

# Recent Arbitrations and Case Law Governing Teacher Dismissals in Massachusetts<sup>1/</sup>

## MASPA

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<sup>1/</sup>These materials are for instructional purposes only and are not intended to constitute legal advice. If you are in need of a legal opinion on the subject matter covered herein, you should contact local school counsel.



1 **I. THE ARBITRATOR'S AUTHORITY UNDER M.G.L. CH. 71, SECTION 42**

2  
3 The following provisions under Section 42 have been cited as setting  
4 parameters for the authority of arbitrators in reviewing the dismissal of a teacher  
5 with professional teacher status:

6  
7 *A teacher with professional teacher status, pursuant to section forty-one, shall not*  
8 *be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming*  
9 *a teacher, insubordination or failure on the part of the teacher to satisfy teacher*  
10 *performance standards developed pursuant to section thirty-eight of this chapter*  
11 *or other just cause.*

12  
13 *At the arbitral hearing, the teacher and the school district may be represented by*  
14 *an attorney or other representative, present evidence, and call witnesses and the*  
15 *school district shall have the burden of proof. In determining whether the district*  
16 *has proven grounds for dismissal consistent with this section, the arbitrator shall*  
17 *consider the best interests of the pupils in the district and the need for elevation*  
18 *of performance standards. . .*

19  
20 *Upon a finding that the dismissal was improper under the standards set forth in this*  
21 *section, the arbitrator may award back pay, benefits, reinstatement, and any other*  
22 *appropriate non-financial relief or any combination thereof. . .*

23  
24 *With the exception of other remedies provided by statute, the remedies provided*  
25 *hereunder shall be the exclusive remedies available to teachers for wrongful*  
26 *termination.*

27  
28 (See Appendix for full text of Section 42.)

29  
30 **II. JUDICIAL DECISIONS ON ARBITRAL AUTHORITY<sup>1/</sup>**

31  
32 *School Committee of Beverly v. Geller, 435 Mass. 223 (2001)*

33 The Supreme Judicial Court vacated a judgment of the Superior Court  
34 upholding an arbitration award. The arbitrator had ordered reinstatement of a  
35 teacher with PTS whom the district had dismissed for conduct unbecoming a  
36 teacher, based on his physical and verbal abuse of students on three separate  
37 occasions (i.e., as described in Justice Ireland's opinion, the teacher "forcibly  
38 pushed, shoved, jabbed, dragged, knocked down or slammed into locker three  
39 different sixth grade students"). The arbitrator found no just cause for the  
40 dismissal after conducting an analysis weighing the teacher's 20-plus years of good

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<sup>1/</sup> Case summaries included herein are based primarily on those included in the Massachusetts Department of Education and Secondary Education (DESE) website, with additional information drawn from judicial and arbitral decisions and related commentary.



1 performance against the incidents of misconduct. The school district appealed to  
2 Superior Court, which upheld the arbitration award. The Appeals Court reversed  
3 that judgment, concluding that it violated public policy. The SJC in effect  
4 overturned the Arbitrator's decision, thus upholding the teachers dismissal through  
5 a plurality opinion as follows:

6 Three justices focused on limitations on the arbitrator's authority under  
7 Section 42, concluding that if an arbitrator finds that one of the grounds  
8 enumerated by Section 42 for dismissal (in this case conduct unbecoming)  
9 has been proved, the arbitrator may not substitute his own judgment of  
10 what the penalty should be for the judgment of the school district. This  
11 opinion noted the arbitrator's use of the terms "totally inappropriate,"  
12 "unacceptable" and "conduct which cannot be condoned" indicated serious  
13 misconduct that fit within the realm of "conduct unbecoming." The opinion  
14 also noted that "this is not a case of an arbitrator finding a teacher to have  
15 engaged in minor misconduct that, however nominal, fit within a category on  
16 which dismissal could be based." (Cordy, Marshall, Sosman)

17 Justice Ireland, concurring in the result and with whom Justice Cordy  
18 joined, did not address the arbitrator's authority under Section 42 but  
19 instead reasoned that the arbitrator's award should be vacated, based on  
20 the Commonwealth's well-defined public policy protecting students from  
21 physical abuse. (Ireland, Cordy)

22 Three justices dissented, finding that the arbitrator did not exceed the  
23 scope of his authority under Section 42 by reinstating the teacher. Rather,  
24 the dissent argued that even when serious misconduct had been established,  
25 the statute authorizes the arbitrator to then review the penalty imposed in  
26 light of the circumstances surrounding the case (i.e., the best interest of  
27 the pupils in the district and the need for the elevation of performance  
28 standards). The dissent also rejected vacating the award based upon public  
29 policy, citing precedent allowing for the application of this doctrine only  
30 where the employee conduct would have required dismissal. Under Section  
31 42, the legislature may have permitted dismissal for the conduct at issue,  
32 but did not mandate it. Thus, according to the dissent, traditional  
33 deference must be given to the arbitrator's decision. (Cowin, Greany, and  
34 Spina)



1 *Atwater v. Commissioner of Education, Essex Superior Court Civil Action No. 06-*  
2 *01454A (2010), affirmed by the Supreme Judicial Court in Atwater v.*  
3 *Commissioner of Education, 460 Mass. 844 (2011)*

4 A teacher with professional teacher status was dismissed for conduct  
5 unbecoming a teacher (i.e., inappropriately touching a student, including reaching  
6 down her shirt and touching her buttocks in a sexual manner as well as hugging the  
7 student in an attempt to restrain her from leaving). He took the matter to  
8 arbitration, per state statute (G.L. c. 71, § 42), and an arbitrator upheld the  
9 dismissal, finding that the conduct constitutes a serious breach of a teacher's  
10 responsibility to his students. In view of the "serious nature" of Atwater's  
11 misconduct, the arbitrator concluded that dismissal was not an excessive penalty.  
12 She went on to state: "Neither do I find that it would be in the best interests of  
13 the students to have him return to the district as a teacher."  
14

15 The teacher then appealed to Superior Court, alleging that Section 42  
16 violates the Massachusetts Constitution and also that the arbitrator had acted  
17 beyond her authority, engaged in misconduct, and exhibited bias against him. The  
18 Court found that the creation of an arbitration system for review of termination  
19 decisions was neither an improper delegation in violation of the separation of  
20 powers requirement of Article 30 of the Massachusetts Declaration of Rights, nor  
21 an illegal infringement on the free access to courts requirement of Article 11,  
22 because: (a) the arbitration does not infringe upon the core functions of the  
23 judiciary, (b) the right being arbitrated was created under statute and not the  
24 common law, and (c) the courts maintain meaningful judicial review over the  
25 arbitrator's decision. The court further held that the arbitrator did not misapply  
26 the statute or engage in misconduct.  
27

28 *School Committee of Chicopee v. Chicopee Education Association, Mass. Appeals*  
29 *Court (2011)*

30 The Appeals Court vacated a Superior Court order upholding an arbitration  
31 award, and ordered the underlying arbitration award vacated. A dismissed teacher  
32 with professional teacher status had grieved his dismissal under the terms of a  
33 collective bargaining agreement and an arbitration hearing was held under the  
34 terms of the contract. The arbitrator framed the issue as whether the school  
35 committee had just cause to discharge the teacher, and found that while just cause  
36 for discipline existed (sick leave violation and insubordination), "in line with  
37 principles of progressive discipline," the punishment imposed was not commensurate  
38 with the violations committed. The arbitrator ordered the teacher reinstated.

39 The Appeals Court noted that in *Beverly v. Geller*, 435 Mass. 223 (2001), a  
40 majority of the SJC justices (three on Justice Cordy's concurrence and three on  
41 Justice Cowin's dissent) had observed that G.L. c. 71 sec. 42 "serves as the source



1 and limit of an arbitrator's authority in teacher dismissal cases, regardless of the  
2 provisions of a collective bargaining agreement." The court stated that "Despite  
3 the [Supreme Judicial] court's plurality opinion, Geller holds that in the context of  
4 teacher dismissal, an arbitrator may not 'ignore the limits imposed by statute,' and  
5 craft a decision grounded on the authority provided by a collective bargaining  
6 agreement." The Appeals Court found that the arbitrator in the Chicopee matter  
7 crafted his decision and award entirely from the assumption that the parties'  
8 collective bargaining agreement controlled and without reference to G.L. c. 71, sec.  
9 42, the best interests of the pupils in the district, or the need for the elevation of  
10 performance standards. As the arbitrator never even attempted to apply section  
11 42 review to the case, "he necessarily exceeded the authority provided to him  
12 under the statute."

13 *Lexington v. Mark Zagaeski (Middlesex Superior Court decision, issued May 10,*  
14 *2013, currently on direct appellate review by the Supreme Judicial Court, oral*  
15 *arguments held on March 4, 2014)*

16 This case involves a physics teacher assigned to teach class of students who  
17 were at risk academically and tended to be special education students. On two  
18 separate occasions, several days apart and in front of other students, he stated to  
19 a 17 year old female student that he would give her a better physics grade in his  
20 class in return for sexual favors. Even though the teacher apparently intended this  
21 statement to be a joke, the student was offended and complained to her guidance  
22 counselor, who alerted the principal. Following appropriate procedures under  
23 Section 42, the Superintendent dismissed the teacher, who sought arbitration.  
24 The arbitrator concluded that he agreed with the superintendent's conclusion and  
25 that the teacher's conduct was "at least nominally conduct unbecoming a teacher,"  
26 that it created a hostile or offensive educational environment for the Student, and  
27 violated the District's Policy Prohibiting Sexual Harassment. Despite these  
28 findings, the Arbitrator ordered the teacher's reinstatement with full back pay  
29 (with the exception of two days for imposed a suspension) on the grounds that the  
30 teacher's misconduct was minor and that his dismissal was not in the best interest  
31 of the students (apparently in reference to his prior positive teaching record).  
32 Lexington appealed the matter to Superior Court, which upheld the Arbitrator's  
33 decision. Judgment of the superior court is now on direct appellate review before  
34 the Supreme Judicial Court.

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1 **III. RECENT EXAMPLES OF ARBITRATION DECISIONS UNDER SECTIONS**  
2 **42 AND 42D**

3  
4 **A. FAILURE TO MEET PERFORMANCE STANDARDS**

5  
6 *Boston Public Schools and O.P. (AAA# 11-390-01495-10, Arbitrator Philip Dunn,*  
7 *February 16, 2012).* Upheld dismissal of a teacher. [37 pages]

8 The school district dismissed the teacher based on failure to meet  
9 performance standards. The teacher had 12 years of service in Boston and a  
10 number of years of service teaching in other school districts as well as in collegiate  
11 environments.

12  
13 The arbitrator found that the district conducted four interim evaluations  
14 over two school years fairly, consistently, and in good faith, and that there were  
15 ample, reasonable, objective, non-discriminatory bases for the three evaluators'  
16 judgment that the teacher was continuing to fail to meet core performance  
17 standards. The decision highlights the following:

18  
19 Beginning in the fall of 2008, evaluators engaged in a series of observations  
20 and created reports with detailed observation notes, thus, overcoming  
21 concerns that evaluators had not retained their own personal memory aids  
22 for the file.

23  
24 Evaluation reports included specific deficits and prescriptions for improving  
25 performance (e.g., did not clearly define learning objectives, did not use  
26 grading rubrics on writing assignments, resulting in students not knowing  
27 what elements the student had to include in a work assignment in order to  
28 meet objectives and prescriptions for curing such deficits).

29  
30 The fact that there was input from three different evaluators, along with  
31 the arbitrator's judgment in distinguishing between the credibility of the  
32 evaluators and the teacher, defeated the teacher's claims of bias.

33  
34 The evaluators followed the CBA's requirements for documenting  
35 observations. (Note the differences in types of documentation required for  
36 observations and walk-throughs under DESE model evaluation language.)

37  
38 The teacher received a letter from the Superintendent warning her that she  
39 might be subject to dismissal if her performance did not improve, followed  
40 by additional classroom observations that reflected many of the concerns  
41 previously noted. The notice of intent to dismiss to the teacher followed, on  
42 April 16, 2010.



1 In moving to the merits of the claim the arbitrator reviewed a series of  
2 previous arbitration awards involving the discharge of teachers in Boston and the  
3 holding in School Committee of Beverly v. Geller, 435 Mass. 223 (2001), noting that  
4 the Geller decision limits an arbitrator's discretion by preventing an arbitrator  
5 from substituting his or her judgment for that of the administration if the facts as  
6 alleged by the administration are established. Based on those documented  
7 performance deficiencies established by Boston, the arbitrator upheld the  
8 discharge.

9  
10 *Beverly Public Schools and C.A. (AAA# 1139-2284-09, Arbitrator Michael Stutz,*  
11 *September 21, 2011). Upheld dismissal of an elementary school nurse. [22 pages]*

12 This discharge was based upon incompetence and failure to meet  
13 performance standards. The Arbitrator found the nurse's "performance to have  
14 been incompetent [providing a student with the wrong medicine; failing to provide  
15 student allergy information to teachers; failing to conduct and record student  
16 height, weight, vision and hearing checks], and considering that her errors and  
17 omissions endangered student welfare, the statute [G.L. c. 71, § 42] effectively  
18 requires her termination."

19  
20 **B. CONDUCT RELATING TO STUDENTS WITHIN THE SCHOOL**  
21 **SETTING**

22  
23 *Plymouth Public Schools (AAA# 11-390-01726-1209, Arbitrator Philip Dunn, March*  
24 *13, 2013). Upheld dismissal of a teacher. [31 pages]*

25 The school district dismissed a veteran (27 year) physical education teacher  
26 with no prior history of discipline, based on an incident where the teacher, while  
27 supervising intramurals after school, grabbed a misbehaving middle school student  
28 and shoved him through a door, without injury to the student.

29  
30 In his defense, the teacher asserted that he merely grasped the student by  
31 the arm and guided him out the door and that he felt that he and other students  
32 were at risk of being attacked by the student. However, the arbitrator credited  
33 the eyewitness accounts of three students and a custodian, finding that the  
34 student had merely failed to comply with the rules of the activity at hand. When  
35 the grievant directed the student to sit out the remainder of the activity, the  
36 student became verbally abusive toward the grievant. When the grievant ordered  
37 the student to leave the gym, the student refused, leading the grievant to push the  
38 student out of the gym door with his hands on the student's shoulders and chest.  
39 The force of the push propelled the student backwards out of the double gym  
40 doors. The arbitrator found that this contact involved aggressive force, rather  
41 than mere physical escort and that the student had posed no threat of physical  
42 harm. Further the arbitrator noted that if the teacher believed removal of the



1 student was necessary, he could have asked the custodian to supervise the students  
2 while he left the gym momentarily to get assistance.

3  
4 Notably, the arbitrator did not find the decision of the Department of  
5 Children and Families (DCF) to screen out a report of possible abuse or of a court  
6 magistrate not to issue criminal charges relevant to his findings.

7  
8 Having found that the district established that the misconduct had taken  
9 place, the arbitrator noted that if the misconduct is serious in nature, the  
10 arbitrator must uphold the termination, unless he or she makes specific findings  
11 that the best interests of pupils or need for elevation of performance standards  
12 warrant a lesser form of discipline. He found the misconduct was serious in nature,  
13 especially in light of the district's clear and firm policy against using force against  
14 students. (See also, DESE regulations on restraint requiring that all districts have  
15 such policies.) He found no facts to warrant lesser discipline, even though the  
16 grievant had no prior record of discipline in his 27 year teaching career.

17  
18 *Lawrence Public Schools and V.R. (AAA# 11-390-0632-11, Arbitrator Parker*  
19 *Denaco, March 9, 2012).* Upheld dismissal of a special education teacher. [27  
20 pages]

21 A special education teacher with 11 years of service in Springfield was  
22 discharged for conduct unbecoming a teacher and child abandonment after leaving a  
23 second grade student with autism alone in a classroom while she accompanied two  
24 other students to the bathroom.

25  
26 The arbitrator noted that the school principal had previously reviewed with  
27 all staff provisions of the handbook which stated that "no student should be left  
28 unattended for any reason at any time." The school also had additional precautions  
29 concerning supervision of special education students including a Behavior Emergency  
30 Response Team (BEST) which provides assistance in matters involving safety,  
31 illness, sudden injuries or violence of students.

32  
33 The classroom had five severely disabled students, served by three  
34 teachers. However, on this occasion the teacher was left in the classroom with  
35 three of the students, two of them insisting they had to go to the bathroom. When  
36 the third student, identified as being a very autistic, moody, repetitive and strong  
37 willed second grader, refused to accompany the teacher and the other two children  
38 to the bathroom, the teacher elected to take the two students, leaving one alone.  
39 When another teacher assigned to the class returned approximately 1 minute and  
40 45 seconds later, she found the student alone, locked in the room, and she reported  
41 the matter to the principal.



1 Administrators noted that teacher had other options, including calling the  
2 office or an adjacent classroom for assistance, calling the Behavior Response Team,  
3 or advising the students that they could go to the bathroom as soon as the other  
4 teacher returned. They also distinguished this from a circumstance in which a  
5 classroom teacher had been suspended for five days after leaving her general  
6 education classroom unattended due to a family emergency.

7  
8 The arbitrator noted the limitation on his authority imposed by School  
9 District of Beverly v. Geller. In upholding the dismissal, the arbitrator noted the  
10 handbook provisions and stressed that this experienced teacher should have known  
11 how to interpret and manage behaviors of special education students and should  
12 have considered the implications of leaving a substantially disabled student alone,  
13 and that she "put a child at risk without exhausting the procedures in place for  
14 such types of assistance at the school in question."

15  
16 *Weymouth Public Schools and P.O. (AAA# 11-390-00127-12, Arbitrator James S.*  
17 *Cooper, April 30, 2012)* Upheld suspension of a kindergarten teacher, but  
18 overturned dismissal of a kindergarten teacher. [22 pages]

19 A kindergarten teacher received a 1½ day suspension for leaving a student  
20 alone in a bathroom while the teacher took the rest of the class on a nature walk  
21 (challenged and eventually upheld by the arbitrator). Soon after the suspension the  
22 teacher sent two kindergarten students to an empty classroom to retrieve a piece  
23 of equipment. The district then dismissed her for insubordination and conduct  
24 unbecoming a teacher. The arbitrator overturned the dismissal, rejecting the  
25 district's arguments that: (1) school policy clearly prohibited the use of the  
26 "buddy-system" in sending students to an empty classroom; and (2) the teacher's  
27 actions in allowing students to be without adult supervision immediately after  
28 receiving a suspension for leaving a student alone constituted insubordination. The  
29 arbitrator ordered the teacher reinstated.

30  
31 *Springfield Public Schools and C.G. (AAA# 1139-1437-11, Arbitrator Susan R.*  
32 *Brown, June 26, 2012).* Upheld dismissal of a teacher. [25 pages]

33 An eight year veteran teacher denied a sixth grade student's request to use  
34 the bathroom and left the student alone in a classroom at the end of the day. The  
35 PTS teacher transferred to a new school after the start of the school year. Within  
36 the teacher's first three months of employment at the school, the principal met  
37 with him twice in response to student complaints about his treatment of students.

38  
39 The teacher had a classroom policy of not allowing students to use the  
40 bathroom during the last class of the day. The teacher justified this policy as  
41 consistent with the school's rules requiring that students be supervised at all times  
42 and also explained that he was "offended" by student requests to use the bathroom



1 during the final period of the day, because they could easily use the bathroom  
2 during lunch.

3  
4 On the particular day at issue, the teacher denied a student's request to  
5 use the bathroom and gave the student a time-out for repeating her request. When  
6 the teacher and the rest of the students left the class at the end of the day, he  
7 instructed the sixth-grade student to remain. Left alone in the classroom for about  
8 30 minutes, the student urinated on herself. The teacher argued before the  
9 principal that the student had engaged in this conduct on purpose, citing the  
10 student's discipline history, claiming "hell hath no fury like that of a scorned  
11 woman." A Section 51A report was substantiated by DCF.

12  
13 In reviewing the dismissal, the arbitrator concluded that the teacher was  
14 unduly harsh in the application of his bathroom rules for 11 and 12 year olds and  
15 that he had been on notice of the prohibition against leaving students unattended in  
16 the classroom. In considering the seriousness of the conduct, the arbitrator  
17 described that his misconduct resulted in an extremely humiliating situation for the  
18 student, in addition to her being left unsupervised for up to 30 minutes. While the  
19 arbitrator noted that he had been distracted at the end of the school day by  
20 receiving a call about his gravely ill brother, she also noted that he appeared to  
21 have no misgivings about his behavior and instead maintained throughout the  
22 arbitration that his rule was appropriate and that everyone was lying about him.

23  
24 *Fall River Public Schools and L.S. (AAA# 11-390-02252-09, Arbitrator James S.*  
25 *Cooper, September 19, 2011). Upheld dismissal of a teacher. [11 pages]*

26 This case was based on incompetence, conduct unbecoming a teacher, and  
27 incapacity. The arbitrator found that: while the teacher was capable of teaching,  
28 the school district proved that the teacher was incapable of "controlling the  
29 disciplinary and educationally conducive atmosphere of her classroom"; the teacher  
30 engaged in conduct unbecoming a teacher (but not physical abuse) when she  
31 grabbed a student by the collar, a finding that provided additional support for the  
32 termination; and it was not in the best interests of 5th grade students to have a  
33 teacher who falls asleep in class (even if due to a medical condition that the  
34 district had previously accommodated).



1 IV. CONDUCT TOWARD OTHER STAFF IN A SCHOOL SETTING

2  
3 *Springfield Public Schools and K.P. (AAA# 11-390-00046-12, Arbitrator Craig*  
4 *Overton, November 17, 2012). Reduced dismissal of teacher to a verbal warning.*  
5 *[18 pages]*

6 On a professional development day, before school was in session, the teacher  
7 behaved in a bizarre and belligerent manner toward her principal. As she was leaving  
8 the school, and after threatening to smash the principal's car, the teacher hit the  
9 principal's parked car as she pulled away from the school. The district terminated  
10 the teacher, finding that she engaged in conduct unbecoming a teacher and her  
11 actions posed a direct threat or a significant risk of harm to the safety of  
12 students and staff. The arbitrator found that dismissal was not a proportionate or  
13 reasonable discipline, in light of the teacher's long (19 year) and unblemished  
14 record with the schools. The arbitrator also considered the teacher's extreme  
15 personal stress to be a mitigating factor, and found that there was no evidence the  
16 teacher presented a risk of harm to students or staff.

17  
18 *Assabet Valley Vocational School District & A.S. (AAA# 11 390 01714 10,*  
19 *Arbitrator Roger S. Achille, April 19, 2011). Arbitrator overturned a 20-day*  
20 *suspension of a librarian. [16 pages]*

21 In considering this suspension, the arbitrator first confirmed that MGL  
22 Chapter 71, Section 42D imposes the same "just cause" standard as terminations  
23 under Section 42. Applying that standard in this case, he found that the suspension  
24 of the librarian did not meet the just cause standard.

25  
26 The facts involved a teacher calling the librarian to investigate the  
27 whereabouts of a student who had failed to report to class on time. At arbitration,  
28 all agreed that the student was in fact in the library, leading the librarian to ask  
29 the student whether she had signed the library sign in log. The student answered  
30 that she had not.

31 All the other facts were in dispute. According to teacher, the librarian said,  
32 "All right, well, I'll lie. How long do you think you've been here?" The librarian then  
33 reportedly stated that the student signed in at the beginning of the period. In  
34 contrast, the librarian claimed she simply said "I will cover you," meaning that she  
35 would vouch for the student's presence in the library for the whole class period.

36 The arbitrator listed several reasons for overturning the suspension. First,  
37 he faulted the investigation conducted by the school. Although the principal had  
38 interviewed and received written statements from the teacher, librarian and student,  
39 he failed to follow up with two individuals the librarian had identified as witnesses.  
40 Then, although the principal verbally discussed his findings with the Superintendent



1 (who ultimately made the decision for suspension), the principal failed to provide his  
2 meeting notes or the written statements to the Superintendent. Nor did the  
3 principal describe how the student's account factored into his findings. Given the 20  
4 day penalty, which the arbitrator viewed as severe, the arbitrator found the  
5 investigation deficient in meeting the just cause requirement.

6 Further, the arbitrator found that the conduct, even if established, would  
7 not have warranted a 20 day suspension. At most, the teacher was guilty of lying  
8 about whether the student signed in, not whether she was present at the library.  
9 She had no disciplinary history up to this point. Further, whether or not the  
10 librarian was disciplined was irrelevant to whether or not the school could hold  
11 student accountable for her failure to report to the classroom.

### 12 13 C. CONDUCT OFF SCHOOL GROUNDS

14  
15 *Gustafson and Fail River School Committee (AAA# No. 11-390-01104-12, Arbitrator*  
16 *Mark L. Irvings, December 14, 2012). Dismissal Reduced to One-Week Suspension.*

17 The district dismissed a teacher for conduct unbecoming a teacher, based upon  
18 her involvement in giving a controlled substance (three Oxycodone pills) to a friend  
19 outside of school and conduct in access to student's school records without authorization.  
20

21 The events began when the parent of a student called the police relating to a  
22 domestic dispute involving the parent's boyfriend, who was also the teacher's friend  
23 ("Sam"). The parent handed the police a prescription bottle with the teacher's name  
24 on it, containing one pill, and reported that the teacher had given it to Sam.  
25

26 When the police visited the teacher's house, she admitted that she given the  
27 pill to Sam because he was in pain. The teacher was taken into police custody. The  
28 next day the parent called the principal, relayed the events of the day before, and  
29 also claimed that the teacher had improperly accessed the student records of her  
30 son, who was not one of teacher's students. While the criminal charges were  
31 pending, the district discharged the teacher based upon (1) her admission,  
32 contained in the police report, that she had given a controlled narcotic to another  
33 person and (2) her action in obtaining records of a student without authorization.  
34

35 With the criminal charges dismissed, the arbitrator overturned the  
36 discharge based upon the teacher's testimony that both she and Ryan had  
37 prescriptions for narcotics to treat back pain and that she handed three pills to  
38 Ryan "to hold him over" until he could see his own doctor. She explained that it did  
39 not occur to her that this was wrong. The arbitrator concluded that this conduct  
40 did not constitute conduct unbecoming. She also noted the Perryman case holding  
41 that a teacher can be disciplined for off-duty conduct that violates the "position of



1 special public trust" that teachers occupy. However, here, the conduct did not bear  
2 a sufficient detrimental nexus to the work place as to justify discharge.  
3

4 The arbitrator imposed a one week suspension based upon the teacher's  
5 accessing the student's records without authorization, even though the teacher  
6 testified that she had accessed the records for the benefit of the parent after  
7 the parent had raised concerns about her son's progress and school attendance.  
8

9 See also, Serrazina v. Springfield Public Schools, 464 Mass. 1101 (2013).  
10

#### 11 D. PROCEDURES

12  
13 *West Boylston Public Schools and S.J. (AAA# 1139-0147-12, Arbitrator Michael*  
14 *W. Stutz, August 31, 2012).* Upheld dismissal (or non-renewal?) of a teacher at the  
15 end of the teacher's fourth year at the school, as a non-PTS teacher. [9 pages]

16 The teacher had received a non-renewal notice in March of her third year of  
17 teaching due to performance concerns. Her union proposed that she be given a  
18 fourth year to prove herself to the incoming principal, and that she would waive her  
19 right to PTS which would otherwise attach with the appointment to a fourth year.  
20 The school agreed and the parties signed an agreement to waive professional  
21 teacher status. The agreement contained clear and unequivocal waiver language.  
22

23 Despite this waiver, when the teacher was non-renewed at the end of her  
24 fourth year, she filed for arbitration under Section 42, citing a Superior Court  
25 decision in Salem v. Hyman, 2005 WL 4927150-2, in which a trial court judge  
26 suggested that the district had sought to avoid the statute and ruled that such a  
27 waiver violated public policy. The arbitrator declined to follow the Salem decision,  
28 stating there was no indication that the district had sought to avoid the operation  
29 of the tenure statute, citing the following factors:  
30

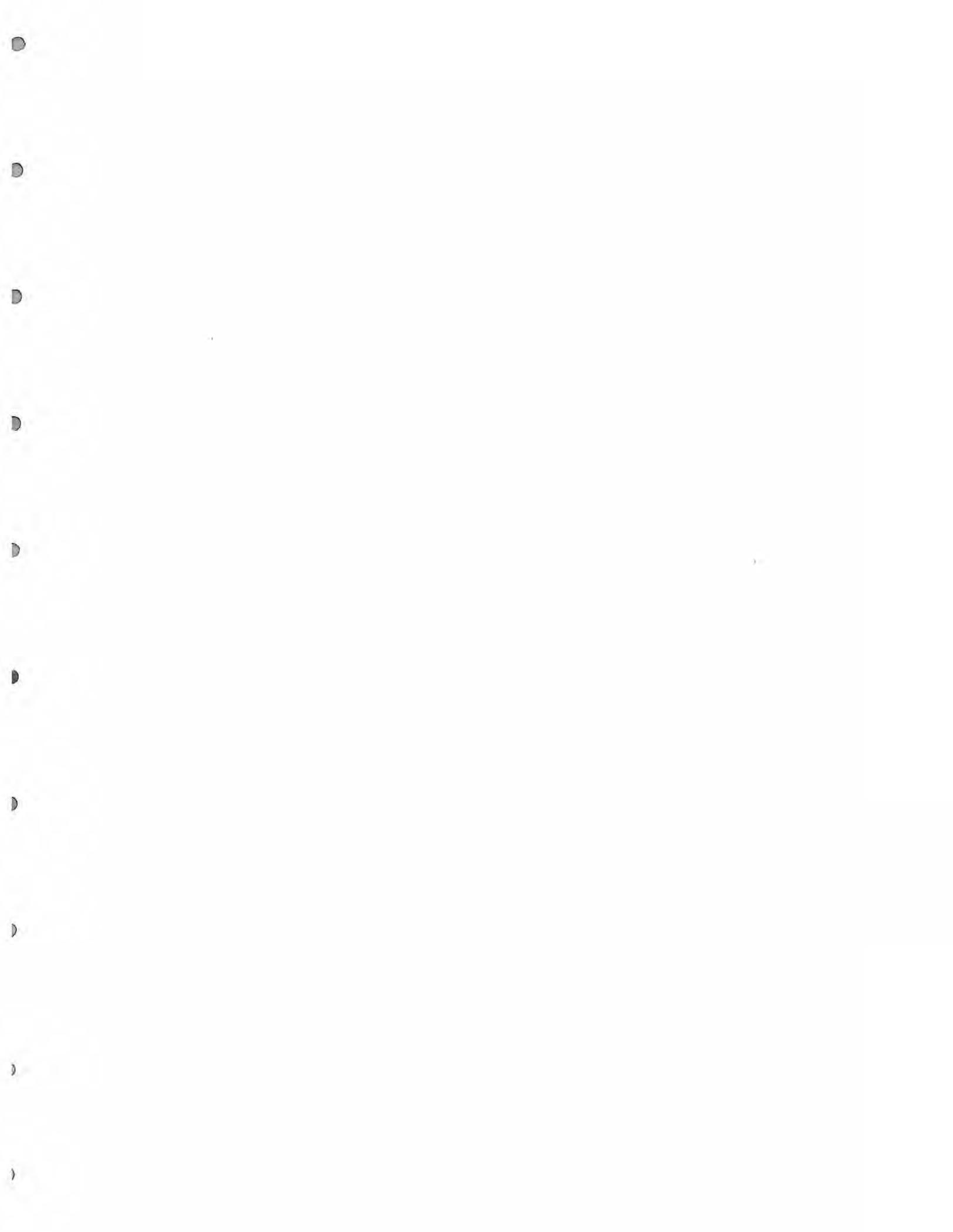
31 The teacher had already received a non-renewal notice at the end of year 3  
32 and, absent such a waiver, would clearly have been terminated at that time.  
33

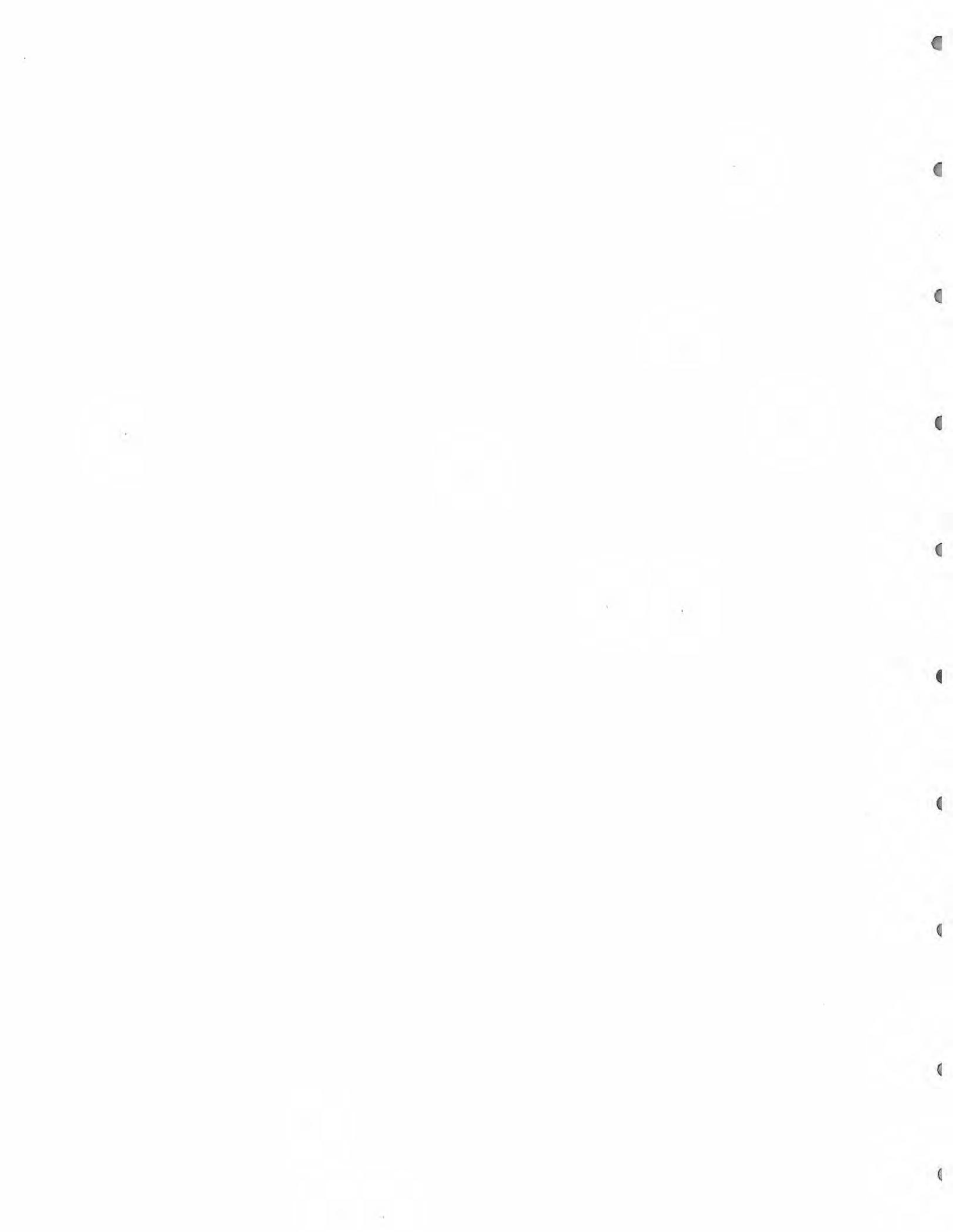
34 The union, not the district, had proposed the waiver.  
35

36 The teacher intentionally and voluntarily agreed to the waiver's terms.  
37

38 The arbitrator also noted that both parties benefited from the waiver, as it  
39 provided the teacher with an additional year to improve and provided the district  
40 an additional year to make an employment decision and possibly avoid terminating  
41 the teacher. The arbitrator also noted that enforcement of the waiver was in the  
42 public interest because it saved time and money.







**PART I ADMINISTRATION OF THE GOVERNMENT****TITLE XII EDUCATION****CHAPTER 71 PUBLIC SCHOOLS****Section 42** Dismissal or demotion of teachers or other employees of school or school district; arbitration

Section 42. A principal may dismiss or demote any teacher or other person assigned full-time to the school, subject to the review and approval of the superintendent; and subject to the provisions of this section, the superintendent may dismiss any employee of the school district. In the case of an employee whose duties require him to be assigned to more than one school, and in the case of teachers who teach in more than one school, those persons shall be considered to be under the supervision of the superintendent for all decisions relating to dismissal or demotion for cause.

A teacher who has been teaching in a school system for at least ninety calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal or superintendent, as the case may be, and to present information pertaining to the basis for the decision and to the teacher's status. The teacher receiving such notice may be represented by an attorney or other representative at such a meeting with the principal or superintendent. Teachers without professional teacher status shall otherwise be deemed employees at will.

A teacher with professional teacher status, pursuant to section forty-one, shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause.

A teacher with professional teacher status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. The commissioner shall forward to the parties a list of three arbitrators provided by the American Arbitration Association. Each person on the list shall be accredited by the National Academy of Arbitrators. The parties each shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator from amongst the three. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association to be consistent with the provisions of this section. The parties each

shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator from amongst the three. The board of education shall determine the process for selecting arbitrators for the pool. The fee for the arbitration shall be split equally between the two parties involved in the arbitration.

At the arbitral hearing, the teacher and the school district may be represented by an attorney or other representative, present evidence, and call witnesses and the school district shall have the burden of proof. In determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards.

The arbitrator's decision shall be issued within one month from the completion of the arbitral hearing, unless all parties involved agree otherwise, and shall contain a detailed statement of the reasons for the decision. Upon a finding that the dismissal was improper under the standards set forth in this section, the arbitrator may award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof. Under no circumstances shall the arbitrator award punitive, consequential, or nominal damages, or compensatory damages other than back pay, benefits or reinstatement. In the event the teacher is reinstated, the period between the dismissal and reinstatement shall be considered to be time served for purposes of employment. The arbitral decision shall be subject to judicial review as provided in chapter one hundred and fifty C. With the exception of other remedies provided by statute, the remedies provided hereunder shall be the exclusive remedies available to teachers for wrongful termination. The rules governing this arbitration procedure shall be the rules of the American Arbitration Association as pertains to arbitration.

*[Seventh paragraph effective until September 1, 2016. For text effective September 1, 2016, see below.]*

Neither this section nor section forty-one shall affect the right of a superintendent to lay off teachers pursuant to reductions in force or reorganization resulting from declining enrollment or other budgetary reasons. No teacher with professional teacher status shall be laid off pursuant to a reduction in force or reorganization if there is a teacher without such status for whose position the covered employee is currently certified. No teacher with such status shall be displaced by a more senior teacher with such status in accordance with the terms of a collective bargaining agreement or otherwise unless the more senior teacher is currently qualified pursuant to section thirty-eight G for the junior teacher's position.

*[Seventh paragraph as amended by 2012, 131, Sec. 3 effective September 1, 2016 applicable as provided by 2012, 131, Sec. 9. For text effective until September 1, 2016, see above.]*

Nothing in this section or section 41 shall affect the right of a superintendent to lay off teachers pursuant to reductions in force or reorganization resulting from declining enrollment or other budgetary reasons. No teacher with professional teacher status shall be laid off pursuant to a reduction in force or reorganization if there is a teacher without such status for whose position the covered employee is currently certified or if there is a less qualified teacher with such status holding the same or similar position for which the covered employee is currently certified. No teacher with such status shall be displaced in accordance with the terms of a collective bargaining agreement or otherwise by a more senior teacher with such status unless the more senior teacher is currently certified pursuant to section 38G and is at least as qualified for the position as the junior teacher holding the position. The criteria for determining a qualified teacher under this paragraph shall be subject to the collective bargaining provisions of chapter 150E; provided, however, that any such collectively bargained for qualifications shall include, as the primary factors, indicators of job performance, including overall ratings resulting from comprehensive evaluations conducted consistent with section 38 and the best interests of the students in the school or district; and provided further, that for the purposes of this paragraph, no distinction shall be made between the overall performance ratings established by the board of elementary and secondary education finding that the teacher has met or exceeded acceptable performance standards developed under said section 38 and that are defined by the board as proficient and exemplary. The school committee and the collective bargaining representative may negotiate for seniority or length of service only as a tie-breaker in personnel actions under this paragraph among teachers whose qualifications are no different using the qualifications collectively bargained for in accordance with this paragraph.







# American Arbitration Association

## VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration Between

**Olga Pelensky, Appellant**

**-and-**

**Boston Public Schools**

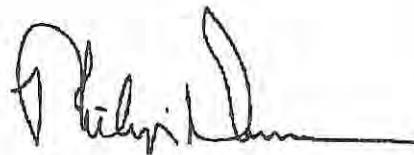
**CASE NUMBER: 11 390 01495 10**

### AWARD OF THE ARBITRATOR

The UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated \_\_\_\_\_ and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The Boston Public Schools had just cause to dismiss Olga Pelensky pursuant to Massachusetts General Laws Chapter 71, Section 42.

Date: February 16, 2012



Philip Dunn, Arbitrator

Appearances:           Brendan Greene, Esq., counsel for the Boston Public Schools  
                              Joseph Lettiere, Esq., counsel for the Appellant

**STIPULATED ISSUE**

Did the Boston Public Schools have just cause to dismiss Olga Pelensky pursuant to Massachusetts General Laws Chapter 71, Section 42? If not, what shall be the remedy?

**EVIDENCE PRESENTED BY THE EMPLOYER**

This case, brought pursuant to M.G.L. c.71, §42, addresses the appeal of Olga Pelensky of her dismissal from her position as a teacher with professional teacher status in the Boston Public Schools (BPS), effective June 30, 2010.

The Employer acknowledges that Ms. Pelensky has an impressive resume of academic credentials and teaching experience. She holds a Ph.D. in English from Tufts University. She has taught many courses in the English discipline at numerous institutions of higher learning, including Wellesley College, Boston University, Tufts University, the University of Rhode Island, and the University of Massachusetts. In addition, she has taught in the Chicago and Lowell Public Schools. Finally, prior to her termination, she had taught for 12 years in the Boston Public Schools. There is no evidence in the record of any deficiencies in her teaching prior to her evaluation dated October 30, 2008, that being the first of four evaluations upon which the BPS relied in making its decision to terminate the employment of Ms. Pelensky.

In school year 2008-09, Ms. Pelensky was assigned to teach English Language Arts at the Academy of Public Service (APS), which was part of the Dorchester Education Complex. The Headmaster of APS was Rudolph Weekes. Betty Nolan was the Assistant Headmaster. Weekes

delegated to Ms. Nolan the supervision of the teachers in the English Department. More specifically, he asked Ms. Nolan to evaluate Ms. Pelensky in that fall of 2008.

Ms. Nolan had arrived at APS with an interesting background. She has a degree in nursing, and a Master's Degree in Public Health. She commenced employment with the Boston Public Schools in 1998 as a school nurse. She then obtained a Masters in Education. In 2005, she enrolled in a Principal Fellow program, through which BPS trains promising staff members to become administrators. One of the major components of the Principal Fellow program is training in the supervision and evaluation of teachers. Ms. Nolan successfully completed the Fellowship program, obtained her administrator's certification, and then worked through school year 2006-07 at Charlestown High School as a Unit Leader. Among other duties, Unit Leaders are responsible for the supervision and evaluation of teachers, and Nolan performed teacher evaluations during that year. She then assumed the role of Assistant Headmaster at APS, commencing in school year 2007-08.

The October 30, 2008 Evaluation

Ms. Nolan observed two of Ms. Pelensky's classes, the first on September 22, 2008 and the second on September 29. Nolan also took into consideration certain reports received from parents, and Ms. Pelensky's attendance record. Ms. Nolan then prepared the written evaluation instrument dated October 30, 2008. Nolan rated Ms. Pelensky as "Does Not Meet Standards" (DNMS) for all eight listed Dimensions, and gave her an overall rating of DNMS. With each of the eight Dimension ratings, Ms. Nolan included detailed observation notes and prescriptions for improved performance. The following comments and prescriptions were particularly noteworthy, in the context of this arbitration proceeding.

Under Dimension 1, "Equity and High Expectations," Nolan's extensive comments included the comment, "Mrs. Pelensky does not demonstrate a high standard of instruction for her students. [She] ... did not have an objective posted on the board. On 9/29/08 the following statement was written on the board: 'Students will learn two elements of writing and improve their literary analysis.' This statement was not a clearly defined learning objective...." Nolan included the following prescriptions under Dimension 1:

- Mrs. Pelensky will write clear defined objectives according to the Reader's/Writer's workshop model using the language: "Students will be able to...." The mini-lesson needs to be in alignment with the posted objective.
- Mrs. Pelensky must use effective questioning to engage all students and to check for understanding....
- Mrs. Pelensky's lesson activities must be aligned to the stated objective. Directives to the students must be written.

Under Dimension 2, "Professionalism," Nolan observed, "Mrs. Pelensky does not maintain excellent attendance.... [She] has missed 25 days since 9/22/08.... While Mrs. Pelensky had never been disciplined for the large number of sick days she took, she begrudgingly admitted during her cross examination that it is detrimental to students if much of their classroom instruction is coming through a variety of substitute teachers.

Under Dimension 3, Ms. Nolan noted that Mrs. Pelensky had not posted for her classes student work, nor any grading rubrics for such written assignments. As Ms. Nolan explained in her testimony, "A grading rubric is a grid and it allows a student to measure, and also the teacher to measure a level of proficiency or mastery in a given topic or area, going to, for example, no mastery to middle mastery...." Thus, a rubric informs the student of what elements he/she must

include in a work assignment in order to meet the objectives of that assignment, and it also guides the teacher's grading of that assignment so that students will have a sense of transparency, equity and consistency in the grading process.

Under Dimension 5, "Instructional Planning and Implementation," Ms. Nolan observed as a problem, "Mrs. Pelensky's lesson was not explicit in what students were expected to learn (and) she did not adhere to the workshop model." Ms. Nolan continued under Dimension 5 with the directive,

Mrs. Pelensky must:

1. Develop lessons for English 11 and English 12 aligned with BPS curriculum
2. End the "free write" activity. The "write" must be focused/directed and aligned to the lesson of the day....<sup>1</sup>
4. .... Homework assignments must require student to read, write, and analyze material based on the lesson objective.
5. Plan lessons ... focused on what students will know and be able to do.....
7. Effectively structure class on the three elements of the "workshop....."
9. Differentiate instructional strategies e.g. modeling, ... and providing individualized coaching.
10. Know students' English Language Development Levels and use this information to inform instruction....
12. Integrate technology into curriculum and instructional practices to facilitate student understanding....

Under Dimension 7, "Monitoring and Assessment of Progress," Ms. Nolan again noted that Ms. Pelensky "does not use rubrics and other tools to help students evaluate their work. No ... grading rubric was displayed...." The prescriptions under this dimension included, "Post

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<sup>1</sup> Nolan testified that she issued this directive because "free writes did not derive from what she was supposed to be teaching ... (and were) not structured at all...."

student grading system and provide students with appropriate rubrics....”

The March 25, 2009 Evaluation

Perhaps because Ms. Nolan had relatively little prior experience in performing teacher evaluations, and/or to get a fresh perspective given the poor evaluation which Ms. Pelensky had received in October 2008, BPS assigned a different administrator to perform the evaluation upon Ms. Pelensky in the early spring of 2009. The evaluator assigned was Dale Libkin, who was in her seventh year as the Director of Performance Management for BPS. In that role, Libkin had supported the evaluation of about one hundred educators per year, so she had overseen the evaluation of literally hundreds of educators. Prior to that role, Libkin had served as a school principal in BPS and before that in Everett, Washington. In sum, Libkin had a wealth of experience in the evaluation of teachers.

Before commencing the evaluation process through classroom observations, Ms. Libkin and Ms. Pelensky met. They agreed that Ms. Libkin would serve as her evaluator, and they agreed upon at least the first date on which Ms. Libkin would come and observe one of Ms. Pelensky's classes.

Libkin made observations of classes taught by Ms. Pelensky at least on February 25, 2009, March 4, 2009, and March 25, 2009.<sup>2</sup> The first two observations lasted for virtually entire class periods, or slightly longer. The last observation, of March 25, Ms. Pelensky testified, lasted for only about five minutes; “It was basically a walk-in and a walkout, took about five minutes.

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<sup>2</sup>The record evidence suggests that Ms. Libkin also observed a class taught by Ms. Pelensky on March 9. See BPS Exhibit 1.E, page 9, “Dimension #5”, where Ms. Libkin specifically cites, “On March 9, 2009, Ms. Pelensky posted “Standards 7.12.” See also T3-59,60, where Ms. Libkin acknowledges that there may have been a class visit on March 9. The record evidence does not establish for how long Ms. Libkin observed Ms. Pelensky's teaching during this March 9 visit to her classroom.

And then a delivery of the final evaluation 15 minutes later.” As had Ms. Nolan a few months earlier, Ms. Libkin based on her classroom observations found Ms. Pelensky’s performance to be below acceptable standards, and thus gave ratings of DNMS in all eight measured dimensions. Moreover, during her visits, Libkin noted that Ms. Pelensky had failed to follow many of the prescriptions and directives that Ms. Nolan had issued back early in the 2008-09 school year. Ms. Libkin gave Ms. Pelensky an overall rating of DNMS. These are some of the more significant observations made by Ms. Libkin and recorded in the March 25, 2009 evaluation.

Under Dimension 1, Libkin wrote,

Ms. Pelensky fails to identify challenging learning objectives for every class.... On February 25 ... the posted objective stated: *to write a page easily and expand media literacy*. On March 4 ... the objective read: *to easily create an argument; media literacy*. On March 25 (sic, March 9), the objective read: *to easily be able to write one page using writer’s technique to break through blocks; to expand reading and analysis skills*. These objectives lack rigor and describe vague tasks rather than specific learning objectives that define what students should know and be able to do. As a result, students aren’t academically challenged, nor can they be held accountable for specific learning targets....

Ms. Pelensky asked some appropriate questions regarding the movie (which the students had just watched). But she failed to leave students time to think ... and then give their answers. As a result, students are left to passively take in the movie and aren’t encouraged to stretch their thinking....

Students have written formal complaints to the BPS Office of Equity complaining that Ms. Pelensky fails to instruct them. They are concerned because the only activity requested of them is to free write on a daily basis....

Prescriptions:

- Post learning objectives for every class, every day, that explicitly state what students will know and be able to do

- by lesson's end.
- Give students wait time in order to answer challenging questions....

Under Dimension 5, Ms. Libkin again expressed concern about the vagueness of posted objectives. She cited as unacceptably vague such postings by Ms. Pelensky as *to write a page easily* and *to easily be able to write one page using writer's technique to break through blocks; to expand reading and analysis skill*. In those statements of problem, Ms. Libkin was reconfirming the proscription that Ms. Nolan had issued, that Ms. Pelensky must cease assigning "free writes" and instead assign focused writing specifically aligned with the lesson content of that day. Ms. Libkin continued, "As a result of lack of planning tied to standards and specific learning objectives, students are at a disadvantage in that they are not being provided access to specific curriculum deemed appropriate by the state and school committee."

As an added concern under Dimension #5, Ms. Libkin wrote,

Ms. Pelensky fails to provide grade level appropriate learning standards. On March 9, 2009, Ms. Pelensky posted "Standards 7.12." Standard 7.12 is a pre K - 4 learning standard that includes, but is not limited to statements such as: *know how to handle a book and turn pages*, and *identify the covers and title page of a book*, and *identify upper and lower case letters*. Kindergarten standards were posted in 11<sup>th</sup> and 12<sup>th</sup> grade classrooms. Why? This reflects a serious error in instructional planning and could cause a great deal of unrest if students were made aware of the learning standards their teacher was posting for them.

Prescription:

- Plan grade level lessons that align with state and district standards.
- Post learning objectives that state specifically what students will know and be able to do by lesson's end.

- Post and teach to grade level appropriate learning standards

Under Dimension 7, "Monitoring and Assessment of Progress," Ms. Libkin wrote,

**Statement of Problem:** Ms. Pelensky fails to maintain detailed and organized records to track students' learning and inform instruction. Her Term 1 grades were not accepted by the school's administration because of the breadth of discrepancy between what she reported and what students claimed.<sup>3</sup> Students rarely receive scores on their work. As a result, students have no way of knowing whether they are progressing along district standards. Ms. Pelensky fails to use rubrics and other tools to help students evaluate their work. As a result, students aren't being provided an opportunity to assess their own level of work.

**Prescription:**

- Grade, record and return student work
- Use recorded work to substantiate grades earned
- Develop rubrics that define various levels of student work

This prescription regarding the development of rubrics reconfirmed what Ms. Nolan already had instructed Ms. Pelensky to do, that being to post grading rubrics along with the students' work that the rubric would correspond to.

**The October 22, 2009 Evaluation**

As a result of the Academy of Public Service merging with the Noonan Business Academy, Ms. Pelensky entered a district-wide "excess pool" and ended up being assigned to teach at the Jackson-Mann K-8 School for 2009-2010. The principal of that school was Andrew Tuite, a veteran administrator in the BPS and prior to that in the Brockton schools. In Brockton, Tuite worked as a math teacher, guidance counselor, special education team evaluator,

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<sup>3</sup>Such a rejection of submitted grades by the central office was a very rare occurrence, Ms. Libken testified.

and instructional resource specialist. He came to BPS in 2001-02 as a change coach, then after three years moved into the position of program director in the secondary math department.

As program director, Tuite participated in a professional development program entitled "Research for better teaching on the evaluation of teachers." During his years as program director, he evaluated numerous teachers. In the fall of 2006, he became principal of the Cleveland Middle School for one year, then principal of the Lewenberg Middle School for one school year, and then principal of the Jackson-Mann K-8 School. While at the Cleveland School, Tuite received still more professional development in evaluation of teachers. As principal of these various schools, Tuite in each year carried out about seven teacher evaluations, including an ELA teacher in 2008-09, and five Special Education teachers (who teach ELA among other subject areas) in 2006-07 and 2007-08.

Before the start of the 2009-10 school year, Tuite learned that Ms. Pelensky would be teaching at the Jackson-Mann for the upcoming year. He was informed by BPS's Human Resources Office that Ms. Pelensky had received "Does Not Meet Standards" (DNMS) ratings in her two interim evaluations in the preceding school year. In view of that fact, Tuite was directed to carry out another interim evaluation of Ms. Pelensky, to be completed by mid-November 2009. While he was informed that Ms. Pelensky had received overall ratings of DNMS, he was not provided with (and did not request) Ms. Pelensky's written evaluations from 2008-09. Thus, Tuite was able to look at Ms. Pelensky's teaching performance through a somewhat fresher set of eyes, uninfluenced by what specific deficiencies and prescriptions Ms. Nolan and Ms. Libkin had included in their written evaluations of Ms. Pelensky.

Ms. Pelensky asked to meet with Mr. Tuite, and they did so meet, before the start of the school year. They spoke for over an hour. Mr. Tuite explained his expectations for teachers at the Jackson-Mann School. Ms. Pelensky discussed the previous evaluations she had received. Mr. Tuite explained the evaluation process as it would occur that fall, which would be on a somewhat accelerated track because Ms. Pelensky had DNMS overall ratings on her previous evaluations. Mr. Tuite did not say anything to effect that he was knowledgeable as to how to effectuate Ms. Pelensky's termination.

In the first six or seven Weekes of the 2009-10 school year, Mr. Tuite made several informal and formal classroom visits to Ms. Pelensky's classes. Specifically, he made visits on September 14, from 12:36 to 12:51 p.m.<sup>4</sup>; September 22, from 10:05 to 10:31 a.m.; September 25, 8:16 to 8:36 a.m.; October 5, 10:12 to 11:20 a.m., and October 14, for an entire class period. Mr. Tuite took extensive notes during or immediately after each of these informal and formal evaluations, and retained all those notes which became part of the record in this arbitration proceeding.

Moreover, right from the start, Mr. Tuite provided Ms. Pelensky with prompt feedback after each of his observations of her teaching, including what deficiencies he had observed and what prescriptions Ms. Pelensky was to follow. For example, after the September 14, 2009 observation, Mr. Tuite sent to Ms. Pelensky an email which stated in part,

Based on the observation it does not appear that the lesson was appropriately planned. Furthermore, plans must be done more than one day at a time as reflected in your plan book.  
The stated objective was not clear or appropriate; the objective

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<sup>4</sup>Mr. Tuite arrived for his September 14 visit 36 minutes after the class had commenced.

must be measurable and indicate what students will know and/or be able to do at the end of class. The class did not include a critical component of Readers' and Writers' Workshop – modeling. You should have modeled for students how to use the “quick-writes.” Future lessons such as this must include modeling. Please make an appointment with Ms. Hanagan, director of instruction, to discuss and plan lessons that reflect Workshop instruction....

And, after the September 22 visit, Mr. Tuite wrote,

Ms. Pelensky's class did not reflect Workshop instruction. Although having 2 students is a unique situation, taking nearly 30 minutes on a preliminary activity (“write in notebooks ... aim for bottom of the page ... topic of choice”) is too long and not Workshop. In addition, the mini-lesson had not taken place prior to the end of the observation – nearly 30 minutes. Ms. Pelensky must schedule a time to meet with Ms. Hanagan, director of instruction, to discuss appropriate Workshop instruction; the meeting with Ms. Hanagan must be scheduled prior to September 25<sup>th</sup>....

On October 22, 2009, Mr. Tuite presented to Ms. Pelensky the written “Teacher Performance Evaluation” which he had prepared. He rated her as “Meets or Exceeds Standards” for Dimension 2, “Professionalism;” Dimension 3, “Safe, Respectful, Culturally Sensitive and Responsive Learning Community;” Dimension 4, “Partnership with Family and Community;” and Dimension 6, “Content Knowledge.” However, he rated Ms. Pelensky as “Does Not Meet Standards” for Dimension 1, “Equity and High Expectations;” Dimension 5, “Instructional Planning and Implementation;” Dimension 7, “Monitoring and Assessment of Progress;” and Dimension 8, “Reflection, Collaboration, and Personal Growth.” He gave her an overall rating of DNMS.

In the "Short Narrative" section regarding teacher's strengths, Mr. Tuite wrote a full page of comments which praised several aspects of Ms. Pelensky's work. He noted her positive words of encouragement as used in her classes, which showed her students that she believed in their abilities. He noted that she had maintained excellent attendance, and her positive working relationships with other teachers and the parents of her students. Finally, he noted that she had created a classroom environment which encouraged students to freely share their ideas.

In each of the areas where Mr. Tuite rated Ms. Pelensky as DNMS, he included extensive and detailed statements of the deficiencies he had observed, and detailed and specific prescriptions to help Ms. Pelensky improve in her teaching performance. Under Dimensions 1 and 5, he observed that Ms. Pelensky was not identifying to her students challenging learning objectives; he gave specific examples of the objectives she had written on the blackboard, and how those written objectives failed to meet the requisite standard of "mini Smart ... specific, measurable, attainable, relevant, and timely." He cited the failure of Ms. Pelensky to herself model for her students the concept or work assignment she was presenting in the lesson, noting that Mr. Tuite had specifically directed Ms. Pelensky to include such modeling in her teaching approach. He commented that the assigned "Do Now" – "to write rough drafts in their notebooks" – lasted for about 30 minutes, rather than the appropriate 5 to 10 minutes; and during those 30 minutes, Ms. Pelensky "gave no content specific instruction to her students." He noted, "Although students did have opportunities to write there was no clear connection to the objectives or standards of Ms. Pelensky's lesson." He wrote as prescriptions:

1. Ms. Pelensky must prepare lesson plans one week in advance....
2. Ms. Pelensky's plans must include modeling, ... Workshop format, and opportunities for students to engage one another....
3. Ms. Pelensky must develop a schedule with Ms. Hanagan, director of instruction, to review Ms. Pelensky's plans and objectives with Ms. Hanagan prior to implementing the lessons.]
4. Ms. Pelensky must meet with Ms. Hanagan by October 21, 2009, and a review and meeting schedule must be in place by October 23....
5. Meetings must commence week of October 26, 2009 and continue until further notice.

Under Dimension 7, Monitoring and Assessment, Mr. Tuite observed that Ms. Pelensky was not using a variety of assessments to measure student learning. He noted that she did not have an assessment portfolio for each student, and her grade book as of mid-October did not have any test or quiz grades recorded. Other work was graded only with comments such as "good," "okay," and "interesting finish," but with no letter grades.<sup>5</sup> Nor did Ms. Pelensky have any conferring notes or other ways to document student progress. Mr. Tuite wrote, "As a result of Ms. Pelensky's bookkeeping and grading system it is unclear how she will adequately and appropriately measure her students' progress...."

Mr. Tuite further observed, "Ms. Pelensky does not use rubrics and other tools to help students evaluate their work.... Work posted on Ms. Pelensky's walls is posted without an accompanying assignment or rubric.... By not being clear of her academic expectations – including written rubrics – Ms. Pelensky has not allowed student to put their learning and work

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<sup>5</sup>Mr. Tuite acknowledged the explanation given by Ms. Pelensky, that "excellent" corresponded to an "A," "good" to a "B," and "okay" to a "C." Thus, where she had made such notations in her grade book, Ms. Pelensky was documenting, in her own way, her rating of each student's performance on the written products so graded.

in context and has not given them a performance target to aim for....”

Mr. Tuite then listed a number of prescriptions under Dimension 7:

1. Ms. Pelensky must have an assessment portfolio in place by October 30....
4. Ms. Pelensky must develop and utilize rubrics for all written work.
5. Ms. Pelensky must meet with Ms. Hanagan to develop rubrics to be utilized in the classroom.
6. Ms. Pelensky must include the rubrics with any weekly lesson plans....
7. All student work posted in Ms. Pelensky’s room must be accompanied by a written description of the assignment and the appropriate work rubric.

Finally, under Dimension 8, Mr. Tuite emphasized that he had instructed Ms. Pelensky, repeatedly in post-observation comments, to engage in modeling and to utilize the Workshop format in her classes; but he still did not see such methodologies in his subsequent observations. He bluntly prescribed that she must incorporate his prescriptions into her teaching, and must share the prescriptions he had issued with Ms. Hanagan so that she could assist Ms. Pelensky in implementing them.

Just prior to receiving from Mr. Tuite that October 22, 2009 written evaluation with these prescriptions, Ms. Pelensky on October 13 also had received a letter from Superintendent of Schools Carol Johnson. The superintendent wrote,

During 2008-2009 ... your headmaster judged your performance as not meeting standards.... Your performance has caused sufficient concern for me to notify you that you may be subject to dismissal if your performance does not improve....

Andy Tuite will continue to make classroom visits, share his diagnosis, and recommend prescriptions with you in an effort to improve your performance.... I trust you will take this opportunity

to work with your principal in an effort to improve your performance in the areas of concern.

It is fair to say, then, that by October 22, 2009, if not before, Ms. Pelensky was under clear notice that she must comply with the prescriptions which had been given to her by Mr. Tuite, and by Ms. Nolan and Ms. Libkin before him, if she wished to retain her employment as a teacher in the Boston Public Schools.

The February 1, 2010 Evaluation

Following the October 22, 2009 evaluation, Mr. Tuite observed Ms. Pelensky's work on November 23 and December 16, 2009; and January 4, January 12, and February 1, 2010. Once again, he followed up with Ms. Pelensky after each classroom observation, sharing with her his observations and prescriptions.

On February 1, 2010, Mr. Tuite delivered to Ms. Pelensky the fourth interim evaluation she had received since October 30, 2008. Mr. Tuite gave the Ms. Pelensky the rating of DNMS for all eight dimensions except Dimension 6, "Content Knowledge," where he rated her as "Meets or Exceeds Standards." Mr. Tuite gave Ms. Pelensky an overall rating of DNMS.

A review of this February 1, 2010 shows that Mr. Tuite continued to have many of the same concerns with Ms. Pelensky's work as he had observed back in her October 22, 2009 evaluation. Under Dimension 1, Mr. Tuite reported that Ms. Pelensky was still failing on a consistent basis to provide challenging learning objectives meeting the "SMART" criteria. He gave specific examples from the classes he recently had observed. He then added, "One set of Ms. Pelensky's prescriptions in October was to work with Ms. Hanagan, director of instruction, to improve her objectives – a prescription repeated during meetings after several of the

observations noted above – yet as of the writing of this document Ms. Pelensky has not fulfilled this prescription.” He observed that by failing to identify challenging learning objectives, Ms. Pelensky was not keeping her students focused and engaged; as a result, her students were becoming passive and would not be fully prepared for the rigors of the MCAS testing.

Mr. Tuite further commented that Ms. Pelensky on a recurring basis was simply allowing students to read and write on their own, through much of the class period. Missing was any direct instruction, with modeling from the teacher. Mr. Tuite noted that he had repeatedly directed Ms. Pelensky to utilize the Workshop model, with a mini-lesson delivered by the teacher, but she had failed to follow that prescription. He listed a number of prescriptions, tracking much of what he had prescribed back in October 2009. Among the prescriptions was a repeated insistence that Ms. Pelensky must meet with Director of Instruction Hanagan, which Ms. Pelensky still had not done.

Under Dimension 2, Mr. Tuite cited as a problem Ms. Pelensky’s poor attendance since October 2009. This was a problem which Mr. Tuite had not observed back in October, so this in his mind represented a deterioration in Ms. Pelensky’s performance.<sup>6</sup> Mr. Tuite also expressed a concern that Ms. Pelensky’s system of assessing students’ work continued to be deficient. In particular, he noted that Ms. Pelensky still did not have for his review any student assessment portfolios, though he had directed in October that she must maintain such portfolios.

Mr. Tuite also observed deterioration under Dimension 3. He cited a lack of collaborative work amongst students in her classes, which typically would follow the mini-lesson

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<sup>6</sup>Unbeknownst to Mr. Tuite at the time, poor attendance had been cited by Ms. Nolan as a problem area back in the fall of 2008.

in the Workshop model of instruction; rather, he saw lots of student time reading and writing alone, without instruction from Ms. Pelensky and without interactive time in small student groupings. He also saw poor behavior management in Ms. Pelensky's class, a problem he had not seen back in the fall of 2009.<sup>7</sup>

Under Dimension 4, Mr. Tuite commented about concerns raised by parents of Ms. Pelensky's students, that Ms. Pelensky had been disrespectful or had made inappropriate comments in her interactions with those parents. Indeed, several parents and students had asked that the students be reassigned to a different teacher, and this request had been honored in at least a couple of instances. This was a new concern to Mr. Tuite.<sup>8</sup>

Under Dimension 5, "Instructional Planning and Implementation," Mr. Tuite again cited (as he had under Dimension 1) what he felt were insufficiently specific and rigorous class objectives, as written up on the blackboard for Ms. Pelensky's students to see. He also commented that Ms. Pelensky was continuing not to use the Workshop model of instruction, with its "whole – small – whole" format. Mr. Tuite wrote,

In discussions with Ms. Pelensky following all of her observations for this interim evaluation she has been informed ... that she must structure her class on the elements of Readers' and Writers' Workshop (with its) ... whole-small-whole set up, whereby the first whole will likely be a mini-lesson; the small would be students working individually or in small groups and where Ms. Pelensky could be conferring with individuals or groups; and the final whole will be a chance at the end of class for students to share thoughts, insights, confusions, or otherwise summarize their learning. Ms.

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<sup>7</sup>Ms. Nolan and Ms. Libkin both had observed a similar deficiency back in the fall and winter of school year 2008-09.

<sup>8</sup>Once again, unbeknownst to Mr. Tuite at the time, this problem of poor interactions with students' parents had been an area of specific concern cited by Ms. Nolan back in the fall of 2008.

Pelensky has disputed Mr. Tuite's definition repeatedly, frequently noting that opportunities for students to read and write quietly are the key components of Workshop. Mr. Tuite has agreed with the importance of reading and writing but has regularly and frequently informed Ms. Pelensky that she must do some form of direct teaching each class – especially a mini-lesson where she can share her thinking with students....

Under Dimension 7, Mr. Tuite cited Ms. Pelensky's continued failure to create and maintain assessment portfolios, notwithstanding the October 2009 prescription that she must do so. Similarly, he cited and discussed at length Ms. Pelensky's continuing failure to develop, post, and utilize grading rubrics for each piece of work assigned to her students, although he had repeatedly directed her that she must do so.

Under Dimension 8, Mr. Tuite summarized by recording his obvious frustration that in his view, Ms. Pelensky had "not followed the majority of prescriptions outlined in the evaluation" that Mr. Tuite had given to her in October 2009. Among other things, he cited the fact that Ms. Pelensky never had met with Ms. Hanagan to obtain her support; that Ms. Pelensky had failed with any consistency to adhere to the Workshop model of instruction; that she never had presented to him an assessment portfolio; and she had failed to develop, utilize and post grading rubrics which would assure equity in grading as well as student understanding of what they needed to do in order to be successful in their work assignments. He concluded, "As a result of Ms. Pelensky's refusal to follow the prescriptions provided in her October 2009 evaluation, she has not appropriately utilized the feedback provided to adapt and improve her instruction. Thus her instruction has changed little and her students have not been provided with an appropriate learning environment."

Based upon the four interim evaluations from school years 2008-09 and 2009-10, each with an overall rating of Does Not Meet Standards, Mr. Tuite made the decision to terminate the employment of Ms. Pelensky. On April 16, 2010, he gave Ms. Pelensky an "Intent to Dismiss" letter which read in part, "The grounds for this dismissal are your inefficiency, incapacity, incompetency, and your failure to satisfy teaching standards." On June 11, 2010, Mr. Tuite held a meeting with Ms. Pelensky, Union Vice-President Patrick Connolly and Union Counsel, at which time Ms. Pelensky had the opportunity to present information in support of her retention as a teacher in the BPS. After that meeting, Mr. Tuite gave Ms. Pelensky notice of her termination, effective June 30, 2010. Ms. Pelensky then appealed that termination action pursuant to M.G.L. c.71, §42, resulting in this arbitration proceeding.

**EVIDENCE PRESENTED BY MS. PELENSKY**

Ms. Pelensky gave testimony that was at marked variance from the evidence which the BPS provided. In summary form, Ms. Pelensky asserted the following in her testimony. She was extremely well versed in the "Workshop Model" of teaching as utilized in the BPS, and she consistently employed the various components of that method (including modeling) in her classroom instruction. She followed Ms. Nolan's prescription that she cease utilizing "free writes" as a component of her classroom instruction, through the remainder of school year 2008-09.<sup>9</sup> She appropriately contacted parents regarding their children's academic progress and behavioral issues. Unfortunately, she had some medical problems which caused her to miss more days of work than either she or her administrators would have preferred; however, she

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<sup>9</sup>Ms. Pelensky testified that in school year 2009-10, she once again utilized free writes in her classroom teaching, because Mr. Tuite had not instructed her to refrain from assigning such work to her students.

never was disciplined for excessive absenteeism or sick leave abuse.

Ms. Pelensky appropriately planned her lessons in conformity with the state curriculum frameworks and the BPS curriculum guidelines, and delivered those lessons as planned to her students. She kept proper records including lesson plans, grade books, assessment portfolios, and attendance reports. She routinely posted proper agendas, lesson objectives, and homework assignments. She posted and enforced classroom behavior expectations. She developed and posted rubrics so that her students were able to understand how their work would be graded.

In sum, Ms. Pelensky is a dedicated teacher with immense regard for her students, and for their talents and abilities. She worked diligently to provide them with a solid education in English such that they would be prepared to perform well both on standardized tests and also in their future careers.

Unfortunately, Principal Weekes disliked Ms. Pelensky and had Assistant Principal Nolan sign the negative evaluation which he in fact authored. Ms. Libkin, while an experienced evaluator, made only limited observations over a short period of time, and beyond that, she failed to give the requisite feedback to Ms. Pelensky as required by the BTU/BPS collective bargaining agreement (CBA). Finally, Mr. Tuite exhibited from the start an obvious bias against Ms. Pelensky, stating three times in their first meeting that he knew how to terminate her pursuant to the CBA. The DNMS ratings which they gave to Ms. Pelensky were inaccurate and the result of bias, and thus do not provide a proper basis for the termination of this dedicated teacher.

DISCUSSION

Pelensky's Claim of Procedural Error

Appellant cites Article V.F.7. of the BPS/BTU collective bargaining agreement, which provides as follows:

**7. Informal Evaluations**

Principals/headmasters, the superintendent and their designees may from time to time visit classrooms to observe informally the classroom management and instructional practices of teachers. If the observer notes need for improvement in any area, the observer will provide written feedback to the classroom teacher within five school days of the informal visit.

Appellant notes that Ms. Libkin made observations in Ms. Pelensky's classroom on February 25, March 4, and March 25. Ms. Pelensky further notes that Ms. Libkin did not, within five days of the February 25 and March 4 observations, provide written feedback to Ms. Pelensky.

Based upon those facts, Appellant makes the following argument.

There is no excuse for the fact that no written feedback was given to the Appellant after ... the ... observations. This failure is in direct violation of the requirement of Article V.F.7 of the Collective Bargaining Agreement (CBA)... This absolute and unqualified contract requirement has an obvious and critically important purpose. It is designed to ensure that every teacher is given fair notice of all perceived deficiencies and, thereby, a fair opportunity to correct them. Having denied that notice and opportunity by Ms. Libkin, Ms. Pelensky's March 25, 2010 evaluation must be deemed invalid, and therefore must be expunged because it violated this contractual requirement.... Once the Libkin evaluation is invalidated, the Boston Public Schools is left to rely on only three (3) DNMS evaluations. Because this is a contractually insufficient basis for Ms. Pelensky's termination [since four DNMS, interim evaluations are required to support a

termination decision], the termination must be reversed on this ground, alone, if for no other.

However, the procedural requirement in Article V.F.7 has to do with informal visits, not the formal observations on which a formal evaluation is based. Regarding formal observations, post-visit meetings and written feedback is regulated by Article V.F.3(b), not Article V.F.7. The visits which Libkin made on February 25 and March 4 were formal observations, for virtually entire class periods (or longer, in one case). Indeed, prior to commencing her observations, Ms. Libkin met with Pelensky in advance and they discussed that Libkin would be evaluating Ms. Pelensky, and they even discussed that the first observation would be on February 25. Quite clearly, then, at least these first two observations simply were not “informal” observations, to which the Article V.F.7 procedures would apply.

As noted in footnote 2 on page 6, it appears that Ms. Libkin observed one of Ms. Pelensky’s classes on March 9. However, the record evidence does not disclose for how long that observation may have lasted and whether it was a formal versus an informal classroom observation. Accordingly, the Appellant has not proven that an “informal” evaluation occurred on March 9, and that the procedural requirement set forth in Article V.F.7. were violated in relation to whatever observation occurred on that date.

The last observation, of March 25, as described by Ms. Pelensky, quite clearly was more an informal walk-through than a formal observation. However, shortly thereafter, on the very same day of March 25, Ms. Libkin presented to the Ms. Pelensky her formal, written evaluation. The extensive feedback contained in that formal evaluation instrument met the procedural requirement of Article V.F.7. regarding the March 25 visit.

Accordingly, the claim of procedural irregularity based upon the language of Article V.F.7. is not supported by the record evidence.

The Merits of the Termination Action – The Relative Credibility of Witnesses

As the Appellant notes, much of Ms. Pelensky's testimony was in sharp conflict with that provided by the BPS witnesses, Ms. Nolan, Ms. Libkin, and Mr. Tuite. The Appellant argues that her demeanor, forthrightness and recollection of detail established her testimony as, by far, more accurate, credible and reliable than that of the BPS witnesses.

However, based on a careful review of the massive amount of record evidence, I conclude that the factual recitations made collectively by Ms. Nolan, Ms. Libkin and Mr. Tuite were more credible and reliable than the conflicting factual assertions made by Ms. Pelensky. I base this finding upon the following considerations.

Looking first at the Appellant's testimony, it was seriously flawed and not credible in certain key respects. The most significant single flaw in the Appellant's testimony related to her initial, absolute insistence that she never wrote anything like "Standard 7.12" on the blackboard as an objective for her students in a class which Ms. Libkin visited. Yet, in her Plan Book for the week of March 9 – 13, Ms. Pelensky quite clearly wrote "Standard 7.12" as the standard to which she would be teaching in that week. That entry, as initially made by Ms. Pelensky, shows that she intended to, and logically did, make reference to that Standard 7.12 on the board and to her class. Her insistence to the contrary was obviously wrong.<sup>10</sup>

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<sup>10</sup>Standard 7 is a grade pre-K through 4 standard. At the end of Standard 7 the Massachusetts ELA Curriculum Framework states, "The majority of students will have met these standards by the end of Grade 4, although teachers may need to continue addressing earlier standards."

Moreover, it is quite apparent from a careful review of the Plan Book that Ms. Pelensky at some later point over-wrote, in rather clumsy fashion, on "8" over the "7" and a "5" over the "2," thus altering "7.12" to read "8.15." When pressed on that point, she denied recalling if she over-wrote the "7.12" entry in this manner. This troubling evidence at least suggests that Ms. Pelensky may have gone back at some point and altered her Plan Book, perhaps to support her insistent testimony that she never wrote "Standard 7.12" on the board of her class as Ms. Libkin had testified to.

The Appellant then volunteered, "If it was changed then it was because Mr. Weekes raised an issue with seven and beginning reading. And since he didn't like it, I would have gone and I would have changed it for his – because he was not happy with that. However, since I had students who were reading at such low reading levels, I would stand by using Standard 7. I don't really see a problem with that."

The problem the arbitrator has with this shifting testimony is that if Ms. Pelensky had so altered her Plan Book entry from "7.12" to "8.15" at the direction of Principal Weekes, then she would have remembered that fact, and simply testified to it in a clear and straightforward manner. Instead, Ms. Pelensky initially insisted with confident recollection that she never wrote "Standard 7.12" on the board; then suggested that, well, may be she did, since it would have been appropriate to cite "Standard 7.12" to her students, given the low reading ability of some of them; then for a long time resisted the suggestion that she had written "Standard 7.12" in her Plan Book, and/or that she had later gone back and over-written "8.15;" then conceded only that she could not recall making such an overwrite; and then explained in some detail about why she would have made such an overwrite, given Mr. Weekes' unhappiness with her reference to

Standard 7. Bluntly, this shifting and internally contradictory testimony had the effect of shredding Ms. Pelensky's credibility as a witness.

Then, too, there was Ms. Pelensky's testimony that Principal Weekes had withdrawn certain allegations of misconduct against Ms. Pelensky, and that he had taken no action against her at all regarding those allegations. In fact, Mr. Weekes on November 25, 2008 issued to Ms. Pelensky a very stern written warning which recited certain unacceptable actions attributed to Ms. Pelensky, with several "directives" to Ms. Pelensky included. That written notice to Ms. Pelensky ended with the warning, "Failure to adhere to the directives contained in this memorandum shall constitute insubordination and may subject you to discipline up to and including termination." Ms. Pelensky, of course, would have remembered receiving such a harsh set of written directives and warning from Mr. Weekes. Her testimony to the contrary was false, and further undermined the credibility of Ms. Pelensky as a witness.

Turning to the testimony offered by the three BPS witnesses, it must be said that both Ms. Nolan and Ms. Libkin exhibited limited ability to recall some of the details of their interactions with Ms. Pelensky. Neither of them retained contemporaneous notes of their observations of Ms. Pelensky's classes, and that lack of daily notes quite clearly reduced their ability to recall certain details of those observations on a day by day basis. They did, of course, record their impressions not long after the fact of their classroom visits, in the formal evaluation documents. However, the lack of day by day notes did impact negatively on their ability to relate at the arbitration, on a day by day basis, such details as the precise dates on which classroom observations occurred, amounts of time spent on any given visit, and what they observed on day one versus day two.

In contrast, Mr. Tuite made and retained notes regarding each visit, formal or informal, to Ms. Pelensky's classes. He gave Ms. Pelensky written feedback promptly after each visit, and retained those documents as well. That careful creation and retention of records on a day by day basis greatly assisted him in recalling all the relevant details, even long after the fact when eventually testifying as a witness in this arbitration proceeding.

Ms. Pelensky suggests that at least two of the three BPS witnesses were biased against her, and that bias caused them to make up or exaggerate, or at least to mis-perceive, supposed deficiencies in her work. She suggests that Mr. Weekes, who had an obvious dislike for her, in fact wrote the evaluation which Ms. Nolan signed; he simply used Ms. Nolan as a straw woman to further his aim of getting rid of Ms. Pelensky on trumped up charges.

There is no evidence in the record to support such an allegation, other than the testimony of Ms. Pelensky herself. There is no dispute that Ms. Nolan made the class observations on the dates that she testified about. She gave detailed testimony about what she observed, and she confirmed that she herself (not Mr. Weekes) authored the evaluation instrument dated October 30, 2008, based upon what she personally observed. I credit Ms. Nolan's testimony in that regard. She was a relatively inexperienced evaluator, with no actual experience as a classroom teacher, and she failed to keep day by day notes. That perhaps would reduce the weight that should be given to her October 30, 2008 evaluation of Ms. Pelensky, if taken alone. I do not find, however, that she acted with bias or predisposition against Ms. Pelensky.

Ms. Pelensky does not claim that Ms. Libkin harbored bias against Ms. Pelensky. I find that Ms. Libkin acted in good faith in making her evaluation of Ms. Pelensky. The failure of Ms. Libkin to make and retain day by day, contemporaneous notes of each class observation did

adversely affect her ability to recall certain details. And, quite clearly, in school year 2008-09, Ms. Libkin's office was badly understaffed, which may have resulted in a somewhat more limited set of observations of Ms. Pelensky's classes. Those factors had the effect of reducing, so some extent, the weight that would be given to the March 25, 2009 evaluation, if taken alone.

Finally, Ms. Pelensky claims that Mr. Tuite from day one exhibited strong bias against her. She claims that he said, three times in their initial meeting, that he knew how to terminate her pursuant to the CBA. She claims that she left that meeting in tears, and promptly informed family and friends of what Tuite had told her in that meeting.

Oddly, however, she claims that she did not tell anyone at the BTU about these highly disturbing comments supposedly made by Tuite, in late August, until around late September or early October – when, she says, she told Union Vice-President Pat Connolly. One would think that Ms. Pelensky, knowing her job to be in jeopardy under the evaluation process, would have immediately informed the BTU of such inappropriate statements by her new principal and evaluator. It is not credible that she waited a month and a half before even mentioning such troubling comments to her Union representative. Moreover, Mr. Connolly was not called to corroborate Ms. Pelensky's claim that she eventually did complain to him (in late September or early October 2009) these supposed statements by Mr. Tuite back in August. Thus, once again, we are left with only Ms. Pelensky's uncorroborated claim of bias.

Contrary to Ms. Pelensky's assertion, I found Mr. Tuite to be a particularly credible witness. He exhibited a serious commitment to providing support to Ms. Pelensky, in hopes of helping her be successful. He took care not to look at the prior evaluations, with their DNMS ratings, as had been prepared by Ms. Nolan and Ms. Libkin. That showed a determination on his

part to not be unduly influenced by what they had written, but rather to look at Ms. Pelensky's work through a fresh set of eyes. He took care to document, day by day, what he saw in Ms. Pelensky's classes, and what he shared with her to support her in improving in areas of perceived deficiencies. In sum, I found Mr. Tuite to be a highly experienced and committed administrator and evaluator, whose goal was to get right his objective evaluation of Ms. Pelensky's work.

Importantly, there was consistency among the observations made by all three BPS evaluators who had observed Ms. Pelensky's classes. That consistency of observations was all the more telling because Mr. Tuite did not see the evaluations written by Ms. Nolan and Ms. Libkin until after he had completed his evaluations of Ms. Pelensky. Their consistent observations, as documented in the four interim evaluations given to Ms. Pelensky over the course of one and a half school years, had the effect of enhancing the credibility of all three of the BPS witnesses.

Based on these credibility determinations, I find to be factually accurate the information as conveyed through the testimony and documents presented by the BPS witnesses. To the extent that Ms. Pelensky gave conflicting testimony, that testimony she offered is not credited.

**The Merits of the Termination Action – The Controlling Legal Standards**

The undersigned arbitrator in 2008 heard and decided another case involving the termination of a BPS teacher with professional teacher status. *Patricia Odum v. Boston Public Schools*, AAA Case No. 11 390 01973 06 (Dunn, 2008). Like Ms. Pelensky, Ms. Odum had filed an appeal pursuant to M.G.L. c. 72, §42.

In *Odum*, this arbitrator discussed the controlling legal standards for such reviews brought under M.G.L. c. 72, §42, quoting at length from *Barehmi v. Boston Public Schools* (2006, Arbitrator Tim Buckalew), who in turn was quoting from *Cunningham v. Boston School Committee*, AAA Case No. 1139-1761-03 (2004, Arbitrator Ryan). In that *Barehmi* case, Arbitrator Ryan wrote,

While the parties differ on its meaning and implications for this award, they agree that the Arbitrator's decision must conform to the teachings of *School Committee of Beverly v. Geller*, 435 Mass. 223 (2001), the seminal case interpreting the Education Reform Act amending G.L. c. 72, §42, the external law governing teacher dismissals.... Prior to the amendments, arbitrators acting under the just cause provision of a collective bargaining agreement followed the arbitral practices interpreting just cause, but now must be mindful of additional considerations prescribed by the legislature including the best interests of pupils in a district and the need of the elevation of performance standards.

According to the Employer, these new strictures and the express delegation of exclusive authority (in) termination ... decisions to principals and headmasters, subject to review and approval of the school superintendent, means that an arbitrator must uphold a decision to terminate a teacher for poor performance if the school district proves its decision was based on legitimate pedagogical concerns stated in the statute, including, inter alia, "failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause." In addition to the *Geller* decision, the Employer asks the Arbitrator to heed the awards of Arbitrator Ryan in *Cunningham and the Boston School Committee*, AAA Case No. 1139-1761-03 (2004) and Arbitrator Irvings in *Gerardo and Worcester School Committee*, AAA Case No. 1139-1520-03 (2004). These awards have properly interpreted the post-ERA limited role of the Arbitrator and hold that the Arbitrator should not substitute his judgment for that of the school administration's on whether a teacher has met its performance standards: "If the evaluation was applied fairly and consistently to the teacher, and if there was some reasonable, objective, non-discriminatory basis for

the evaluator's judgments, then the arbitrator must generally defer to the administration concerning the teacher's competence.  
*Cunningham*, p. 33.

The undersigned commented in the *Odum* decision, "I agree with and adopt the statutory and contractual analyses contained in the *Barehmi* and *Cunningham* decisions." I reiterate that expression of agreement here, and thus will apply that legal analysis in this case involving the appeal of Ms. Pelensky.

**The Application of the Controlling Law to the Facts of this Case.**

A thorough review of the copious record in this case demonstrates that three different evaluators, over the course of a year and a half and through four interim evaluations, consistently observed many deficiencies in Ms. Pelensky's teaching. A useful starting point for the analysis in this regard is the set of prescriptions which Ms. Nolan included under Dimension 5, "Instructional Planning and Implementation," in her October 30, 2008 interim evaluation of Ms. Pelensky:

Mrs. Pelensky must:

1. Develop lessons for English 11 and English 12 aligned with BPS curriculum
2. End the "free write" activity. The "write" must be focused/directed and aligned to the lesson of the day....
4. .... Homework assignments must require student to read, write, and analyze material based on the lesson objective.
5. Plan lessons ... focused on what students will know and be able to do.....
7. Effectively structure class on the three elements of the "workshop....."
9. Differentiate instructional strategies e.g. modeling, ... and providing individualized coaching.
10. Know students' English Language Development Levels and use this information to inform instruction....

12. Integrate technology into curriculum and instructional practices to facilitate student understanding...

In addition to that listing of Dimension 5 prescriptions, under Dimension 7, "Monitoring and Assessment of Progress," Ms. Nolan wrote that Ms. Pelensky "does not use rubrics and other tools to help students evaluate their work. No ... grading rubric was displayed...." The prescriptions under this dimension included, "Post student grading system and provide students with appropriate rubrics...."

Unfortunately, a review of the evaluation instruments as later written by Ms. Libkin and Mr. Tuite show that either because of inability or unwillingness, Ms. Pelensky failed through the next school year and a half to implement these prescriptions. In the second half of school year 2008-09, Ms. Pelensky listed on the board as an objective, "Standard 7.12." Since Standard 7 refers generally to curriculum that would be taught to K-4 students, that objective raised for Ms. Libkin an entirely reasonable concern that Ms. Pelensky still was not developing lessons for English 11 and 12 students, aligned with BPS curriculum – as required in Ms. Nolan's prescription #1. In addition, even if some single sub-part of Standard 7 might have been appropriate to teach to her eleventh and twelfth grade students, it would have been necessary to explicitly list that specific objective – such as, "You will be able to de-code large, complex words by breaking them down into their roots, prefixes and suffixes."

Second, Ms. Pelensky quite notably continued to rely heavily upon the assignment of "free writes," or their functional equivalent, contrary to Ms. Nolan's prescriptions #2 and #4. Mr. Tuite noted in his October 22, 2009 evaluation, "Although students did have opportunities to write there was no clear connection to the objectives or standards of Ms. Pelensky's lesson." He

further noted that a distinctly unstructured “Do Now” writing assignment – “to write rough drafts in their notebooks” – lasted for about 30 minutes, rather than the typical “Do Now” lasting for only the first few minutes of the class. He, too, was concerned, then, that Ms. Pelensky still was relying far too heavily on totally unstructured writing, “free writes” in fact if not in name, rather than writing assignments specifically aligned to the ELA subject matter being taught on any given day.<sup>11</sup> Ms. Pelensky suggested that she returned to assigning free writes in 2009-10 because Mr. Tuite had no problem with them. His comments as written into his evaluations of Ms. Pelensky make clear that he in fact did share Ms. Nolan’s concern regarding so much unstructured writing, and he put Ms. Pelensky on notice of his concerns in that regard.

Regarding Ms. Nolan’s prescription #5, Ms. Libkin and Mr. Tuite saw similar deficiencies, though from a slightly different perspective. They both observed that Ms. Pelensky’s posted objectives – which presumably were aligned with her lesson plans – failed to identify what students would know and be able to do, based on that day’s lesson. Ms. Libkin commented that Ms. Pelensky’s posted objectives “lack rigor and describe vague tasks rather than specific learning objectives that define what students should know and be able to do.” Mr. Tuite made similar observations in both of his evaluations of Ms. Pelensky in school year 09-10.

Regarding Ms. Nolan’s prescription #7, Ms. Libkin and then Mr. Tuite observed as well that Ms. Pelensky was consistently failing to structure her classes in accordance with the three core elements of the Workshop method. None of them observed Ms. Pelensky with any kind of

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<sup>11</sup> Since Mr. Tuite had not read the evaluation instrument prepared by Ms. Nolan, it is entirely unsurprising that he did not use the same terminology, “free write,” in his expression of concern about too much unstructured writing. The fact that he harbored that same concern in substance, without having even seen Ms. Nolan’s evaluation of Ms. Pelensky, provided powerful evidence of the sincerity of Mr. Tuite’s common concern with what Ms. Nolan had written a year earlier.

consistency start a class with a brief Do Now, followed by a teacher-centered Mini-Lesson where Ms. Pelensky was giving focused instruction on some new material from the ELA curriculum, followed by the “small” segment of individual student work or small group collaboration, then followed by a return to the “whole” of the class reviewing and summing up what had been the focus of that day’s work. As Mr. Tuite acknowledged during his cross-examination, he saw at times parts of what would be consistent with the Workshop model, but he like Ms. Nolan and Ms. Libkin did not see Ms. Pelensky adhering to the overall Workshop methodology on any kind of a consistent basis.

Similarly, regarding Ms. Nolan’s prescription #9, none of the evaluators saw Ms. Pelensky herself modeling of the concept that she was attempting to present in any given class. She was instructed by all three evaluators to utilize modeling, typically as part of the Mini-lesson, so as to demonstrate and share with her students her knowledge of the concept being taught. However, Ms. Pelensky failed to follow that prescription, right through to the end.

Regarding Ms. Nolan’s prescription #12, it is fair to say that Ms. Pelensky never embraced the concept of integrating technology into her curriculum and instructional practices. Mr. Tuite demonstrated in his testimony and in the evaluations which he penned his understandable frustration that Ms. Pelensky only used once, and then only to post a learning objective, the overhead projector which Mr. Tuite had provided to her all year long for purposes of modeling concepts she was teaching to her classes.

Finally with regard to Ms. Nolan’s prescriptions, Ms. Pelensky quite notably failed to develop, post, and utilize grading rubrics aligned with each and every assignment upon which her students would be graded. Such rubrics, Ms. Pelensky was told repeatedly, were important so

that students, parents, and administrators would know what students were being expected to include in any given piece of their work. Rubrics, if developed, utilized, and posted for each gradable piece of student work, would give students, their parents, and administrators confidence regarding the fairness and equity of Ms. Pelensky's grading of students' work. Remarkably, though Ms. Pelensky was directed by Ms. Nolan, Ms. Libkin, and then Mr. Tuite to prepare, post, and utilize such rubrics in her grading of work, Ms. Pelensky in one and a half years posted only one rubric, a generic one developed by the State Department of Education for the grading of a formal written portion of the MCAS tests. Thus, she never herself prepared, posted, and utilized a single grading rubric. Quite predictably, that left students unguided about what her expectations were regarding any given assignment, and left the students, their parents and the administration without confidence regarding the fair and equitable grading of students' work by Ms. Pelensky.

Beyond that, Ms. Pelensky noted that even though she did post (repeatedly) the single rubric associated with the formal writing section of the MCAS test, she in fact did not apply even that rubric in a consistent way for each of her students. She asserted that it would be unfair to do so, since students arrived in her class with different levels of preparation in ELA. Thus, she explained, she would give a student a high grade simply for improving from where he/she was, whether or not that grade conformed to what was stated on the rubric. From that testimony it is clear that not only did Ms. Pelensky not develop and rely upon any grading rubrics of her own, she also did not faithfully apply the one, state-developed rubric which she did post for her students. It is unsurprising, then, that students, parents, and administrators were left with little confidence about the fairness, equitableness, and accuracy of the grades which Ms. Pelensky was

issuing to her students.

Related to the requirement of developing, posting, and utilizing grading rubrics, Mr. Tuite also directed Ms. Pelensky to assemble assessment portfolios for her students. These assessment portfolios, if assembled as directed by Mr. Tuite, would have provided another method by which Ms. Pelensky could explain and justify the grades given to any specific student. As with the directive to develop grading rubrics, Ms. Pelensky failed at any point to assemble assessment portfolios.

It is not as if Mr. Tuite just left Ms. Pelensky without support, and simply waited for her to fail to meet his expectations. On the contrary, he gave her prompt and constant feedback after each visit to her classes. Moreover, he directed Ms. Pelensky, repeatedly, to meet regularly with Ms. Hanagan, the director of instruction at the school, so that Ms. Pelensky could receive support and guidance from Ms. Hanagan in meeting Mr. Tuite's various prescriptions for improving her instruction. It is remarkable that Ms. Pelensky never followed this directive, and thus never availed herself of the support which Ms. Hanagan could have offered.

To conclude, the BPS (consistent with state requirements) has the right to establish the curriculum content that its teachers must adhere to, and also has the right to mandate what methodologies its teachers must utilize in their instruction of the students attending the Boston Public Schools. In the view of three different evaluators, Ms. Pelensky consistently failed to conform her teaching practices to the required curriculum content, the mandated teaching methodologies, and the grading protocols. Given all the deficiencies as repeatedly observed by three different evaluators over the course of one and one-half school years, and the overall rating of DNMS they issued to Ms. Pelensky on four interim evaluations in that span, it must be

concluded that Mr. Tuite acted in accordance with M.G.L. c.71, §42 when he terminated the employment of Ms. Pelensky. The record evidence in this case establishes that the four interim evaluations in school years 2008-09 and 2009-10 were applied in good faith, fairly and consistently to Ms. Pelensky, and that there were ample, reasonable, objective, non-discriminatory bases for the three evaluators' judgments that overall, Ms. Pelensky was continuing to fail to meet core performance standards. Accordingly, the undersigned arbitrator must defer to the administration's determination in that regard. For this reason, it must be concluded that the Boston Public Schools had just cause to dismiss Olga Pelensky pursuant to M.G.L. c.71, §42.

