STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 230 No. 44064 MP-2362 Decision No. 26524-A

Appearances:
Mr. Richard Perry, at hearing and on brief, and Mr. Peter Guyon Earle, on brief, Perry, Lerner & Quindel, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, WI 53202-3908, appearing on behalf of the Milwaukee Teachers' Education Association.
Ms. Mary M. Rukavina, Assistant City Attorney, City of Milwaukee, Office of the City

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Milwaukee Teachers' Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on May 24, 1990, alleging that the Milwaukee Board of School Directors had committed prohibited practices in violation of Sec. 111.70(3)(a)1 and 5, Stats, by violating the parties' collective bargaining agreement. On June 21, 1990, the Commission appointed James W. Engmann, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on said complaint was held on July 26, 1990, in Milwaukee, Wisconsin, at which time the Respondent answered the allegations of the complaint on the record. The parties were afforded the opportunity at hearing to enter evidence and to make arguments as they wished. Said hearing was transcribed, the transcript of which was received on August 17, 1990. The parties filed briefs which were received on September 21, 1990, and reply briefs which were received on October 31, 1990. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Milwaukee Teachers' Education Association (hereinafter Association or Complainant) is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. The Association is the exclusive bargaining representative of a bargaining unit consisting of certificated teachers and related professional personnel engaged in the education of student in the Milwaukee Public Schools. The Association maintains its principal office at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. The Milwaukee Board of School Directors (hereinafter Board or Respondent) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. As such, it operates the Milwaukee Public Schools. The Board maintains it principal office at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

3. At all times material herein, the Association and the Board have been parties to a collective bargaining agreement covering certificated teachers in

the employ of the Milwaukee Public Schools. Part VII, Section K of the 1989-90 agreement provides as follows:

> K. NONDISCRIMINATION CLAUSE.
> The MTEA (Association) and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap, or union activities.
>
> The Board agrees that where women and minorities are concerned, the principle of equality of treatment shall be maintained.
>
> Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable. They shall be submitted to the WERC (Commission) for determination as prohibited practice (contract violation) pursuant to Section 111.70(3)(a)(5), Wisconsin Statutes. They shall not be handled pursuant to Section J above.

Part III, Section G(6)(b), Professional Assistance Procedure, provides as follows:

> If the employe is found to be medically disabled by appropriate medical personnel, he/she shall be granted sick leave for necessary treatment. If the employe does not have sufficient sick leave, up to twenty (20) days of sick leave may be advanced which will be deducted from future accumulations.

4. Thomas Taylor, Jr. is a certificated teacher who has been employed in the Milwaukee Public Schools since 1972. As such, he is represented by the Association and covered by the collective bargaining agreement between the Association and the Board. Since 1978 Taylor has taught at Harlen Garland Elementary School. His evaluations indicate that he is at least a very competent teacher. Since 1982, his evaluations have noted sick leave use of over ten days per year. He has not been counseled, warned or reprimanded for excessive absenteeism or anything else during his tenure on the job. On February 17, 1989, 1/ Taylor was arrested and charged with two counts of possession of a controlled substance, specifically marijuana and cocaine. On February 20, Taylor was arrested and charged with one count of possession of a controlled substance, specifically cocaine.

5. On February 21, an article appeared in the Milwaukee Sentinel under the headline, "5th grade teacher arrested for 2nd time on drug charges." Said article stated:

> A fifth-grade teacher at Garland Elementary School. . . faces additional drug charges after being arrested a second time since Friday.
>
> Thomas Taylor, 44, originally was arrested Friday as he

1/ All dates refer to 1989 unless otherwise noted.

> was driving away from his apartment. . . . Police were there to carry out a search warrant. He was charged with misdemeanor drug possession, (sic) as the result of a police raid.
>
> Taylor was arrested again Monday, hours after he was charged in the first case.
>
> According to police, members of the Violent Crimes Task Force were conducting a surveillance operation on a drug house. . . when they spotted Taylor.
>
> Capt. Vincent Partipilo said Taylor was seen walking into the house and exiting quickly.
>
> Police said that when he was stopped for questioning, he threw a package containing a white powder that appeared to be cocaine at officers.
>
> Taylor told police he was celebrating his release from court earlier in the day, said Capt. Craig Hasting of the Vice Control Division.
>
> Hours earlier, police said, Taylor had appeared in the district attorney's office for a charging conference regarding his arrest Friday.
>
> Police had executed a search warrant on his home and found cocaine and marijuana in his house and car.
>
> Taylor was being held in the City Jail Tuesday.
> A school district spokesman said Taylor would be suspended without pay while the criminal charges were being handled.

6. On February 21, the Board by Assistant Superintendent Robert W. Long suspended Taylor and directed him to appear at an administrative inquiry on February 23. As a result of said inquiry, the Board by the Assistant Superintendent suspended Taylor from all teaching duties without pay as of February 24, pending resolution of the matter under the collective bargaining agreement. In a letter to Taylor following the administrative inquiry and dated February 23, Garland School Principal Robert Helminiak advised Taylor that a meeting would be held on March 1 to consider a charge against Taylor of conduct unbecoming a professional educator by violation of state statutes involving possession of a controlled substance. The misconduct charge was not resolved at the March 1 meeting and, therefore, a hearing was scheduled for March 8. On March 7, the Association by Assistant Executive Director Robert P. Anderson contacted the Board by telephone and advised Administrative Specialist Raymond Nemoir that Taylor would be unable to attend the conference scheduled for March 8 because he had been admitted to De Paul Hospital. Anderson and Nemoir agreed to reschedule the conference at a later date.

7. On or about March 7, Taylor was admitted to De Paul Hospital. The course of treatment was as follows:

> The patient was immediately involved in the program and immediately involved himself in group. The patient was very defensive, very guarded. He did begin to work on steps one through five. His first two weeks in treatment he was in total denial of the seriousness of

> his alcoholism. He did appear to be in touch with the power of the cocaine. Tom (Taylor) did begin to bond with some of the group members, and it appeared that he was sharing with some group members outside of group. Tom's last week in treatment, it appeared that he really got in touch with how powerful his addiction was, came to group and began to share. It appeared that his defenses came down, he was very open, willing to accept feedback, and took on the look of a different person. At this time Tom seemed very motivated, and ready to start his recovery. He did complete steps one through five. . . . The patient's employer was contacted. It was not clear if Tom was going to have a job or not. He has many legal problems around his cocaine abuse which has not been cleared up as of yet. . . . It appeared to the treatment team, that the last week in treatment Tom really did a turnaround; was looking very motivated and if he continued with his aftercare would probably be able to maintain ongoing sobriety. 2/

2/ "(S)teps one through five" refers to the 12 step program of recovery of Alcoholics Anonymous. The 12 steps are as follows:

1. We admitted we were powerless over alcohol--that our lives had become unmanageable.

2. Came to believe that a Power greater than ourselves could restore us to sanity.

3. Made a decision to turn our will and our lives over to the care of God as we understood Him.

4. Made a searching and fearless moral inventory of ourselves.

5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.

6. Were entirely ready to have God remove all these defects of character.

7. Humbly asked Him to remove our shortcomings.

8. Made a list of all persons we had harmed, and became willing to make amends to them all.

9. Made direct amends to such people wherever possible, except when to do so would injure them or others.

10. Continued to take personal inventory and when we were wrong promptly admitted it.

11. Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us and the power to carry that out.

12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics and to practice these principles in all our affairs.

Taylor was discharged on April 3, after which he participated in De Paul Hospital's outpatient program which included three weekly therapy sessions, twice weekly random urine drug screenings, two weekly meetings of Alcoholics Anonymous, work with an AA sponsor and monthly case reviews. From on or about March 7, 1989, through at least July 26, 1990, the day of hearing, Taylor's drug screenings were negative.

8. On July 26, Taylor entered guilty pleas for two counts of misdemeanor possession of cocaine and one count for misdemeanor possession of marijuana in violation of Secs. 161.16(2) and 161.41(3), Stats. On September 1, Taylor was sentenced to six months in the County jail, which sentence was stayed. He was placed on probation for three years and ordered to serve four weekends in the House of Correction, to pay $750 in fines and costs, and to perform 60 hours of community service.

9. A hearing was held on September 11 before Director of Human Resource Management Raymond E. Williams. In a letter dated September 15, Williams wrote to Taylor as follows:

> A hearing was held on September 11, 1989, under Part IV, Section N, 1(c) of the contract to consider the following charge of misconduct against you:
>
> Conduct unbecoming a professional educator by violation of State Statutes 161.16(2)(b)(1), 161.14(4)(t) (possession of a controlled substance).
>
> Present at this conference in addition to you and I were Ms. Clara Gonia, a Counselor from De Paul Rehabilitation Hospital, and Mr. Robert Anderson, MTEA.
>
> On February 17, 1989, you were arrested for possession of cocaine and marijuana, a violation of State Statutes 161.16(2)(b) and 161.14(4)(t). On February 20, 1989, you were arrested a second time for possession of cocaine.
>
> Ms. Gonia, testifying on your behalf, stated that you have been a participant in a drug rehabilitation program since March, 1989. She indicated that you have struggled, but worked hard while in the program. She also stated that you were involved in the counseling of other professionals and were showing signs of a good recovery.
>
> Your involvement with drugs and the strong influence you have over impressionable minds are a potentially dangerous combination. The fact that you are in a treatment program is commendable; however, the seriousness of your behavior makes your continued employment with the Milwaukee Public Schools a risk too great to ignore. It is for this reason that I will recommend to the Superintendent of Schools that you be terminated from your employment as a teacher in our district.

10. In a letter to Taylor dated September 19, Superintendent of Schools Robert S. Peterkin stated that he concurred with the disposition of the matter by Williams. In a letter to the President of the Board of School Directors dated September 26, Taylor appealed the Superintendent's decision to dismiss him as a teacher and requested a hearing before the full Board.

11. A hearing was held before the Milwaukee Board of School Directors on December 4. At said hearing, the Board took action which it stated in a letter dated December 12 to Taylor from Secretary-Business Manager John J. Peterburs. Said letter stated in relevant part as follows:

> Please be advised that at its meeting of December 4, 1989, the Milwaukee Board of School Directors adopted the following action in the matter of your appeal of dismissal as a teacher in the Milwaukee Public Schools:
>
> "That you sign a return to work agreement in which you are required to agree that for a period of five years you will continue participation in support programs to prevent you from participating in alcohol or narcotics. After two years of continued participation, the administration will review your participation in the program and may rescind the requirement to continue in the program if they believe it is no longer necessary.
>
> "That part of this program must involve a program of medical monitoring of your condition. Verification of your participation in the support program is required.
>
> "That you provide a statement from your doctor a minimum of every four months stating whether or not you test positive for drugs. Any positive test of drugs will automatically terminate your employment with the Milwaukee Public Schools.
>
> "You will receive a suspension through the 1989-1990 school year without pay."

12. The Association filed a grievance with the Board on behalf of Taylor on January 10, 1990, alleging a violation of Part VII, Section K of the collective bargaining agreement between the parties. The matter was not resolved through the grievance procedure. Part VII, Section K of the agreement specifies that grievances under this section are not subject to arbitration but are subject to proceedings under Sec. 111.70, Stats., as violations of Sec. 111.70(3)(a)5, Stats. This matter is properly before the Examiner under Part VII, Section K of the contract and Sec. 111.70(3)(a)5, Stats.

13. Taylor is alcoholic and drug dependent. Taylor's dependence on alcohol and other drugs, specifically cocaine, is an impairment which makes achievement unusually difficult. The Board perceived Taylor's impairment as limiting his capacity to work. The Board's suspension of Taylor from teaching for 18 months and its requiring him to enter into a return to work agreement meant to prevent, verify and monitor his use of alcohol and other drugs was based on Taylor's handicap of alcohol and drug dependence. Said action was not based on Taylor's conviction of possession of a controlled substance. Taylor's handicap was not reasonably related to his ability to adequately undertake his job responsibilities, nor did it threaten the safety of himself, fellow workers or students. The Board did not show that accommodating Taylor's handicap by allowing him to take an unpaid leave under Part III, Section G(6)(b) of the collective bargaining agreement would pose any hardship on the Board's program.

CONCLUSIONS OF LAW

1. Thomas Taylor is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

2. The Milwaukee Teachers' Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. The Milwaukee Board of School Directors is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

4. Jurisdiction over this matter is present through Part VII, Section K of the collective bargaining agreement between the parties which specifies that a grievance under this section is not subject to binding arbitration but is to be adjudicated as a prohibited practice complaint of violating Sec. 111.70(3)(A)5, Stats.

5. Thomas Taylor is handicapped within the meaning of Part VII, Section K of the collective bargaining agreement between the parties.

6. The Board's action of suspending Taylor and requiring him to enter into a return to work agreement was not based on Taylor's conviction of possession of a controlled substance in violation of Secs. 161.16(2) and 161.41(3), Stats.

7. The Board's action of suspending Taylor and requiring him to enter into a return to work agreement was discrimination against Taylor based on his handicap in violation of Part VII, Section K of the collective bargaining agreement.

8. The Board's action of suspending Taylor and requiring him to enter into a return to work agreement was not justified under the exceptions set forth in Sec. 111.34, Stats.

9. Accommodating Taylor's handicap by allowing him to take an unpaid leave under Part III, Section G(6)(b) of the collective bargaining agreement posed no hardship on the Board's program.

10. The Board's refusal to accommodate Taylor's handicap by allowing him to take an unpaid leave under Part III, Section G(6)(b) of the collective bargaining agreement was discrimination against Taylor based on his handicap in violation of Part VII, Section K of the collective bargaining agreement.

11. By violating Part VII, Section K of the collective bargaining agreement, as determined in Conclusions of Law 7 and 10 above, the Board violated Sec. 111.70(3)(a)5, Stats. 3/

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issue the following

ORDER 4/

3/ Although the Association alleges on complaint that the actions of the Board violated Secs. 111.70(3)(a)1 and 5, Stats., the Association offered no evidence nor made any argument as to either an independent or derivative violation of Sec. 111.70(3)(a)1, Stats. For that reason, no such violation is found.

4/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

IT IS ORDERED:

1. That the Board cease and desist from discriminating against Taylor on the basis of physical handicap.

2. That the Board expunge all reference to the return to work agreement, the suspension without pay and the misconduct proceedings from Taylor' records.

3. That Taylor's record be amended to show that he was on medical leave without pay, pursuant to Part III, Section G(6)(b) of the agreement, from February 21, 1989, through August 30, 1990.

4. That the Board notify the Wisconsin Employment Relations Commission in writing within twenty days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 11th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Association

On brief, the Association argues that the contractual prohibition against handicap discrimination embodies the Wisconsin Fair Employment Act (Act); that Thomas Taylor is handicapped within the meaning of the Act; that the Board's suspension of Taylor without pay constituted discrimination on the basis of a physical handicap; that a reasonable accommodation of Taylor's handicap requires that the Board provide him with a medical leave rather than a punitive suspension; that the Board has failed to provide any evidence in support of its burden to show that its discrimination against Taylor was permissible under the Act; and that the Board's defense that it permissibly discriminated against Taylor on the basis of his conviction is both pretextual and false.

The Association also argues that Part VII, Section K of the collective bargaining agreement between the parties prohibits discrimination on the basis of physical handicap; that Taylor's drug and alcohol addiction constitutes a physical handicap within the meaning of Section K; that the Board failed reasonably to accommodate Taylor's handicap when it punitively suspended him rather than grant him a medical leave without pay; and that this failure to accommodate constituted discrimination on the basis of a handicap in violation of Part VII, Section K of the contract.

In addition, the Association argues that the Board's affirmative defense that it permissibly discriminated on the basis of arrest and conviction rather than on the basis of a handicap is both pretextual and false; that, first, the record overwhelmingly demonstrates that the motivating reason for the punitive action against Taylor was his handicap and not the fact of his arrest and conviction; that, second, the circumstances surrounding Taylor's arrests and convictions are not substantially related to the circumstances of his job; and that Part VII, Section K of the collective bargaining agreement between the parties, by virtue of its incorporation of the Act, is grounded on the principle that treatment of drug and alcohol addiction is more appropriate that punitive discrimination.

The Association requests that all reference to the return to work agreement, the suspension without pay and the misconduct proceedings pursuant to Part IV, Section N, be expunged from Taylor's record, and that his record be amended to show that he has been on a medical leave without pay, pursuant to Part III, Section G(6)(b) of the contract from February 21, 1989, through August 30, 1990.

On reply brief, the Association argues the Board discriminated against Taylor on the basis of his physical handicap; that the Board's brief erroneously argues (1) that the Complainant failed to prove that Taylor is an alcoholic and a drug addict, (2) that alcoholism and drug addiction are not necessarily handicaps, (3) that the Complainant failed to prove that the Board knew that Taylor was handicapped, and (4) that the Board's adverse employment action was based on Taylor's arrest and conviction and not his handicap; that Taylor is an alcoholic and drug addict and that the Board stipulated to the same; that alcoholism and drug addiction constitute a handicap under both Wisconsin and federal law; and that the Board knew that Taylor was handicapped.

The Association also argues that the circumstances of Taylor's arrests

and conviction were not substantially related to the circumstances of his particular job as a teacher; that the Board erroneously equates "substantially relate" as used in Sec. 111.335(c), Stats., with "nexus" as used in the civil service law of the federal government and of other states; and that the punitive suspension of Taylor is not rationally related to an effort by the Board to avoid the risks of repeat conduct.

Finally, the Association concludes that Part VII, Section K of the agreement between the parties was violated when the Board punitively suspended Taylor and imposed a return to work agreement on him; that the Association carried its burden of establishing that Taylor is handicapped by virtue of his alcohol and drug addictions and that the Board discriminated against him on that basis; that the Board failed to establish that the discrimination was necessary on the ground that the handicap is reasonably related to Taylor's ability to adequately perform his job duties; that the Board failed to reasonably accommodate Taylor's handicap by granting him a medical leave as required by Part III, Section G; that the Board's affirmative defense that it permissibly discriminated on the basis of arrest and conviction is both pretextual and incorrect because the circumstances of the offense for which Taylor was arrested and convicted are not substantially related to the circumstances of his job; and that, therefore, Taylor is entitled to have all reference to the return to work agreement, the suspension without pay and the misconduct proceedings be expunged from his record and that he is entitled to have the record amended to show that he has been on medical leave without pay, pursuant to Part III, Section G(6)(b) of the contract from February 21, 1989, through August 30, 1990.

Board

On brief the Board argues that the Association has not proven that Taylor is handicapped within the meaning of the Wisconsin Fair Employment Act (Act); that the Association has not introduced any evidence into the record on the issue of Taylor's impairment or the Board's perception that he had an impairment which made achievement for him unusually difficult or limited his capacity to work; that, quite the contrary, the Association has introduced significant evidence supporting the position that Taylor's problems occurred outside of school and in no way impaired his achievement or capacity to work; that Taylor's performance evaluations illustrate a pattern of satisfactory performance and make no reference to his inability to achieve or any noticeable impairment on the job; that the Association has not produced any evidence to support the position that Taylor had an actual or perceived impairment; that, in fact, the evidence that was introduced illustrates that Taylor was never impaired on the job nor did the Board ever perceive that Taylor was impaired or limited in his capacity for work; that in addition to establishing that Taylor is handicapped under the definition provided in the Act, the Association must also prove that the Board took adverse employment action against Taylor based upon that handicap; that paramount to establishing that the Board's adverse employment action was based upon Taylor's handicap, the Association has the burden of proving that the Board had knowledge of the handicap; that the record establishes that the Board took an adverse employment action against Taylor; and that the record does not support the allegation that the adverse action was based upon Taylor's handicap.

The Board also argues that in its charging letter of September 15, 1989, the Administration informed Taylor that the Administration had concluded that he was guilty of conduct unbecoming a professional educator by violation of state statutes involving the possession of a controlled substance; that it was Taylor's involvement with criminal activity, not his physical or mental impairment or his ability to perform on the job, that was at the heart of the

misconduct charges against him; that the evidence establishes that the basis for the decision was Taylor's involvement with the criminal justice system; and that, therefore, the Association has failed to meet its burden of proof with respect to (a) establishing that Taylor has a handicap, and (b) that the Board's adverse employment action was based on that handicap.

In addition, the Board argues that the Board did not discriminate against the Complainant on the basis of an arrest and a conviction record within the meaning of the Act; that in dealing with convicted criminals, actions taken by an employer which might normally constitute discrimination are deemed not to be unlawful if it can be shown that the circumstances of the offense substantially relate to the circumstances of the particular job; that, thus, a wide variety of off-duty misconduct, from conviction of a teacher for theft and aggravated assault to drug possession, have been regarded as rationally related to on the job performance; that this concept is particularly emphasized where the arrest or conviction are publicized; that the Administration attempted to balance its interest in protecting students from an unreasonable risk against its interest in rehabilitating a criminal; that the Board expressed its concern that the adverse publicity may have had an embarrassing affect to the District; and that such a concern is valid and legally permissible when it is found that the mission of the public employer is affected by any notoriety present in the arrest and prosecution of the employe.

The Board concludes that the Association has not met its burden of proof in establishing that Taylor was handicapped within the meaning of the Act; that the Association has not established that the Board illegally discriminated against Taylor on the basis of his arrest or conviction record within the meaning of the Act; that, therefore, the Board has not engaged in any prohibitive labor practice in violation of Sec. 111.70, Stats.; that the Board struck a fair and legally permissible remedy; that Taylor was suspended for one year to put some time and distance between himself and the fifth grade students he taught; that he was also required to sign a work agreement in which he agreed to submit to random drug testing as ordered by his terms of his court ordered probation; that Taylor agreed to such a condition; and that, therefore, the Complainant's petition for relief should be denied and the Complaint should be dismissed.

On reply brief, the Board argues that the Association has not met its initial burden of proof because it has not established that Taylor suffered from a real or perceived lessening or deterioration or damage to a normal bodily function or condition or the absence of such bodily function or condition; that there is not one shred of evidence in the record where an expert medical diagnosis has been rendered regarding Taylor's alleged alcoholism and drug addiction; that the Association has not met its secondary burden of proof because it has not established that Taylor's impairment either actually makes or is perceived as making achievement unusually difficult or limits the capacity to work; and that, therefore, the Complainant's allegation of handicap discrimination should be summarily dismissed.

The Board also argues that the Respondent has contended from the start that its employment decision was permissible under the exception to the prohibition against discrimination against someone on the basis of a conviction record; that the Complainant classifies this as pretextual; that without a showing of a handicap, however, the bottom of Complainant's argument falls out; that Complainant has not met the burden of proof in establishing that Taylor is a handicapped individual under the Act; that Taylor was convicted of misdemeanors the circumstances of which substantially relate to the circumstances of his particular job; that Taylor, by virtue of his two misdemeanor convictions for two separate violations of the same criminal statute within three days has, at the very least, demonstrated poor judgment and a woeful lack of

responsibility; that the very nature of a teacher's job requires that he or she exercise good judgment and responsibility over the population they serve; and that the Respondent had reason to doubt Taylor's judgment and concluded that his involvement with drugs and the strong influence he had over impressionable minds was a potentially dangerous combination and created a risk too great to ignore.

DISCUSSION

The Association and the Board agree that Part VII, Section K of their collective bargaining agreement incorporates the Wisconsin Fair Employment Act (hereinafter Act) and federal law. 5/ The Act makes it unlawful for an employer to discriminate against an employe 6/ in terms, conditions or privileges of employment 7/ on the basis of handicap. 8/

Three points are essential to establishing that a person has been discriminated against in regard to employment due to a handicap: (1) The complainant must be handicapped within the meaning of the Act; (2) the complainant must establish that the employer's discrimination was on the basis of handicap; and (3) it must appear that the employer cannot justify its alleged discrimination under the exceptions set forth in the Act. 9/

Thus, the first issue to be determined is whether Taylor is handicapped within the meaning of the Act. The Act states that a handicapped individual in an individual who:

> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
>
> (b) Has a record of such an impairment; or
>
> (c) Is perceived as having such an impairment. 10/

The Board correctly states that a two-step process of analysis is needed to determine whether an individual is handicapped under the Act. "In summary, the person alleging that he or she is handicapped under the Act must establish first, an actual or perceived impairment, then, second, that such condition either actually makes or is perceived as making achievement unusually difficult

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5/ Milwaukee Board of School Directors, (hereinafter Wilkerson), Dec. No. 21315-A (McLaughlin, 8/84), at 10; Milwaukee Board of School Directors, (hereinafter Molling), Dec. No. 23604-B (Schiavoni, 4/87), at 12-14, reversed on other grounds, Dec. No. 23604-C, (WERC, 2/88).

6/ Section 111.325, Stats.

7/ Section 111.322(1), Stats.

8/ Section 111.321, Stats.

9/ Boynton Cab Co. v. ILHR Department, 96 Wis. 2d 396, 406 (1982); Wilkerson, supra; and Molling, supra, at 14.

10/ Section 111.32(8), Stats.

or limits the capacity to work." 11/

The Board does not dispute that Taylor is an alcoholic and cocaine addict. 12/ The Board does dispute that alcoholism and drug addiction are necessarily handicaps per se.

It is well settled that alcoholism is a disease 13/ but does it constitute an impairment for purposes of the Act? The element of "impairment" is satisfied by showing an actual or perceived lessening, deterioration, or damage to a normal bodily function or bodily condition, including the absence of said function or condition. 14/ Certainly alcoholism and drug dependence meet these criteria. 15/

Establishing an impairment, however, is not enough. The Act also requires the complainant to

> establish that the impairment either actually makes or is perceived as making 'achievement unusually difficult or limits the capacity to work'. . . The disjunctive 'or' in the statute makes it clear that one of two conditions must be met to satisfy this second step. Either the claimant must show that the real or perceived impairment makes achievement unusually

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11/ City of La Crosse Police and Fire Commission v. Labor and Industry Review Commission, 139 Wis. 2d 740, 762 (1987).

12/ In its answer to the complaint placed on the record at hearing, the Board admitted that for a period of ten years Taylor has suffered from alcoholism and, for a period of approximately two years, Taylor suffered from addiction to cocaine. On brief, the Board raised the issue of whether the Association had proved that Taylor was an alcoholic and addict but did not argue that the Association had not proved the same. Instead, on brief the Board disputed whether alcoholism and addiction are necessarily handicaps per se. On reply brief, the Board argued that the Association did not prove by medical testimony that Taylor is an alcoholic and addict. As the Board admitted such in its answer to the complaint, it can not on reply brief put the Association to its proof on this matter. For the purpose of this decision, Taylor is deemed by admission to be an alcoholic and addicted to cocaine.

13/ Connecticut General Life Insurance Company v. DILHR, 86 Wis. 2d 393, 407 (1978). See also Milwaukee Board of School Directors, Dec. No 23604-C (WERC, 2/88) at 7-8.

14/ City of La Crosse, supra, at 759-760. The element of "impairment" can also be satisfied by showing that the condition perceived by the employer would constitute and actual impairment if it in fact did exist.

15/ Section 51.01(1m), Stats., defines "alcoholism" as "a disease which is characterized by the dependency of a person on the drug alcohol, to the extent that the person's health is substantially impaired or endangered or his or her social or economic functioning is substantially disrupted." An "alcoholic" is defined in Sec. 51.01(1), Stats., as "a person who is suffering from alcoholism," while someone who is "drug dependent" is defined in Sec. 51.01(8), Stats., as "a person who uses one or more drugs to the extent that the person's health is substantially impaired or his or her social or economic functioning is substantially disrupted."

> difficult, or the claimant must show that the real or perceived impairment limits the capacity to work. An employer's perception of either satisfies this element as well. 16/

Does the impairment of alcoholism and drug dependence make achievement unusually difficult? The Board argues that the Association did not prove that Taylor had an impairment which made achievement for him unusually difficult and that, to the contrary, the Association introduced significant evidence supporting the position that Taylor's problems occurred outside of school and in no way impaired his achievement.

What is meant by the phrase "makes achievement unusually difficult"? The Wisconsin Supreme Court answered the question as follows:

> The determination rests not with respect to a particular job, but rather to a substantial limitation on life's normal functions or a substantial limitation on a major life activity. See, School Bd. of Nassau County, Fla. v. Arline, 107 S. Ct. 1123, 1129 (1987). 17/

Thus, the analysis looks not at Taylor's job but at his life. Certainly, alcoholism and drug dependence, by definition, limit life's normal functions and major life activities and, thus, meet this condition. 18/

Do the impairments of alcoholism and drug dependence limit the capacity to work? Again, the Board argues that the Association did not prove that Taylor had an impairment which made achievement for him unusually difficult and that, to the contrary, the Association introduced significant evidence to show that Taylor's problems occurred outside of school and in no way limited his capacity to work.

The Wisconsin Supreme Court has also determined what is meant by the phrase "limit the capacity to work." The Court said that the condition of "limits the capacity to work" refers to the particular job in question. 19/ Again, alcoholism and drug dependence can certainly limit an employe's capacity to teach.

Irrespective of whether Taylor's impairment limited his capacity to work, the actions of the Board showed that it perceived that Taylor's impairment limited his capacity to teach. The Board determined that Taylor's impairment required that he be suspended from teaching for 18 months. The Board also determined that Taylor would have to sign a return to work agreement in which he was required for a period of five years (1) to continue participation in support groups to prevent him from participating in alcohol and drugs, (2) to be involved in a program of medical monitoring of his condition, including verification of his participation in the support group, and (3) to provide a statement from his doctor a minimum of every four months stating whether he tested positive for drugs. Regardless of whether Taylor's capacity to work was limited, this condition is still met because the Board perceived his capacity

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16/ City of La Crosse, supra, at 761.

17/ Id.

18/ See footnote 15/ above, quoting Sec. 51.01(1m) and (8), Stats.

19/ City of La Crosse, supra, at 761-762.

to work was limited. 20/

The finding that an alcoholic and drug dependent is handicapped under the Act is consistent with other decisions. In Squires v. LIRC, the Court reviewed the discharge of an alcoholic employe to determine whether the discharge was discrimination based on handicap. In first determining whether the complainant was handicapped within the meaning of the Act, the Court said, "The first point is not at issue. It is undisputed that the employee is handicapped by reason of his alcoholism." 21/ In Molling, the Examiner also determined that the disease of alcoholism is a physical handicap. 22/ Other courts have determined that alcoholism and drug addiction are handicaps. 23/

Thus, it is determined that Taylor suffers from an impairment of alcoholism and drug dependence, that said impairment makes achievement unusually difficult, and that the Board perceived his impairment as limiting his capacity to work. Based on this, it is determined that Taylor is handicapped within the meaning of the Act.

As to the second issue, the burden of proof is on the Complainant to establish that the employer's discrimination was on the basis of handicap. 24/ The Board argues that it did not discipline Taylor based on his handicap but, rather, based on his criminal convictions. The Board further argues that said discipline was not discrimination because the convictions were substantially related to the circumstances of Taylor's job. The Association argues that this is pretext.

The overriding concern of the Board's administration in recommending Taylor's termination was his involvement with drugs. In his letter to Taylor quoted in Finding of Fact 9 above, the Director of Human Resources Management wrote:

> Your involvement with drugs and the strong influence you have over impressionable minds are a potentially dangerous combination. . . . (T)he seriousness of your behavior makes continued employment with the Milwaukee Public Schools a risk too great to ignore. It is for this reason that I will recommend to the Superintendent of Schools that you be terminated from your employment as a teacher in our district.

Nowhere does the Director state that it is Taylor's conviction that is the reason for his recommendation; no, it is his "involvement with drugs."

The Superintendent concurred with this recommendation. The major concern

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20/ Section 111.32(8)(c), Stats.

21/ 97 Wis. 2d 648, 651 (Wis. Ct. App. 1980).

22/ Supra, at 15.

23/ Hazlett v. Martin Chevrolet, 51 FEP Cases 1588, 1590 (Ohio 1986), reviewing several state and federal decisions on the matter.

24/ The Board argues on brief that the Association must prove that the Board knew of the Taylor's handicap and that the Association failed to do so. On the record it is obvious that the Board was aware of Taylor's handicap before it made its decision to suspend him.

of the Board was Taylor's drug dependence as well. All of the conditions of the return to work agreement imposed by the Board were directly related to preventing, monitoring and verifying Taylor's use of drugs. As quoted in Finding of Fact 11 above, the Secretary of the Board wrote to Taylor in part as follows:

> "That you sign a return to work agreement in which you are required to agree that for a period of five years you will continue participation in support programs to prevent you from participating in alcohol and narcotics.
>
> . . .
>
> "That part of this program must involve a program of medical monitoring of your condition. Verification of your participation in the support program is required.
>
> "That you provide as statement from your doctor a minimum of every four months stating whether or not you test positive for drugs. . . ."

Nowhere does the Board direct Taylor to participate in support programs to prevent him from participating in criminal activity, neither does the Board require that his conviction record by monitored nor that his probation officer provide a statement every four months that he has been free from conviction. The Board's action focuses entirely on Taylor's alcohol and drug dependence, supporting the Association's argument that the Board's use of conviction record to support its action is pretext. Although the arrest of Taylor started this process and although the Board's action came after Taylor's convictions, the record is clear that the action taken by the Board was based on Taylor's dependence on alcohol and other drugs; that is, based on Taylor's physical handicap, and not his conviction record.

The third issue requires a determination that the employer cannot justify its alleged discrimination under the exceptions set forth in Act. The Act states that, notwithstanding the prohibition against employment discrimination, it is not employment discrimination because of handicap to:

> discriminate against any individual . . . in terms, conditions or privileges of employment if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment. . . . 25/

The Board did not show that Taylor's handicap related to his ability to adequately undertake the job-related responsibilities of teaching. The record shows that throughout the ten years of Taylor's alcoholism and two years of his drug dependence, he was a competent teacher with no record of any problems. 26/ Nothing in the record suggests that Taylor ever used alcohol or other drugs at school or that he was ever under the influence of alcohol or other drugs while at school. Thus, the Board did not show that Taylor's alcoholism or drug dependence interfered in any way with his teaching.

25/ Section 111.34(2)(a), Stats.

26/ At the hearing before the Board, an issue was raised regarding Taylor's attendance during this time. While the number of his absences were noted on his teacher evaluations since 1983, he was never counseled, warned or disciplined regarding excess absenteeism.

In determining whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, the Act allows the employer to consider the present and future safety of the individual, the individual's coworkers and, if applicable, the general public. 27/ If the employment involves a special duty of care for the safety of the general public, the employer may consider said special duty of care in evaluating whether the employe can adequately undertake the job-related responsibilities of a particular job. 28/

The Board did not show in any way that Taylor's handicap impacted on the safety of himself, his fellow teachers or the general public. Nothing in the record suggests that Taylor's use of alcohol or drugs involved students in any way. There is absolutely no evidence that Taylor bought from, sold to, or used alcohol or other drugs with his students or any students, either at school or elsewhere. Thus, the Board did not show that Taylor's handicap in any way compromised the safety of anyone, including students. Finally, the Board did not show that Taylor's job involved a special duty of care for the safety of the general public.

The Act states that employment discrimination because of handicap includes:

> Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business. 29/

A reasonable accommodation would have been to allow Taylor to take an unpaid medical leave, as allowed for under the agreement between the parties. The Board offered no evidence that such an accommodation would in any way pose a hardship on its program. Therefore, by refusing to accommodate Taylor's handicap in this way, the Board discriminated against Taylor on the basis of handicap.

27/ Section 111.34(2)(b), Stats.

28/ Section 111.34(2)(c), Stats.

29/ Section 111.34(1)(b), Stats.

Since the Board discriminated against Taylor on the basis of handicap by suspending him for 18 months 30/ and requiring a return to work agreement 31/ in violation of Part VII, Section K, I have ordered the expungement of all reference to the suspension, including the misconduct proceedings, and the return to work agreement. As the Board discriminated against Taylor by not accommodating his handicap in violation of Part VII, Section K, I have ordered that his record be amended to show that he was on medical leave pursuant to Part III, Section G(6)(b), the contractual provision for accommodating medical disabilities.

Dated at Madison, Wisconsin, this 11th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

30/ There may be factual situations in which the Board could discipline an employe for being arrested for possession of a controlled substance . This decision holds only that such a factual situation is not present in this case.

31/ There may be factual situations in which the Board could require an employe to enter into a return to work agreement, such as the one at issue here. This decision holds only that such a factual situation is not present in this case. This decision makes no holding as to the appropriateness of the specific elements of the return to work agreement (participation in support programs, medical monitoring, drug test verification) for that was not at issue here.