

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MIDDLETON EDUCATION ASSOCIATION

and

MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT

A/P M-10-185-2

(Group Grievance, Discipline)

Appearances:

Mr. Kirk D. Strang and Ms. Kathy L. Nusslock, Attorneys at Law, appearing on behalf of the District.

Mr. William Haus, Attorney at Law, appearing on behalf of the Union.

ARBITRATION AWARD

The Union and Employer named above are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. The undersigned was asked to hear and resolve a group grievance of disciplinary actions. Hearings were held in Middleton, Wisconsin on October 4, 5, 7, November 30, and December 1, 6, 9, 13, 14 of 2010, and January 18, 31, February 9, 10, March 31, April 25, 26, 28 and May 3 of 2011, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 29, 2011.

ISSUE:

Were the Grievants disciplined for just cause? If not, what is the appropriate remedy?

BACKGROUND

The Employer is a school district with approximately 900 employees in six elementary schools, two middle schools and a high school. There are seven people in this group grievance who received various forms of discipline. They are:

Andrew Harris – termination
Michael Duren – 12 day suspension
Gregg Cramer – 10 day suspension
Paul Gustafson – 15 day suspension
Brad Rogeberg – 7 day suspension
Parker Vivoda – 3 day suspension
Jason Pertzborn - reprimand

Rogeberg and Vivoda reached a settlement with the District, and any remedy in this case will not affect them. However, their disciplinary actions are part of the same set of circumstances that involved the other people disciplined in this case.

Harris is the main focus of this grievance because he received the harshest discipline and because his case opened up the District's awareness to the other cases. Harris started teaching at the District in 1993 and continued up until December 3, 2009, when he was placed on administrative leave with pay. He was put on administrative leave without pay on January 4, 2010, and ultimately discharged on May 5, 2010. Harris had not been previously disciplined.

This case centers around an incident on October 7, 2009, at the conclusion of a team teacher meeting in the Glacier Creek Middle School. There were four members of the team – Andrew Harris, Kristin Davis, Marlene Feinstein and Melanie Cochems. Harris taught science, Davis taught social studies, Feinstein taught math, and Cochems taught English. They had the same group of students and met every day for about 45 to 47 minutes. They discussed projects, parent-teacher conferences, individual students, related subject matters, student enrichment time, and designed activities to cross subject matters. Until the end of 2009, the same team had worked together for the previous nine years.

Cochems testified that the team had about 42 minutes and they usually discussed business first. If they finished early, they would talk about their personal lives. They had developed a close relationship with each other. Harris described their close personal friendships and noted that what was said in team meetings would stay in team meetings. They talked about movies they had seen and the women in particular talked about sexual matters and their menstrual cycles. Davis participated in those discussions and freely discussed her own sex life with her husband. Cochems described an incident where Davis told the team

about playing Pictionary over the weekend with her family, and the word to be drawn was "country." Davis said that her brother-in-law drew a picture of a woman's vagina with legs and then a tree. Davis drew the pictures on the blackboard for the team. Davis once told the team that she had sex with her husband and she did not realize that her tampon was still in, and her husband had to fish it out of her vagina. Davis also made a comment that her husband thought that she was cheating on him, that he found her underwear in the laundry and it was crusty. Feinstein recalled that Davis talked about oral sex and called her own breasts "tribal tits." Davis told the group that a nursery opened up called Morningwood Nursery, and that she and her husband thought it was a hoot because he would often wake up with erections which they called his morning wood. These comments were all meant to stay in the room. Davis denied that she ever told lewd jokes to the team. She denied talking about having crusty underwear or giving blow jobs. While she agreed that all the team members made some inappropriate comments, she said she did not instigate such conversations. Team members used foul language with each other, and Davis participated in that. Feinstein testified that she would have been shocked if she heard that Davis was upset that Harris was involved with e-mails or jokes with sexual content because Davis was the one that usually sent the jokes and looked on-line for things like that. Feinstein said that the women all discussed personal sexual matters but Harris did not. Harris described these talks as "girl talk," and that the women seemed comfortable discussing such matters in front of him. No one on the team had any sensitivity about discussions regarding sexual matters.

About two years before the October 7, 2009 incident, the team's relationship with Davis had become difficult. Davis opened a MySpace account on the computer and invited students to be her friends on it. Both students and her adult friends were using the site. The other team members objected because they thought that Davis had crossed the lines between teacher and student, and that students should not see some of the adult conversations about drunkenness and profanity that appeared on Davis' MySpace site. The other team members also objected to Davis' closeness with students, where students babysat for her children. On one occasion, Davis met students at a midnight showing of a movie on a school night, and some of those students did not report to school the next day and team members objected to that. Cochems felt the relationship changed when Davis made the MySpace page with students on there. One student posted something about Cochems and Harris being butt heads because they had switched two students out of classes, feeling those students could not handle being together. Davis left that posting up on her website. Cochems and the other team members also objected to the fact that Davis left school for a couple of hours during school time, and they were not supposed to leave during conference time. Cochems went looking for her when some parents wanted to meet with her but Davis was gone.

The team decided to deal with the problems with Davis by handling it within the team. They confronted Davis during one of their team meetings during 2007, and Harris led the discussion. Cochems and Feinstein thought Harris would be the best person to present their concerns to Davis, so he did most of the talking when the team confronted Davis. Harris started by telling Davis about her MySpace page and that she allowed students to make negative comments about teachers on it. He also talked about her absences from work and how it

affected the other teachers. Davis asked if they wanted her to leave the team, and Harris said absolutely not, that their goal was to fix a problem. This conversation lasted only about 15 or 20 minutes, and Davis left the room and did not come back for the remainder of that team meeting.

Cochems was going to tell Davis that she was frustrated with Davis as a volleyball coach, because Davis showed up for only 6 out of 12 practice sessions. So Cochems did most of the work herself although they both got the same amount of pay for it. Cochems also had a discussion with Davis about her absences. Cochems and Davis taught some things together and coached together, and Cochems felt that Davis took advantage of her. Cochems said that Davis was absent a lot and she told her that she took too much time off. Feinstein testified that after the team confronted Davis about the MySpace issue and other issues, Davis was angry with them for a long time and angrier with Harris because he did most of the talking to her. It was a few months before Davis started talking with them again.

Davis felt she had become the odd man out on the team before the confrontation with the team members over the MySpace page. She did not go out for social drinks with the team members, and she knew that they went out together for drinks or food, went to movies and comedy clubs, and played cards. Davis had gone out socially with the other team members up until the time that they confronted her in 2007.

The team always met in Harris's room, which was at the end of a hallway. There was a wall at the end and no exit there. Students would not pass the door to Harris' room during passing time. Harris' computer would not be visible to anyone unless he or she came at least half way or more into the room.

At the end of the morning meeting on October 7, 2009, Davis was half way out the door when she said she heard Harris say that his sister had sent him an e-mail and they had to see what she sent him. Harris did not recall making that comment. He recalled that at the end of the team meeting, Davis was on her way out of the room, and he swung his chair around to his computer and opened up an e-mail from his sister. He may have said, "Hey, Mel," referring to Cochems. Cochems did not remember Harris saying anything but that he was looking at his computer and began laughing. Cochems asked Harris what he was laughing at, and he pulled away from his computer so she could see the image on it. Cochems said, "Oh, Andy," or "Oh, nasty," and then Feinstein looked up and saw the computer too. Cochems testified that Davis had heard their reaction and came back into the room to look at the computer. Harris also thought that Davis had heard their reaction and then she turned about to come back into the room and look at the e-mail. Davis said she had an idea that it might be an inappropriate joke because she knew that Harris' sister had sent him adult jokes in the past, and Harris had shown pictures before over a period of time. Harris and Cochems and Feinstein did not ask Davis to come back into the room to view the e-mail, but she did so on her own volition. Davis said that Harris told them the subject line of the e-mail was something like "practicing my aim" or "hunting season."

When Harris opened the e-mail, there was a picture of a nude woman with a target painted on her nude derrière. The subject headlining section of the e-mail said "Fw: Image XXXXXXXX." The written content said: "Happy Wednesday!!!! I've been out practicing with my bow." Davis told Harris that the picture was disgusting and she left. Cochems said she was not offended by the image, and she had never seen Davis object to anything said or seen during team meetings before. Cochems testified that Harris had shared a couple of inappropriate pictures with them in the past. Feinstein called it disgusting also but she was not offended by it. Feinstein had seen other pictures of nudity or pornography that Harris showed on his computer in the past, probably 3 or 4 during 15 years.

When Davis left the classroom, there were students in the hall. No students are involved in this case, and due to the layout of the room, door, computer, etc., no students could have seen the screen on Harris' computer without coming far into the room. Davis testified that she was appalled at the picture and worried that a student would come in and see it and they would all be in trouble.

Davis reported the incident to the principal, Tim Keeler, later in the day. She described the picture to Keeler and expressed her concern that students could be accidentally exposed to something like that. However, she told Keeler that if he were going to talk to Harris, she wanted to remain anonymous. She asked Keeler if he could tell Harris that a random internet search flagged some things he got on his computer. Davis was clear about asking that her name not be used because she had had some disagreements with the team in the past and did not want more conflict. She testified that she was also worried about her personal safety, because Harris once said that if he stopped teaching, he would love to become a hit man. After this incident, Davis' husband bought her pepper spray.

Davis had seen porn or inappropriate images on Harris' computer before that came from his sister. She had laughed at it or said that it was disgusting but had not complained to anyone else before. In her testimony, she stated that she had told Harris that he had to stop it, but she did not say anything like that during the investigatory interviews. Davis said she objected this time because it was the first time she had seen him open an e-mail like this one with the door open and kids in the hall, and she felt he had little regard for student safety. Davis knew that Harris did not have a class in the next period and students would not be passing by his classroom to go anywhere else.

A few weeks went by without anything happening. Keeler stopped in Davis' room to ask about a field trip, and she asked him about the matter with Harris. He told her that he had forgotten about it. Davis again asked Keeler to keep her name out of it, although Keeler told her the best way to handle it would be to be forthright and truthful. Keeler said he would give her a couple of days to think it over, and that she could let him know whether or not she wanted him to proceed.

Keeler apparently did not wait for Davis to get back to him, because he talked with Harris about the matter before he talked to Davis again. He called Harris to his office and told

him that Davis had complained about the image of a nude woman on an e-mail on his computer. Davis had said that she was insulted by the e-mail, and Harris responded that he found that hard to believe. Harris told Keeler that he got those e-mails on occasion from his sister, and Keeler said that he understood and that he should forward it to his home computer. Harris said he would apologize to Davis, and Keeler agreed that he should do so. The meeting was short. Keeler did not mention the acceptable use policy (AUP) and did not indicate that Harris faced any discipline.

Harris sent Davis an apology – which Cochems and Feinstein reviewed first – by e-mail on November 4, 2009, and in it, he pointed out to Davis that he did not go to Keeler when the MySpace/Facebook issue arose, and he could no longer trust that anything said in the team meeting would not end up in Keeler’s lap. Davis called Harris’ e-mail apology threatening. She replied the following day by saying that she did not feel comfortable approaching him and the team has been in hot water before with the administration. She stated that she did not want to be a part of a scandal that involved a student walking into a meeting where a teacher is looking at porn, and that a kid could have seen his e-mail because the door was wide open. The door had been closed until Davis opened it to leave the team meeting, and she left it open when she came back to see what was on Harris’s computer.

The incident that Davis referred to in her response to Harris regarding the team having been in hot water before involved a team picnic. The team’s block of kids, about 110 strong, was to have a picnic at the end of the year. The team teachers had decided to implement a point system based on grades, behavior, and other factors, and about 8 of the kids did not have sufficient points. Originally, those kids were to spend the picnic day in school, but the team decided that was too harsh and allowed them to be in a section of the park that was roped off and they were not allowed to participate in some activities. The team had cleared the procedure with Keeler, so they had administrative approval. Some of the parents objected and took their concerns up to the superintendent, but no one was disciplined for this.

Harris blew off some steam about Davis with another teacher, Shelly Festge, who taught in another building. They exchanged numerous e-mails, during which Harris wrote about “shunning” Davis because of her complaint to Keeler.

Davis did not accept the apology from Harris and continued to pursue the matter. Davis was upset with Keeler and did not feel as if she could trust him. She forwarded Harris’ apology to Keeler and noted that this is what happens when anonymity is disregarded. While the team continued to work together, Davis testified that Harris would not look at her or speak to her. In late November of 2009, Davis called the District Superintendent, Donald Johnson, because she had lost faith in her principal, Keeler. She wanted Keeler to understand how disappointed she was in the way that he handled the issue, and she told Johnson that she would like to switch blocks so that she would not have to work with Harris on a daily basis. Davis testified that she told Johnson about the computer picture just because Keeler had disappointed her so much. Johnson told her that he would get some information and get back to her. A few days later, the Director of Employee Services, Tabatha Gundrum called her.

Johnson testified that in late November of 2009, Davis came to his office with her complaint about being exposed to pornographic materials by Harris and that she wanted some intervention from the Central Office to ensure a safe and secure teaching and working environment. She did not desire the exposure to the materials and felt it had occurred over a period of time and she could no longer tolerate it. She conveyed to Johnson that she felt intimidated by the environment and by Harris. Davis had already received Harris' apology but felt it did not reflect any significant remorse.

During Thanksgiving of 2009, Harris went to Minnesota to his sister's house. He told her that he had been called into the principal's office because of one of the e-mails she sent him, and he told her it would be a good idea to cease and desist sending him any more of them.

The Investigation

Gundrum became involved with the investigation when Johnson called her about the complaint he had received from Davis in late November of 2009. Gundrum looked at the administrative side of the e-mail system to review Harris' e-mails. Gundrum did not have to search his computer to see whether he was going onto the web to search for inappropriate material because the District has a filter that prevents anyone from getting into inappropriate sites. Gundrum found 23 e-mails from Harris' sister that she thought would violate the acceptable use policy because of the images of naked women, men, jokes, and matters inappropriate for a school district.

Harris' sister frequently sent him e-mails to his District's computer. He may have received hundreds of e-mails from her. While the Harris family had a computer at home, Harris did not use it and he had no personal e-mail account other than his school account. When he saw that an e-mail was coming from his sister, he would not necessarily look at the subject line but just open it up. He acknowledged that a few of them had sexual content. Out of the 23 e-mails shown by the District's exhibit #20, he was able to open up 21 of them over a 14-month period. He calculated that of this group, either 1.3 or 1.4 times a month his sister sent something inappropriate. If the e-mails had attachments, he opened some of them. He then deleted them twice, first by deleting the e-mails to the trash file and then by deleting the trash so that he could no longer retrieve them. Harris was not aware that his deleted e-mails were still retained in the District's system.

The following 23 items are the e-mails that the District found objectionable. Five of them are videos and the others are pictures or images. A couple are jokes with a sexual overtone. Some are single pictures, others contained multiple pictures under the same attachment or e-mail. Harris's sister sent all of them to Harris' e-mail address at the District during 2008 and 2009. Johnson reviewed all the images at the hearing and rated them on the movie scale of PG-13, R and X. He called PG-13 probably suggestive but not any significant nudity, R would be partial or frontal nudity, and X would be genitalia and sex acts. The

Arbitrator found all of his ratings of all images to be fair and reasonable.

1. From September 8, 2008: The subject line read "Nice Cash Register" and the e-mail was a link to a video that showed a woman exposing her breasts. Harris did not send a reply.
2. From October 19, 2008: The subject line read "Ha Ha" and the copy following was a joke about castration. Harris did not send a reply.
3. From October 26, 2008: The subject line read "Special Sandals" and the copy following was a joke about sex. Harris did not send a reply.
4. From November 12, 2008: The subject line read "Winter is coming..." and the picture shown on the printout is a still shot of a motion picture in the attachment where a snow sculpture is shaped like a penis, which moved back and forth spitting snowballs out the end of the penis. Harris did not send a reply.
5. From January 13, 2009: The subject line read "Newspaper Article of the Year" and the attachment had an article from a newspaper with the headline "Scouting for 'camel toads' at pool" with the columnist correcting the word "toads" to "toes" and noting that "camel toes" is a crude expression for women wearing very tight pants. Harris did not send a reply. Johnson testified that this e-mail did not seem inappropriate to him and that he would not have included this one with the others.
6. Also from January 13, 2009: The subject line read "New wipers" and there was some copy and an attachment. The attached picture, which is also visible if one scrolls down the e-mail, is a nude woman on the hood of a car with her legs spread across the windshield. Harris did not send a reply.
7. Another from January 13, 2009: The subject line read "Hen party" and there a link to a video of a game that several women were playing with plungers and toilet paper rolls. The game was silly rather than obscene, but it could be called suggestive at worst. Harris did not send a reply.
8. Again from January 13, 2009: The subject line read "mistakes in the family album" and several attachments were included. There were 9 separate pictures which could be seen by scrolling down the e-mail as well as opening the attachments. Harris replied to his sister with the comment, "thanks for the laughs though I am guessing that they all came from jason (though they were kinda clean if they were from jason!!)." A couple of the pictures are obscene but most of them are not. Harris recalled seeing this e-mail but couldn't be sure where he had seen it. Johnson stated that some of these pictures should not have been counted in the total since they were not inappropriate in terms of nudity or sexual content.
9. From January 19, 2009: The subject line read "XXX" and one could either scroll down or open several attachments. There were 10 separate pictures of a woman mostly nude in some obscene poses. Harris replied to his sister with the comment "tell Jason I love him!!!!!!" His sister replied that she was unable to get any porn from Jason and these pictures came from a different source.
10. From January 27, 2009: The subject line read "Concentration For Men(R)" and had a "click me" icon (or hyperlink to a website), which no one in the District was able to open due to the District's website filter. Harris replied to his sister, "can't do it - I am internet blocked! damn." Gundrum tried the icon at home and it led to a site called

“hornygamer.com.”

11. From February 16, 2009: The subject line read “WhyMenNeedBoats1 – this is a powerpoint—XXX.” There is one attachment that has 14 pictures attached to it, although a couple of those images are cartoons. The pictures are of lots of women, several of them topless, in swim suits. Harris forwarded this to a friend in Idaho and another person. He replied to his sister with the comments, “Gotta love ya!! Just bought a new zero turn mower – should have bought a damn boat!”
12. From March 15, 2009: The subject line read “XXX” and had an attachment that was a video called “Tits and Beer Song” which included a lot of breasts. Harris did not reply.
13. From April 9, 2009: The subject line read “Rodney” and the e-mail had an attachment called “Lucky Midget.wmv” which is an obscene video of a little man running around naked and having sex with women. Harris replied several days later by commenting, “wow!happy easter Monday to me!!” Johnson called this video pretty significant and beyond X if there were such a thing.
14. From April 13, 2009: The subject line read “The new Ford Snatchback Vehicle-ADULT XXX” and had an attachment with a picture of 3 nude women bent over in the rear of a vehicle. Harris did not send a reply.
15. From April 17, 2009: The subject line read “Chilly today Careful when opening-ADULT CONTENT XXX” and had an attachment with five files which were pictures of women’s bare breasts. Harris replied to his sister, “Wow those are bizarre nips!!!”
16. From April 24, 2009: The subject line read “Recall on Chinese Breast Implants” and contained an attachment for a video. Harris replied, “you funny girl!!!!”
17. From September 17, 2009: The subject line read “beach soccer-XXX” but no one could open this one. Harris sent a reply that read “I love ya sis!!!!” Gundrum counted this one even though no one could open it, because Harris did not deny seeing it and because of his response to his sister. Johnson thought that this one should not have been counted.
18. From October 7, 2009: The subject line read “Image XXXXXXX” and had an attachment that was the picture of a woman with a target painted on her behind. This is the e-mail that started this whole case, the one that Davis saw and complained about to Keeler and eventually Johnson. Harris sent a reply to his sister with the comment, “ewwwwwwwww!!!!too funny.”
19. From October 23, 2009: The subject line read “Be Very Careful Using E-Bay!warnyoursoninlaws and grandchildren.” It had an attachment that pictured a nude woman with some bomb materials strapped around her. Harris did not send a reply.
20. From October 24, 2009: The subject line read “When a costume is just wrong” and had an attachment which contained 6 pictures, ranging from obscene to ridiculous. Harris sent a reply but did not mention or refer in any way to the content of this e-mail. He just wrote about family travel plans. Johnson would not have counted a couple of pictures in this group.
21. From October 30, 2009: The subject line read “avoid the curse” and had several attachments which were 8 pictures of naked women. Harris did not send a reply.
22. From November 6, 2009: The subject line read “Pair Of Nikes..xxx” and had an attachment that had 8 pictures of a nude woman with paint on her body to look like clothes. Harris did not send a reply.

23. From November 17, 2009: The subject line read "YOUR OPINION NEEDED, PLEASE!!!XXX" and had an attachment with 7 pictures of women in swim suits or thongs that left them virtually nude. Harris did not send a reply.

Harris forwarded one with some nude women on a boat to a friend of his in Idaho and another friend. He did not forward them to anyone in the District or show them to students. He did not forward them to himself at another address or download them. He did not open up e-mail from his sister to view pornographic mater. He did not recall sharing pornographic materials on the e-mail with the team members in the past, but he did not deny Davis' testimony that he had shown them to team members in the past. Harris admitted that many of these pictures would be inappropriate to view in an educational environment even if no kids saw them. When Harris replied to his sister, his name, professional title, school name, and e-mail address were included as a matter of course, probably automatically programmed that way.

Gundrum met with Davis on November 30, 2009. Davis told Gundrum at she was getting ready to leave the classroom on the morning of October 7th when Harris said, "Hey, wait, come here, I just got an e-mail from my sister" or "you've got to see this e-mail from my sister." Davis told Gundrum that Harris shared something with inappropriate content that came from his sister maybe once or twice a year. Davis told Gundrum that she had become the odd man out because of changes to her family situation. She said Harris often swears like a sailor and has shared off color jokes and comments. When Gundrum asked if Harris made sexual comments, Davis said that he had been throwing sunflower seeds at Feinstein and commented that one of them had hit her "boob" but she had no knowledge that he made sexual references outside of the team meeting or around kids. Davis said she was most concerned that students might see these materials because Harris opened this one when the classroom door was open and students had begun to pass in the hallways. When Davis told Gundrum about Keeler's reaction, she added that she felt "like a rape victim with the frat buddies all in on it." Davis expressed her concern about working with Harris and they talked about her switching blocks. She expressed some level of fear about possible retaliation because Harris once said that if he was not teaching, he would be a hit man. There was a running joke about Harris being a hit man. It started many years ago during a Union meeting when Harris complained that some of the building representatives were not being utilized enough, and another member told him that they could always use a hit man and he could be the hit man. Davis knew about the joke and said she wanted to add some people on his list. It was not taken seriously by anyone. Davis said Harris could be intimidating, because he had a loud voice, and he is nearly a foot and a half taller than her. She testified that he had grabbed her arm in the past and it hurt.

Gundrum first met with Harris on December 3, 2009. David Dahmen was there as the Union representative, and George Mavroulis, Assistant Superintendent for Educational Programs, was there for the District. Gundrum told Harris that there were accusations made regarding the content of his e-mail and she was placing him on paid administrative leave while the District started to investigate the matter. Gundrum showed him a copy of the District's

acceptable use policy and told him they needed to meet again but not without legal representation. The meeting was short and he left the building.

Gundrum met again with Harris later that afternoon. Mavroulis and Dahmen were again present as well as Lauri Roman, an attorney representing the Association. In this meeting, Harris said he knew about the acceptable use and harassment policies and that he had received e-mails from his sister that had content in conflict with the AUP. While Harris told Gundrum that he had told his sister to stop sending e-mails on many occasions, he admitted at hearing that he had not done so until the Thanksgiving after he was called into Keeler's office about it but before this meeting. He asked if he could get his sister blocked from sending any e-mails to him at work. Harris said he probably had sent images to others such as his friend in Idaho. Regarding the e-mail shown to team members on October 7, 2009, Harris indicated that never in a million years would he have thought it to be offensive because it fit into the nature of their team meetings. He had heard all kinds of sexual stories from the team members as well as information about menstrual cycles and bedroom stories. He had made jokes or comments with sexual connotations during team meetings. He did not believe there was anything in his e-mail because he always deleted it and strongly stated that students were never exposed to any of the e-mails sent from his sister. Gundrum told him that the e-mails and attachments that were received, viewed, and potentially forwarded, as well as the volume and content all violated the AUP. She also mentioned a general concern about the number of e-mail exchanges with other staff during student time as well as the content of discussions. Harris showed Gundrum that his e-mail was empty, verifying that he had deleted the e-mails coming in.

Gundrum also met with Cochems, Feinstein and Davis on December 3, 2009. Cochems said that Harris had opened e-mails from his sister a couple of times in the past 10 years. She had seen the e-mail of October 7th and said something like "Oh nasty" but was not offended by it. Feinstein said that the October 7th image was not offensive to her, and that it was opened and deleted right away. Both teachers liked Harris as a teacher and a person.

Gundrum met with Cochems on December 7, 2009, and Cochems told her about the intimate talk at team meetings, the fraying of the relationship with Davis over the Facebook issue and that she did not know why Davis had to do this. Gundrum met again with Davis, probably on around that same time, and Davis admitted that she had shared in personal conversations during team meetings but that she has been more of a bystander. Davis said that Harris has mentioned female chest sizes and commented on the overall physical appearance of female students, but that he was uncomfortable about addressing dress code issues with students and referred them to the other team members.

Gundrum also had interviews with staff members Mary Watts, Michelle Schreier, and Shelley Festge. Watts was questioned on December 10, 2009, regarding the number of personal e-mails from Harris, and she told Gundrum that that has a long-term friendship with Harris. The same was true with Schreier and Festge. Festge told Gundrum that the comments that she and Harris made about Davis were sarcastic.

The third meeting with Harris took place December 14, 2009, with Harris, Gundrum, Dahmen, Mavroutis, Johnson and Attorney Haus in attendance. Chris Bauman, president of the Association, was also there and first became involved in Harris' disciplinary action at this meeting. Gundrum presented the 23 e-mails that she had found in Harris's computer that were deleted but stayed in the administrative side of the archive system. Harris said he could not open the website link to hornygamer.com and was not sure if he had seen the family album e-mail at the District or somewhere else. He confirmed that he had forwarded the e-mail about boats to one or two of his friends outside of the District. He said that if the e-mails were in his e-mail system, then he had received them. Harris was also asked about his apology to Davis and her reply, as well as his e-mails with Festge that referred to putting Davis' face on a picture from some website as something grotesque. Harris stated that he and Festge were close friends and former neighbors, and the remarks about Davis were not intended as retaliation but as a knee jerk reaction after being called into Keeler's office. Harris said he was upset that Davis went outside of the team to deal with the issue. Gundrum gave copies of the *Cedarburg School District* and *Menomonie* cases to the MEA representatives and noted that District policy was violated and possibly some state DPI issues would require the District to report this incident for their own licensing review. Johnson mentioned the potential for open records requests. When Haus mentioned that Harris was not seeking out this type of pictures, Gundrum noted that the responses to the e-mails appear to be welcoming or at least tolerant and there was no request that the e-mails stop. Finally, Johnson noted that Harris' future employment with the District might be in jeopardy following a final review of the data gathered, and said the District was working through the investigation as quickly as possible. Bauman recalled that the meeting was early in the week (it was a Monday) and that the District intended to reach a decision by Friday. According to Bauman, Johnson said that somebody in a MEA leadership position should know better.

At the next meeting on December 17, 2009, those present included Bauman, Haus, Gundrum, Johnson, and Robert Butler, Attorney for the District. Butler said that because of the *Cedarburg* case, they had no choice but to fire Harris unless he resigned. The District stated that it had no choice but to report it to the Department of Public Instruction because the conduct was immoral. Bauman did not believe that the District's investigation had been completed at that time because the District said they were still working on it and hoped to complete it soon. Johnson testified that the facts had all been gathered at this point but the report was not written up. The District also said that if Harris resigned before the investigation was completed, it might not have to go public. Bauman did not know that at that time the District was also investigating other teachers for inappropriate use of computers. She knew of it by the next meeting on January 10, 2010 when she met with Johnson, Gundrum and Haus. The District said they were trying to close the investigation as soon as possible on Harris. Harris was placed on unpaid administrative leave on January 4, 2010. Discussions over Harris continued during January of 2010.

Although the District never changed its mind on discharging Harris, the issue did not go to the Board until March of 2010. Johnson said the delay was caused by the ongoing

investigation at the high school, the numerous grievances and responses filed in January, some ongoing negotiations over the appropriate discipline, and the number of open records requests. Johnson sent Harris a letter on March 22, 2010, notifying him of a Board meeting to be held on March 30, 2010 where the Board was to consider Harris' discipline, and the notice stated that the violations warranted termination of his employment. Gundrum's summary report of findings was dated February 8, 2010, and the Association had no knowledge of any action the District was taking against Harris between February 8 and March 22, 2010. Haus was not available to attend the March 30th Board hearing, and the actual date of the Board hearing was May 3, 2010 and the discharge of Harris was May 5, 2010.

During the next meeting on January 20, 2010, the District, represented by Johnson and Gundrum, showed Bauman and Haus the spreadsheet (Union Ex. #34) with names of all the individuals that were being investigated regarding content on their computers and e-mails. The District had not yet administered discipline to the eight people on the list but it had recommended disciplinary measures that ended up being close in reality.

During Gundrum's investigation into Harris' e-mail, she suggested to Johnson that they should look at the rest of the system for similar kinds of content. Johnson had also heard from other administrators that teachers were wondering if Harris was being singled out, which raised a flag about whether there were more inappropriate materials on other computers. Gundrum looked for specific words and subject lines with XXX in them. The word search was for the words "boob, breast, fuck, porn, nips, cock, dick, sex, testicle, Rodney, tits, explicit and horny." The District was primarily concerned with those who sent or received e-mails that contained attached or embedded adult content images (porn), as well as those that sent significant levels of inappropriate or off-color jokes. In cases where staff members only received inappropriate jokes, they were given reminders of the AUP and told that there would be no further disciplinary action taken against them. These notices were sent out on March 3, 2010, and the Association grieved them on March 11th.

A substitute teacher who had retired from the District, Thomas Dunn, sent several e-mails to other teachers. Although Dunn used his home computer, he sent these e-mails to several District computers through the teachers' work e-mail addresses. An e-mail sent on December 9, 2009 with the subject of "Destructive Nature of Beavers" went to teachers Paul Gustafson, Mary DiPiazza, Mike Duren, Mary Harker, Brad Rogeberg and Parker Vivoda. On the same date, Dunn sent another e-mail called "Living in Arizona" to Rogeberg, Vivoda, Gustafson and Duren. Both of these e-mails had pictures of nude or partially nude women in them. On December 10, 2009, Dunn sent an e-mail with the subject "Irish Humour XXX" to Gregg Cramer, and this e-mail contained a picture of nude women. Dunn sent inappropriate or pornographic pictures in e-mails on several occasions to several teachers.

In determining the level of discipline, Gundrum, Johnson and Denise Herrmann, the high school principal, looked at the number of situations, the number of e-mails, the number of images, the number of attachments with inappropriate content and images, the content of the jokes, whether the person receiving them had responded and how they responded (were the

e-mails welcome), and whether an employee had prior discipline. While they did not discuss what was porn or not, they drew the line at whether the content was inappropriate or not. However, where the content was more objectionable, it weighed into the decision making process. Gundrum also looked at jokes and whether the content was appropriate. She was concerned that some might fall under the harassment definition if they made references to race, religion, ethnicity, or sexual orientation. They also considered professional expectations for staff members, common sense, whether students were affected, although no students were involved or affected. They considered the severity of the content, even on incoming e-mails, and determined whether it was egregious (very obscene) or inappropriate. While the person had no control of what was sent, the District felt that people had control over how they dealt with it and whether they tried to stop the sender from sending more such material. The AUP does not give employees any direction on what to do if they receive something that violates the policy.

They considered the Harris case to be different because an image was shown to female staff members and one of them made a complaint. Duren and Gustafson, who both had prior discipline in their records, were given the longest suspensions of 12 and 15 days. Cramer had no prior discipline but was a significant sender of jokes and got 10 days of suspension. Rogeberg, Vivoda, Pertzborn, and Frederickson had no prior discipline. Pertzborn and Frederickson (not in the unit) sent some jokes and got letters of reprimand. Vivoda sent nothing forward and got 3 days of suspension. Rogeberg forwarded some things and got 7 days of suspension. Dunn, who was a substitute teacher and who had sent many of the offending e-mails, was not allowed to continue as a sub.

Gundrum explained that her thinking on recommending discharge for Harris involved the number of e-mails received, the length of time over which they were received, the graphic nature of them and the graphic nature of the videos in them, as well as the fact that Harris shared them with female colleagues. She also noted that his responses back to his sister – such as “tell Jason I love him” and “love you, Sis” – indicated to her that the e-mails were welcomed by Harris. Nothing in the responses from Harris back to his sister stated anything such as – don’t send these to me anymore. The teachers at the high school did not share the e-mails with others, Gundrum said. Gundrum also testified that Harris was retaliating against Davis after he was called into Keeler’s office – that Harris gave Davis the silent treatment during team meetings.

The decision to terminate Harris was made by Johnson, Gundrum, and George Mavroulis. It was made before the decision was made about the discipline of the other Grievants in this case. It was based partly on the advice of Attorney Robert Butler, who told the District that it had to terminate him because of the *Cedarburg School District* case. (More on the *Cedarburg* case in the Discussion section of this award.)

On December 17, 2009, Gundrum met with Haus, Bauman, Butler and Johnson where the District told Haus and Bauman that Harris had the choice of resigning or being terminated. Harris was on paid leave at the time and on January 4, 2010, the leave became unpaid. On

December 17, 2009, the District had just begun its initial search of the computer system to see what else was out there and whether other people would be involved. Gundrum got the information back on the computer search a couple of days later. The investigation of Harris was over by December 17, 2009.

On January 20, 2010, Gundrum met with Haus and the Union and presented a document (Union Ex. #34) that had a chart with all the grievants (plus Hayden but not Pertzborn) and the number of e-mails with inappropriate pictures, the number they sent with inappropriate pictures, the total number of inappropriate pictures, the number of inappropriate movies, the estimated number of jokes, the number of inappropriate websites accessed, and the recommended discipline. Gundrum's estimate on the number of jokes is more or less a guess. Due to the volume of jokes, she took a sample and guessed that about 50 percent of them would be inappropriate, 25 percent would be questionable, and 25 percent would be fine. Thus, the column with the number of jokes is probably overstated for the number of jokes that were actually inappropriate. The fact that Harris tried unsuccessfully to open a website on a link in an e-mail was counted against him in this document, even though he could not open it due to the District's filter. Harris would have no idea what he would be seeing if he got to the website, since he was only clicking on a link that said "click me." Gundrum found that Harris' reply to his sister that said "damn, I'm internet blocked" indicated that he attempted to go to the site. Gustafson, Rogeberg, Vivoda and Welti were able to access inappropriate websites because they had laptops they could take out of the District and access those sites somewhere else. The chart also had a miscellaneous column where 3 movies with oral sex were noted for Gustafson's computer. These movies were obtained outside of the District and such items were not considered for discipline because the AUP was not clear that people could not use their computers at home for inappropriate things. Duren, Cramer and Vivoda had already told the District that they were retiring at the end of the year, before this investigation either started or was completed. Two days later, on January 22, 2010, the disciplinary letters went out, with most of them varying somewhat from the January 20th chart.

Gundrum testified that the pictures or images could be considered differently based on the fact that some were more graphic or offensive than others. In other words, all were inappropriate but some were more inappropriate than others. Gundrum noted that exposed genitalia is more pornographic than frontal nudity from the waist up. This was one factor considered in determining the level of discipline imposed. She also counted all of the e-mails that had inappropriate images in them regardless of the subject line and whether there was some indication of the content to alert the recipient. She stated that if a person receives inappropriate e-mails on a continuing basis, he or she needs to get it stopped or seek help to get it stopped. While the AUP has no reporting procedure, the District expected common sense to rule in the case of incoming e-mails. It did not expect common sense to rule in the case of laptops used to access pornographic websites outside the District because it had not been clear with that with staff members and had told them they could use the laptops for their personal use.

The District considered the investigation into Harris and the others as two different

investigations, even though the latter one came about only because of the investigation into Harris' e-mail. The District had decided to terminate Harris before it made disciplinary decisions about the other high school teachers. Gundrum, Johnson and Herrmann made the disciplinary decisions about the high school teachers.

Johnson testified that there were a number of factors considered in recommending the discharge of Harris. First, there was the volume of material received and accessed, the 23 different communications from his sister, and the volume of visual images and video clips, and some of these were rated X in the subject line. In addition to the volume, the nature of the material and level of inappropriateness was given consideration. Johnson felt that Harris encouraged the e-mails and his replies to his sister showed a willingness and interest in receiving them. There was also the complaint by Davis, and the materials were shared with his team members during team time. Johnson considered that Davis said she felt a bit intimidated and that Harris was not remorseful in his apology, and that he discussed shunning Davis and retaliating against her with other staff members. Johnson was also concerned that the material was being accessed during the school day when students are in school and potentially in the classroom. Johnson stated that people can do what they want on their own time but the standard is substantially higher when they are on the clock and working with children.

The Board hearing on Harris took place May 3, 2010 and he was notified on May 5, 2010 of his discharge. The Board made the following findings:

1. Andrew Harris received, shared, and forwarded e-mails and attachments that violated the District Acceptable Use Policy and Harassment Policy
2. Andrew Harris received, shared, and forwarded e-mails and attachments with pornographic, indecent, and inappropriate content that is not acceptable in a school/educational environment.
3. Andrew Harris encouraged, furthered, and did not take effective action to stop his receipt of the e-mails and attachments referenced in paragraph 2, above.
4. Andrew Harris' behavior constitutes "harassment" as described in the District's Harassment Policy.
5. The employee presenting the complaint regarding Andrew Harris' conduct reasonably perceived the working environment as hostile and as adversely impacting her working conditions and work environment.

Gundrum and Johnson would also have considered the factor of school time being used for e-mails or viewing inappropriate materials and how this took away from educational time. However, the Board did not appear to consider that factor in its decision, and it would seem that the decision to terminate Harris was based so strongly on other factors that he would have been terminated even if he never did anything personal on school time.

Mike Duren (12 day suspension)

Mike Duren is a high school teacher who retired at the end of the 2009-2010 school year. He had prior discipline in his record – a letter of reprimand for the loss of building keys and a four-day unpaid suspension in 2007 for a physical confrontation with a student. However, Gundrum later learned at an unemployment compensation hearing that there was an agreement that had been reached between the former superintendent, William Reis, and Duren on the suspension for the student interaction and this agreement reduced the four-day suspension to a one-day suspension. As part of the settlement, Duren was to complete a non-violent crisis intervention workshop during the 2007-2008 school year, which he did. The District was to remove all documentation related to the suspension from his personnel file at the end of the 2007-2008 school year, but it did not do so and Gundrum thus found it and considered it in recommending the discipline decision.

Duren received inappropriate e-mails from Dunn. He also received several appropriate and school related messages from Dunn, and the content of e-mails was not always clear from the subject line. Duren told Gundrum that he made two verbal requests to Dunn in December of 2009 and January of 2010 to stop sending him e-mails.

Gundrum listed eight e-mails from Dunn in her investigation. Most were jokes with pictures, some noted above. She also found a couple other inappropriate images on his computer's hard drive. Gundrum met with Duren on January 8 and 19, 2010. Duren told Gundrum he did not recall sending, forwarding, saving, sharing or replying to any of those messages. He indicated that he was generally aware of the AUP and harassment policies. Duren was given a 12 day suspension which is part of this grievance.

Paul Gustafson (15 day suspension)

Paul Gustafson is a high school teacher and has had prior disciplinary issues including an unpaid suspension. The first disciplinary action was a letter of reprimand for angry or inappropriate behavior toward another teacher and was over 10 years ago. He was suspended in 2007 for having alcohol on his breath at the beginning of the workday. Gustafson received nine e-mails from Dunn that were the same e-mails Dunn had sent to others. In a meeting on January 8, 2010, Gustafson told Gundrum that he may not have opened some of them or scrolled down to see the images. He did not send, forward, share or save them, but he may have replied to some of them with something like "ha ha." He may have forwarded jokes but not images. He verbally asked Dunn to stop sending e-mails to him when he heard there was an e-mail content review occurring with another member of the staff. One e-mail from Dunn called "Strip tease gone bad!!!!!" was sent to several teachers, including Mary Harker, Linda Schuerman, Cathy Patton, and Mike Duren. The e-mail had an attachment to a link that was on YouTube. Gustafson forwarded this to another person's e-mail account. Gustafson forwarded another e-mail that concerned Gundrum because of the message in it about an orgasm.

Gundrum found something else while on a search on Gustafson's computer on January

13th, shortly after their interview. The search was for Madison swingers and showed several sites that occurred in December of 2009. In a second interview on January 19, 2010, Gustafson said that he had looked at these from his home (he has a laptop computer). In Gundrum's summary report, she states: "As a result of our District policy not providing information to regulate off site, non-network use of laptops, a decision was made to not include the website content in the overall decision to discipline." Gundrum's disciplinary letter of January 29, 2010, mentions that a review of his hard drive revealed access to at least two internet sites that were blocked by the District's filters.

Gregg Cramer (10 day suspension)

Cramer was an English teacher at the high school for 33 years who retired at the end of the 2009-2010 school year. He had never received any discipline during his career. Cramer had a laptop computer assigned to him. He received several jokes, some with pictures, from Dunn, Rogeberg, Pertzborn, and Mike Esser, a retired teacher from the District. Cramer is very fond of jokes and loves to make people laugh. He loves to share jokes with others and make them smile or laugh. Cramer shared jokes all through his career. He used to use the school's copy machine and put copies of jokes in mailboxes. He has told jokes over the telephone, face to face, in groups, and he considered who his audience was. He has tried to be sensitive and not offend people. He kept two lists of people – the larger list was the English teachers as well as an assistant principal, Jill Gurtner, who was the English Department supervisor – and Cramer sent jokes that would not likely offend anyone to this group. A smaller list included some English teachers, as well as other teachers and coaches that he knew. Rocky Falcone, an assistant principal and a dean at the high school, was on that list. This list received some jokes that were potentially inappropriate or questionable to some people.

Cramer met with Gundrum and Herrmann on January 8, 2010. At that time, he did not know Harris at all but knew that something was going on with a middle school teacher. Gundrum told him that e-mails could be released to the public, and this shocked Cramer. He testified that had he known e-mails could be made public, it would have changed his attitude considerably, because it would be like telling a joke over a PA system instead of whispering it to someone. No assistant principal or supervisor ever told him that he was violating school policy. He was not aware that he was violating any District policy until he met with Gundrum. He told Gundrum that he would be hesitant to open any e-mails from Dunn as well as some other staff members, such as Pertzborn, Welti and Esser, if students were in the vicinity because he wouldn't know what he would see when he opened them. In this meeting, Cramer was told that he was not going to be fired but he would be suspended for a number of days. He was eventually suspended for 10 days.

Gundrum found a folder in Cramer's e-mail folders that had over 1,000 pages worth of jokes received from various individuals. Because of the large number of jokes that Cramer sent by e-mail, Gundrum looked at a sample of 87 e-mail messages of jokes. Only one of them had images of topless women. On July 30, 2009, Cramer sent an e-mail called "Darned clever, these Canadians" from his personal e-mail account to his school district e-mail account and

forwarded from there to Bill Frederickson, a custodian at the high school. This e-mail contained some topless women. Gundrum's analysis of the jokes found that they contained references to race, religion, sexual orientation, sex, national origin, disabilities, or off-color language or other inappropriate content. Only 9 of those 87 jokes had no content regarding race, religion, sex, off-color language, etc. However, these jokes were not necessarily offensive or would not necessarily offend people.

In Cramer's disciplinary letter (Jt.#2), Gundrum stated that he had indicated that he had a basic understanding of the AUP and harassment policies, but Cramer denied having such a basic understanding. She also stated that he had asked Dunn to refrain from sending inappropriate e-mails to him, but Cramer said he had asked that of Esser, not Dunn. Two administrators – Falcone and Gurtner – did not say anything to Cramer. Gurtner received a nondisciplinary letter of instruction about some of the jokes that she received.

Brad Rogeberg (7 day suspension)

Brad Rogeberg is a teacher at the high school and has no other prior discipline in his record. During his interview with Gundrum on January 8, 2010, he indicated he received e-mails with inappropriate content from Dunn, and the titles did not always indicate what the content would be. Rogeberg did not recall sending, forwarding, saving, replying or sharing any of them. He forwarded jokes but no attachments or images. He was not aware that this information could be sought through public records, and he thought he had done all the right things. He deleted the images and thought that they were then gone, so he was surprised that his actions were not correct. Before the winter break in 2009, he told Dunn that it was not a good idea to send such e-mails to him. Rogeberg had a laptop and there were some porn sites on it that could not be viewed in the District due to the District's filter. During his second interview on January 19, 2010, Rogeberg told Gundrum that he had not been to any of those sites. Because the District had determined that its policy did not provide information to regulate off-site, non-network use of laptops, the website content was not considered in the disciplinary decision. Rogeberg received a 7 day suspension but entered into a settlement and is not a grievant in this proceeding.

Parker Vivoda (3 day suspension)

Parker Vivoda is a high school teacher with no prior discipline in his record. He also received e-mails from Dunn that were inappropriate and asked Dunn if they should be doing this but did not ask him to stop. Vivoda did not send, forward, save, reply or share these e-mails and always deleted them. He had also accessed an adult website on his laptop computer when it was out of the District. Vivoda received a 3 day suspension but entered into a settlement agreement and is not a grievant in this proceeding.

Jason Pertzborn (Verbal Warning)

Jason Pertzborn is a teacher at the high school and has no prior discipline in his file. In

his interview with Gundrum on January 27, 2010, he confirmed that he had received and forwarded e-mails that included inappropriate content and jokes that might be interpreted as inappropriate in a school setting. Gundrum told him she was giving him a verbal warning and directing him to no longer send jokes of that nature, and he received a letter reprimanding him.

Shawn Welti and Matt Hayden

Shawn Welti is a teacher at the middle school who has no prior discipline in his record. He was interviewed on January 15, 2010 by Gundrum and indicated that he had received e-mails with jokes and pictures that were inappropriate. Most of them were sent by a friend of his. He did not recall sending, forwarding, sharing or replying to those messages and stated that he had left a voice mail message to his friend and told him not to send inappropriate information. Gundrum found only one e-mail that he received with a power point attachment that had several (about 30) nude and/or pornographic images. The subject line read: "PPS XXX." Welti also used his District laptop computer to search inappropriate web sites while out of the District's network. Welti was not given any discipline. He was given a letter of instruction about the appropriate use of the internet and e-mail which was to be put in his personnel file. While several other teachers had letters of instruction that were not placed in their personnel files, Johnson stated that Welti had received a fairly explicit e-mail with a number of different images and the District wanted Welti to know that this was documented.

Matt Hayden is a teacher at the middle school with no prior discipline in his record. He received an inappropriate e-mail from a friend. Hayden replied to his friend about a YouTube video being hilarious and used some inappropriate language in his response. Hayden forwarded this message on to two other addresses. He was also given a nondisciplinary letter of instruction.

Gundrum, along with Johnson and Herrmann, decided that in the cases of Welti and Hayden, no discipline was warranted because they had one-time situations and the conduct was not repeated. They weighed the number of situations, number of e-mails, and number of images. Because there was a large volume of jokes, they focused on attached images that were inappropriate. For the people that just received a lot of jokes but didn't do anything with them, they decided to give them nondisciplinary letters of instruction reminding them of the AUP and telling them what they should or should not do. Thirty people received such letters. Gundrum said they also took into account whether the receiver of e-mails responded and whether those responses appeared to welcome the e-mails or whether they were just deleted. That would tell them whether the person potentially invited the e-mails. Prior discipline was also taken into account.

Rocky Falcone, Bill Frederickson, and Thomas Dunn

Rocky Falcone is an associate principal and dean of students at the high school. He is not a bargaining unit member and not affected by this grievance. Falcone received a number

of jokes via e-mail from Cramer. Cramer named several people in these e-mails.

Bill Fredrickson is a maintenance mechanic at the high school who received and forwarded jokes, but he is not part of the bargaining unit and not affected by this grievance.

Thomas Dunn, the retired substitute teacher that sent many of the offensive e-mails, was interviewed by Johnson and his administrative assistant, Cheryl Janssen on January 8, 2010. Dunn had been forwarding these types of e-mails to staff members over the previous two or three years. He seemed surprised and apologetic in the interview and said he would not have sent anything to somebody who told him not to do so. He told Johnson that the recipients of the e-mails had never asked him to stop. Johnson believed that the recipients of these e-mails did not ask Dunn to stop until they found out that the administration knew about them. Dunn was taken off the substitute teacher list.

Appropriate Use Policy

There are a couple of acceptable use policies (AUP's) in the District. One is dated November 2002 and revised September 2007. The other is dated July of 2006. It states in part:

1. Deliberate accessing or transmitting materials that are obscene or sexually explicit is prohibited.
2. Deliberate transmission of any material that is in violation of Federal or State statute is prohibited. This includes, but is not limited to copyrighted material, hate mail, harassment, discriminatory remarks and threatening or obscene material.

Gundrum testified that the word "accessing" would apply to opening e-mails. The District allows employees to use computers for personal use although the policy does not address that point. The policy refers to access to the internet and other network resources being available to faculty and staff without cost. It also notes that even with internet filtering required by the Children's Internet Protection Act (CIPA), it is impossible to control all materials on the web. Gundrum also noted that the transmission of jokes is not per se prohibited by policy, but the content and volume of jokes might be prohibited. She noted the professional behavior and expectations are considerations also, especially in activity during the workday.

During contract negotiations between the parties for the 2005-2007 contract, the Association proposed in March of 2005 that teachers' e-mails, internet files and searches would not be tracked or monitored by the District without a teacher's consent for disciplinary purposes, and that a teacher would be informed when the District sought to review computer records including e-mails. The District did not agree to this proposal, and in its response to the Association, it noted that it owned and maintained e-mail and internet accounts and had the right to access and monitor computer use to ensure compliance with acceptable use policies and law. The Association withdrew its proposal on June 3, 2005. Sometime after that, Gundrum was in a meeting with the Association where the Association objected to the District's desire to have the AUP signed by all staff members. The Association was not

objecting the distribution of policies or in-service about them, but was just objecting to having members sign off receipt of them. Harris had no knowledge about a dispute between the Association and the District over whether the District could require employees to sign an AUP.

George Mavroulis is the Assistant Superintendent of Educational Services at the District. He served on the District's technology committee. The Director of Technology Services, Conrad Wrzesinski, served as the head of the committee. Chris Bauman, the President of the Association, also served on the committee, as did teacher Jeff Wilson. Wilson was involved in writing the standards for skills of students and expectations of students. Mavroulis testified that the District had to have a technology plan filed with the State Department of Public Instruction, and the committee formulated that plan. This plan was effective between July 2007 and June 2010. The predecessor plan, in effect between 2001 to 2006, had a committee that included Bauman and Wilson. Also on that committee was the Glacier Creek Middle School Principal Michael Nummerdor, as well as the Assistant Superintendent for Business and Employee Services Tom Wohlleber, with Wrzesinski as the chair.

Mavroulis also served as a principal at Elm Law for 10 years between 1992 and 2002. He testified that Wrzesinski sent him a copy of the staff internet acceptable use policy and asked him to distribute it in staff handbooks, which were put in staff mailboxes. He also stated that the AUP was posted on a bulletin board where other staff notices were posted. The procedure was repeated each year, with policies for the handbooks and policies being posted on bulletin boards. Mavroulis was not a principal at Glacier Creek where Harris taught. Keeler was the current principal, and the previous principal was Nummerdor. Nummerdor was the principal at the Glacier Creek Middle School between 1996 and 2005. He knew Harris and worked with Harris the whole time he was principal. Nummerdor also distributed the AUP's to the faculty at the beginning of school years. There were several things from the central office that had to be distributed, so each faculty member had a folder and the AUP's were put in those folders. If teachers did not pick up their folders, the folders were put in their mailboxes. Nummerdor testified that the AUP's were also posted in the break room. He acknowledged that there were no in-service sessions at the AUP, no point-by-point discussions on it, and no disciplines for violating the policy.

Nummerdor recalled staff meetings where the subject of accessing inappropriate or pornographic materials on computers was raised. The internet was fairly new and teachers were looking for curriculum on sites. Nummerdor said they talked about sites such as "whitehouse.com" versus "whitehouse.org" – the former being a pornographic site and the latter being the one that took you to the White House. The District did not have a good filtering system at that time, and the discussion revolved around how to develop curriculum that did not put kids on certain web sites. Nummerdor recalled that they talked about if you went to a pornographic site once, it probably would not be a big deal, but if you kept going back to that same site, it could cause problems. Nummerdor testified that when the District got a filtering system, it could block out legitimate sites, and teachers were told they could go to Wilson or Wrzesinski to get them opened up for their use. This discussion took place at a staff meeting.

David Dahmen is a teacher at Glacier Creek Middle School. He is active in the Association and is a building representative and the grievance chairperson. He has been on the negotiation team since 1987. He testified that he became familiar with the AUP about the time this case arose, when he and Harris were called into the office to discuss some computer issues. He did not recall seeing a posting of the AUP in his building before. He had attended faculty meetings at the beginning of the year and pick up folders with materials in them but never saw an AUP in those folders. Dahmen said he tended to look carefully through his folders. He did not recall attending any technology training sessions where the AUP was a subject or discussed.

Cochems knew that the District had an AUP but had not seen one and did not recall receiving one. Feinstein had not seen the District's AUP before, although she told Gundrum that she probably had read it when she was first hired. Feinstein had read an AUP at her part-time job at the Marriott. Feinstein said she has received off-color jokes with foul language on her school computer.

Harris testified that he was not aware of the District's AUP on October 7, 2009. He had not seen it and it had never been the subject of an in-service presentation. He first saw it the morning of December 3, 2009, when Gundrum showed him a copy but took it back before the end of this meeting. Later that same afternoon, about 4:00 p.m., when he was interviewed again, he stated that he knew about the AUP and harassment policy, and he made this statement to Gundrum because the AUP had been presented to him earlier in the day. At that later meeting, Harris did not say that he knew that the District had an AUP due to the fact that he was shown it earlier in the day. Even though Harris was supervising eighth graders in a computer lab, he was not aware of CIPA and had not been shown a copy of this act. Harris knew that the District had some sort of blocking technology to prevent students from getting pornography on the Internet. He knew there was some legislation that required schools to put in some blocking technology so that students could not access inappropriate material.

Cramer was aware that there was an AUP at the District but had not seen it before the end of October 2009. He knew that students had to sign something to access the internet in student, but he was not really aware of one for faculty until Gundrum showed him the policy when he was called down for a meeting.

At one time, the Association was affiliated with the Madison Teachers Incorporated (MTI). MTI published a newsletter on a regular basis, and these newsletters were put in Harris' mailbox at school. He typically did not read this publication. The newsletter often carried a warning about Districts' computers, warning that they were not personal computers and everything could be seen by the District. Harris had not seen those articles in the MTI newsletters. The Association sent out a notice in December of 2009 warning that the District can access any e-mails at any time, and it warned that the District was archiving all e-mails for seven years and that teachers were no longer able to delete e-mails.

Harris was a school board member in the Wisconsin Heights School District for one three-year term around 2001 and 2002. During a policy committee meeting in 2002, Harris seconded a motion to approve a board policy on the access and use of technology to bring it into compliance with the CIPA. Harris was at the full Board meeting later in 2002 when the CIPA issue was brought up at that meeting, as well as the Neighborhood Children's Internet Protection Act (HCIPA). Harris did not recall any public hearing or being on the policy committee itself. However, he acknowledged that it is likely that he would have paid attention to underscored language that revised a school board policy.

Jeffrey Wilson, the teacher who replaced Harris, was not aware of the AUP for staff, just for students. He had not seen the AUP before 2010 and the first time he saw it was when Johnson e-mailed a copy to everyone.

Bauman had no knowledge of the AUP or harassment policies ever being distributed to the staff. She thought she had seen some form of the AUP in her mailbox at some point in time.

The District did not provide any in-service programs on the AUP or related issues. After the facts of this case became well known, Johnson sent a reminder to staff about the policy with a copy of the AUP attached. This was sent out January 22, 2010. Johnson provided some guidance to staff about what to do if someone receives an inappropriate e-mail. That person is supposed to report it to his direct supervisor. Gundrum testified that the District expected staff to report inappropriate matter and delete it even before such direction was given after the incidents in question here, even though the AUP did not address the question of what to do about it. Johnson sent another reiteration of the AUP on February 1, 2010, which again discussed the concern of adult/obscene/pornographic materials, the use of district e-mail for personal use, and what to do if one receives inappropriate e-mails.

There were two matters that the staff members were unclear about. First, they did not know that the appropriate use policy would apply to their use of laptops outside the District as well as inside the District. Secondly, they did not know what a person should do if he or she received something via e-mail that violates the policy.

Harassment Policy

The District has an administrative policy on harassment as well as a Board policy on the subject. The administrative policy includes the following statements:

Harassment refers to physical or verbal conduct, or psychological abuse, by any person that disrupts or interferes with a person's work or school performance, or which creates an intimidating, hostile or offensive work or learning environment. It may occur student to student, student to staff, staff to student, staff to staff, male to female, female to male, female to female, or male to male. Harassment may include, but is not limited to, the following:

- Verbal harassment, including epithets, kidding, derogatory comments, slurs or ethnic jokes;
- Physical interference with movement, activities or work;
- Visual harassment, include derogatory cartoons, drawings or posters; and
- Sexual harassment, which is defined as any deliberate, repeated or unwanted verbal or physical sexual contact, sexually explicit derogatory statement, or sexually discriminating remark that is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's academic or work performance. Sexual harassment can take the form of any unwanted sexual attention, ranging from leering, pinching, patting, verbal comments, display of graphic or written sexual material and subtle or expressed pressure for sexual activity. In addition to the anxiety caused by sexual demands on the recipient, sexual harassment may include the implicit message from the alleged offender that noncompliance will lead to reprisals. Reprisals may include, but are not limited to, the possibilities of harassment escalation, unsatisfactory academic/work evaluations, difference in academic/work treatment, sarcasm, or unwarranted comments to or by peers.

Gundrum made summary findings that found Harris had violated the harassment policy. She stated: "...a reasonable person in the Complainant's [Davis] position could have felt harassed by the image that was shown, due to its extraordinarily graphic content and presentation, separately or in conjunction with other acts reported." She further noted that a team member may have been uncomfortable due to the potential for a student coming into the classroom to see the image (of a woman with a target painted on her butt). There is no finding that Davis was harassed or felt harassed. There is no evidence that anyone ever asked Harris to stop his behavior. Gundrum testified that Davis reported that she was interfered somewhat with her work, that she felt intimidated by Harris, and that there was some level of retaliation.

In Gundrum's findings for the high school teachers, she found that no one engaged in behavior that constituted harassment based on a specific complaint or repeated behavior after a request to stop. She testified that no one but Harris and Dunn forwarded nude images, and while Cramer forwarded a joke that had three topless women embedded as part of the joke, there was a difference between partial nudity and full nudity.

Union Activity

The Association's bargaining team consists of five people, including the president and vice-president. The vice-president is always the chair of the bargaining team. Harris was the vice-president of the Association at the time of his discharge, and Chris Bauman was president. Harris had been active in the Association for most of his career, having served as a building

representative and vice-president. He was responsible for updating other teachers on the status of negotiations via e-mail.

In October of 2009, contract talks were not going well, from the Association's perspective. The District and Association negotiating teams met on October 8, 2009, and Harris sent out an update to all teachers after that. Among other things, Harris wrote that the District didn't value its teachers, that the Board added insult to injury by presenting the worst financial package in the history of the Association, and that taking care of teachers was not a priority. Dahmen and Tim Keeler's brother Pat Keeler, who were members of the negotiating team, offered editorial suggestions to this letter before it was sent out. Johnson learned about this letter when Matt Geiger, the editor of the Middleton Times, called him for a comment about it. Johnson had not seen it and could not comment on it.

Harris found out that someone took his update and gave it to the press, who then contacted Johnson. When Johnson and Board President Ellen Lindgren came to the next negotiation session on October 13, 2009, they were upset – even angry, according to Bauman - about Harris' update and the fact that it had been released to the press. They also thought the tone of the letter would not help negotiations. They asked to speak to Bauman and Attorney Haus after the bargaining session, and they asked Bauman if she would call Geiger and ask him not to publish Harris' letter. Bauman contacted Geiger the following day but Geiger published the letter anyway as well as Lingren's response of October 20, 2009.

This was not the first time that Harris had disagreed with the Board nor the first time he had written updates to the Union membership. Johnson testified that Harris was a moderating force in negotiations, that his prior experience as a school board member may have given him a different perspective, and that he was useful in coming to agreement in many cases. Johnson felt that the negotiations were more difficult without Harris on the Union's bargaining team. Bauman had never heard Johnson's opinion about that before the arbitration hearing, and she did not agree with Johnson's statement that negotiations became more difficult when Harris stopped attending sessions following the disciplinary action taken against him. However, she admitted that Harris assisted the parties in finding solutions at the bargaining table and said that he came up with ideas, as they all did.

Bauman testified that near the end of January of 2010, she found out that three of the teachers involved in the investigation of their e-mails were talking with Gundrum about a deal, and she was upset that the Association leadership had not been contacted about it. Cramer, Rogeberg, and Vivoda were involved in a discussion to settle their grievances and no Association representative was present. Johnson testified that building representatives had been contacted but not the Union leadership. Rogeberg and Vivoda settled with the principal but Cramer did not. It apparently occurred when neither Bauman nor Attorney Haus was available. Bauman was on her way to bargaining, and when she got to District administrative center where contract talks were to take place, she notified Attorney Haus that there was a settlement meeting at the high school without an MEA representative present. Bauman, Haus, Johnson and Butler had a heated discussion about this settlement meeting following the

negotiation session.

A settlement offer had been proposed for all of the teachers – except Harris – to teach without pay or take substitute pay while they served their suspensions. All of the teachers had agreed that it was in the best interests of the students for the teachers to remain in their classrooms and teach even if they were not getting paid due to the suspensions being imposed.

Cramer recalled that Jill Gurtner, an associate principal at the high school and supervisor of the English department, came to his room and asked him to go the Principal Herrmann's office after school in regard to the e-mail situation. At this meeting, they were told that they could teach during their suspensions if they would sign a statement agreeing not to file a grievance. The meeting was on a Wednesday or Thursday, and they were told they had to sign an agreement by Friday morning because the suspensions were to start soon. Cramer did not ask for this meeting and he did not know who initiated it. Vivoda was ready to sign a statement during the meeting. Cramer did not want to be bargaining for a deal on his own and he did not accept the settlement offer.

Department of Public Instruction

Section 115.31(3)(a)3, Wis. Stats., states that an administrator shall report to the state superintendent the name of any person employed by the educational agency and licensed by the state superintendent if the person is dismissed by the employer based in whole or in part on evidence that the person engaged in immoral conduct. The statute defines immoral conduct in Sec. 115.31(1)(c) as "conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil."

The District reported the incident with Harris to the DPI. The District never alleged that any students or children were involved at any time and has at all times stated that no students or children were involved. Upon advice of legal counsel, Johnson notified the DPI of the incident with Harris. Johnson stated in his testimony at hearing that he believed Harris' conduct did endanger the welfare and education of children, and that he stated so in his letter to the DPI. On February 3, 2010, Johnson sent an open letter to parents and guardians regarding the investigation and potential discipline. The letter stated that: "Our first concern was, and continues to be, the safety and well-being of our students. This investigation does not involve children in any manner."

Outside Publicity

Early in 2010, the District received several requests for public records from the Middleton Times Tribune, the Wisconsin State Journal, and the local television stations -- Channels 3, 15 and 27. The media outlets were seeking information on the discipline or potential discipline of teachers and administrators regarding technology use. On January 7, 2010, Matt Geiger, the editor of the Middleton Times, sent an e-mail to Johnson stating that he

had received a message from an anonymous source and wanted to verify it. The message read:

“Just received a phone call from a man, who wishes to remain anonymous about a Glacier Creek Middle School teacher, Andy Davis. Apparently, Mr. Davis was let go from the school about two weeks ago for having pornography saved in his computer at work. The man that called said that Mr. Davis had a ton of pornographic images and e-mails that he would forward and pass on to other teachers.”

Kristen Davis’ husband’s name is Andy Davis. When asked at hearing if her husband had called the Middleton newspaper to break the story regarding Andrew Harris, she denied it. Johnson made no judgment about the use of the name “Andy Davis” although it could have been an attempt by Geiger to draw out the real name, Andy Harris. A lot of people – students, parents, and teachers – would have been aware that Harris was on leave at this time.

Johnson sent a reply back to Geiger that said:

“Middleton-Cross Plains Area School District has placed a Glacier Creek Middle School teacher on unpaid administrative leave. An ongoing investigation is in progress at this time, so the district has no official comment on an internal personnel matter. It should be noted that this investigation does not involve children in any manner.”

In March of 2010, the District notified the Grievants of the requests under the Wisconsin Public Records Law seeking records related to its investigation into their use of District technology/computer systems. The media was given the records it sought, and all of them ran stories. A couple of other newspapers and radio stations also ran the story.

Feinstein saw some media coverage of the District’s investigation into computer use by staff, both on television and in the print media. She noted that when the media was covering it, the staff was somewhat divided but is not divided on it now. She believed that the media coverage hurt the school.

Teacher A

In 2006, a teacher called herein Teacher A received a one-day unpaid suspension for having five inappropriate pictures on his computer. A student hacked his way into Teacher A’s computer and found some images of nude women. The student shared that information with friends, and when it got back to the administration, an investigation found that the photos had been saved to the teacher’s network account. Teacher A told Gundrum that the inappropriate photos had been sent to him on the e-mail and that he didn’t realize he had saved them to a file where he had his granddaughter’s photos. In addition to the suspension, Teacher A had to go to the Employee Assistance Program to discuss issues on judgment and decision making connected to District policy. He was also banned from coaching his athletic team for one

competition. Teacher A did not grieve the discipline and the Association had no involvement with it.

Harris was aware that Teacher A was disciplined because of pictures on the computer. He did not know how he became aware of this case, but he knew about it shortly after it happened. He did not review this case.

Jeffrey Wilson

Jeffrey Wilson, a middle school technology support teacher for several years, applied for the position that Harris held. Harris' position was posted by Keeler on May 10, 2010. Wilson's position was in danger of being eliminated and he wanted to keep a full-time position. However, Wilson was concerned about what would happen to him if he took Harris' job and the District were to lose in arbitration. On May 10, 2010, he e-mailed his concern to Gundrum, who responded the following day in an e-mail that stated in part: "The arbitration process can take months and I am assuming that an appeal to the court system may follow whatever an arbitrator would rule anyway – by one of the parties. This can take years to fully process. It is not the District's intent to return Andy to the classroom at any point or for any reason."

THE PARTIES' POSITIONS

Both parties filed comprehensive briefs and reply briefs which were of significant assistance to the Arbitrator. Rather than summarize them separately here, the Arbitrator will address their arguments during the Discussion section of this Award. Not all of the arguments will be addressed. Some of my discussion and conclusions (but not all) will be noted under a specific heading, particularly where the parties' arguments have gone on at some length.

DISCUSSION

The Cedarburg Case and Other Cases (Arbitrator's Discussion)

Cedarburg Education Association v. Cedarburg Board of Education, 313 Wis.2d 831 (Wis.Ct.App., July 23, 2008) *review denied*, 764 N.W.2nd 531 (2009) is an important case in this proceeding because Johnson testified that his attorney, Robert Butler, told him there was no choice but to fire Harris because of the *Cedarburg* case. That conversation occurred on December 17, 2009, where Johnson, Butler, Gundrum, Bauman and Attorney Haus were present. Butler did not testify and it is not known what he meant by having no choice because of the *Cedarburg* case.

In the *Cedarburg* case, a teacher, Robert Zellner, was at the school on a Sunday in November of 2005. He turned off the "SafeSearch" function and purposefully searched for and accessed pornographic material for sixty-seven seconds. Zellner was discharged and the case went to arbitration, where the arbitrator reinstated him and reduced his discipline to a letter

of reprimand. The arbitrator found that a single rule violation did not warrant termination and noted that Zellner had been treated differently from other employees in the district. The Cedarburg School District refused to reinstate him and the case was appealed to a circuit court, which vacated the award and stated that immoral conduct provides grounds for license revocation under Wis.Stat. 115.31. This statute had not been raised or cited by either party before the arbitrator. On appeal, the Court of Appeals also faulted the arbitrator for completely ignoring Sec. 115.31, Wis.Stats., and it affirmed the circuit court's vacating the award on public policy grounds. The Court of Appeals case is unpublished, and as such, is of no precedential value but may be cited for persuasive value.

Zellner also filed a suit in federal court, and the Seventh Circuit Court of Appeals decided it on April 29, 2011, *Zellner v. Herrick*, No. 10-2729. Zellner brought a civil rights complaint against the school board in which he asserted that he was fired as a result of his union activities. Zellner was the president of the Union and served as the Union representative for the high school at the time of his termination. The Seventh Circuit noted that Zellner argued that he had established a *prima facie* case of retaliation as well as evidence of pretext. The First Amendment prohibits a public employer from retaliating against an employee for engaging in protected speech. A plaintiff must show that his speech was constitutionally protected, that he suffered a deprivation likely to deter free speech, and his speech was at least a motivating factor in the employer's action. If a plaintiff shows that an improper purpose was a motivating factor, the burden shifts to the defendant to show that the same decision would have been made in the absence of the protected speech. If the defendant carries that burden, then the plaintiff must show that the proffered reasons for the decision were pretextual and the real reason for the decision was retaliatory animus. In other words, Zellner was arguing that "but for" his union activities, he would not have been terminated. The Court found that Zellner knowingly violated a school board policy, and without evidence that **some other teacher violated the policy in a similar way and received a milder sanction**, Zellner's "but for" case rested on conjecture.

The last sentence above – particularly the bold print – is important in the instant case. Several other teachers violated the Board policy in a similar way and received far milder sanctions. More on this later.

Johnson testified that he had no choice but to report Harris' conduct to the Department of Public Instruction because the conduct was immoral. He did not report the conduct of any other teacher to DPI because none of them was dismissed. Section 115.31(3)(a)3, Wis. Stats., states that an administrator shall report to the state superintendent the name of any person employed by the educational agency and licensed by the state superintendent if the person is dismissed by the employer based in whole or in part on evidence that the person engaged in immoral conduct. The statute defines immoral conduct in Sec. 115.31(1)(c) as "conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil."

Johnson stated in his testimony at hearing that he believed Harris' conduct did

endanger the welfare and education of children, and that he stated so in his letter to the DPI. However, he never explained how Harris' conduct endangered the welfare and education of students, and therefore, did not meet the second prong test of the statutory definition of immoral conduct. On two occasions, Johnson publicly stated that children were not involved in this matter at all. On January 7, 2010, Johnson sent an e-mail regarding his statement to the newspaper that ended with the sentence: "It should be noted that this investigation does not involve children in any manner." On February 3, 2010, Johnson sent an open letter to parents and guardians regarding the investigation and potential discipline. The letter stated that: "Our first concern was, and continues to be, the safety and well-being of our students. This investigation does not involve children in any manner."

The District claims that Harris' conduct met the statutory standard for "immoral conduct." It believes the Union twists and distorts Johnson's legitimate efforts to calm parents and reassure them that there were no sexual assaults, sharing of porn with students or other alarming issues involving their children. The District says that telling parents this is not equivalent to telling them that large volumes of pornography in schools pose no danger to children or their education. The Union cites no authority to interpret Wis.Stat. Sec. 115.31 for the proposition that no "endangerment" can occur unless children are shown pornographic materials. DPI construes its own authority in a manner consistent with the Court of Appeals' interpretation in Cedarburg. See *In the Matter of the Teaching Licenses of Kent A. Tollakson* (DPI; 4-10-2008).

In the DPI case cited by the District, a teacher's license was revoked after he used his school computer to view pornography including at a time when students were in the classroom. It appears that the DPI and the teacher entered into a stipulation in the license revocation process. There are significant differences between Harris' case and the *Tollakson* case. For one thing, no students were in the classroom when Harris saw e-mails with porn, and for another thing, the DPI did not revoke Harris' license.

The District cites other school expulsion cases to show how "endangering" is interpreted. In those cases, there did not need to be any proof that the risks present actually ripened for students to be found in violation of the standard of endangering the property, health or safety of others. The District objects to the Union's contention that children have to have seen the pornography for it to endanger their health, safety, welfare or education, because it claims that viewing and sharing pornography in this volume over this period of time in professional meetings at school during work hours and class time does endanger the health, safety, welfare, or education of pupils. The statutory language concerns conduct that endangers – that is, that creates risk. Those risks don't have to have fully materialize to be real and immediate, the District contends.

The problem is that the District can't have it both ways. It cannot go to the parents and the press and say – there's no harm to your kids, no risk, don't worry, and then go to the DPI and say – there's risk and harm of endangerment. Moreover, the District is asking the Arbitrator to make an interpretation of Sec. 115.31, Wis.Stats., that even DPI did not make,

that the very existence of pornography coming in on e-mails is enough to meet the statutory definition of immoral conduct. It would seem that “immoral conduct” is something under one’s control, not something that is out of one’s control such as the receipt of e-mails. One of important facts here is that all the pornography that came in e-mails that was viewed by Harris and other teachers was **deleted** from their computers. The teachers had no knowledge that it still existed on the server. Anyone hacking into Harris’ computer would not have found it. He did not save it or store it. He deleted it from the e-mail and also from the trash bin. He showed his computer to Gundrum to show her nothing was on it. He did not know the server saved it. In the case of Teacher A, a student hacked into the teacher’s computer and found nude photos that had been saved (and still got only a one-day suspension as opposed to a discharge here). So in this case, a student would have to hack into the server, which is under the District’s control.

The District continues to argue that turning a team meeting into a forum for displaying such materials necessarily endangers the educational process, since a team meeting is supposed to be about collaborating on shared students’ educational needs. However, that argument doesn’t follow the facts. The team meeting was **over** on October 7, 2009, with one of the team members on her way out the door. The testimony showed that the team meeting sometimes ended before the entire class period was up, and that’s when the team engaged in their personal talk. There is no evidence that the team was using much time to do anything other than work on their students’ needs together. The testimony showed that sometimes when the team business was completed and there were still a few minutes on the clock for that period, the team members engaged in some very personal talk. In the final analysis, this case is not really about **when** viewing porn occurred – it’s about the fact that it occurred at all. The discipline would have been the same whether it occurred at midnight or contract and contact time.

In the *State of Minnesota Department of Administration*, 117 LA 1569 (Arb. Neigh, 2002), a discharged grievant used his state-owned computer to seek out and access websites with pornography, female bondage and violence. Others in the department received lesser disciplinary measures. A consultant/investigator with experience in internet pornography investigations ranked content at four levels: 1) sexual jokes and cartoons with nudity; 2) more sexually explicit materials, including nude pictures and stories or jokes about sexual acts; 3) much more sexually explicit and violent pictures and stories; 4) child pornography. The investigator also considered it more serious to send than to receive such e-mails, and even more serious to search out such material on the internet, as the grievant had done in this case. The basis for the grievant’s discharge was the violent and pornographic nature of the material he sought, unlike others, and it stood out as violent and disturbing in comparison. The arbitrator found that the employer reasonably concluded that the nature of the material accessed by the grievant was more offensive and warranted a more serious penalty. The arbitrator also found it valid for the employer to consider the embarrassment to the department, as well as complex factors applied to all employees.

The case of *Menomonie Area School District*, Case 64, No. 68669, MA-14305 (Morrison,

2009), involved a head custodian in a school district who was discharged and the arbitrator found just cause for the discharge. The grievant forwarded an e-mail with pornographic material to another employee, who conducted an investigation and found several e-mails with inappropriate materials. Some of the images involved under-aged children. A check of other employees' computers turned up nothing. In this case, the employer argued that *Cedarburg* stands for the proposition that the State has a strong public policy against any school district employee engaging in immoral conduct, and that viewing pornography with district computers on district property and time constitutes immoral behavior. While that arbitrator accepted that interpretation, I respectfully disagree. Such an interpretation sets up a *per se* rule. Anyone looking at pornography on a school computer at any time would be engaged in immoral behavior, under a *per se* rule. Such an interpretation cannot stand for two reasons. First of all, the statute defines immoral behavior and uses a two prong test – where the second prong specifically states “that endangers the health, safety, welfare or education of any pupil.” Secondly, a *per se* would be nonsensical. What if a student or another employee wanted to sabotage a teacher or school employee? All one would have to do is send an e-mail with porn on it and the person receiving it would then be engaged in immoral behavior, under such a *per se* interpretation. Or a teacher or employee could go to the wrong address – such as “whitehouse.com” instead of “whithouse.org” – and suddenly have accessed a porn site. Fortunately for anyone who uses an employer's computer and e-mail system, that is not the definition for immorality. While the arbitrator in the *Menomonie School District* case ultimately found that the grievant had engaged in immoral behavior and such behavior warranted his discharge, there may have been plenty of just cause due to the involvement in child pornography. I am only saying here that I cannot agree with this interpretation of “immoral behavior” inasmuch as the statutory definition differs and must involve the health, safety, welfare or education of any pupil.

If, as the District here urges, the viewing of pornography a school computers were to be deemed immoral conduct, the Arbitrator asks – what about all the high school teachers? They also viewed pornography and were not discharged and not charged with immoral conduct.

In *Columbia County*, Dec. No. 58192 (Greco, 2000), a highway department employee, Voightlander, was charged with sexually harassing another employee by: 1) telling her she had a “nice ass,” 2) showing her the cover of a pornographic magazine, 3) telling her she could go camping if she slept naked in his tent, and 4) asking her to dance on a table and take her clothes off when money was thrown at her. The arbitrator, in mentioning the pornographic materials, stated that any employee caught with such filth can be subjected to discharge. The *Columbia County* case has several facts that are not present in the instant case. (Actually, this Arbitrator knows the grievant Voightlander who has been the grievant in many cases, some of them before me, and has a long history of discipline.)

The District also submits that Harris' conduct was far worse than Zellner's in the *Cedarburg* case, and also more egregious than the grievant in the *Menomonie* case. The Arbitrator finds that cases are always different and turn on their facts. In the *Cedarburg* case,

Zellner was reinstated by the arbitrator but the Circuit Court and the Court of Appeals upheld the district's position. In the *Menomonie* case, there was some child pornography involved, which opens up a whole new problem. The case of *Columbia County* shows some obvious harassment of another employee as well as much prior discipline. Nothing in the *Cedarburg* case compels a decision to discharge Harris, and the grievants' conduct in other cases cited have the elements of child porn and sexual harassment which is not present in this case.

Acceptable Use Policies

The Union raises several objections to the AUP. It argues that the District did not adopt clear and consistent policies on technology use and harassment and that the District did not communicate its policies to its employees. (The harassment policy will be dealt with separately later.) The Union also argues that the District did not communicate the potential disciplinary consequences of violating the AUP or apply it evenhandedly to all employees. The Union notes that the District was not clear which version of its AUP was in effect at the time of the events at issue herein.

The District asserts that none of the Union's points about the AUP truly matter because the District doesn't need a policy against viewing and/or sharing pornography, nudity, inappropriate or ethnic humor in order to expect teachers to know better or to sanction them for doing so. The conduct is so obviously wrong that advising employees that they cannot do it is not required under a just cause analysis. These are professional people and they knew their conduct was not permitted.

Gundrum said that there were two different versions of the AUP placed in evidence. One is a two-page document (Policy No. 522.7) dated December of 2009, and the other is a one-page document dated July of 2006. Gundrum showed Harris a copy of the older version rather than the current version when she first met with him. On January 22 and February 1, 2010, Johnson sent the versions of the AUP out to staff and noted that the attached policy called "updated draft" should not have been called a draft but was in fact policy. The Union questions why the AUP identified in the District's Investigation Report does not match the AUP disseminated by Johnson in 2010. The Union says that the District is still unclear and inconsistent in even identifying the current AUP.

The District states that if the Union means to suggest that a reader of the policies would not understand that receiving e-mails with pornographic pictures or pornographic movies attached to them would violate these policies, the first point is that the Union maintains that nobody knew that any such policies existed in the first place. The District notes that its policy has consistently prohibited using District technology to access, view, or share material that is obscene or discriminatory. Policy 363.3 applies to e-mail among other things. Policy 522.7 states that "[d]eliberate access or transmitting materials that are obscene, sexually explicit or child pornography is prohibited." The policy warns that school computers are owned by the District and that the District reserves the right to monitor and access an employee's internet activities and e-mail content, and violations may result in discipline. All the previous AUP's are

consistent on prohibiting obscene or sexually explicit material. The District asserts that there are any number of versions of AUP's that have been issued over the years, and rather than being proof of confusion, they all ban obscene material and material that is discriminatory.

The Union then objects that the District did not share or distribute its AUP with all faculty and staff prior to the events which are the subject of this proceeding. There was no in-service direction or instruction to staff. While Mavroulis gave copies of the AUP to teachers under his supervision, he simply put it in their mailboxes. He never served as an administrator or principal of a building in which Harris was a teacher. Keeler was the principal of the school where Harris taught, but the District did not call Keeler as a witness. It called Keeler's predecessor, Nummerdor, who put policies and materials from the District in teacher folders at the beginning of the school year. The Union points to the testimony of teachers Cochems, Wilson, Cramer, Bauman and Harris to show that teachers were unaware of the AUP and had not seen it before. Harris saw the AUP for the first time on the morning of December 3, 2009, when Gundrum showed him a copy. His statement later in that afternoon regarding his awareness of it was based on the morning's showing of it. The District failed to comply with its own policy that states that it shall be shared with all faculty and staff on an annual basis, the Union states. The District never explained how employees were to deal with e-mails they received from others which contained inappropriate content until 2010. Now the District has told employees that if they receive inappropriate e-mails from someone they know, they should reply to them and tell them this is not welcome and to stop.

The District disputes the Union's claim of not communicating the AUP with its staff. Nummerdor put a copy of the AUP in a folder for every faculty member that came to the first faculty meeting, and if any faculty member did not get a folder, he then put it in that person's mailbox. Nummerdor spoke directly with Harris about signing the AUP. He also posted the AUP. Administrators distributed and posted policies at multiple buildings, including Harris' building. During the District's investigation, every employee that was interviewed indicated that he or she was aware of the AUP, including Harris, and they all acknowledged that they had received information that violated the AUP. Harris claimed at the hearing that his knowledge of the AUP came from being shown it on the morning he was placed on administrative leave, and he knew nothing about it before. The District found such testimony to be not credible. Harris made bargaining proposals about the AUP. Everyone told Gundrum they were aware of the AUP and stood by those statements. The policy was handed out every year. If an employee missed it once, it is not likely he or she would miss it every year (and if he did, was that the District's fault?).

The Union points out that the current policy (522.7) is specifically directed at the internet and internet resources, while the draft (363.3) contains the more general term "electronic communications" and explicitly lists the terms "e-mail" and "internet access" as "technology resources." Also, the current policy (522.7) makes no reference to culpability for the content of e-mails that are received. The draft (363.3) excludes the word "deliberate" but includes in the listed prohibitions the terms "downloading, displaying, viewing, accessing or attempting to access, storing or transmitting any images, cartoons, messages or material which

are sexually explicit.” The Union states that one does not need to use the internet to open an e-mail that has already been received and is stored on the District’s e-mail system. It is not clear what “deliberate accessing” means when it comes to items stored on the District’s server. Harris did not import or save any pornographic materials from the internet, and the only pornographic material found in his e-mail was sent to him. When Harris deleted an e-mail on his computer, he believed that e-mail was erased and deleted. He was not aware that the e-mail continued to be stored on the server memory.

The Union claims the lack of clarity in the District’s application of its AUP is shown by the discipline of Teacher A in November of 2006. Teacher A received an e-mail containing five pictures with multiple nude images of a number of women and stored the images in a file. A student hacked into the teacher’s computer and found the images. Teacher A received a one-day unpaid suspension. Gundrum’s disciplinary letter to him did not cite the receipt of the e-mail as a violation and she did not inform him to tell the sender not to send additional e-mails or tell his supervisor. With the exception of Harris, the Grievants are being disciplined on the basis of a general search without any complaint.

The District states that the fact that Teacher A’s disciplinary letter was not framed as a multiple count recitation of every way the AUP could be violated means nothing in evaluating the language of the AUP. While the Union complains that the AUP had historically been enforced based on specific complaints, one cannot allege a pattern of enforcement while claiming no one knew of a policy that was being enforced in the first place. The Union has also claimed that Harris was singled out for his union activities, and if the District were intent on singling him out for union activities, it would not have actively sought information about other potential violations through an assessment of all computers used in the District. The District can review its technology to determine whether employees have engaged in any illegal or improper conduct. The policy says so. The District rejected a proposal from the Union in bargaining that sought to restrict its right to monitor or review District computer activity. That proposal was made by Harris. In this case, the District acted reasonably by finding it had a larger problem than the situation presented by Harris.

The Union also argues that the District takes no responsibility for informing teachers how the technology system works. Harris thought he had deleted all the e-mails because he and others were unaware that the District’s system continued to store them. It was after the fact that the District sought to inform teachers about what to do if they received inappropriate e-mails. The Union also notes that the AUP prohibits “deliberate accessing or transmitting materials that are obscene,” and that an individual is not deliberately accessing the internet when he opens an e-mail or an attachment to it. Thus, an individual cannot know what an e-mail contains until he opens it and cannot be held accountable for the contents that were selected by the sender.

The District notes that e-mail is transmitted via the internet and there is no separate worldwide e-mail web. The District concedes that an individual could be sent something that violates the AUP, but what that individual does after opening it shows whether his or her

conduct was deliberate. In this case, Harris responded to his sister's pornographic e-mails with enthusiasm and thanks, and so he got more e-mails with attachments labeled "porn" or "XXX." He sometimes showed these attachments to others and responded with more encouragement, and the cycle kept on repeating until he got caught. The District states that this is a situation where there was an arrangement for his sister to keep feeding him pornographic material. It is not a situation where Harris was innocently caught unaware.

The District further objects to the Union's notion that nothing in the AUP puts employees on notice that a certain number of inappropriate images viewed or received can result in greater discipline. It also objects to the Union's statement that the level of discipline would depend on a number of subjective factors, such as whether the e-mails contained images, text or jokes; how many images were viewed; whether there was top, bottom or total nudity; whether the jokes mentioned ethnicity, nationality or race; and how explicit and offensive the images were in the eyes of Gundrum and Johnson. The District states that it searched all computers and only a handful of employees had received inappropriate material, and there were a couple of situations where the transactions were genuinely out of control of the recipients. For the most part, the recipients were willing participants.

The District cites Welti as an example of someone with pornography on his computer but was not disciplined. He received an e-mail with a lengthy pornographic attachment. He saw it and told the sender never to send him such materials at work. The interview with Gundrum indicates that there was more than one such e-mail. However, the District believed Welti and noted that such e-mails stopped, and he was given the benefit of the doubt that he had not "deliberately accessed" this type of material.

The District acknowledges that any number of factors may determine the level of discipline. Sometimes the level of nudity will matter, sometimes the number of images received will be relevant. Having one image can be different than having an extensive history of receiving and sharing images. One truly horrific image can matter more than others. One attachment with multiple images is not the sole determinant. Sometimes the degree to which an image is explicit counts. Showing it to others or sending it along in another e-mail is relevant. Content that goes to protected classifications may be more volatile or discriminatory. Also relevant is a pattern of behavior that shows that receipt is deliberate because it is actively encouraged. All these factors do not make the decision making process arbitrary, the District says, and instead shows how good and balanced judgment is applied.

Finally, the Union notes that the District issued non-disciplinary letters of instruction to about 40 teachers for their receipt of inappropriate e-mails. The District's claim that there is almost universal knowledge and compliance with its AUP is exaggerated.

Arbitrator's Discussion regarding the AUP

First of all, it must be said that with or without a policy or several policies, everyone knows that you can't have porn on your employer's computer, especially if your employer is a

school district. Now how it got there is a matter of some contention here. But essentially, the parties have spent a lot of their efforts debating the finer points of the AUP's and the Arbitrator agrees with the District that even if there were no policy, the conduct at issue would be objectionable and subject to discipline. No one needs a policy to tell them that.

However, the AUP takes on some importance in this case, primarily because of the way the District used it in determining who to discipline. Where the District gave a pass to a couple of teachers because it felt the policy was too vague to discipline them, it must also realize that the policy is vague about other matters such as what to do about offensive incoming e-mails. More on this later.

First, to the issue of which policy was in effect or whether there was great confusion about updated and different policies, the District correctly note that it makes no difference – they all prohibit the same thing. The deliberate accessing and transmitting of materials that are obscene or sexually explicit are prohibited. All of the Grievants knew that there was a policy and that the images we are talking about in this case were inappropriate in a school district.

While several teachers testified that they were not aware of the AUP and had not seen it before, the District made reasonable efforts to distribute it. It's true that there never was an in-service on it, but there does not have to be an in-service on it for it to be in effect and for people to be aware of it. The policies were put in teachers folders or their mailboxes and they were posted in buildings. Even if none of the teachers read the policies, some knowledge of the AUP may be imputed to them. The District can expect that teachers will read the materials it gives them. Knowledge of the AUP has to be imputed to Harris in particular – he and Nummerdor had a discussion about signing the policy. Harris had been a school board member at Wisconsin Heights when something on an AUP came up. He was active in the Union when the Union proposed to restrict the District's right to monitor computer activity. While Harris and the other Grievants may not have read the policies in question, they knew that having porn on their computers was wrong and would lead to discipline. They did not know that the porn stayed on the server after they deleted it.

The AUP talks about "deliberate accessing and transmitting" and there is some debate about what deliberate accessing means. Transmitting is clear enough, and anyone who sent inappropriate materials or forwarded them obviously violated the AUP in this fashion. However, it is not a deliberate act when one receives e-mail, and it's not clear that looking at one's e-mail would mean that one has deliberately accessed obscene materials. The AUP never addressed the problem about what to do if inappropriate materials are received via e-mail. While the District clarified that issue after the fact, the employees were using their own judgment to delete these materials. That is a reasonable response to the e-mails. At a certain point, it is not enough, but no one knows where that point is.

The parties dispute whether there has to be a specific complaint or whether the District may discipline people based on a general search without a complaint. I believe the District, as

the employer and owner of the computers, has every right to make a general search without a complaint and I give it credit for doing so in light of the complaint that came to its attention. This general search works both for and against both parties in this case. It weakened the Union's argument about anti-union animus and it weakened the District's argument that Harris' discharge was fair and for just cause where it did not discharge others with similar conduct. Also, the District is not generally obligated to inform teachers that its server would store their e-mails even if they deleted them. The AUP also does not have to spell out all the factors that would result in discipline, or how much discipline, or how many images would trigger discipline. A policy is a general statement and cannot possibly address all the factual situations that might occur.

However, the AUP is significant in this case. The AUP did not address this type of situation where incoming e-mails contained pornographic images and it did not address what to do about them. It also did not address personal use of laptop computers that people took out of the District and away from its filter and searched for pornographic websites. In the latter case, the District gave those people a pass on it, and in the former case, the District did not. I find that to be too inconsistent in administering the policy, and this inconsistency lends weight to the finding that the charges on some of the people are too arbitrary.

Harassment Policy

Only Harris was found to have violated the harassment policy. The Union asserts that the District's claim that Davis was personally offended by the image of the target painted on a woman's behind is not credible, and she in fact did not complain that she was harassed. Her expressed and pretextual concern about students possibly being exposed to the image does not constitute harassment, and if she were so concerned, she would not have left the door open. The Union notes that the team was very free and open in discussing highly personal matters such as sex and used rough language. Davis never complained about this and participated and contributed to it. The friction that developed between Davis and the team members existed before October 7, 2009, and had nothing to do with Harris showing inappropriate images. She testified that she laughed about the inappropriate images and never complained about them over a period of several years. Harris did not call Davis back from her exit position at the door – she went back voluntarily.

The Union believes that Davis and her husband were conniving to get Harris into trouble. Davis could have left the room and not looked at the photo. She opened the door and left it open. She went to the principal's office with a scheme to protect her anonymity by having the principal lie about how the picture came to his attention, and the lie about a random search was her husband's idea. Her husband's name is Andy Davis. Then Geiger of the Middleton Times e-mailed Johnson that he received a phone call that a teacher named Andy Davis was let go for having pornography on his computer. There is no reasonable explanation for how Geiger got the name of Andy Davis into the message except he mixed up the name of Andy Harris with the caller's name – Andy Davis. Finally, when Davis went to Johnson, her complaint was about Keeler's handling of the matter in a way that did not protect her

confidentiality.

The District responds by saying that it reasonably concluded that the definition of “harassment” was met in Harris’ case. The District asserts that Davis’ motives are not germane to determining whether there were contract violations, regardless of whether she used the opportunity to take vengeance on an innocent man as the Union claims or whether she felt increasingly isolated in her teaching team and was pushed over the edge by a shocking photo. The District also objects to the Union’s comparison of Harris and a finding of harassment to the high school teachers where no harassment findings were made. The District notes that the meaningful distinctions between Harris and the high school staff were based on volume, severity, use of team meeting team, retaliation, and other factors.

The District further defends its harassment finding by noting that the policy specifically includes visual harassment, including derogatory cartoons, drawings or posters, and that there shall be no retaliation against anyone who has reported harassment or cooperates in a harassment investigation. Gundrum noted in the summary report on high school personnel that the materials could be considered of a harassing nature if they were shared with others that did not enjoy this type of humor, and that no clear hostile environment had been created although it could have been if the materials were shared and unwelcome. While Davis had not characterized her complaint as one of harassment, Gundrum noted that Davis reasonably felt uncomfortable and her report met the criteria of the policy and that Davis found Harris intimidating and was uncomfortable with the image he shared on October 7, 2009.

The District finds that the sharing of inappropriate material at the middle school was welcomed and nurtured over time by a consenting group. However, after Harris, Cochems and Feinstein confronted Davis, their relationship with her was strained and she was not comfortable with them. Harris’ apology reads like an attack and he schemed with other team members and teachers about shunning Davis and did so. Gundrum concluded that it was reasonable for Davis to feel uncomfortable and that she had been harassed because of the conduct, apology, and retaliation.

The District says the failure of Davis to label her complaint as one of harassment is irrelevant. Also it is not unusual for an employee to seek anonymity, and the harassment policy pledges that complaints will be treated as confidential. The fact that the team confronted Davis years before about her conduct does not mean that she welcomed pornography. She testified that she objected to porn before and no witness contradicted her on that point. During the prior times when Harris displayed pornographic pictures, Davis said it was disgusting, that he shouldn’t show that, or that he had to stop it. While the Union makes much of the fact that she came back to see the picture on her own and left the door open, she did not know what the picture was when she came back to have a look. The only clue of warning was that Harris said the e-mail had been sent by his sister.

The District also objects to the Union’s comments about Andy Davis being the anonymous source for Geiger’s information. Since both Andy Davis and Andy Harris have the

name first name, Geiger may have used the name of Davis accidentally, or he could have used the name to get Johnson to give him the correct name. Moreover, if Davis was acting out of vengeance for the confrontation that occurred years earlier with her team, she had plenty of other opportunities far closer in time than October of 2009. Finally, the District states that although Davis' testimony differs from Cochems and Feinstein about her involvement in frank discussions at team meetings, a person could participate in racy discussions and still object to Harris' target picture or to pornography generally. That picture would offend lots of people, including people who have shared dirty jokes or stories with their friends. The Union is wrong in suggesting that a person could not object to pornography because she had talked about personal sexual matters or laughed at dirty jokes.

Arbitrator's Discussion on Harassment Policy

The charge of harassment against Harris in this case is just not sustainable. First of all, the conduct does not meet the definition, which is: "Harassment refers to physical or verbal conduct, or psychological abuse, by any person that disrupts or interferes with a person's work or school performance, or which creates an intimidating, hostile or offensive work or learning environment.....Sexual harassment, which is defined as any deliberate, repeated or unwanted verbal or physical sexual contact, sexually explicit derogatory statement, or sexually discriminating remark that is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's academic or work performance." Regarding retaliation, the policy states: ". . . sexual harassment may include the implicit message from the alleged offender that noncompliance will lead to reprisals. Reprisals may include, but are not limited to, the possibilities of harassment escalation, unsatisfactory academic/work evaluations, difference in academic/work treatment, sarcasm, or unwarranted comments to or by peers."

Contrary to Davis' testimony, I find that Harris did not invite her or the other team members to look at his computer when he opened up his e-mail from his sister and saw the "target" picture. The reaction of the team members, including Harris, who could see the computer enticed Davis to see what was on the e-mail. She walked back into the room without being invited back to see the e-mail.

The fact that Davis saw (due to her own actions) a pornographic photo on Harris' computer does not rise to the level of harassment or sexual harassment. That fact that she had seen such inappropriate images on his computer before – probably for several years – from time to time – also does not rise to the level of harassment or sexual harassment without more evidence that it was offensive and unwanted. While Davis testified that she told Harris that it was disgusting and that he had to stop it, Cochems testified that Davis had never objected in the past.

The District is correct when it suggests that Davis' motives are not germane, except that where the District also considered Harris' silent treatment of Davis to be retaliation, the District should have been wondering who was retaliating against whom. I agree with the District that

Harris' apology was pretty weak and hardly an apology, but Davis could have taken it up with Harris or the team. Instead, she pursued her complaint beyond the team, above Keeler and all the way up to Johnson and probably to the local newspaper. It is more likely than not that Geiger got the names mixed up when he used Andy Davis' name in the e-mail to Johnson. Otherwise, he would not have been very discreet at protecting his so-called anonymous source. Davis certainly did not mind getting Harris into trouble, even if she was not retaliating for the confrontation she took from the team in general and Harris in particular over her social media use with students and her absences and other matters that bothered the team. By the time the "target" picture showed up, Harris and Davis was really not on good terms anyway. Thus, his suggestion in e-mails that he was shunning her was hardly any retaliation. He kept on working with her to fulfill professional obligations. Davis' remarks to Keeler and Gundrum about Harris talking about being a hit man were sheer exaggeration. Everyone in the team knew that it was a joke. There was no retaliation.

And there was no harassment in the first place. Even if Davis was no longer part of the close team that laughed at Harris' pictures from his sister, she was no prude and it would take some doing to offend her. The two other female members of the team described her talking about her crusty underwear, her husband's morning "wood," her "tribal tits," and other highly personal things such as her husband fishing a tampon out of her. Davis once drew a picture of a vagina and a tree on a blackboard to show how someone drew the word "country" in a Pictionary game. As amusing as that might be, it would be the height of hypocrisy for Davis to make any claim that she was uncomfortable or harassed by seeing the "target" picture on the computer. The District claims that it is possible for her to have engaged in such sex talk once when she was tight with the team but now as an outcast it's ok for her to take offense at it. She took part in these activities – viewing inappropriate images, talking trash with the team – for several **years** and complains only now? That does not square with logic.

Davis' claim that she was concerned about students seeing the image on the computer and the teachers getting in trouble is also very suspect. She knew that students were not coming into Harris' classroom and would not be passing in the hallway by his classroom. She chose to come back into the room – based probably on something Harris or Cochems or Feinstein said, no one is sure a year or so later – to see what was on the computer. She was not being asked by Harris to come back. She chose to do this. And she left the door open. That hardly would be the action of someone who was concerned about students being able to see this image on the computer. She knew, of course, that students would not be able to see the computer from the doorway and would have to come well into the room. So her stated concern about students lacks the ring of truth.

In the Board's findings against Harris, number 5 states: "The employee presenting the complaint regarding Andrew Harris' conduct reasonably perceived the working environment as hostile and as adversely impacting her working conditions and work environment." This is not true. Davis herself never believed or stated that the working environment was hostile or that it adversely impacted her working conditions and work environment. Even after she was confronted by the team for her conduct, a couple of years went by where she continued to

work with the team but was socially separated from the others. Her testimony did not indicate that there was any element of harassment present in her own view.

In sum on the harassment policy and charge, I find that there was no harassment and this element cannot be used for any disciplinary action against Harris.

Union Activity

The Union asserts that the District was motivated to pursue the discharge of Harris because of his protected Union activity. Harris taught science since 1993 in the District without any prior discipline. He was very active in the Union, the Middleton Education Association, for many years, and served as its vice-president and chaired its bargaining team. He sent an e-mail update on the status of bargaining to the MEA membership of October 9, 2009, and someone gave a copy to the press. The Board was very upset about the content. It was October 7, 2009 when Harris opened the e-mail that Davis saw and reported to Keeler and Johnson.

The Union finds several things show the District's hostility and commitment to the discharge of Harris. One is the reaction of Johnson and Board President Lindgren to Harris' e-mail regarding the status of bargaining and their written response. One is the investigation that went over the top, enforced an unclear policy, and added internet content that Harris did not and could not view. One is that the District changed its AUP on an *ad hoc* basis from a complaint driven system to a system that retroactively enforces on a cumulative basis without progressive discipline, thus depriving Harris of progressive discipline. One is that the decision to discharge Harris was made before the investigation was complete. One is Gundrum's e-mail to Harris' successor telling him that it is not the District's intent to return Harris to the classroom at any point for any reason and the District would continue to fight that fight as far as it can be taken.

The Union also contends that anti union animus is shown by the District's attempt to negotiate a settlement of the grievance directly with individual grievants and without informing the Union or including it in those negotiations. Another factor is the vastly disparate disciplinary treatment accorded to the almost 50 teachers implicated in some way with regard to alleged violations of the AUP. About 40 of them received no discipline. About 10 received very disparate levels of discipline that are not justifiable or explainable.

The District responds by noting that Harris had a long history of accessing the most shocking of pornography. The testimony showed that it was going on longer than the District has records due to a system crash. The District says that Harris is the only employee that showed pornography to other teachers in professional meetings, and he deliberately displayed his material to an uncomfortable minority member of the team.

The District cites the Seventh Circuit decision of *Zellner v. Herrick* (see above) where Zellner argued that the district had fired him for his union activities rather than his accessing pornography at a work computer. The District points to the Court's conclusion that "[w]ithout

evidence that some other teacher violated the Policy in some similar way and received a milder sanction, Zellner's 'but for' case rests on conjecture." The District asserts that while Harris' conduct was unique, the only individuals that were even remotely similar in terms of pornography lost their jobs as well, while the next group received various levels of suspension. The District also claims that it wasn't the fact that Harris sent an e-mail about bargaining to staff that concerned the District, it was the fact that the e-mail was forwarded to the local newspaper and it was going to be published in the midst of sensitive negotiations. Both parties saw that as problematic to their negotiations and the Union joined in the request to not publish.

While the Union offered the e-mail exchange between Wilson and Gundrum as proof of anti-union hostility, the District defends Gundrum's statement that they were willing to defend their decision to discharge Harris zealously, and that does not discriminate based on union activity. The District also takes issue with the Union's claim that anti-union hostility is evident in the alleged District attempts to negotiate a settlement directly with the Grievants without informing the Union and including the Union in those negotiations. The District contends that the meeting at the high school had nothing to do with Harris. Some of the high school staff hoped to return to the classroom when their suspensions would otherwise begin and volunteered to work the days for which they would not be paid. The District said it would find union representation, but Bauman and Haus were in negotiations. The District told the teachers they did not have to meet if they wanted to wait until a Union representative was available. The District claims it did not try to negotiate directly with the Grievants, and this was one atypical circumstance, prodded by the teachers who wanted out.

Arbitrator's Discussion of Anti Union Animus

While the District is correct in noting the Harris was receiving offensive e-mails for a long time before the October 2009 incidents, the District did not know about them at that time. The timing is important because the District only became aware of this in October (Keeler was aware in October) and November of 2009, after the letter from Harris regarding the status of bargaining went out to teachers and then went out to the newspaper, an event which generated the concern on the Board's part. Thus the timing of the decision to discharge Harris – which occurred in December of 2009 – is close on the heels of Harris' protected activity and can raise an inference of anti-union animus, that is, that the decision to discharge him may have been motivated in part by his union activity.

The District also characterizes Harris' receipt of porn as "accessing" it, but this a matter of interpretation. The District also goes too far in its description of the porn, calling it the "most shocking of pornography." The investigator with experience in internet-pornography investigations in the *Minnesota* case rated pornography in four levels (see above under "Other Cases") with the more offensive levels being those that include violence or children. None of the porn in this case rose to those higher levels. While much of it is objectionable, none of it is "the most shocking of pornography" and none of it rises to the worst levels with violence or includes children. Some of it is really offensive, such as the video called "Lucky Midget," which

was probably the worst of it, with the possible exception of the e-mail images sent to Welti. But it is not the “most shocking” of pornography, as the District calls it.

The District is incorrect when it states that Harris “deliberately displayed his material to an uncomfortable minority member of the team.” First of all, he did not show Davis anything – she came back into the room on her own to get a look at it. No deliberate display there. Secondly, Davis was neither uncomfortable nor a minority member of the team. She was not uncomfortable with porn by her own conduct within the team meetings (if you draw a vagina on the blackboard, you aren’t uncomfortable looking at one on a computer). And she was not a minority member of the team. If the District means by “minority member” that she called herself the “odd man out” after their 2007 confrontation, this is just a social designation. All of the team members had the same status within the team. While Harris was once designated as a team leader, that designation had been dropped some time ago.

The *Zellner* case is very relevant in the part where the Court found that Zellner knowingly violated a school board policy, and without evidence that **some other teacher violated the policy in a similar way and received a milder sanction**, Zellner’s “but for” case rested on conjecture. In *Cedarburg*, there were no other teachers being disciplined. In this case, there are several other teachers who violated the Acceptable Use Policy **in a similar way and received milder sanctions**. Much milder sanctions. The difference between a discharge and suspensions is a huge difference in sanctions. No one got discharged except Harris, and no one got more than a 15 day suspension, with lesser suspensions down to three days and one with a letter of reprimand. The District had a whole range of options between a written reprimand and a discharge, but only in the case of Harris did it decide to go for the ultimate penalty.

What the District refuses to acknowledge is the similarity between Harris and the high school teachers who were suspended. The gap between them is not large enough to justify the big gap between a discharge and a suspension. The District says that other individuals who were remotely similar in terms of pornography lost their jobs as well. That’s not the case. The Arbitrator assumes that the District is talking about one administrator (Falcone) who was apparently forced to resign, and one substitute teacher (Dunn) who was taken off the sub list. Dunn was not an employee who could be fired by the District, although he could lose potential work opportunities by being taken off the sub list. Falcone was an administrator and as such, had no recourse to the just cause standard of a collective bargaining agreement. The high school teachers who received suspensions were engaged in similar conduct as Harris. They had received e-mails with pornography in them, had deleted them, and in a couple of cases, forwarded them.

The District also misses the point when it states that the meeting at the high school regarding a settlement of these grievances had nothing to do with Harris and thus is not determinative of anti-union animus against Harris. The real point is that the District shows some anti-union animus by its willingness to disregard the Union and bypass it in order to make a settlement with the teachers at the high school, some of whom indicated a willingness

to make such a settlement. There was no need to create a last minute meeting, which could have been scheduled when Union representatives were available. The suspensions could have been delayed in order to have a Union representative capable of dealing with grievances present. There was a lack of acknowledgement on the District's part to have a grievance settlement discussion with the Union, instead of with individual Grievants who may have wanted something done quickly with or without the Union. This action put other Grievants and the Union in a bad position. There were seven Grievants and only two signed off on settlements with the District. As further evidence of the individual bargaining going on, the District was not willing to make settlements with all of the Grievants, just certain ones. The District made an attempt to bypass the Union although it backed off when challenged on it.

A couple of other factors show some anti-union animus. In their discussions about Harris, Bauman testified that Johnson said that somebody in a MEA leadership position should know better. Also, the District made a decision to not return Harris to the classroom at any point for any reason, as noted by Gundrum's e-mail to Wilson, Harris' successor. Why would the District take such a harsh stance with Harris when it had a similar problem with other teachers? A couple of factors run against any finding of anti-union animus, such as Johnson's testimony that he found Harris to be a moderating influence on the Union bargaining team, as well as the fact that the District did not have to go looking for other people who may have violated the AUP.

However, even where there is some evidence of anti-union animus as there is in this case, an employer may still have just cause to discipline or discharge employees. While a partial motive of anti-union animus can be extremely significant in a prohibited practice case, it is not as much so in an arbitration case if the employer can still meet its burden of proving just cause. In this case, the District has just cause for discipline but not for discharge.

Other Factors

The District states that Harris accessed and shared large quantities of pornographic material during work time for several years. The volume of pornographic material received by him in just over one year is substantial to the point of being overwhelming, where he got 23 separate e-mails that had pornographic images, obscene jokes, and motion pictures with roughly 70 different pictures, five movies or moving pictures. The District continues by stating that the content is shocking, and that Harris is responsible for soliciting, viewing, responding to and forwarding or sharing this material. Harris' responses to his sister's pornographic e-mails were encouraging and soliciting. In several cases, Harris responded to the e-mails during the school day, and he shared it with other teachers while they were at school. Harris knew that e-mails with "XXX" in the subject line indicated something sexual or pornographic was attached. He acknowledged receiving e-mails with inappropriate content about 1.3 or 1.4 times a month over 9 or 10 years.

The Union objects to the way that the District counted Harris' e-mails. It did not reduce the count for the e-mails that had no indication in the subject line that there was inappropriate

content in them. It did not leave out the e-mail that had a newspaper article attached, even though Johnson would not have counted this one. It did not consider that some people don't read the subject line. The Union would bring the count down to 10 which were spread out over more than 14 months. Harris deleted all of them and never opened them during passing time and no student ever saw them. The Union points out that no recipient of e-mail has control of the number of images received and cannot tell how many images he is receiving until he opens the e-mail.

I find that the volume of Harris' e-mails – at least the ones at issue here – is not overwhelming by any means. From September 8, 2008 until November 17, 2009, there were 21 e-mails that the District deemed inappropriate, although the Union would call it 10. Out of the 23 listed by the District, 2 were discounted at hearing by Johnson, 2 were jokes with no images attached, and Harris replied with some enthusiasm to 7 of them. Harris' sister sent him dozens – maybe hundreds – of e-mails that were ok. Harris estimated that the inappropriate e-mails amounted to either 1.3 or 1.4 times a month. However, no matter what the numbers are, none of the inappropriate images should be on the District's computer system.

The Union argues that the District takes its vague AUP language to an extreme and holds teachers accountable for factors out of the control of e-mail recipients and factors that are totally subjective. For example, the level of discipline would depend on whether the e-mails received contained only text or images or jokes, whether jokes mention any ethnicity or race, how many images were received, whether the images contained top nudity, bottom nudity or total nudity, how explicit were the images, how offensive were the images to Gundrum or Johnson, and what was the recipient's reaction to the e-mails.

The Union states that the discipline imposed on the Grievants other than Harris was without just cause for many of the same reasons cited with Harris, such as the lack of distribution of the AUP, lack of explanation of the AUP, and the lack of consistency of the application of the AUP. The AUP was applied to this group when there was no complaint.

The District objects to the Union's inference that Gundrum's and Johnson's judgments were subjective and left employees to their whims. Gundrum and Johnson didn't draw conclusions that are out of step with prevailing standards and norms. They concluded that soliciting and viewing and sharing huge volumes of pornography at school, on work time, in professional meetings, merits dismissal. They concluded that an extraordinarily high volume of humor based on things like race, gender, and sexual orientation, nudity, and some amount of nudity or pornographic material merits a suspension. The District says show parents some of these images and see what their reaction would be.

I believe that Gundrum and Johnson used reasonable factors to determine discipline. I would caution, however, that judging the number of images coming in on each e-mail is probably futile and possibly arbitrary, because one e-mail could have 1 image and another 100 images. The recipient has no control over that and such counts can lead to arbitrariness. When Johnson rated all the images as PG, R, or X, I agreed with each of his ratings.

The District also notes that arbitrators consistently hold that teachers are role model for students and are held to a higher standard of conduct. Arbitrators have identified adverse publicity as a factor in cases that involve harassment and pornography on an employer's computers. In the *Minnesota DOA* case (see above), the arbitrator found it valid for the employer to consider the embarrassment to the department and the state when the workplace misconduct was exposed to public scrutiny. The District asserts it has suffered substantial adverse publicity in this case. The Grievants' conduct sullies the District's programs as a whole.

The Arbitrator agrees that teachers are supposed to be role models. That would be all the teachers. High school, middle school, elementary. The Union is correct when it says that the District rolls out the role model argument for Harris but not for the high school teachers. It has to apply equally. The fact that this case got some outside publicity is harmful to the District and the District is entitled to show the public it serves that it has dealt with the matter in a serious manner. Certainly the penalties of suspensions are serious disciplinary measures because discharges can easily follow suspensions if the conduct continues.

The District claims that Harris actively prospects for pornography by observing that he can no longer get porn from a particular individual or by expressing frustration that he is internet blocked from seeing certain material that has been sent to him, and there was nothing accidental or passive about Harris' conduct.

The Arbitrator strongly disagrees with this – one actively prospects for pornography by searching out websites, not by the mere receipt of e-mails from friends or family members. Welti and Vivoda were actively looking for porn on their laptops when they took them out of the District, thereby evading the District's filter for such materials. The fact that Harris replied to his sister's inappropriate e-mails with words such as "thanks, gotta love ya, you funny girl," etc., does not show us that he was actively seeking out porn. He did not discourage his sister, but he did not seek it out either. He replied with some enthusiasm 7 times in the two years that the server saved. Most of the time, he did not reply or mention the inappropriate image or images. Only 8 of these e-mails had "XXX" in the subject line or some word that would alert a recipient that there might be porn or inappropriate images, and one of them couldn't be opened. Harris had no recollection of which subject lines he might have noticed, and it's typical when friends send e-mails for the recipients to just open them up.

The District would like some consideration of the fact that people were using school time or contract time for personal use, and worse, inappropriate use, of its computers. The Arbitrator believes that every Grievant would have received the same discipline even if the inappropriate use occurred well outside the school day or well outside of any contracted time. The disciplinary measures did not specify this element sufficiently for the Grievants to defend it and therefore should not be considered. If the District wants more control over personal use of computers during school time, it can certainly do so in the future by tightening rules on such use of computers and notifying employees of such rules.

Disparate Treatment

Two administrators – Falcone and Gurtner – were receiving inappropriate images and jokes. Gurtner received a nondisciplinary letter of instruction about some of the jokes she received. Falcone resigned from the District.

The Union sees much disparate treatment by the chart in Union Exhibit #34 which was given to the Union and later revised slightly. For example, in the category “sent with pictures” Harris had 2 while Hayden had 2 but received no discipline. As for number of pictures, Harris had 80+ but this cannot be verified by viewing the record. Others had between 16 and 47. There was not much correlation between the number of images and the discipline administered. The 4 teachers with 40 or more images received 7, 10, 12 and 15 days of suspension which do not correlate with the number of images received. A category called “inappropriate website access” shows Harris with 1, but he never saw that website due to the District’s filter. However, it was counted against him and Gundrum downloaded images from that website from her home and put these images in evidence. The Union points this out to say that this detail shows the level of effort and unfairness shown by Gundrum and the District in dealing with Harris. Others who had counts in this category received suspensions, except Welti who received no discipline. The Union also notes that Harris received hundreds of e-mails from his sister each year and relatively few of them had inappropriate content.

The District argues that the chart (Ex.#34) was to facilitate a discussion with the Union regarding settlement. The District weighed any number of factors and never represented that every relevant consideration was captured by the chart.

The Union finds that receiving and viewing an e-mail with inappropriate content is not the same as deliberately visiting a known porn site on the internet for the purpose of viewing porn. The District glosses over this difference. When some teachers used their District computers at home to visit pornographic web sites, the District suddenly realized that its AUP was less than clear and did not explicitly forbid such a use. The Union says the District was making ad hoc decisions that helped rationalize the disparity in its disciplinary actions.

The Union points out that the District is gunning for Harris where it pays little attention to other Grievants, such as Duren and Gustafson, thereby trying to create a shock differential between Harris and the other Grievants. The e-mails, images and sender listed for Duren, Gustafson and Rogeberg are identical, yet the disciplines for these three was 12 days, 15 days, and 7 days. The District does not mention in its brief that Gustafson, Duren and Rogeberg also received hundreds of jokes. The Union notes that in Gustafson’s case, the District decided not to count 3 movies with oral sex because Gustafson had accessed those outside of the District on his laptop.

The Union asserts that on one hand, the District says there is no need to have a policy with regard to inappropriate computer use, but on the other hand, takes the position that the policy was not clear enough to hold employees accountable for the use of District computers to

access pornographic websites from home or other sites outside the District. Why does the District forgive access to internet porn on District equipment away from school due to the lack of clarity of its AUP, but not forgive the receipt of porn where there is also a lack of clarity on how to handle it.

In another example of the disparity between Grievants, the Union looks at Pertzborn and Welti. Pertzborn received 8 e-mails with off color jokes and then forwarded them to Welti. There was also an image of a penis made of snow. Receiving and sending e-mails on 8 separate occasions yielded a letter of reprimand for Pertzborn. Welti's receipt and viewing of those e-mails from Pertzborn did not enter into his e-mail count or result in discipline.

The Union asserts that the District claimed it had no choice but to discharge Harris and then questions why it did not apply its "no choice" standard to the other Grievants. Why did the District suddenly have choices galore to impose several different levels of discipline or none at all? The Union believes that the District made a quick decision to discharge Harris and never looked back or re-evaluated its decision even as it considered the conduct of the other Grievants. The Union argues that the District cannot properly assert that it had no choice but to discharge Harris when it did not apply that *per se* rule to others implicated in similar conduct. The District has never articulated where it draw the line for application of the *per se* rule other than to claim that it applies to Harris.

Both parties acknowledge that there are degrees of culpability. The Union contends that the District failed to set up reasonable and understandable criteria for making distinctions and providing a reasonable rationale for the differences in discipline. The Union asserts that the District is unreasonable and arbitrary when it bases discipline on elements over which the Grievants have no control, such as the number of images received and the subjective view of the content of the images.

As another example of disparate treatment, the Union points out that the District says that Harris should be discharged because he cannot be a role model, but it is tolerant of the very same conduct, at the very same time, regarding several other teachers. In its chart (Union Ex.#34), the District had 7 columns, such as e-mails received with pics, e-mails sent with pics, pics, movies, jokes, inappropriate website access, and other. There was no weight to be given to each element. The Harris line is exaggerated – he is listed as receiving 25 e-mails with pictures, and he received only 23 and one of them did not contain any pictures and one of them could not be opened. The Union says there were actually 18 e-mails with pics – a 33% exaggeration by the District. Harris forwarded 1 e-mail with pictures to two friends outside the District, which the District counts as 2, but when other Grievants send an inappropriate e-mail to multiple recipients, it only counts as 1. There is no explanation why Duren received 12 days of suspension and Gustafson received 15 days for nearly identical factors, including prior discipline. Another comparison – Vivoda received 5 e-mails with 17 images compared to Cramer's 5 e-mails with 45 images, and Vivoda got a 3-day suspension and Cramer got 10 days. The Union finds the most shocking examples of inconsistent treatment in 2 teachers who received no discipline. Hayden received one e-mail with images which Gundrum described as

very profane with sexual references and his e-mails included links, and he sent 2 e-mails to others and he had a movie. Welti had 1 e-mail with 30 images and 3 inappropriate website accesses. Welti acknowledged receiving other inappropriate e-mails from a friend whom he identified, but the District did not search for those e-mails.

The District states that all staff members that sent or received multiple e-mails with attachments containing inappropriate images received some level of discipline. That level took into consideration the number of e-mails, the number of images, whether the staff member tried to stop the receipt of inappropriate e-mails, and whether the staff member transmitted the inappropriate e-mails to others. The District states that an individual had to be a willing participant in the exchanges to be deemed culpable, and Welti and Hayden were not disciplined because they received only one inappropriate item at their school computer. A substantial number of recipients who did not appear to be requesting or encouraging senders to provide them with jokes or images were not disciplined. As for jokes, the District considered both content and quantity. A high volume takes up space on the District's network and distracts the sender' and recipients' attendance to their duties. The District weighed whether the person was accessing or sending inappropriate material at home or at work and whether the person had prior discipline, such as Duren and Gustafson. Also, the District looked at its policies and professional standards and expectations of professional staff.

Arbitrator's Discussion on Disparate Treatment

This is a very troubling area because of the differences in the discipline doled out to the Grievants in this case. The difference ranges from a discharge to a letter of reprimand. That's a huge difference, and too big a bridge to cross for the differences in conduct and responsibility of the Grievants.

It is not appropriate to compare Harris with Falcone and Dunn. Dunn was not an employee of the District but was a substitute teacher who had no right to continued employment. The District removed him from the substitute call list. Falcone was an administrator who was an at-will employee with no recourse to a just cause standard for termination. Neither Falcone nor Dunn was similarly situated to Harris.

The District properly took prior discipline into account in the cases of Duren and Gustafson. However, it should have taken into account the fact that Harris had no prior discipline. Duren's prior discipline presents a unique problem and will be noted separately later in this Award. In Gustafson's case, he had two rather serious disciplinary issues. One of them was old, over 10 years ago, but one was fairly recent and very serious, where he was suspended in 2007 for having alcohol on his breath at the beginning of the workday and tested positive for alcohol. In the current issue, he had a laptop that he took out of the District and accessed inappropriate websites. Gustafson received the greatest amount of discipline of all the Grievants except for Harris. He could easily have been terminated, and given the prior suspension, such a termination could be justified.

The District showed too much disparate treatment between Harris, with no prior discipline, and Gustafson, with prior discipline who went further in his conduct than Harris in that Gustafson deliberately accessed porn websites, as opposed to Harris, who received porn in the e-mail from his sister. Gustafson admitted that he replied to Dunn's inappropriate e-mails with a reply that said "ha ha" which is tantamount to the same conduct that Harris did when replying to his sister with words of thanks. Harris did not ask his sister to stop sending those e-mails until he had been suspended. Gustafson did not ask Dunn to stop sending those e-mails until he heard that e-mail content was being reviewed by the District. Again, very similar conduct.

Compare Pertzborn to Harris – both received and forwarded e-mails with inappropriate images or jokes. Harris was terminated and Pertzborn received a letter of reprimand. While Pertzborn did not have the same volume of inappropriate images that Harris did, he forwarded a picture of a truck with a snow sculpture of a penis to Welti. The act of forwarding inappropriate e-mails creates more culpability than the act of receiving them. Again, too much disparity in the amount of discipline given out by the District.

Compare Harris with Welti, who received no discipline. Welti received inappropriate e-mails from a friend and he claimed that he left a voice mail message to that friend to stop them. Welti also used his laptop computer outside of the District to access pornographic websites. Again, taking the laptop outside the District to actively put porn on the computer or to see it would be more of an offense than the passive act of receiving inappropriate e-mails. Welti's letter of instruction is placed in his personnel file. The difference between the conduct of Welti and Harris cannot be justified with a letter of instruction to one and a termination to the other. Again, too much disparate treatment.

Teacher "A" received a one-day suspension in 2006 when a student hacked into his computer and found inappropriate images saved to his network. Harris saved nothing and deleted inappropriate images twice – from his in-box and from his trash bin. The difference between a one-day suspension and a termination is so big that it cannot be justified on the record in this case.

The District stated that it did not consider it appropriate to discipline teachers for taking their laptops out of the District and looking at pornographic websites on them because its AUP was vague on this matter. The AUP was similarly vague (or silent) on what people are to do when receiving inappropriate e-mails. Yet the District finds it perfectly acceptable to determine – after the fact – that these people should have stopped it on their own **and** to discipline people for not stopping it, all the way up to termination. The District made no judgment about the people taking laptops and putting porn on the hard drives. It did not require them to make the professional judgment that this was the wrong thing to do on the District's equipment. In both cases, people did not realize that the materials stayed on the server in the case of e-mails or the hard drives in the case of the laptops. The District expected common sense to kick on regarding e-mails but not regarding laptops. It expected teachers to use professional judgment when receiving e-mails but did not expect the same professional judgment to apply to the use

of laptops being used to access pornographic websites. The District's use of the AUP to excuse some people while disciplining others – where the AUPs was vague or silent in both cases – is arbitrary and results in too much disparity in the treatment and disciplinary decisions.

I agree with the Union that when the District discharged Harris, it never looked backed. When it found that it had a problem at the high school, it still never looked back. The District could have decided to discharge everyone. Once it decided it was not going to discharge everyone, it could have and should have looked back to see if its decision regarding Harris was in line with the others or whether it was excessive.

I give the District credit for boldly examining the total scope of the problem. Such action diminishes the inference of discrimination for Harris' union activity. However, the disparity in the degrees of discipline exacerbates the excessiveness of the discharge of Harris. There were a lot of choices between a reprimand, a suspension, and a discharge. The District used its discretion to give suspensions of various lengths of 3, 7, 10, 12, and 15 days. It could have given Harris a longer suspension of even 30 days and justified it more easily than trying to justify a discharge in light of others receiving no more than 15 days of suspension.

So much disparate treatment results in this discharge being unreasonable, arbitrary, excessive, and an abuse of discretion. The decision the District made in 2009 to discharge Harris should have been reconsidered in January or February of 2010 when all of its investigation was completed. There was no reason to continue to treat Harris in isolation of the other cases. The discharge did not even take place until May of 2010.

Cramer

Cramer is treated here as a distinctively separate case from the others because he was disciplined for sending lots of jokes to others. He forwarded one e-mail with a couple of topless women to Fredrickson, and he received some pornographic images in e-mails from Dunn.

The Union states that Cramer had been teaching for the District since 1977 and had not seen the AUP and had never attended an in-service program on it. Cramer had collected and shared jokes through his career and he shared jokes with administrators. He was never disciplined or instructed to stop sending jokes. Cramer is a good humored and pleasant person who told and sent jokes freely without ever receiving a complaint, and suddenly he faces a suspension twice the length of any previously given out by the District for anything.

The Union concedes that Cramer's jokes' file was extensive, but adds that the District knew about it because Cramer even included some District administrators among his recipients. The Union says Cramer was careful to avoid offending recipients and the District never got any complaints about the jokes. Gundrum acknowledged that sending jokes during the school day is not a *per se* violation of the AUP. Cramer also received e-mails that the District asserts violated its policy from a substitute teacher who had legitimate reasons to be communicating by e-mail to teachers, including Cramer. The Union objects to the District

faulting Cramer for opening e-mails from a co-worker when there is no indication that the content is inappropriate. The Union claims that the District made no distinction between appropriate jokes and inappropriate jokes.

The District takes issue with jokes that refer to lesbians, national origin, religion, and sexual orientation, and it argues that perhaps half the jokes would violate the District's nondiscrimination policy. Cramer received 5 e-mails with 43 pornographic photographs from Dunn. The District notes that Cramer understood what was inappropriate in the classroom but did not apply the same filter to the e-mails he shared with others using the District's computer system.

The Arbitrator finds that Cramer's jokes were mostly harmless. Cramer took some care to not offend people with his jokes. If Cramer had known he was violating the AUP, he would have stopped sending them. If he had known that the e-mails could be made public, he would never have sent them. If he had been told by administrators such as Falcone or Gurtner, who received his jokes, that he was violating policy and should stop, he would have stopped. He was using a different technology – a computer – instead of the copy machine. How could the District allow this for 30 years and now suddenly jump to a 10-day suspension? Some more progressive discipline is called for in this case, because under these circumstances, a 10-day suspension is excessive.

Just as some knowledge of the AUP must be imputed to the teachers, knowledge of Cramer's conduct must be imputed to the District, which, through its administrators, had full knowledge of Cramer's conduct in sending lots of jokes. Just as the District expects teachers to use some professional judgment in dealing with e-mail content, it must expect its administrators to do the same. In light of the District's prior knowledge and Cramer's clean record of 33 years, his 10-day suspension is excessive and should be reduced to a written reprimand.

Duren

Duren's suspension is being reduced to a written reprimand because the District mistakenly enhanced his discipline due to its understanding of prior discipline. While Duren had a four-day suspension in 2007, there was a settlement agreement to reduce the four-day suspension to a one-day suspension and the District was supposed to remove all documents about this suspension from his file in the 2007-2008 school year. The documents were not removed and Gundrum did not learn about this settlement until some time later, at an unemployment compensation hearing. The District could have reduced the penalty once it knew about this but did not do so. Because the District should not have considered the prior discipline at all due to the nature of the parties' settlement, it was improper and resulted in a greater penalty than necessary. Duren's suspension is thus reduced to a written reprimand.

Summary

This Arbitrator has stated in many other cases that once it is determined that there is just cause for discipline, arbitrators should hesitate to second guess the level of discipline imposed. If arbitrators were likely to reduce penalties in arbitration, unions would take every disciplinary action to arbitration. Thus, an arbitrator should not substitute his or her judgment for that of management unless the penalty is clearly excessive, unreasonable, discriminatory, arbitrary, or management has abused its discretion.

Accordingly, some of the disciplinary actions will stand as determined by the District. But some disciplinary actions meet the elements of being excessive, discriminatory, arbitrary and an abuse of discretion. Disciplinary measures issued to Duren, Cramer and Harris are to be adjusted due to reasons noted above.

The *Cedarburg* case does not compel the District to discharge Harris or any other Grievant. The District failed to show that there was “immoral conduct” as defined by Sec. 115.31(1)(c), Wis.Stats., in that it did not meet the second prong of the statutory definition where there was no endangerment of the health, safety, welfare or education of any pupil.

Where the District made copies of the AUP available in various ways to everyone – such as posting it, putting it in teachers’ folders and mailboxes – some knowledge of the policy or policies may be imputed to the Grievants. Regardless of the policies, everyone knew that the content of the e-mails in question was inappropriate to be on District computers. I have also noted that since the District found its own policy to be too vague to discipline those who took laptops out of the District and accessed pornographic websites, it should have considered that its policy was similarly vague or silent regarding incoming e-mails. I have also found that the harassment policy did not apply.

There is some evidence of discrimination for union activity, inasmuch as the timing of the discharge came on the heels of Harris’ letter that was critical of the Board in collective bargaining and ended up in the newspaper. However, because there is some mixed evidence on this factor, as noted above, this factor alone is not dispositive. It does, however, lend some weight in the overall picture. Lending a great deal of weight is disparate treatment of similarly situated employees.

I find that the penalty of discharge in Harris’ case is excessive for several reasons. His worst offense is forwarding one inappropriate e-mail to two friends and not exercising the good judgment to discourage his sister from sending these types of e-mails to him. Additionally, Harris exercised poor judgment by showing his team members some inappropriate e-mails once or twice a year for several years, even though his team members were not offended by them. With others doing the same or similar types of things – viewing pornographic materials in various ways, receiving inappropriate e-mails, forwarding them to others, failing to discourage the senders, attempting to or in fact accessing inappropriate websites – the fact that he was discharged while others were suspended or received written

reprimands or nothing at all, the discharge cannot stand. It becomes arbitrary and an abuse of discretion to hold one person accountable with the ultimate penalty while others are not held to the same standard. It lends weight to the inference that the discharge may have been in part for protected union activity. It is true, as the District states, that progressive discipline does not have to be applied in all cases. However, that does not mean that the discharge is appropriate in this case. This case presents a unique fact. People receiving discipline were receiving e-mails with porn embedded in them. People who actually sought out porn on District computers by using them outside of the District were not disciplined for that.

No one believes that a person can be discharged for what he or she receives on the e-mail. If that were so, no one would ever accept an e-mail account from an employer. Employees should be disciplined for their **own conduct**, not what others do to them. Receiving e-mail is a passive thing and to a great extent out of one's control. That, of course, does not mean that the recipient should let it go on forever.

When these people received inappropriate and pornographic e-mails, they realized that such images were inappropriate and should not be in the District's computers. So they deleted those e-mails. Harris even deleted them twice, first from the e-mail and then from the trash bin. That's a completely reasonable thing to do. So where did they go wrong? They should never have forwarded or shared these e-mails, because by doing so, they were no longer passive recipients but active senders of porn. At some point, they needed to exercise some good judgment or common sense to discourage the senders of pornographic materials. I don't know exactly where in time that point begins, but in Harris' case, it's fair to say that somewhere in the several years of receiving these inappropriate e-mails from his sister, he needed to make attempts to stop them from coming into the District's computer. There is no magic number where one can say with certainty that after this number of e-mails, one should actively discourage the sender. However, we don't have to worry about where that line is in this case, because there were several years of e-mails coming to Harris from his sister.

The District has just cause to discipline Harris but because the penalty of discharge is excessive, arbitrary and an abuse of discretion, the penalty needs to be reduced to be comparable to other penalties for similar offenses. The discipline for Harris should be at least as harsh as the worst discipline given out to others who were similarly situated. Other than Harris, Gustafson received the most discipline with a 15-day suspension. Gustafson has prior discipline and a suspension in his record and Harris has no prior discipline in his 17 years with the District. Harris should also get a 15-day suspension. The suspensions of Duren and Cramer are to be reduced to written reprimands, in accordance with the discussion above.

AWARD

The District had just cause to discipline all Grievants. In accordance with the discussion above, modifications are made to the disciplinary actions of Andrew Harris, Gregg Cramer, and Michael Duren. All other disciplinary actions should stand as determined by the District.

The District did not have just cause to discharge Andrew Harris but did have just cause for discipline. The District may impose a fifteen (15) day unpaid suspension upon Andrew Harris and the personnel records shall be changed to reflect this instead of the discharge. The District is ordered to immediately offer Andrew Harris reinstatement to his former position or to a substantially equivalent position, and to pay to him a sum of money for all lost wages and benefits, minus any money (including unemployment) received elsewhere from the date of the unpaid suspension and subsequent discharge to the date of reinstatement.

The District shall reduce the 10-day suspension of Gregg Cramer to a written reprimand and change the personnel records to reflect this and to pay to Gregg Cramer the sum of money for lost wages for the suspension.

The District shall reduce the 12-day suspension of Michael Duren to a written reprimand and change the personnel records to reflect this and to pay to Michael Duren the sum of money for lost wages for the suspension.

The Arbitrator will hold jurisdiction until May 30, 2012, for the sole purpose of resolving any disputes that may arise regarding the scope and application of the remedy.

Dated at Elkhorn, Wisconsin, this 28th day of February , 2012.

Karen J. Mawhinney, Arbitrator