

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHAWANO-GRESHAM EDUCATION
ASSOCIATION

and

SHAWANO-GRESHAM SCHOOL DISTRICT

Case 19
No. 53417
MA-9349

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, appearing on behalf of the District.

ARBITRATION AWARD

The Shawano-Gresham Education Association and Shawano-Gresham School District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Thomas L. Yaeger, an arbitrator from its staff, to resolve the David Weasler grievance. The Commission appointed Thomas L. Yaeger pursuant to that request. Hearing in the matter was held on April 18 and 19, 1996, in Shawano, Wisconsin. The hearing was transcribed and the parties filed post-hearing briefs on June 28, 1996.

ISSUE:

The parties were unable to stipulate to a statement of the issue and the undersigned frames the issue as follows:

Did the District have just cause to terminate music teacher Weasler pursuant to Article VI, B of the parties' collective bargaining agreement?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE VI - EMPLOYMENT

- A. Dismissal. Nothing in this Agreement shall preclude immediate suspension without pay for a teacher by the Board for habitual intoxication, drug addiction, moral turpitude, and mental incompetence, or behavior placing the safety, welfare, or morals of the students in jeopardy.

- B. Discipline. No teacher shall be discharged during the term of his/her individual contract without just cause. No teacher shall be nonrenewed or suspended without just cause. In addition to the due process guarantee under Wisconsin Statutes, Section 118.22, a teacher being notified of non-renewal or discharge shall be given the right to request with the Board within five (5) days of his/her receipt of the notice, a hearing before the Board. Such request shall include a statement requesting either a public or private hearing. The reasons upon which the Board is considering non-renewal or discharge shall be furnished to the teacher prior to the hearing upon request of the teacher. The teacher has the right to be represented by counsel of his/her choice and has the right to call witnesses and submit evidence. The teacher has the right to cross-examine and rebut any unfavorable testimony. The decision of the Board shall not be arbitrary or capricious and the teacher shall receive a copy of the Board's decision along with the reasons upon which such decision was based.

. . .

BACKGROUND:

The basic facts of this case are not in dispute. The grievant, David Weasler, has been employed as a middle school music teacher and band director for the Shawano-Gresham School district for 27 years. On August 23, 1995, the Shawano County Sheriff Department and Shawano Police Department conducted a search of the Weasler's home, where they found five mature marijuana plants ranging in height from six feet to eight feet. The officers also found a number of

paraphernalia, including a bong, marijuana residue, a plant stalk and some seeds which were germinating in a window sill. Subsequently, Weasler was charged with a misdemeanor for possession of marijuana and a felony for allowing a dwelling to be used for growing marijuana. Word of Weasler's charges appeared in the local paper and became a topic of discussion among parents and staff. On November 13, 1995, the Board of Education of the District terminated Weasler. The Union then filed a grievance contending Weasler's discharge was not for just cause, and therefore violated Article VI - Employment, B. Discipline of the collective bargaining agreement. The grievance was not resolved and was appealed to arbitration.

POSITION OF THE UNION:

The Union asserts that the District did not have just cause to terminate Weasler. First, the Union asserts that Weasler was not given any forewarning or foreknowledge of the possible or probable disciplinary consequences of his conduct. The District did not establish a rule concerning Weasler's conduct for which he was discharged. He did not have notice of a rule that was applicable to his situation; there was no rule or order telling Weasler how to handle ones own child who was allegedly growing marijuana plants in the backyard. Also, the grievant had been under medical treatment for depression for at least ten years, while his son was psychologically fragile. Therefore, Weasler only did what he thought was best in terms of raising his son. Additionally, there was no evidence to suggest that Weasler actually encouraged the growing of marijuana. In fact, there is evidence on the record to suggest that Weasler actually tried to discourage his son Dru from any wrongdoing.

Next, the Union argues that the District did not conduct a fair and objective investigation of Weasler's situation. The District did not conduct its own investigation of the alleged illegal activity. In fact, the Superintendent read about the incident in the local newspaper, requested the police report and the Board made its decision before Weasler's criminal charges were resolved. The Union also claims that the Superintendent only looked at the negative incidents that were in Weasler's work history; it did not consider any of the positive remarks or reviews. The Union also questions the reliability of Sergeant Johnson's police report, upon which the Board relied, because the report was filed 12 - 14 hours after any conversations with Weasler. The Union urges the Arbitrator to give little weight to his testimony. Similarly, the Union defends Weasler's decision to not testify at the hearing. Weasler's reason for not testifying was based upon his criminal lawyer's advice against doing so and fear that his testimony may be used by the District Attorney in his criminal trial.

The Union also maintains that the District did not apply its rules and penalties evenhandedly and without discrimination. During 1989-90, Val Marciniak was charged and convicted of hit-and-run and drunk driving and was allowed to continue teaching while he was a Huber prisoner. Whereas, here, the grievant had not been convicted of any offense and was terminated. Therefore, the District is not applying its penalties and rules in a nondiscriminatory

manner. Additionally, the District was required to advise its employees that it would no longer be lenient toward drug and alcohol offenses and that it would not be following a course like it adopted with Marciniak.

Additionally, the Union contends that the degree of discipline imposed was not reasonably related to the offense nor in line with Weasler's record of service to the District. There is no evidence to suggest that Weasler's teaching effectiveness suffered at any time. In fact, Weasler's pending charges had no effect on his teaching ability during the period following his arrest and before his discharge. Therefore, the Union argues that the punishment is unrelated to Weasler's ability to maintain leadership in the classroom. Also, the discipline does not reasonably relate to Weasler's record of service. The District gave no consideration to the grievant's 27 years of commendable service. During his years of service, he had only received one written reprimand for a minor misunderstanding.

The Union believes, therefore, that the District did not have just cause to discharge Weasler.

POSITION OF THE DISTRICT:

On the other hand, the District argues that there was just cause to terminate Weasler based on the fact that he allowed his son to grow marijuana plants in the backyard. First, the District points out that because Weasler did not testify at the hearing, his silence creates a legitimate adverse inference against his position. The District cites case law to show that negative inferences are allowed when a party fails to call a material witness who is in their control. Additionally, the District argues that the Union could have motioned for a closed hearing, thus enabling Weasler to testify without fear that his testimony would be used in his criminal trial. Therefore, since Weasler did not testify, the District urges the Arbitrator to credit Sergeant Johnson's testimony. Additionally, the District argues that the Arbitrator should not credit the alleged statement by Weasler, made to another officer, that he tried to discourage Dru from growing the marijuana.

The District also justifies its decision to terminate Weasler because teachers are to be held to a higher standard of conduct than other employees. School employees are held to a higher standard of conduct because they function as role models to children. The District argued the community members' testimony regarding role models established that the grievant by allowing his son to grow marijuana in the backyard was viewed negatively, and this conduct was not tolerated by community standards. It concludes Weasler's inaction in permitting his son to grow marijuana was inappropriate for a teacher role model.

The District also asserts that a teacher's out-of-school conduct may affect his classroom fitness. The District argued the case law established that a teacher's conduct can be affected by their out-of-school conduct and therefore, Weasler's teaching ability may also be affected.

Further, the District argued that there is a nexus between his off-duty conduct and his role as a teacher. First, his actions have a negative effect on the District's reputation for providing a proper education to children. And, children may feel that if their "role model" condoned illegal behavior, it may be alright for them to engage in such conduct. The District also argued that additional proof that this type of conduct is not allowed or supported by other teachers was that not one teacher appeared to testify on Weasler's behalf.

Next, the District argues that Weasler did not comply with his contractual obligations. The District, according to the collective bargaining agreement, may discharge an employee for an offense of moral turpitude if it believes students' morals are in jeopardy. Also, Weasler's contractual obligations call for him to be a good role model and a good citizen. The District's teacher handbook states that teachers are to present themselves as a positive role model in the community. The District believes that being charged with a misdemeanor and a felony are sufficient to establish just cause for discharge. Growing marijuana or allowing it to be grown on one's property is so obviously in violation of the law, the District did not have to expressly forbid it.

The District argues that Weasler, by allowing his son to grow marijuana in his backyard, has not presented himself as a positive role model. Weasler teaches children who are at a very impressionable age, and a Shawano community standard is to encourage children, through positive role models, to develop an understanding and sense of justice and honesty. Both the school and the community support anti-drug programs and drug awareness. Weasler's conduct goes against what the District and the community support, and shows disrespect for the school and community's support of such programs.

The Employer also urges that, even though the grievant has worked in the District for 27 years, he has not been without his share of problems. For example, Weasler was one of six teachers who did not complete their 12 hour requirement for professional improvement. Also, Weasler did not contact the Chamber of Commerce on whether or not the band would participate in the Merchant's Christmas parade. Weasler also did not pay a phone bill of \$112.87 for the music room phone. There was also a letter of reprimand sent to Weasler regarding a \$200 check for participating in the Oktoberfest Parade that was deposited into his own checking account instead of the school activity account. There were also complaints against Weasler that he did not prepare lesson plans for the substitute teachers. Weasler's record also indicates absences from work and coming in late for work, and a letter was sent to Weasler regarding his excessive absences. Also, in Weasler's record, there is a letter of reprimand for his disruption of a lyceum event. Consequently, the District believes that inasmuch as Weasler's 27 years of employment with the District was less than exemplary, it does not mitigate the seriousness of his misconduct nor should it be the basis for militating in favor of a penalty less than discharge.

For these reasons, the District believes it had just cause to terminate Weasler.

DISCUSSION:

The basic facts that gave rise to Weasler's discharge are not in dispute. Local law enforcement officers came to Weasler's home with a search warrant on August 23, 1995, and found five marijuana plants growing in the backyard. Inside the house they also found marijuana paraphernalia and marijuana residue. Weasler advised the officers that his son Dru was growing the marijuana in the backyard. The police charged Weasler with a misdemeanor for possession of marijuana and a felony for permitting his property to be used for growing marijuana. At the time of the hearing the criminal charges were still pending.

The Union has argued that the District did not have just cause to terminate the grievant as required by Article VI of the parties' collective bargaining agreement. The Union asserts the District was required to give Weasler forewarning that his actions could result in discipline, including discharge. Further, it contends there was no district work rule or directive applicable to this particular situation, and the grievant's conduct was not obviously contrary to the Employer's interest such that a warning was unnecessary. The Union believes Weasler's own medical condition, as well as that of his son, dictated Weasler's handling of Dru's growing and presumably using, marijuana while living at home; and the District's action against him inappropriately puts his effectiveness as a parent in issue. The District counters that is not the issue. It claims the District does not have to consider the reasoning behind Weasler's failure to see to the removal of the plants and product. Rather, the District argues this case is about Weasler permitting marijuana to be grown on his property within 1,000 feet of a school, which was not compatible with his role model status as a teacher in the District.

The undersigned is persuaded that Weasler knew or should have known that growing and using marijuana is against the law. He also knew or should have known that permitting his son to grow and use marijuana on his premises would subject him to criminal prosecution as well. Furthermore, he had to know that being charged with and/or convicted of a criminal act could put him in jeopardy of being disciplined or discharged. Consequently, because of the obviousness of those facts, it was not necessary for the District to forewarn Weasler or any other of its teachers that such circumstances would subject them to possible discipline up to and including discharge.

Weasler and the Union would have me find that his inaction in this case did not justify the District taking disciplinary action against him. On the one hand they argue he and his son's bouts of clinical depression explain, and presumably excuse, his failure to take action against his son's illegally growing marijuana. The Union cites the undersigned to Eagle Point School District, 100 LA 496 (Wilkinson, 1992) where the arbitrator found in favor of a discharged teacher who did not consent to, and actually protested her husband's marijuana growing. There the arbitrator concluded that certain behaviors are obviously inconsistent with the "role model" of a teacher, but other behaviors, such as nonfeasance, are not necessarily so obvious. In Eagle Point, the arbitrator reasoned that:

Notice cannot be imputed that as a role model, a person in Grievant's position could not maintain a property coownership with a spouse, who used a portion of the property to which the employee lacked any practical control over the employee's objections, for illegal purposes. Without a specific rule to that effect it cannot discharge grievant on that basis.

The undersigned believes Eagle Point is distinguishable from the instant case. Most importantly, Weasler had parental authority and control of his son while he was living in his home. Furthermore, the relationship of parent to child is more akin to teacher and student than husband and wife. The latter is generally recognized as an equal partnership whereas the former is looked upon as guardian by nature. The parent/child relationship is characterized by the parent's ability to, as well as responsibility for, direction and control. The degree of direction and control exercised is the personal choice of the parent, and can vary in degree from authoritarian to permissive. In this instance, clearly a reasonable characterization of Weasler's choice was one of permissiveness. As the Union points out, he had options. One of those options was to direct his son to remove the plants and paraphernalia or remove them himself. He chose to do neither. An additional distinguishing feature of this case is that the arbitrator in the Eagle Point case found that the employe had exercised control over her home, and it was in her husband's cabinet business to which she was denied access where the growing of marijuana occurred. Here, there can be no dispute that Weasler was in control of his home and property, not his son. He did not exercise control over his home as did the teacher in Eagle Point.

Another exacerbating factor in this case is that Weasler did not have to make an instantaneous, irrevocable decision on how to proceed. The plants did not grow from seedlings to eight feet overnight. Thus, he had considerable time to deliberate and reconsider his approach to the situation, and the consequences of his permitting his son to continue with this clearly illegal activity. For these reasons the undersigned does not believe the District needed to have promulgated a rule or otherwise put Weasler on notice that his failure to prohibit his son from engaging in illegal activity at his home was in contravention of his responsibility to the District to conduct himself as a "good citizen."

The Union also argues that Weasler did not ignore the situation, did not actively encourage any wrongdoing, and, in fact, tried to discourage his son from any wrongdoing. However, by doing nothing more than "trying to discourage" Dru's illegal activity, he gave his tacit approval and in so doing subjected himself to being charged with criminal misconduct. Thus, this is not a situation where Weasler had no personal exposure if he failed in his attempt to discourage Dru from engaging in an illegal activity. He now has been charged with criminal activity for permitting Dru to grow marijuana. If it is a crime to knowingly permit a member of one's household to grow a controlled substance on the premises, Weasler is guilty. He admitted to the arresting officers that he knew his son was growing marijuana, and he did not testify to rebut that

assertion. Consequently, by permitting his son to grow the plants, he arguably committed a criminal act.

The District contends Weasler's conduct was not consistent with his role model status as a middle school music teacher. The Union argues that the "role model" standard applied by the District in this case does not provide a sufficient nexus between his conduct and role as a band instructor. It argues that the Wisconsin courts have held that a "role model" standard based upon community standards is inherently inconsistent, and cannot be used to establish the required nexus between immoral conduct and the health, welfare, safety or education of any pupil. Were this case one of applying a standard having statewide application, I would apply the reasoning of the Court in Thompson v. Department of Public Instruction, 197 Wis.2d 688, 541 N.W.2d 182 (Wis. Ct. App. 1995). However, those are not the facts. Here the "role model" standard is being applied locally and consistent with this community's own standards seen through the eyes of their elected officials. It does not have to be consistent with another school district's "role model" standards. Weasler is under contract to Shawano-Gresham School District and must adhere to that District's rules and policies. Merely, because this District has different "role model" standards than other districts does not make them unenforceable. The court in Thompson found that because a "role model" standard by its nature may vary from community to community, it could not be used as the nexus for license revocation pursuant to a State statute. The State statute was required to be applied uniformly in all districts throughout the State. As such uniformity or consistency was a prerequisite to any standard being applied. Clearly, that is not the case where a local decision without statewide application, like in this case, is involved.

Courts and arbitrators have recognized that teachers serve as role models in our schools, and consequently school districts have an interest in ensuring they will be seen as such. In Chicago Board of Education, 102 Ill. App. 3d 741, 430 N.E.2d 310, 58 Ill. Dec. 368 (1981), the court said:

We are aware of the special position occupied by a teacher in our society. As a consequence of that elevated stature, a teacher's actions are subject to much greater scrutiny than that given to the activities of the average person. We do not doubt that knowledge of a teacher's involvement in illegalities such as possession of marijuana would have a major deleterious effect upon the school system and would greatly impede that individual's ability to adequately fulfill his role as perceived by the Board.

The U.S. Supreme Court has also recognized that teachers serve as role models.

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy. Ambach v. Norwick, 441 U.S. 68, 78-79, 99 S.Ct. 1589, 1595-96, 70 L. Ed.2d 49 (1979) (footnotes omitted)

Arbitrator Conner in East Lansing Board of Education, AAA Case No. 54-39-1166-84 (1985), stated "school employees are held to a high standard of conduct precisely as they do function as a role model." And, as Arbitrator Harry Graham noted:

While this incident may no longer be at the forefront of public consciousness it must be clear that school personnel bear a special responsibility. As the District indicates, they do indeed furnish role models for students. . . . Employees of a public school district have a responsibility of serving as positive, not negative, role models for students. Westlake City School District, 94 LA 373 (1990).

This School District also looks upon its teachers as role models for students. In its Professional Staff Handbook some expectations for teachers are set out.

7. Community Involvement - The effective teacher:

. . .

- b. Presents himself/herself as a positive model in the community.

. . .

There can be no doubt that Weasler's position as middle school music teacher and band director placed him in the position of being a role model for students. That, no doubt, can at times

be a heavy burden to carry. At this time in his life, when he was experiencing difficulties in parenting his own teenage son, and dealing with his own mental health problems, it became an even heavier burden to bear. Nonetheless, he was not absolved from his responsibility of being a role model as a teacher. As noted earlier herein, the illegal activity of growing marijuana plants to a height of eight feet took time. Thus, there were many opportunities for Weasler to reflect, examine and re-examine the decision he had made to permit his son to grow the plants on his premises, and to take steps to end the activity. However, he chose to allow the activity to continue. Clearly, he did not place his responsibility as a teacher role model, and his ability to continue in that capacity, in the proper perspective vis-a-vis the decisions he made in parenting his son. The consequence was being charged with a crime of moral turpitude, defined as one that offends the moral sense of a community.

The District called parents to testify. They affirmed the District's belief that its teachers are expected to serve as role models. They also expressed the general belief that Weasler's conduct was not compatible with his role model status as a teacher, and reflected poorly on both the District and himself. That sampling of opinions confirmed the District's determination that his conduct exemplified an attitude that was inconsistent with the message the District wanted to impart to its students. Weasler, by allowing his son to grow an illegal substance on his premises signaled his tacit approval of such activity. In this case, the old adage "actions speak louder than words" seems apt. Thus, what is most significant for an individual in Weasler's position is to conduct oneself consistent with the role model standards of his/her employer.

Clearly, Weasler's decision to allow his son to illegally grow and presumably use marijuana on his premises was in contravention of his role model status and rose to the level of misconduct involving moral turpitude. Offenses of moral turpitude are generally viewed in the employment setting as serious infractions, warranting severe discipline, including immediate discharge. It is also clear that being a teacher role model Weasler's misconduct is most remarkable. He most assuredly understands after 27 years in the profession that his profession demands that he be held to a higher standard of conduct than many others because he is expected to be a role model charged with guiding and instilling values in youngsters placed in his classroom. This is an awesome responsibility that we often overlook, and may only focus upon when unfortunate events occur, like those in this case. The District believed that Weasler could no longer fill his responsibility to effectively perform as a role model, and therefore, just cause existed to terminate his employment. The Union and Weasler believe to the contrary, and contend that the penalty of discharge is not reasonably related to the offense, nor consistent with his 27 years of commendable service in the District. They also believe his discharge amounted to disparate treatment vis-a-vis another employee in the District.

The other District employee, Marciniak, was convicted of hit-and-run and drunk driving during the 1989-90 school year, and allowed to continue teaching. However, based upon the available facts, the undersigned believes Weasler's case is distinguishable. While very few of the facts of that case were presented in this record, it is apparent that a teacher who had been drinking,

drove a vehicle, was in an accident and left the scene. Clearly, that was a serious error in judgment on the teacher's part. Does the fact that the District did not discharge that teacher preclude the District from discharging Weasler? I don't believe so. As noted earlier herein, the decision to continue to let his son illegally grow marijuana was a reasoned one that he had many weeks and months to contemplate. At any time during that period he could have changed course and removed the plants or directed his son to discontinue his illegal activity. Those factors are distinguishable from an individual who, after having too much to drink, gets into his vehicle and drives. The latter is more akin to a spontaneous action than Weasler's. Also, without knowing the facts, it is impossible to know if the individual was excessively legally under the influence or at a .11 level of intoxication where he did not recognize he was legally under the influence. It is not illegal to drive after having been drinking, although it may be ill advised. However, there is no question that it is illegal to grow marijuana or permit it to be grown on one's property.

What is required is that the Employer avoid random and completely inconsistent disciplinary practices. In other words, there should not be unfair distinctions made in the discipline accorded to individuals who have committed substantively similar offenses, with similar prior records, etc. There is no evidence of the other teacher's prior record and evaluations, etc. Thus, there is just not enough evidence surrounding the prior incident of drunk driving to conclude these cases are so much alike that the District's treatment of Weasler is unfair. Thus, the undersigned believes the District was not required to treat Weasler as it did the other teacher. Furthermore, merely because one person's inappropriate, criminal misconduct does not result in discharge, the next individual cannot assume he/she will be so fortunate.

The final question is whether Weasler's 27 years of employment in the District mitigate against his discharge? In this case, I don't believe so. This was serious misconduct that received local publicity that shed a negative light on both the District and Weasler. It also had the affect of undermining his role model status, and created the appearance that he was not supportive of the District's attempt to instill in students that marijuana use is inappropriate. Because teachers are held to higher standards of conduct than others, his actions compromised his role model status in the eyes of the District to such an extent that they believed he was no longer employable. Clearly, that was a subjective determination, but one that was supported by the testimony of District parents and taxpayers. Therefore, the undersigned is persuaded the District established it had just cause to terminate Weasler.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The District did have just cause to terminate music teacher Weasler pursuant to Article VI, B of the parties' collective bargaining agreement. Therefore, the grievance is denied. 1/

1/ The undersigned was advised by the parties on August 27, 1997, that Weasler pled no

Dated at Madison, Wisconsin, this 28th day of August, 1997.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

contest to one charge of keeping a dwelling which is resorted to by persons using controlled substances.