BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| SUPERIOR SCHOOL DISTRICT EMPLOYEES LOCAL NO. 1397, AFSCME, AFL-CIO | Case 100 No. 44191 MA-6206 |
| and | |
| SUPERIOR SCHOOL DISTRICT | |

Appearances:

Mr. Victor Musial, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Stevens L. Riley, appearing on behalf of the District.

ARBITRATION AWARD

Superior School District Employees Local No. 1397, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the Superior School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a suspension. The undersigned was so designated. Hearing was held in Superior, Wisconsin on September 17, 1990. The hearing was not transcribed and the parties orally argued their respective positions at the conclusion of the presentation of the evidence.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The Grievant has been employed by the District for thirteen (13) years and fills the position of custodian/engineer at Blaine Elementary School. The Grievant is responsible for the steam heating system, electrical motors, routine maintenance, such as repairing broken glass, as well as general safety including the location of any activated fire alarm to determine whether there is a fire, and if so, to put it out or inform the fire department of its location. On February 8, 1990, the Grievant reported for work as normal at Blaine Elementary. Sometime after 11:20 a.m., the District's representatives could not locate the Grievant. After searching for him, the Assistant Superintendent, Gerald Peck, was informed of this fact. At approximately 1:45 p.m., Peck along with the Director of Buildings and Grounds, Bob Shears, went to Blaine Elementary and along with two custodians at Blaine began a search of the building. At about 2:00 p.m. Shears located the Grievant sleeping behind the duct work in the fan room located above the second floor of Blaine Elementary. Peck detected the odor of alcohol on the Grievant's breath. A meeting was held with the Grievant and his Union steward. The Grievant stated that he was taking medication and had become very sleepy. The Grievant denied drinking alcohol and was asked to submit to a breath test and the Grievant agreed. Peck contacted the Police liaison officer, Doug Osell, who brought his preliminary breath testing unit to Blaine Elementary. Osell told the Grievant he would administer the test only if the Grievant agreed voluntarily. At first, the Grievant indicated he would not agree and after Peck indicated the assumption was the Grievant had used alcohol and after a conference with the Union steward, the Grievant agreed to take the test. The result was a .13 reading on the device. The Grievant then admitted that he had been drinking while at work. The Grievant had gone to his truck during work and consumed alcohol. The Grievant was referred to the Employe Assistance Counselor and taken home. The Grievant was suspended with pay pending the decision by the Superintendent as to disciplinary action. By a letter dated February 22, 1990, the Grievant was suspended without pay for thirty working days. The Grievant had received no discipline prior to this incident and had a good work record. The Grievant filed the instant grievance asserting that the penalty imposed was too severe.

ISSUE

The parties stipulated to the following:

> Whether or not the District violated the collective bargaining agreement by suspending the Grievant for thirty (30) working days as a result of his becoming intoxicated and sleeping, all while on the job?
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> If so, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

Article VIII - Suspension and Dismissal

Section 1. The Board agrees to act in good faith in the suspension or dismissal of any employee covered under this Agreement. Any employee may be suspended without pay or discharged for just cause only.

Section 2. The sequence for disciplinary action shall be:

A. Oral reprimands;

B. Written reprimands with a copy sent to the Union;

C. Suspension; and

D. Discharge.

A written reprimand sustained in the Grievance Procedure or not contested by either the employee or the Union shall be considered a valid warning.

Section 3. The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge. Theft of personal or public property, gross negligence or willful dereliction of duty, insubordination or any act which is inappropriate to or counter to the welfare of children and other employees shall be cause for immediate suspension or discharge.

Section 4. Upon completion of the probationary period, no employees covered by the terms of the Agreement shall be suspended or dismissed unless thy (sic) are given five (5) days written notice of their pending dismissal or suspension. A suspended or discharged employee or his/her representative may make a written application for hearing of the case of dismissal or suspension before the Board by filing the same, in writing, with the Superintendent within five (5) days from the date he/she received his/her notice of dismissal or suspension. A hearing of the dismissal or suspension shall be held by the Board as a whole or an appropriate committee selected by the Board.

DISTRICT'S POSITION

The District contends that it had just cause to suspend the Grievant for thirty working days. It submits that the Grievant's conduct is an aggravated case of alcohol abuse. It points out that the Grievant was knowingly drinking while at work because he had to go out to his truck in February to get the alcohol and drank until he went to sleep. It further notes that the Grievant crawled behind the duct work and went to sleep for at least two hours during work while staff were looking for him. It claims that the Grievant not only endangered himself but others in the building given his responsibilities for safety in the building. The District argues that it has a program of discouraging alcohol and drug abuse and must send an appropriate message to others. It maintains that the conduct on the Grievant's part is admitted and the District's judgment in assessing the penalty should be respected in that it was not unreasonable, arbitrary or capricious or an abuse of discretion. It insists that the record fails to establish any disparate treatment of the Grievant on the facts and its decision as to the penalty must stand.

UNION'S POSITION

Union contends that the discipline is "punishment" and is unreasonable and excessive. It submits that others including those who have responsibility for students have abused alcohol and have not been suspended. It claims that the Grievant was suffering from an illness and was not treated fairly and that there was disparate treatment of the Grievant. It insists that the penalty of thirty (30) working days was too harsh and the penalty should therefore be reduced.

DISCUSSION

The sole issue for determination in this matter is the appropriateness of

the penalty imposed. In general, where discipline has been imposed, the inquiry is whether the Grievant committed certain acts or omitted to do certain acts in violation of the Employer's work rules. Additionally, the investigation of the Grievant's guilt or innocence is sometimes an issue. Here, it is admitted that the Grievant consumed alcohol while at work and then slept during working hours. It is undisputed that the Grievant was intoxicated by virtue of the test given by a skilled and knowledgeable police officer which indicated a degree of alcohol in excess of that established by statute for drivers to be considered intoxicated. There was no challenge to the District's investigative procedures and thus, only the penalty imposed is being challenged.

It is a well settled rule that in the absence of contract language to the contrary, the arbitrator has the inherent power to determine the sufficiency of the cause and the reasonableness of the penalty imposed. 1/ Additionally, it is primarily the function of the Employer to determine the penalty and the circumstances under which the penalty imposed can be set aside by the arbitrator are those where discrimination, unfairness or capricious and arbitrary action are shown. 2/ In short, an abuse of discretion must be proved. If an arbitrator could substitute his judgment and discretion for that honestly exercised by the Employer, then the functions of management would have been abdicated and every case would go to arbitration, creating an intolerable situation. 3/ Thus, the issue is whether the District abused its discretion, that is, does the penalty imposed by the District fit the crime. Here, the evidence established that the Grievant engaged in very serious misconduct, drinking on the job and sleeping on the job. In many places, these are dischargeable offenses. The Grievant performs his duties in a school and the use of alcohol by an employe certainly could send a wrong message to impressionable young children. A school is not an inherently dangerous place to work nor is it a dangerous environment, however, the Grievant does have responsibilities to maintain a safe environment for the children. On the other hand, the Grievant has had no prior discipline, has had a good work record and apparently never demonstrated that he had a problem with alcohol. The Grievant has undergone rehabilitation. It appears from the record that the District considered all these factors when it determined the penalty. 4/ Although the Grievant asserted that there was disparate treatment, the record fails to show that a different penalty was imposed on another employe under the same situation, i.e. drinking on the job, becoming intoxicated, and then sleeping on the job in a remote location. It appears that the facts in this case are unique and the mere assertion that others have not been suspended for alcohol use, without establishing what the underlying circumstances were, does not establish any disparate treatment. The undersigned can find no basis to conclude that the District abused its discretion in setting the penalty in this case, and therefore concludes that there is no reason to set aside the penalty. The evidence shows no discrimination, unfairness or capricious or arbitrary action on the part of the District by suspending the Grievant for thirty (30) working days for the misconduct set out above and hence, the District did not violate the collective bargaining agreement.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

## AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 28th day of September, 1990.

By ______________________________

Lionel L. Crowley, Arbitrator

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1/ Great Atlantic & Pacific Tea Company, 63-1 ARB para 8027 (Turkus, 1962).

2/ Brunswick City School District, 94 LA 581 (Talarico, 1990).

3/ Id.

4/ Ex. 5.