

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

DAVID RASMUSSEN

and

WESTON SCHOOL DISTRICT

Case 29  
No. 54037  
MA-9528

Appearances:

Cullen, Weston, Pines & Bach, by Mr. Gordon E. McQuillen, on behalf of grievant David Rasmussen.

LaRowe, Gerlach & Roy, S.C., by Mr. James P. Gerlach and Ms. Linda L. Hale, on behalf of the District.

ARBITRATION AWARD

The above-entitled parties, herein "Rasmussen" and "District", have agreed to arbitrate grievant David Rasmussen's non-renewal. Pursuant thereto, hearing was held in Reedsburg, Wisconsin, on October 2, 3, and November 15, 1996. The hearing was transcribed and the parties thereafter filed briefs which were received by April 15, 1997. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the District have just cause to non-renew grievant David Rasmussen's teaching contract for the 1996-1997 school year and, if not, what is the appropriate remedy?

BACKGROUND

Rasmussen, a shop teacher and driver's education teacher, has been employed by the District for about 18 1/2 years. Throughout his employment, Rasmussen was counseled and disciplined over his conduct.

In 1979, he was told that he could not park his private vehicle in the back of the school building. He grieved that directive on September 7, 1979, after which the matter was dropped. In 1980, he received a letter from then-District Administrator Bruce A. Lemery and then-Principal Cynthia J. Valitchka which claimed that soda pop was being sold in his shop; that he was using the

shop to house his private vehicle; and that he had used the school's name for personal profit. Rasmussen denied all those charges.

In 1980, he also was told by them that he had improperly placed a refrigerator and a carpet in the shop after he had been earlier told that he could not do so and that, as a result, they must be removed. In 1986, he was counseled over his failure to immediately turn over his shop keys after being ordered to do so by then-High School Principal James S. Miller.

In 1987, he was counseled over allowing unsupervised students to do work in the shop area. In various years, he was counseled again over parking his private vehicle in the back of the school building. In 1988, he was counseled over allowing students to work on power equipment without any supervision.

In 1991, he received a written reprimand -- his first designated as such -- for allowing a student to walk home alone in bitter cold. In that same year, he received a reprimand for allowing students to take home lumber that did not belong to them. He did not grieve either reprimand.

In April, 1993, he was suspended for three (3) days without pay for using wood in his shop class without proper authorization. He was then told that "similar unethical confirmed practices at this school district will cause termination of your contract." He did not grieve that suspension.

In April, 1993, he was suspended for three (3) days after he forced two girls to retrieve metal pins from a shop room pit filled with oil and other putrid substances. He was told at that time: "Any further disciplinary action may result in my recommending to the Board of Education your dismissal from employment at Weston High School." Rasmussen did not grieve that suspension.

In April, 1995, he was suspended for three days for inappropriately touching a girls' knee during driver's education class. Superintendent Howard Justman by letter dated March 28, 1995, thus warned him that any further misconduct could lead to his "termination". Rasmussen grieved and arbitrated that suspension in a separate arbitration proceeding before Arbitrator Thomas L. Yaeger who subsequently ruled on April 3, 1997, that the District had just cause to suspend him. Weston School District and Weston Teacher's Association and South Central United Educators, Case 28, No. 53184, MA-9266. (4/97).

In September, 1995, Rasmussen was counseled over purchasing materials without proper school authorization. In January, 1996, he was twice counseled over parking in the back of the school. Justman and Rasmussen then also talked about students who were improperly parking their cars behind the school building and who were smoking there. When Justman told Rasmussen to report them, Rasmussen replied that he would not do so.

Rasmussen on February 12, 1996, twice told a student to present a bill for a new hammer to another teacher after one of the latter's students apparently broke the hammer in Rasmussen's

shop several weeks earlier.

By letter dated February 14, 1996, School District Clerk Donald Fearing informed Rasmussen:

Dear Mr. Rasmussen:

Pursuant to Wisconsin Statutes Sec. 118.22(3), (a)t least 15 days prior to giving written notice of refusal to renew (sic) a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice that the board is considering non-renewal of the teacher's contract for the 1996-97 school year. Notice is hereby given that the Board of Education of the School District of Weston, upon the recommendation of the District Administrator, intends to consider terminating your employment contract with the District for reasons which have been provided to the Board by the District Administrator.

The Board will be considering your failure to perform at a professional level of competence the services, duties and obligations required by the laws of the State of Wisconsin and the rules, regulations, and policies of the School Board, as evidenced by:

1. Failure to adhere to school district rules, regulations and policies, including without limitation by enumeration, the act of refusing to park your vehicle in the front of the school parking lot and failure to follow the directives of the District Administrator to park your vehicle in the front of the school parking lot.
2. Failure to adhere to school district rules, regulations and policies, including without limitation by enumeration, the act of authorizing the purchase of items without obtaining the approval of appropriate school district officials and failure to follow the directives of the District Administrator in how to process a purchase request.
3. Failure to adhere to school district rules, regulations and policies, including without limitation by enumeration, making unprofessional accusations that

have created disharmony among colleagues and students.

4. Exercising discretion in a manner inconsistent with the responsibilities and duties of a teacher by directing a student to give an invoice to a colleague rather than communicating directly with the colleague or communicating with assistance from administration.
5. Professional history including prior disciplinary activity.

This notice is being provided to you as a result of Board action at its Board meeting on February 12, 1996.

Notice is further given that you have a right to a hearing before the Board of education, which shall be conducted with full regard of due process, prior to your contract being terminated if you file a written request with the Board on or before 4:00 p.m., February 21, 1996. If you request a hearing your request must include a statement requesting either a private hearing or a public hearing before the Board.

Rasmussen on March 6, 1996, attended the District Board's hearing which considered whether he should be non-renewed. The District's Board that evening unanimously decided to non-renew him on the basis of the following decision which stated in pertinent part:

...

It is the decision of the Board, by unanimous vote of all of its members, that just and reasonable cause exists for non-renewal of David Rasmussen's teacher's contract for the 1996-1997 school year. The Board's decision is based on the testimony of the witnesses, the recommendations and opinions of the School District Administrator and School Principal made and given during the hearing, and upon the exhibits received into evidence, marked W-1 through W-68 and R-1 through R-8. Viewed in its entirety, the evidence is clear and convincing that Mr. Rasmussen has failed to adhere to certain School District rules, regulations and policies. His failure in this regard is most recently evidenced by his acts on numerous occasions of purchasing or attempting to purchase items

both large (ink jet computer printer) and small (oil) without regard to or in violation of District rules on the subject, by handling a dispute with another teacher concerning the payment for school property (a hammer) without regard to School purchase order rules and involving a student in the payment dispute inappropriately, all contrary to Mr. Rasmussen's obligation to recognize the basic dignities of all individuals with who he interacts in performance of his professional duties, and by continuous and repeated parking of his personal vehicle in a location prohibited by School parking rules. Such conduct implies an attitude on Mr. Rasmussen's part that the School rules and policies do not apply to him, an attitude which is not only detrimental to the morale and operation of the School but is a poor example to the students at Weston High School whose best interests are the Board's utmost concern.

In so deciding, the Board is mindful that in the past Mr. Rasmussen has received classroom evaluations which are, for the most part, favorable, and has exhibited competence with respect to many classroom teaching tasks. However, it is also true, that the person providing many of the comments in these evaluations, School Principal Drew, an experienced educator, recommends that Mr. Rasmussen's contract not be renewed. In addition, the Board listened carefully to the one past student and three present students concerning their belief that Mr. Rasmussen is a good teacher who has had a positive impact on their educational experience and the testimony of others concerning the contributions which Mr. Rasmussen has made to the community by his involvement in activities outside of the School. And, the Board is not unmoved by Mr. Rasmussen's own testimony that he is sorry, that he may have been "bullheaded" at times, and his request that he be given another chance to conform his conduct to School District expectations.

Nevertheless, after careful deliberation and review of all of the records received and the testimony of all of the witnesses, the Board is of the opinion that just and reasonable cause exists for non-renewal at this time. As the totality of the evidence shows, there have been many instances over a number of years where Mr. Rasmussen has engaged in conduct contrary to School rules and policies relating to inappropriate conduct toward students, misuse of School property, parking of his personal vehicle, and other matters, some of which instances have resulted in discipline of Mr. Rasmussen short of non-renewal. He has been offered the

opportunity to obtain counseling. He has been given numerous warnings, both written and oral, concerning the possible consequences, including non-renewal of his contract, should such conduct continue. Based on the evidence before it at this hearing, the Board concludes that to give Mr. Rasmussen another chance would unduly undermine and depreciate the significance of the prior progression of discipline and the repeated warnings and directions clearly and expressly disclosed to him by the School rules, policies, and District Administrators over the past years.

Accordingly, Mr. Rasmussen's teacher's contract for the 1996-1997 school year will not be renewed. The President and/or Clerk shall give written notice of this decision of non-renewal to Mr. Rasmussen on or before March 15, 1996, pursuant to s. 118.22(2), Wis. Stats.

. . .

The District on March 11, 1996, subsequently told Rasmussen that his teaching contract would not be renewed for the following year. Rasmussen grieved his non-renewal, hence leading to the instant proceeding.

While his grievance was pending, Rasmussen missed a number of days of work because of a claimed illness. One of Rasmussen's former students testified here that Rasmussen in May, 1996, allowed his shop students to steal shop equipment. Rasmussen denies that he did so.

#### POSITIONS OF THE PARTIES

Rasmussen mainly argues that the District did not have just cause to terminate him because it has failed to meet any of the "seven tests" enunciated by Arbitrator Carroll Daugherty in Enterprise Wire, 46 LA 359 (1966). He also contends that there is no merit to the District's claim that he engaged in misconduct after he was told of his termination. He therefore asks for a traditional make-whole remedy which includes his reinstatement.

The District contends that it had just cause to terminate Rasmussen because it has satisfied the seven tests set forth in Enterprise Wire, supra. It further asserts that Rasmussen engaged in

post-discharge misconduct by letting students steal school property and that, as a result, he does not deserve to be reinstated even if the District initially lacked just cause to non-renew him.

## DISCUSSION

This case represents a textbook example of how not to properly evaluate and discipline a troublesome employe. For as Rasmussen correctly points out, the District over the years did not always copy him with pertinent documents; it did not properly warn him about some of his conduct which the District now relies upon in support of its discharge decision; 1/ and it has blown up out of proportion other incidents.

That is why there is no point in now regurgitating all of the accusations levied against Rasmussen and his detailed responses thereto. It suffices to say here that the entire record has been considered and that the matters addressed below are the ones deemed most important. That also is why there is no need to address each and every charge and countercharge advanced by the parties in support of their respective positions.

Moreover, in weighing this record, it must be remembered that the District bears the burden of proving that it had just cause to terminate Rasmussen. Hence, there is no need to examine all of the misconduct charges levied against him which are not clearly supported by the record. Rather, it is enough to only address those charges where the District has met its burden.

With all of the foregoing in mind, I therefore find the following:

One, Rasmussen has had a sorry employment record. For, even when many of the other charges levied against him are excluded, he was suspended in 1993 after he forced two girls to clean out a filthy drain in the shop. His misconduct - some would say cruelty - therefore fully deserved the three-day suspension levied against him, as well as the accompanying warning which stated: "Any further disciplinary action may result in my recommendation to the Board of Education your dismissal from employment at Weston High School."

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1/ Thus, some of the communications directed to Rasmussen were not clearly marked discipline. Had they been so designated, the District would be better able to rely on those supposed acts of misconduct to support its discharge decision. If the District wishes to avoid this problem in the future, it must label all such correspondence as either an oral warning, written warning, or suspension. It also must maintain detailed, written verification of any misconduct charges if it hopes to prove them in an arbitration proceeding. It also must provide to affected teachers copies of any such materials - which is something it did not always do here.

The District also had just cause to suspend him for three days in 1993 for using wood in his shop class without proper authorization. Rasmussen was then warned: "similar unethical confirmed practices at this school will cause termination of your contract."

The District similarly had just cause to suspend Rasmussen on March 28, 1995, for his conduct as a behind-the-wheel driver's education teacher when he improperly touched a female student. He at that time was warned that any further misconduct could lead to his termination.

In addition to these suspensions, the District twice reprimanded him in 1991 for allowing a student to walk home in bitter cold and for allowing students to take home lumber that did not belong to them.

Rasmussen has tried to explain away most of this misconduct, but to no avail, as one of the iron rules in the employer-employee relationship holds that employees cannot subsequently challenge an earlier disciplinary action that was not grieved at the time. Since he did not grieve his first two suspensions or his 1991 reprimands, they stand. Arbitrator Yaeger's April, 1997, Award which found that the District had just cause to suspend him for his behind-the-wheel misconduct also stands.

In his defense, Rasmussen asserts that he "could not reasonably have been expected to have had knowledge of the probable consequences of his alleged conduct" in part because the District had cried "wolf" too often when it earlier threatened to discharge him. Rasmussen, however, never offered this rationalization at the hearing when he was asked on cross-examination about his suspensions and the warnings which accompanied them. To the contrary, he expressly acknowledged that he understood those warnings when they were issued. Thus, it is inherently implausible to believe that Rasmussen at the time of his three suspensions did not fully understand that he would be fired if his misconduct continued. Moreover, even if he did not understand that stark reality, any such misconception on his part was wholly unjustified.

Two, Rasmussen chose throughout his employment to openly defy the District's rule which prohibits employees from parking behind the school building unless they have a specific need to do so. That rule provides:

"ALL TEACHERS MUST park their vehicles in the parking lot in front of the school building. This is the only authorized area for teacher vehicles. The back of the school is for SCHOOL VEHICLES ONLY and AUTHORIZED vehicles related to the bus garage."

Here, Rasmussen was warned about this rule in 1979, but he over the years continued to park there for reasons known only to himself. In his defense, Rasmussen asserts that other teachers have parked there with impunity. Any such instances, however, were isolated and there



is no evidence that the District knew about them. To the contrary, the record shows that the District has always tried to enforce its no-parking ban. Moreover, Rasmussen in January, 1996, twice improperly parked there without even offering any plausible explanation for doing so. Instead, he lamely claimed that some school board members did not object to him doing so. In fact, Rasmussen's reference was to conversations he had with them in about 1979. Their opinions hence are no longer valid after he had been repeatedly counseled about this problem.

Three, the District therefore had just cause to terminate him in 1996 for that insubordination and for improperly using a student to convey a message to one of his fellow teachers. Rasmussen did the latter because he was angry that a hammer in the shop apparently had been broken by a student in the other teacher's classroom. Rather than deal directly with the other teacher, however, Rasmussen twice told one of his students to bring a bill for the hammer's replacement to the teacher. Such conduct was unprofessional because Rasmussen had absolutely no business in using a student as a pawn in his dispute with another teacher.

Without more, an employer ordinarily lacks just cause to fire an employe for these latter infractions. Here, though, there was much more in light of Rasmussen's sorry disciplinary record which contained three separate suspensions and three separate warnings to the effect that he could be fired if he did not straighten out. His continued defiance of the District's parking ban and his unprofessional conduct regarding the hammer incident showed that his misconduct would never improve.

In this connection, Rasmussen correctly points out he has received favorable evaluations for his classroom work. Those evaluations, however, are not enough to save him since Rasmussen was not fired over his teaching, but, rather, for his rank insubordination and his unprofessional conduct in the broken hammer incident.

Moreover, it is immaterial that Rasmussen's prior suspensions were for different acts of misconduct, as there is no requirement under the just cause standard that discipline cannot move to the next step unless it is based on prior, identical misconduct. Rather, all that is required is that the new misconduct is sufficient in and of itself to warrant discipline. That is the case here and that is why the District had just cause to impose discipline at the next disciplinary step - which is termination.

Four, even if we were to assume arguendo, that the District in March, 1996, lacked just cause to initially non-renew Rasmussen's contract, Rasmussen's subsequent misconduct prevents his return. Thus, student "G.M." 2/ testified that Rasmussen in May, 1996, openly allowed students in his shop to steal valuable shop tools and lumber right in front of him. "G.M." thus testified that when things were being stolen, Rasmussen would cover his eyes with his hands and

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2/ The parties agreed that initials rather than the actual name be used to identify this student.

say: "I don't see nothing. I don't do anything." The student said that he took that to mean "he really didn't care anymore what was gone, what was taken, what was being done there." While Rasmussen denied this allegation, I discredit his testimony and, instead, credit the testimony of the student involved.

Rasmussen's gross misconduct in allowing such stealing to take place right in front of him thereby forfeited any reinstatement rights that he otherwise might have.

In light of the above, it is my

AWARD

That the District had just cause to non-renew David Rasmussen's teaching contract for the 1996-1997 school year; his grievance is therefore denied.

Dated at Madison, Wisconsin, this 9th day of May, 1997.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator