

**AMERICAN ARBITRATION ASSOCIATION**

**IN THE MATTER OF THE ARBITRATION**

**AAA NO: 01-180004-5415\**

**BETWEEN**

**Grievance #18.04**

**SHAKER HEIGHTS CITY SCHOOL  
DISTRICT**

**AND**

**SHAKER HEIGHTS TEACHER  
ASSOCIATION**

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**OPINION AND AWARD**

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**Arbitrator:**

**Bruce B. McIntosh  
Impartial Arbitrator Selected by the Parties**

**Appearances:**

**For the School District  
Eric J. Johnson  
Attorney at Law**

**For the Teacher's Association  
Susannah Muskovitz  
Attorney at Law**

**STATEMENT OF THE CASE**

The Shaker Heights Teachers Association ("Union") represents all certified/licensed classroom teachers and other professionals in the Shaker Heights School District ("District").

On October 10, 2018, the District placed Grievant on paid administrative leave pending an investigation. This investigation began when the mother of Student A ("A") a junior at the high school complaining that Grievant made some offensive comments to her daughter in a class and within ear shot of other students including criticizing A's work performance and that she was doing "D" work even though she had a "B" average in her class at the time. The mother's e-mail further provided that she found the Grievant's comments racist and bullying as well as singling out her daughter because of

her being an African American.

The parties stipulated that all prerequisites to arbitration were satisfied and the matter was properly before the Arbitrator for decision and award.

Prior to the arbitration scheduled for February 12, 2019, there were multiple issues and discussions with the parties and the Arbitrator regarding the propriety of subpoenas that had been e-mailed to the Arbitrator which he signed and returned. These resulted in having conference calls with the Arbitrator wherein the substance of these subpoenas were discussed. Although there was no formal opinions by the Arbitrator, these matters were temporarily resolved with the Arbitrator giving his preliminary thoughts but reserving his ruling when witnesses and/or exhibits would determine admissibility.

On February 11 the District notified, by e-mail, the Union that it had decided to remove the "documented verbal warning" from Grievant's file and would, therefore, not contest the grievance. The Arbitrator drove to Cleveland on February 11 and was unaware of any e-mail regarding the District's position until his arrival at his destination and the hearing the following day.

When the Arbitrator was informed that the Union demanded that the District write several letters of apology to teachers, parents and others as a demand in its grievance as a remedy. The District disagreed arguing that the Contract does not authorize equitable remedies.

After arriving at the site of the arbitration, the Arbitrator requested counsel for the District to join with him and counsel for the Union as it appeared there was no compromise that could be achieved without the parties and the Arbitrator all being available for interaction and resolution. The Arbitrator requested the parties provide opening statements which were taken and transcribed by the court reporter. Multiple references were made by the Union to a number of exhibits in its opening statement along with an agreement to provide the District with the selection from those that she brought to the arbitration prior to the date scheduled for providing the briefs to the Arbitrator. These were received and distributed to the parties on March 18, 2019. Counsel for the District, who received all of

the Union exhibits on February 12, 2019 advised that he had no objection and, whereupon, all tendered were admitted into evidence.

### **ISSUES FOR REVIEW**

- (1) Whether due process was afforded Grievant before she was placed on paid administrative leave and was advised that she was clear to return to work on November 11, 2018?
- (2) Whether or not the Collective Bargaining Agreement allows equitable remedies and letters of apology upon finding that the District violated the Collective Bargaining Agreement.
- (3) Whether or not the District's enter of a plea of *Nolo Contendere* to the grievance renders the jurisdiction of the Arbitrator removed.

### **SHAKER HEIGHT'S SCHOOL DISTRICT'S POSITION**

On October 5, the mother of *Student A*, a junior at Shaker Heights High School complained in writing to then-school principal Jonathan Kuehnle that on September 24, 2018, high school teacher Grievant had made some offensive comments to her daughter, Student A, in class and within earshot of the other students in the classroom. Student A is African American. The class was an advance placement English class in the International Baccalaureate program. Grievant's comments included questions as to Student A's capability to perform at this level and that Student A was doing "D" work, although the student had a "B" average in her class at the time. The student's mother's e-mail also alleged that she found Grievant's comments racist and bullying.

The School District began an investigation and placed Grievant on **paid** administrative leave pending investigation which was to commence on October 10, 2018. Dr. Marla Robinson, Chief of Staff, undertook the investigation. Robinson delegated to herself to investigate the racism aspect of parent's complaint and delegated to the, then Principal, Kuehnle, to focus on the bullying aspect. On October 11, Grievant and Morris were informed in writing that the investigatory interview would commence on October 12, and it did. On October 12, Robinson Kuehnle, Grievant and Union President John Morris met to begin the process. Robinson reminded the Union after that meeting that

Kuehnle's investigation into the bullying aspect was ongoing and asked Grievant to provide a statement. Grievant complied.

On October 3<sup>rd</sup>, Grievant was advised, in writing, that, "the evidence does not support a finding of discrimination on your part." The letter, nevertheless, reminded Grievant that the investigation as to the bullying allegation was on-going.

When the school was advised that Grievant would not meet without the Union attorney present, a meeting was scheduled for, and took place on November 5. Grievant was asked whether she had anything to say, to which her attorney said "no", and that Grievant preferred to submit a written statement. On November 6, the District advised Grievant that she was cleared to continue to work, effective November 7<sup>th</sup>,. She did not do so, but instead took a leave of absence. The grievance followed and arbitration was scheduled on February 12<sup>th</sup>, 2019.

On February 11, the District notified the Union and the Arbitrator that it had decided to remove the "documented verbal warning" in Grievant's file and would, therefore, not contest the grievance.

The single issue before the Arbitrator is whether or not the Labor Agreement authorizes him to order an equitable remedy – letters of apology-the Union demanded is demanding. Unless expressly allowed in the Labor Agreement equitable measures such as punitive damages and letters of apology are beyond the authority of the Arbitrator. The CBA expressly requires that arbitration awards must pertain exclusively to the provisions of the contract which does not provide for equitable remedies.

The District fully understands and admits that it did not carry its burden for Grievant's discipline and chose not put on a case in chief. However, the District admits no wrong doing because it engaged in none. It received a serious complaint from a parent, investigated that complaint, and during that investigation received voluntarily from other students similar allegations against the Grievant. Grievant had Union representation each time she was asked to meet with the District. It provided her with the evidence of parent complaints that were redacted of data that could have identified the students and parents that made them.

The Arbitrator is authorized to sustain the grievance and issue an award in favor of Grievant on the record as it now stands. What the Arbitrator is not authorized to do is order the equitable relief the Union demands.

The Union, like all Unions, does have a voice. Its voice is at the bargaining table. It cannot now be permitted to achieve a radical arbitrable expansion of Union rights which do not exist in the contract. That is exactly what the Union seeks and *only* the Arbitrator can prevent it from misusing this forum to pursue the creation of contract language which does not actually exist within the four corners of the CBA.

### **UNION'S POSITION**

Article 1, Section 1.01 of Article XII of the CBA contains the grievance procedure which culminates in final and binding arbitration. Under the CBA, the definition of the grievance is very broad. It is defined as a claim initiated by a teacher or the Association that there has been a violation, interpretation, a misapplication of the policies, master contract, (i.e. the CBA), salaries, hours, employment conditions, and/or disciplinary actions under such policies or rules of the Board and it may be processed as a grievance.

This case is broader than the reprimand issued against Grievant, a teacher. The grievance also alleges violations of policies, employment conditions, and disciplinary action under such policy and rules of the Board. The grievance alleges: (1) the discipline issued against Grievant was without just cause and deprived Grievant of her due process rights; (2) Grievant has been improperly threatened with further discipline up to and including termination; (3) the Administration has determined Grievant's authority as a teacher and has violated her academic freedom to teach and assess students appropriately; (4) the administration has failed to communicate to Grievant openly and honestly about her professional actions; (5) the investigation itself violated District policy, provisions of the CBA and Grievant's due process rights; and (6) placing Grievant on administrative leave, cutting off her district e-mail, instructing her not to have any contact with district staff, students, or parents under the threat

that she could be charged with insubordination, prevented her from defending herself against the improper allegations.

The District issued discipline without informing Grievant of the allegations against her or providing her an opportunity to defend herself. The District made public disparaging statements about Grievant while prohibiting her from speaking under the threat that she would be terminated for insubordination. Then finally, when Grievant was going to be able to speak fully, the District abruptly and unilaterally cut her off once again by refusing to participate in the arbitration.

On September 17, 2018, seventeen school days into the school year, Grievant sent a message to Student A's guidance counselor that A has been snoozing in class on more than one occasion and not really doing her work thoroughly. Grievant advised the guidance counselor that it is a shame since A had a lot to offer. A's mom never called Grievant back.

On October 9, 2018, Dr. Marla Robinson, Chief of Staff, interviewed Student A. In the morning on October 10, 2018, Grievant was directed to meet with Dr. Cavucci at the Administration Building and advised her to bring the Union President to the meeting. At that time, Grievant had no idea that A's mom had filed a complaint. When Grievant entered Dr. Cavucci's office, she was handed the letter stating the District was placing her on administrative leave "until further notice pending an investigation." Additionally, she was told that she was prohibited from entering any District facility or grounds without prior approval nor was she allowed to have contact with any District staff, students, parents regarding the investigation. The District cut off her access to her District e-mail and placed a message on it that directed persons to contact the High School for assistance. She was required to contact Dr. Cavucci once each morning for "accountability purposes" and to be available during school days.

In addition, Grievant lives in the school district and is a prominent member of the community. She has been active in many community functions and in contact with many of her students, parents and former students on a regular basis. When she was placed on administrative leave, all this was

abruptly cut off.

Rumors at the High School were rampant. On October 19, 2018, Mr. Kuehnle, former principal, sent an e-mail message to the entire High School staff, officially informing them that Grievant had been placed on administrative leave. He, likewise, sent a comparable e-mail to parents. The same day, Shakerite, an award winning student newspaper at the High School, published a story reporting that Grievant had been placed on administrative leave.

On October 24, 2018, Dr. Marla Robinson, Chief of Staff, sent Grievant a letter stating that the investigation into discrimination had been concluded and that the evidence did not support a finding of discriminatory action on her part. The same day, a letter to A's mom with the same information and assured her that the District was still conducting the investigation of bullying, harassment, and intimidation of her daughter. Dr. Robinson concluded her discrimination investigation on October 19, 2018 which was three days before she received the written statement from Grievant.

Under the CBA, the District may not suspend a teacher. If actions warrant discipline, the only remedies available to the administration are a reprimand or termination. The threat of termination for "any subsequent violations" in Shaker Heights is very real.

A community meeting took place on the evening of November 8, 2018. Over nine hundred students, teachers, and community members filled the High School auditorium for the meeting. During the meeting, a parent asked for the definition of "hazing and bullying. After the policy was read, A stood up, self-identified herself as the subject of the investigation, and said this had nothing to do with race.

The next day, on November 9, 2018, the Board of Education issued a public statement recognizing that the community meeting had not gone well, and pledging to take the pieces from last night and work with our community to put them together based on truly listening to the many voices that we all heard.

The Board then promised to, among other things, gather statements from witnesses and other

parties ensuring any absence of interruptions are limited to time and scope. Had the arbitration moved forward, the Union would have been able to establish that none of the District's promises were kept. In fact, by refusing to participate in the arbitration hearing, the District effectively refused to listen Grievant's voice.

On December 17, 2018, Mr. Stevens issued a public statement that was sent to thousands of community members stating that there might be new stories involving "complaints by several of our students involving a High School teacher." This clearly shows that, as late as mid-December 2018, the District was still actively smearing Grievant's reputation.

The District's removal of the discipline from Grievant's personnel file is insufficient and does not remedy the grievance. She must be exonerated of all charges of misconduct. The District removal of discipline from a personnel file does not change the fact that the discipline is of public record under the Capital Records Act, O.R.C. 149.43(A)(1).

The District had no problem sending out a mass e-mail announcing its attempt to unilaterally cancel the arbitration hearing, it certainly can send out another mass e-mail that states Grievant was exonerated of all charges. Additionally, the District sent letters to the parents of students denominated as "A-F" informing them that Grievant violated the Board's bullying/hazing policy. These six students/families must be informed that Grievant did not violate the Board's bullying/hazing policy and that Grievant was exonerated of all charges against her.

The Union respectfully requests that the grievance be sustained and that the Arbitrator affirmatively find that Grievant did violate Board policies, that her discipline be rescinded and that a letter be attached to the reprimand that stated it has been rescinded; that any documents related to discipline be removed from Grievant's personnel file.

#### **OPINION AND AWARD**

On October 5, 2018 the then school principal, Kuehnle, received a letter from the mother of



*Student "A"* that Grievant had made offensive comments to her daughter in the presence of other students including an open statement that she was doing "D" work when in fact her average was "B" at that time.

Grievant was placed on paid administrative leave and Dr. Marla Robinson, Chief of Staff, undertook the investigation. She determined that she would investigate the racism aspect of the parent's complaint and that, now former principal, Kuehnle, would focus on the bullying aspect.

On October 11, Grievant was notified that an investigatory interview would commence on October 12<sup>th</sup>, and it did. Present were Robinson, Kuehnle, Grievant and Union President, John Morris. Robinson reminded the Union, that after the meeting, Kuehnle's investigation of the bullying aspect was ongoing and asked Grievant to provide a statement.

Instead, Grievant provided a letter to Dr. Marla Robinson on October 22, 2018. She began her letter by requesting Kuehnle provide a statement detrailling the harassment/bullying allegations, she would gladly provide a statement to him. She advised, at this time, she had not been asked nor was she clear as to exactly what those allegations entailed. She continued that she does not believe she has done anything that would constitute discrimination against any student. She described a racially charged incident three years before and how she was an important clog in investigating and resolving that issue with the expectation that whatever situation did exist would be improved.

During the District's investigation Grievant was asked whether there were other students who did not have their assignments completed. Grievant responded in the affirmative and provided the names of these students together with their positive results from her approach. She identified in her comments that a similar approach was used for issues that included an African American student who, thereafter, earned an "A" in his second semester. Her statement discussed other students similarly challenged , including African Americans, whites and one Mexican. One of the African Americans wrote that, because of her that he "buckled down and you acknowledged the change, I smiled for the

rest of the day and was determined to keep up the good work even more.” She emphasized that the timing of her discipline was a critical time in the school year when students were in the process of preparing applications for college. In addition to teaching Juniors, she also taught AP Language and Composition for many of the students who were applying for early decisions at colleges. Not only did she state that there was no reason to keep her out of the classroom and by doing so would have a detrimental effect on the seniors. She pointed out it made no sense to remove her from the school when the District and she could have used the time for restorative practices to clear up any misunderstanding and to engage in substantive and productive discussions about how to handle the conflict. Grievant concluded her statement with her hope that “I can return to school.”

On November 6, 2018, Dr. Breeden sent a letter to Grievant advising her that based on the evidence gathered by the District pursuant to its investigation, “*I have concluded that you have violated Board Policy prohibiting hazing and bullying.*” She further advised that her letter shall serve as a “documented verbal reprimand” and that any subsequent violation will result in further disciplinary action including termination of her employment contract.

Article X of the CBA provides that when a teacher is disciplined or reprimanded, she “will be” furnished with the information forming the basis for the disciplinary action. Grievant repeatedly requested to be provided with what constituted the alleged “hazing and bullying” which was ignored except for non-specific platitudes.

The Collective Bargaining Agreement does not include suspension of a teacher as authorized discipline. When discipline is warranted, the only remedies available to the District are reprimand or termination. Having threatened her with termination for any “subsequent violations”, becomes even more than a mere threat. The reprimand continued that

- “1. You are directed to treat students in a professional manner in any all contact you may have with them, i.e. verbal, written or otherwise.
2. You are directed to participate in restorative practices with

identified students and/or parents of students to learn how to best move forward with productive relationships following the situation; To this end, you will report to the Administration Building on November 7, 2018 at 11:00 A.M. You will meet with students and/or parents who wish to participate in this session in a facilitated meeting during your contractual work day.

3. Please be aware that Administration will take efforts including classroom observation to ensure your continued compliance with Board Policies.”

Dr. Breeden concluded that she looked forward to seeing Grievant on November 7, 2018 at 11:00 A.M. following her meeting with Dr. Cavucci at 10:00 A.M. on the same morning. Not only was this salutation not something to which Grievant would look forward, the Grievant's leave was lifted the day before the proposed meeting yet she still had not returned to the classroom.

On November 7, 2018, Dr. Breeden wrote letters to the parents of six children which began with she was “writing to finalize our actions with regard to your child” [the first name of each which was included] even before the District had concluded its investigation and evaluation for discipline. These parents were advised that “on the evidence gathered by the District pursuant to its investigation, I have concluded the Board Policy JFCF, Hazing and Bullying (Harassment, Intimidation and Dating Violence) was violated.” She continued that the District would continue to support their children to determine the best way to move forward, “including the opportunity to participate in restorative practices.” It was also announced that a new substitute principal would be involved “ensuring a positive learning environment for your child and ensuring there are no recurrences of violations” of the School Board Policy.

A community Meeting (“Meeting”) was scheduled in the large auditorium on November 8, 2018, in which over 900 students, teachers and community members filled the auditorium. Dr. Wilkins began his comments with the introduction of interim Superintendent, Dr. Glasner, as the new principal. Each of them expressed the need of all to work together, without providing any specifics. A transcript of the Meeting was made and editorizlized. On the second page of the 24 page “transcript”, Scott

Stephens advised all in attendance that there were index cards and “little golf” pencils and envelopes at the end of each aisle. He instructed the audience that they were to pass these down to their friends and colleagues and when they were done be returned to the center or to either side where they would be picked up and brought to Stephens. Immediately, a woman identified as walking down the left center aisle was heard to say “NO”! NO!”. When asked to find a seat she responded “you will not sanitize our questions!” When the monitor responded that they were not going to sanitize the questions but would be reading them. another responded and was transcribed “NO! NO! NO! NO! NO! NO! . . . No paper! No, we want to ask questions directly.”

Although the invitation to the “meeting” did not mention Grievant specifically, the transcript made it abundantly clear that those in attendance had Grievant in their mind and, when it was announced that their goal was to find a resolution to the matter, a groundswell expressed that they wanted Grievant back in the classroom teaching their students identifying her as “. . . a tremendous talent and she's a benefit to our students.” The auditorium resounded with applause.

Discussions in the meeting only deviated from Grievant when a written question was read about a coach who had been dismissed because of criminal conduct. This, of course, had nothing to do with Grievant but, by permitting this deviation with a loud and lengthy discussion soiled Grievant by something with which she had absolutely no involvement. It is particularly inappropriate to consider the discussion of this criminal conduct when it could carry with it a thought that Grievant was guilty as charged particularly before the District had concluded its investigation and evaluation for discipline.

In one of the two October letters Dr. Cavucci sent to Grievant, she not only placed her on administrative leave, she added that she was not allowed on school premises, could not have any contact with students, parents, teachers and, additionally, her District e-mail was closed isolating her from any and all involvement with the school and its Administration. With this undeterminable isolation, she found it necessary to apply for and did receive sick benefits as a source of income.

After a discussion with both counsel, it was agreed that each would present "opening statements" in the presence of the court reporter with the court reporter providing transcripts to which Union's counsel would select exhibits in support of the Grievant's position. Counsel for the District advised that he waived the right to cross examine the testimony contained in any of the Affidavits, and that the discipline be rescinded and would be removed from her file and not be used in any future action. With these stipulations and the authority vested in the Arbitrator by the Collective Bargaining Agreement, the inescapable conclusion is reached that the discipline was issued without just cause.

The Union advanced that, as an additional condition of settlement, the Arbitrator order the District to write letters of apology to the six students/families that Grievant was exonerated of all charges against her. Counsel for the District responded that equitable remedies are expressly prohibited by the CBA and significant arbitral authority is replete with such a demand as the Union is seeking as an extra-contractual remedy for which this Arbitrator has no authority to award.

### **AWARD**

The grievance is sustained.

The Arbitrator further finds and/or orders that Grievant:

- Shall receive all back pay and benefits to which she would have been entitled beginning with the date of her discipline.
- Did not violate Board Policies JFCF and JFCF-R and KLD.
- The Grievant's personnel file shall not be used in any transfer or assignment or promotion nor shall she be placed in jeopardy or be the subject to reprisal or discipline for having filed a grievance.
- The Union's demand that the District provide any letters of apology is denied.

- As counsel for the District advised, it will bear any costs for the arbitration and does not expect the Union to pay for half of it as provided in Article 12.04 of the CBA.

Dated: \_\_\_\_\_ /s/ Bruce B. McIntosh  
Bruce B. McIntosh