair Investigation

The Association contends that Ms. Stanton's bias against Ms. Employee, lack of experience in doing investigations, and failure to appreciate Ms. Employee's history at Palmer lead to false conclusions about facts and the intentions of Ms. Employee. A detailed and lengthy analysis of the evidence is then made to show how the bias of Ms. Stanton negatively affected the investigation. The Association also argues that this bias strongly influenced the Association and Ms. Employee's decision not to testify or present other evidence at the predetermination hearing. Finally, the Association asserts that the "adversarial approach" in the District's presentation of the evidence at the predetermination hearing also discouraged the Association and Ms. Employee from fully participating in the proceeding. Specifically, the Association points to the Superintendent's refusal to accept a student's statement as well as to consider the lawsuit by the Colony High School Principal to show that he had pre-determined the outcome.

Incompetent Investigation

The Association notes that the student interviews show that the threat to sue only occurred in one class—not all four as erroneously concluded by administration officials.

[23] St. Antoine, *The Common Law of the Workplace*, (BNA 2nd Ed. 2005), §6.5(c), p. 178.

Accordingly, the District failed in its investigation to obtain evidence to support the conclusion that Ms. Employee engaged in the conduct for which she was dismissed.

Lack of Evenhanded Enforcement

The Association points to the testimony of Rights Committee Chair Boyle indicting that teachers routinely talk about personal issues in class without any discipline be meted out. The District presented no evidence to the contrary. Finally, the Association points to the lawsuit of the Colony High School Principal as being indistinguishable from Ms. Employee's situation.

Remedy

Back Pay

The Association argues that Alaska state law requires that where, as here, Ms. Employee was denied due process at the predetermination hearing, back pay is mandated. To hold Ms. Employee responsible for inadequacies in the investigation and the predetermination hearing is inequitable.

Reinstatement

The Association asserts that in light of her ability to handle her previous treatment at the hands of the Palmer High School administration, Ms. Employee will be able to be an effective teacher after reinstatement.

FINDINGS

Just Cause

Burden of Proof

It is well established that in a discipline case were the question is whether the employer had "just cause" for disciplining the employee, the burden of proof is on the employer.[24] Normally, as in the present case, that burden on the employer is to prove its case by a preponderance of the evidence.[25] There are two proof elements.[26] One is to prove that the employee engaged in the conduct for which she was disciplined. The second is to prove that the penalty was appropriate under the circumstances. If there is a gap in the evidence or a key element of proof is missing, the employer has not met its burden.

Overview of the Seven Factor Analysis

In the instant case, the Agreement requires an analysis of the discipline meted out against the frequently applied and much analyzed seven step test for just cause originally developed by Arbitrator Carroll Daugherty in 1964.[27] In Daugherty's analysis if the answer to any one of the seven tests was "no", just cause was not established for the discipline.[28] As it turns out, only five of the seven tests are seriously contested in the present situation. Accordingly, this Decision will start an analysis (not necessarily in the order laid out in the Agreement) of as many of those tests as may be necessary to determine whether there was just cause to dismiss Ms. Employee. Again, the failure of the District to satisfy any one of these tests will result in a finding that there was not just cause.

Proof of Conduct Resulting in Dismissal

Certainly, one of the most basic and universally accepted of the seven tests is whether the employee engaged in the conduct for which she was disciplined[29]. Ms. Employee was dismissed

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[24] "The employer has the burden of proving just cause in a disciplinary proceeding." *Seattle Housing Authority*, 117 LA 161, 166 (Monat, 2002).

[25] Elkouri & Elkouri, *How Arbitration Works*, (BNA 6th Ed. 2003), pp. 950-951.

[26] S*upra*, p. 948.

[27] *Grief Bros. Cooperage Corp.*, 42 LA 555 (Daugherty, 1964).

[28] ~~Elkouri &~~ Elkouri, *supra*, pp. 557-559; Brand & Biren, *Discipline and Discharge in Arbitration* (BNA 2nd Ed. 2008), pp. 33-35; Koven & Smith, *Just Cause The Seven Tests* (BNA 3rd Ed. 2006), p. 27.

[29] In applying the seven tests, "the answer to Question Number 5, at least as to whether there is 'substantial evidence or proof that the employee was guilty as charged' generally must be 'yes' for discipline to be sustained in an arbitration. To put it mildly, proof is indispensable. Whatever an arbitrator's approach to just cause happens to be,

primarily because on August 27th she threatened to sue students who started or spread rumors about her *in all four of her classes*.[30] This understanding caused high school administrators to conclude that her conduct was "premeditated" and calculated to "frighten" students. While mention has been made of her misusing class time for discussing personal matters, the final decision of Superintendent Troxel[31] focused on the "threat" to sue students. Accordingly, the District has the burden of proving that the threat to sue students was repeated in all four of her classes in order to sustain Ms. Employee's dismissal.

As carefully articulated in the Association's Post Hearing Brief[32], the student interviews[33] (even though hearsay) only established that the apparent threat to sue occurred in Period 4. Accordingly, the District must rely on its conclusion that Ms. Employee admitted in her interview on September 3rd that she threatened to sue students in all four of her classes.

While Mr. Winter and Ms. Stanton testified unequivocally that Ms. Employee admitted to threatening students in all four classes, Ms. Stanton's written notes simply indicate that the statement "conversations were had in all classes" appears to be on the back of the first page of notes opposite Ms. Employee's answer to question no. 1 in which she says she "talked at length about career and qualifications." There is no clear statement in the notes that the threat to sue occurred in all four classes. A careful review of the testimony of Mr. Winter and Ms. Stanton indicates that they appeared to be testifying as to their *conclusion* that Ms. Employee admitted to threats in all four classes rather than a *specific statement* at a specific point in time. In Ms. Stanton's notes, Ms. Employee's reference to "always" saying that she would sue for $4.2 million is more reasonably explained in light of her two previous references[34] to roughly that amount prior to August 27th and not to an admission of repeating the threat in all four classes.

Were there is no further evidence bearing on the alleged admission than the administrators' testimony, the District would appear to possibly meet its burden. However, Ms. Employee testified very persuasively that she only mentioned suing students who start or spread rumors about her in one of four periods. Indeed, her detailed testimony indicated that she did not initiate the discussion but was rather drawn into it by the questions from one of the students. Her

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proof that the employee really 'did it' is a rock-bottom requirement for discipline to pass arbitral review." Koven & Smith, *supra*, p. 278 (emphasis added). For this reason, the Arbitrator applies the tests out of their normal order.

[30] This position of the District was explicitly taken by Principal Winter, Vice Principal Stanton, and Human Resources Director Gardner at the Predetermination Hearing and also at the arbitration hearing by the District counsel as well. It is significant that on cross examination both Mr. Winter and Ms. Stanton acknowledged that if Ms. Employee had only threatened to sue in one class, such behavior would not have warranted dismissal.

[31] Joint Exhibit No. 3.

[32] Pp. 24-25.

[33] District Exhibit No. 13.

[34] Association Exhibit Nos. 1 and 3.

testimony is supported by some of the student statements as well as a statement from the student who asked the questions. She further said that when she mentioned the amount of $4.2 million, the student said that he would split it with her. It is extremely unlikely that Ms. Employee would testify that she only mentioned suing students in one class while allegedly admitting in the September 3rd interview that she said it in all four classes[35].

The Arbitrator also takes note of the fact that Ms. Employee was very upset at the September 3rd meeting such that she had to take a break to compose herself and her answers appeared to be confused at times[36]. This means that Ms. Employee may have been giving emotional answers to some of the questions rather than accurately reflecting what happened in class. Indeed, she was not informed in advance of the meeting that the topic of making a threat to sue students would be covered[37]. Her answers reflect that she apparently was shocked and caught off-guard by the questions during the meeting.

Based on foregoing analysis, the evidence of the District is off-set by Ms. Employee's testimony. Accordingly, the District has not met its burden of proving by a preponderance of the evidence that Ms. Employee engaged in the conduct for which she was dismissed. Therefore, her dismissal was not for just cause.

Remedy

Back Pay

If the Arbitrator finds a violation of the Agreement, he is to fashion a remedy.[38] Normally, an arbitrator is to "make the grievant whole" or put her in the place she would have

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[35] The Arbitrator notes that Ms. Employee was not asked the direct question at the arbitration hearing by either party as to whether she admitted in the September 3rd interview that she mentioned suing students in all four classes. Additionally, neither party chose to call the fourth witness (Rights Committee Member LaCoss) to the critical September 3rd meeting to testify as to his recollection. Nor were any representations made by either party as to whether Ms. Employee or Mr. LaCoss made any notes of the meeting. Such evidence might have been helpful.

[36] See the detailed discussion to this effect in the Association's Post Hearing Brief (pp. 15-18).

[37] She was only told that a complaint had been made about her misusing class time.

[38] "An arbitrator's broad authority extends to remedies as well as interpretation." Nolan, *Labor and Employment Arbitration*, (West, 1998), p. 274. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

been in "but for" the violation.[39] This would typically include back pay for the lost earnings while being improperly discharged. In the instant case, the District argues that back pay should be denied because Ms. Employee, upon the advice of the Association, refused to testify at the Superintendent's Predetermination Hearing when the Association and Ms. Employee knew that the District was making erroneous factual conclusions. Accordingly, the District was not able to take into consideration her explanation of what happened in the classroom that was presented at the arbitration hearing nor her probable denial of having admitted to making the alleged threat in all four classes at the September 3rd meeting. Had the Superintendent known this information, he might have made a different decision.

The Arbitrator is very troubled by the Association's advice to Ms. Employee that she not testify at the Predetermination Hearing[40] or even put in other evidence available to it. It is somewhat unfair to fault the District for "failing to get the facts right" when key evidence was withheld. Ms. Employee's study notes would have suggested that any reference to suing students was not pre-planned. The Arbitrator accepts Ms. Employee's testimony that at the time of the predetermination hearing she was on medication and under a doctor's care for stress. She testified that this was one of the reasons that she did not testify. On the other hand, the Association could have put forward a doctor's letter to that effect and have submitted an affidavit from Ms. Employee. Moreover, Mr. LaCoss could have testified relative to her alleged admission at the September 3rd meeting. Superintendent Troxel's refusal to accept some documentary evidence offered by the Association should not have discouraged it from putting forth its version of the truth—especially when the District had laid out its apparently erroneous version.

On the other hand, there is some merit in the Association's argument that a careful analysis of the student interviews should have lead high school administration officials to question whether Ms. Employee made the alleged threat in all four classes. Additionally, Mr. Winter should have recalled that Ms. Employee had used the threat of a lawsuit for students/persons spreading rumors about her on two previous occasions without any indication

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[39] "The make whole remedy attempts to place the employee in the same position she would have been in if the improper discipline had not occurred." Brand & Biren, *supra*, pp. 462-463.

[40] The Association's decision was very risky. Many arbitrators recognize the right to draw an adverse inference (an inference that if the person had testified, such testimony would have been adverse to that person's interest) by the failure to testify when she had the opportunity to but elected not to do so. Elkouri & Elkouri, *supra*, pp. 331-332. By analogy, the Superintendent would have been justified in so concluding by Ms. Employee's failure to testify at the pre-determination hearing. Accordingly, the Association had not made the question of whether Ms. Employee threatened her students in all four classes an issue prior to the arbitration hearing. "If a new issue arises at arbitration, an arbitrator ordinarily will refuse to consider the new matter over the objection of the other party." Elkouri & Elkouri, *supra*, p. 298. For reasons set forth in the body of this Decision, the Arbitrator will not invoke the ordinary practice.

from him that to do so was improper. The Arbitrator also notes that Mr. Winter's September 4th letter placing Ms. Employee on administrative leave pending the completion of the investigation stated that a follow up meeting with her would be held. There apparently was no such meeting. Such a meeting would have been a logical time (after Ms. Employee had time to reflect on the allegations against her) to get from her something close to the detailed recitation of the facts that was given at the arbitration hearing. In other words, the District had a second chance to get all the facts from Ms. Employee prior to concluding its investigation and elected not to do so.

On balance, the Arbitrator concludes that Ms. Employee should not be penalized for following the Association's advice not to testify at the predetermination hearing. She was under severe stress and depending on the Association at the time. Accordingly, she shall be entitled to back pay for her dismissal without just cause.

Reinstatement

The District argues that limitations should be placed on Ms. Employee's reinstatement such that she is not reinstated to Palmer High School because the relationship between her and high school administration officials has deteriorated to the point of being irreparable. Alternatively, the District argues that it should be allowed to determine where Ms. Employee should teach within the District.

While the Arbitrator is sympathetic to the District's position on reinstatement, certainly part of the deterioration of the relationship with Ms. Employee was the fault of the high school administration. Nonetheless, the Arbitrator will simply order that Ms. Employee be reinstated to an appropriate teaching position with the District. However, any placing of Ms. Employee at a location other than Palmer High School must be with her consent. The Arbitrator encourages the parties to try to give each other a fresh start.

CONCLUSION

As set forth in detail above, the Arbitrator finds Ms. Employee's dismissal on October 23, 2009 was not for just cause. She shall be reinstated to an appropriate teaching position, awarded back pay and otherwise made whole for this contract violation. Interim earnings shall be subtracted from back pay. The Arbitrator retains jurisdiction for sixty days following the Decision to resolve any issues that may arise in applying this remedy.

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James M. Paulson, Arbitrator

July 17, 2010