BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES, LOCAL 60, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

SCHOOL BOARD OF THE SUN PRAIRIE AREA SCHOOL DISTRICT

Case 96
No. 54682
MA-9757

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Dane County, Wisconsin Municipal Employees, Local 60, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jon E. Anderson, Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson Street, P. O. Box 1110, Madison, Wisconsin 53701-1110, for School Board of the Sun Prairie Area School District, referred to below as the Board, or as the Employer.

ARBITRATION AWARD

The Union and the Board 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 an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Dale Weichmann, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 11, 1997, in Sun Prairie, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by June 19, 1997.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the contract when it discharged the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XIV
Reprimand - Suspension - Discharge

14.01 Just Cause

Employees . . . shall not be suspended or discharged except for just cause. The parties agree that just cause may be the violation of one or more reasonable rules of conduct one or more times.

14.02 Reprimand

It shall be the practice for the supervisor to orally warn an employee who has, for the first time, violated a rule before any written notice or other reprimand is given; however, being under the influence of alcohol, the consumption of alcohol or controlled substances while on the job, or being convicted of a felony, shall subject an employee to discharge without prior warning. . . .

14.04 Discharge

Employees shall not be discharged until other means of reprimand seem to be exhausted or ineffective. . . .

BACKGROUND

The Grievant was hired by the Board on January 3, 1994, as a custodial worker at the Northside Elementary School on the night shift. During the summer months, the Grievant worked on the day shift, which started at 7:00 a.m. The grievance, dated August 8, 1996, challenges the Grievant's discharge, alleging that the Board improperly relied on "the findings of a drug test which the union believes to be faulty."

The drug test questioned by the grievance was initiated by Ludwig Jazdzewski, the Board's Director of Buildings and Grounds. The test was administered on July 16, 1996, but the circumstances which prompted Jazdzewski to request the test date from at least the prior work day. On July 15, 1996, Doug Bollig, the Lead Custodian at Northside, phoned Jazdzewski's office to determine if the Grievant had reported he would not come in to work that day. Jazdzewski informed Bollig that he could find no evidence that the Grievant had called in. Jazdzewski then instructed Bollig thus:

> We . . . instructed (Bollig) that . . . when he showed up to admonish him for not reporting to work on time, to remind him that this was a situation that had happened in the past, to inform him that he would conduct an investigation into the situation, and I told him to act at his own discretion as to whether or not (the Grievant) would, number one, finish the day, and number two, make up the lost time. (Transcript at 16).

While Bollig and Jazdzewski were discussing the matter, the Grievant reported for work. Jazdzewski testified this was roughly forty-five minutes after the scheduled start of the Grievant's shift. Bollig did counsel the Grievant as Jazdzewski had requested, and received an assurance from the Grievant that he would not be late and would call in if he was unable to report for work on time. Bollig did permit the Grievant to work that day and to make up the lost time.

Bollig again contacted Jazdzewski's office on the morning of July 16, to determine if the Grievant had called in. Jazdzewski drove to Northside to discuss the situation with Bollig and Bollig's supervisor. At roughly 7:45 a.m., while they were discussing the matter, the Grievant reported for work. Jazdzewski determined he would conduct an investigatory interview, and had Dick Silvers, then the Union's Vice-President, summoned to Northside to represent the Grievant.

While waiting for Silvers, Jazdzewski engaged the Grievant in small-talk, and observed his behavior. Jazdzewski described his observations thus:

> Well, he looked like someone who had just gotten out of bed. He was slightly disheveled. He had a blank, vacant look to him. I didn't observe anything wrong with the way that he walked, but his talking was slow and casual. He first appeared nervous when he got out of the car when he saw all the supervisors were there. But in his responses to our conversation, he was slow and casual as if there wasn't anything particularly out of line. (Transcript at 20)

When Silvers had arrived, Jazdzewski interrogated the Grievant, who informed Jazdzewski he was late because he had been up all night fixing his car. He then informed Jazdzewski he did

not call in because that would have only delayed him further. When Jazdzewski pressed him for details on the repairs he had made to the car, he responded that he had not actually performed any work, but stayed up with a friend who actually did the repair work. When Jazdzewski pressed for further detail on how long the work had taken, the Grievant responded that he got to bed sometime around midnight.

Although Jazdzewski could not smell alcohol, he became convinced the Grievant was under the influence of an intoxicant. He responded thus:

> I asked him if he was indeed under the influence of alcohol, and he assured me he was not, that he had not touched alcohol since he'd come out of a treatment program. I asked him if he was under the influence of anything else and he said he was not. (Transcript at 22)

Jazdzewski then summoned his managers and Silvers to meet separately from the Grievant.

Jazdzewski asked Silvers if Silvers concurred in his observations. Silvers had perceived "(r)ed eyes, glassy eyes, slow speech" from the Grievant, and had concluded that "he probably was under the influence of . . . marijuana." (Transcript at 42). Silvers informed Jazdzewski that he agreed with Jazdzewski's observations. Jazdzewski had decided to request that the Grievant submit to a blood test. He decided to request the test because the Union had opposed the Board's discharge of another employe, asserting that without a blood test the Board could not reliably determine if the employe was under the influence of intoxicants. Silvers responded that he would not, on the Union's behalf, object to Jazdzewski's request for a blood test.

Jazdzewski, his managers and Silvers again approached the Grievant. Jazdzewski asked the Grievant if he was under the influence of alcohol or any other intoxicant. The Grievant again responded that he was not. Jazdzewski responded thus:

> I asked him what would happen if he were to get a blood test, and he indicated that he would test clear. I asked him if he would accompany me to the Dean Clinic for the purpose of getting a blood test. He indicated that he had no objection. At that point we got in my truck. (Transcript at 24).

At the clinic, Jazdzewski phoned the Board's Director of Human Resources, Annette Baker, to inform her of his desire to have the Grievant tested. Baker made the necessary arrangements. At the clinic, the Grievant decided to submit to a urine test rather than a blood test. He signed two forms indicating his consent to the process. After supplying the clinic with the samples, Jazdzewski drove the Grievant home, and informed him he would be placed on paid leave until the

results of the drug test were determined.

On July 18, 1996, General Medical Laboratories (GML) issued its interpretation of the Grievant's urine sample. Its report returned negative for the following substances: alcohol; amphetamines; barbiturates; benzodiazepines; cocaine; methadone; methaqualone; opiates; phencyclidine; and propoxyphene. The report stated the following for marijuana:

> *** POSITIVE FOR MARIJUANA METABOLITE ***
> POSITIVE BY EIA FOR CANNABINOIDS AT A CUTOFF OF 50 NG/ML.
> POSITIVE BY GC/MS FOR 11-NOR-DELTA-9-THC-9-CARBOXYLIC ACID AT A CUTOFF OF 15 NG/ML. 11-NOR-DELTA-9-THC-9-CARBOXYLIC ACID IS A METABOLITE OF MARIJUANA. URINE DRUG DETECTION MAY NOT INDICATE INTOXICATION.

Baker received this report by fax, and phoned the Lab Technician who had issued the report to clarify what the results meant. Baker understood from her conversation with the Technician that the Grievant's urine sample had first been screened to determine if the metabolite of marijuana could be detected at levels sufficient to be considered a positive result. The cutoff for the initial screen was "50 NG/ML," a level set by the federal Department of Transportation. This positive screen then prompted a second screening for "11-Nor-Delta-9-THC-9-Carboxylic Acid," a particular metabolite of marijuana. That screen was a Gas Chromatography/Mass Spectrometry (GC/MS) screen. The cutoff for this metabolite was "15 NG/ML." The Lab Technician informed Baker that the Grievant's sample returned a result of "333 NG/ML." This level, the Lab Technician informed Baker, would not be the result of passive inhalation. Baker then requested that a separate laboratory interpret the Grievant's urine sample. On July 31, 1996, that laboratory reported its GC/MS test of the Grievant's sample yielded a result of 353 NG/ML.

Jazdzewski, upon learning of the results of the drug test, recommended that the Grievant be discharged. His recommendation was accepted, and the Board confirmed this in a letter to the Grievant dated August 1, 1996, which states:

> The District has completed the investigation into the facts and circumstances relating to the July 16, 1996 incident.
>
> During the course of this investigation, the District has interviewed you and other school district employees, and you voluntarily completed a drug test regarding the July 16, 1996 incident. Based on the results of the investigation and your positive drug test, your employment . . . is terminated effective August 1, 1996 for being under the influence of a controlled substance while on the job. . . .

This letter prompted the filing of the grievance.

Baker heard the grievance at Step 2. At that step, the Union submitted a drug test interpreted by GML on a urine sample submitted by the Grievant on August 5, 1996. That interpretation yielded a negative result for each substance tested, including marijuana at a cutoff of "50 NG/ML." Baker discussed these results with a representative of GML, and concluded it should not alter the Board's discharge decision. In her opinion, the Board's need to comply with the Drug Free Workplace Act required it to define "under the influence" as "having any detectable amount of any illegal substances present in (an employe's) system combined with the obvious signs and symptoms." (Transcript at 55).

Jazdzewski believed he was competent to assess the basis of the Grievant's behavior on July 16, 1996. He has, as a supervisor, observed employes under the influence of drugs at work. He has been trained as an Emergency Medical Technician, and has attended a Board sponsored training program on "Recognizing Substance Abuse and Alcohol Misuse AND Taking Responsible Action." At that seminar, Jazdzewski received material indicating the following symptoms of marijuana usage:

> **Physical Symptoms:** reddened eyes (often masked by eye drops); stained fingertips from holding "joints," particularly for non-smokers; chronic fatigue; irritating cough, chronic sore throat; accelerated heartbeat; slowed speech; impaired motor coordination; altered perception; increased appetite.
>
> **Behavioral Symptoms:** impaired memory; time-space distortions; feeling or (sic) euphoria; panic reactions; paranoia; "I don't care" attitude; false sense of power.

Silvers also believed he was competent to assess the basis for the Grievant's behavior on July 16. Silvers, however, based his competence on personal experience:

> Well, I used to be an addict for about 22 years, clean for about 13. My drug of choice was marijuana. I know when someone's high. (Transcript at 42).

Silvers began his employment with the Employer as a Grounds Keeper. He served in that capacity for about ten years. Sometime in the summer of 1996, he became Lead Grounds Keeper for the Board. In January of 1997, he became a Facility Service Manager, which is a position not included in the bargaining unit. He had served as the Union's Vice-President for roughly ten years, leaving that post when he became a Facility Service Manager. He acknowledged that he had been disciplined several times while a member of the unit, had used marijuana on the job and was working under a "last chance agreement" until, roughly, March of 1996. He noted he did not object to the imposition of a drug test on the Grievant because the Grievant would not acknowledge any problem, and he hoped that the imposition of the test would either confirm the Grievant's position or put him in a position where he would have to acknowledge a problem and

seek help.

The parties jointly submitted documentation from the Grievant's personnel file. Included in that documentation is an evaluation dated August 16, 1995. That evaluation includes the following narrative summary:

> (Y)ou continue to demonstrate steady progress in your daily custodial performance. Your team mates, the school administration and staff, and those who provide support services to Northside all offer positive feedback regarding your service to the school. Keep up this good work.
>
> Keep in mind that you have had momentary lapses which were brought to the attention of the department's administration. You were in the habit of reporting for work in a condition of extreme weariness and had been reported as to have been napping on the job. One day, you were so tired and disoriented as to be unable to properly perform your custodial duties.
>
> You were warned that any continuance of such performance problems would lead to corrective action and could result in disciplinary actions. I am happy to report that there have been no further reports of this type since that meeting.
>
> . . .

Also included in that documentation was a memo dated August 11, 1994, headed "August 8, 1994 Incident and Verbal Reprimand" which states:

> This memo will confirm that on Monday, August 8, 1994 at 8:00 a.m. I talked to you about your arriving late to work. You have been asked before to notify the concerned people involved when absent, shift adjustments, or being late for work, etc. On August 8th you failed to make any contact indicating you would be absent or late for work. Therefore, this memo will serve as a verbal reprimand for failure to contact the Buildings and Grounds Department concerning your absence from work. I also mentioned to you that if you are having an outside problem that is hampering your work performance you should contact the EAP program . . .

The documentation includes a memo dated September 2, 1994, headed "August 11, 1994 Incident." That memo states:

> . . . On August 11, 1994 you came to work on time and were advised to sweep the front concrete sidewalk. You proceeded to secure a dust mop and went

> outside to sweep the concrete sidewalk. It is most unusual for a custodian to use a dust mop to sweep a concrete sidewalk. Immediately, your supervisor, Mr. Doug Bollig, came to talk to you and reassigned you to another task.
>
> At approximately 8:10 a.m. a group meeting was held in the Northside Library Media Center and was attended by Dick Silvers . . .
>
> When I asked you about the incident . . . you shrugged your shoulders and said you were out late last night, however, you did get home in time for some sleep and just came to work. I advised you that you didn't seem yourself today and you indicated that you had allergies and that is the reason your eyes looked the way they did. I asked you if you were under the influence of alcohol or any other drugs and you responded with, "No."
>
> My investigation revealed that something unusual happened when you came to work on the morning of August 11th; and no explanation was offered for it. At the conclusion of our meeting, I advised you that if you reported to work under the influence of alcohol or any other drugs the district could issue discipline up to and including discharge. I asked you if you understood this and you responded, "Yes."
>
> The district expects you to come to work and perform your duties each and every day. The behaviors that you demonstrated on August 11th were not explained and most unusual. Future demonstrations of behavior like this will result in further investigations.

In a memo dated February 21, 1996, Jazdzewski issued the Grievant a verbal warning for failing to follow call-in procedures regarding an absence on January 16, 1996. In a memo dated March 18, 1996, Jazdzewski issued the Grievant the following written warning:

> The purpose of this memo is to confirm the outcome of the investigatory interview of March 11, 1996 regarding your failure to properly notify your immediate supervisor of your late arrival on this same date.
>
> I went to Northside to see whether you had yet arrived; you indicated that you had been up late the previous evening with a friend who was distraught, had been drinking, and was making comments that caused you to fear suicide. I advised you that I would have to hold an investigatory interview into this matter. You acknowledged the right, then waived it, saying that you realize that you failed to make the proper report as a result of oversleeping, and that you were willing to receive any discipline forthcoming.

> We discussed the incident in some depth, and, as I could find no justification for you to have failed in your obligation to report to work on time, or to properly report your absence, I felt discipline was justified. In that you have been disciplined for this same offense on past occasions, progressive discipline requires that this be documented as a written discipline.
>
> I also referred you to the employee assistance program . . .

The narrative summary of the Grievant's May 17, 1996 evaluation states:

> (Y)ou continue to demonstrate attendance problems. You have received counseling . . . yet you managed to qualify for discipline regarding the attendance and call-in procedure.
>
> Keep in mind that your momentary lapses from quality performance cannot continue. You were warned that any continuance of such performance problems would lead to corrective or disciplinary action.
>
> Reports and observations indicate that you do quality cleaning when you are not plagued by outside problems. Please remain aware of, and refer to the Employee Assistance Program should you begin to feel the need. Early intervention could help to avoid such problems having a negative effect on your job performance. . . .

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Employer's Brief

After a review of the evidentiary background, the Employer argues that it "had reasonable cause to direct that the Grievant take a drug test." Jazdzewski has training in the recognition of drug-influenced behavior. Silvers' life experience has supplied him with similar insight into the recognition and treatment of drug abuse. Their experience afforded them the ability to properly evaluate the Grievant's appearance and conduct on July 16. Their mutual recognition of the need for a drug test was understandable and appropriate.

Beyond this, the Board notes that the Grievant "readily consented" to a drug test which, he asserted, "would show him to be free from drugs." The test, however, confirmed Jazdzewski's and Silver's conclusion that he had reported to work under the influence. The urine sample confirmed the presence of marijuana "122 times the cutoff level."

The application of traditional just cause standards warrants a conclusion the Board had cause to discharge the Grievant. The Board employs the seven Daugherty standards to structure this contention, citing GRIEF BROTHERS, COOPERAGE AND UNITED MINE WORKERS, 42 LA 555 (DAUGHERTY, 1964). The first standard has been met since the Grievant had been repeatedly warned regarding his failure to report for work on time and had been told in September of 1994 that his reporting for work under the influence of drugs could result in discharge.

The second Daugherty standard has been met since the requirement of promptness and sobriety are reasonably related to the efficient and safe operation of a school district. Beyond this, the Employer's need to comply with the Drug Free Workplace Act underscores the reasonableness of its work rules. Since the Employer "conducted an investigation prior to disciplining the Grievant," the third Daugherty standard has been met. That this investigation was fair, objective and produced undeniable evidence of the Grievant's guilt meets the fourth and fifth Daugherty standards. That there is no evidence that the Employer has ever acted differently toward any other employe than it did toward the Grievant establishes proof that the sixth Daugherty standard has been met. Since the Grievant was "given numerous chances" and was "given . . . access to the Employee Assistance Program" it follows, according to the Board, that the final Daugherty standard has been met. However harsh the discharge sanction may be, "the Grievant needs to be held accountable for his own actions."

The Employer then contends that its case stands unrebutted. The Union has failed to establish the existence of any mitigating factors, and the Grievant's refusal to testify should "weigh against him." It necessarily follows that the grievance should be denied.

The Union's Brief

After a review of the evidentiary background, the Union argues that Silvers' and Jazdzewski's observations of symptoms of the Grievant's usage of marijuana on July 16 have no basis in "reliable medical authority." The symptoms related by Silvers and Jazdzewski "correspond with someone who has woken up quickly and recently or someone with an allergy problem." The Employer had no demonstrated basis beyond his tardiness to order the Grievant to submit to a drug test. This, the Union concludes, "constitutes insufficient grounds for ordering an employee to provide the District with a sample of his bodily fluids."

The sole reliable fact surrounding the events of July 16 is that the Grievant never worked, and was under no obligation to submit to a drug test. Silvers' indefensible conduct, however, left the Grievant with "little choice but to comply with the invasive and extreme request."

The Union contends that the principal weakness in the Employer's case is its interpretation of Section 14.02. That provision cannot persuasively be read to permit summary discharge based on being "under the influence of a controlled substance." Even if it could, the Employer has failed to prove the Grievant was "under the influence." The presence of the drug

in the Grievant's system falls far short of demonstrating intoxication. That a subsequent test "revealed a negative finding for all controlled substances" casts further doubt on the Employer's case since "heavy drug users typically retain metabolites up to a month."

A more persuasive reading of Section 14.02 reveals that it provides for "three specific bases for immediate discharge." Since the "under the influence" basis is restricted to alcohol, and since the Grievant "does not need to carry a CDL, there exists no nexus linking off-duty conduct of marijuana smoking and regulated on duty conduct." The sole basis the Employer can assert to regulate off-duty conduct under Section 14.02 is conviction of a felony. Because the Employer had no contractual basis to regulate the Grievant's off-duty conduct, it had no basis to require him to submit to a drug test.

Arbitral precedent will not support an unlimited disciplinary interest of employers in an employe's off-duty conduct. While the Union acknowledges some cases seem to treat drug distribution as a type of conduct so severe it can support an asserted disciplinary interest in off-duty conduct, it asserts there can be no contention that this type of conduct is posed here. A review of the Employer's case shows an attempt to "enlarge the scope of the contract" regarding its disciplinary interest beyond anything ever attempted in bargaining.

The Union concludes that the Grievant "is the victim of the Board's zealous application of an anti-drug policy." That his urine "contained metabolites of marijuana" cannot obscure that the Board has no legitimate interest in his off-duty conduct, or that the "invasion of (the Grievant's) privacy rights in this matter is chilling." The evidence reveals only that "(f)or being late, he was made to urinate for the Board's inspection." The Union concludes by asking that the Grievant be reinstated and that he be made whole "in all respects."

The Employer's Reply Brief

The Employer stresses that Jazdzewski's and Silvers' first-hand observations establish the reasonable cause to test the Union refuses to acknowledge. Beyond this, the Grievant consented twice to the urine test.

The study cited by the Union to undercut Jazdzewski's and Silvers' conclusion is dated, post-hearing hearsay which "should not be relied on." That the Grievant did not work on July 16 establishes no fact of consequence to the grievance since he "reported to work, intended to work and intended to work with drugs in his system." The degree of the Grievant's intoxication is, at most, an academic issue. The Board contends that the significant fact is that he was under the influence of marijuana and that the Board has defined "under the influence as having any detectable amount of illegal substance present in (an employe's) system combined with the obvious signs and symptoms."

The Employer then contends that the Union has misconstrued the basis for the discipline.

The Board asserts no interest in the Grievant's off-duty conduct. Rather, the Board asserts a

reasonable interest in the Grievant's "fitness for work" when he reports for work. Nor can the discharge be viewed as a "summary" act. Rather, the Grievant "received several warnings in the past for his failure to report to work on time" and "had been counseled with respect to certain 'unusual' behavior and was specifically told that the could be discharged for reporting to work under the influence."

The sanction of discharge is "properly a function of management" and the Employer urges that arbitral precedent cautions against improper arbitral intrusion into the decisions of management. Since the evidence does not establish unfair, arbitrary or capricious action on its part, the Board concludes the sanction of discharge should stand.

The Union's Reply Brief

The Union urges that the Employer's brief "failed to establish any legal basis for the District's assertion that it was empowered to regulate (the Grievant's) off-duty conduct." Beyond this, the Employer failed to establish that the Grievant was under the influence of alcohol and thus subject to immediate dismissal. It necessarily follows that the grievance must be sustained and that the Grievant should be reinstated and made whole.

DISCUSSION

The stipulated issue questions whether the Grievant's termination meets the just cause standard of Section 14.01. The Board points to Arbitrator Daugherty's seven standards as the definition of "just cause." The parties have not agreed to those standards. In my opinion, the standards are given meaning by the parties' agreement to use them.

Because the parties have not stipulated the standards defining just cause, the analysis must address two elements. First, the Board must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Board must establish that the discipline imposed reasonably reflects that interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline.

The parties' arguments relevant to the first element focus on the Board's asserted interest in the presence of a metabolite of marijuana in the Grievant's urine. That the Board has a disciplinary interest in the Grievant's reporting for work on time, or following call-in procedures if he cannot, is not in dispute. He reported for work, without having called in, forty-five minutes late on July 16, 1996, after committing the same type of offense the day before. Standing alone, this establishes conduct in which the Board has a disciplinary interest.

The operation of the first element can, however, be considered in doubt regarding the

Board's asserted disciplinary interest in the Grievant's reporting for work drug free. Baker

rested the Board's interest on its need to comply with the Drug Free Workplace Act. She defined the Board's interest to extend beyond intoxication to the presence of illegal drugs in an employe's system combined with behavioral manifestations of drug use.

There is no persuasive evidentiary basis to question the Board's asserted disciplinary interest. That the Board must comply with the act to receive federal funding is not in dispute. Nor is it disputed that the Board must reflect its view of community standards in enforcing a drug free workplace. While the limits of this interest pose troublesome issues, the evidence affords no basis to question the Board's assertion that its disciplinary interest extends beyond intoxication to the detectable presence of illegal drugs combined with behavioral manifestations of drug use.

The more closely disputed point is whether the Board's general disciplinary interest can support its conduct toward the Grievant. More specifically, the issue posed is whether the Board's determination that the Grievant reported for work under the influence has been established. That determination rests on the Grievant's July 16 drug test. On this point, the Board's assertion of compliance with the Drug Free Workplace Act coalesces with the Union's assertion of privacy rights. While approaching the issue from different points, both parties' arguments demand that the Board establish reasonable cause to suspect drug abuse precede the request for a test.

The Board has demonstrated that Jazdzewski had reasonable cause to suspect abuse prior to requesting a drug test. Jazdzewski and Silvers were, for different reasons, personally experienced in the assessment of behaviors indicative of drug use. The Union forcefully and accurately points out that the Grievant's red, watery eyes, and disheveled appearance are as consistent with getting out of bed as with abuse of drugs. That the symptoms can point to more than one cause cannot, however, obscure that abuse is one of the potential causes. Significantly, Jazdzewski had more than this to ground his concern. The inconsistency in the Grievant's account for his tardiness could reasonably be perceived as an effort to hide the cause for his tardiness. Beyond this, the Grievant had a track record regarding absence which cannot be ignored. That substance abuse had been reasonably suspected in the past and was reasonably feared to be part of his conduct on July 16 cannot be ignored. That on July 16 he committed the same offense he had been warned about on July 15 could reasonably be perceived to indicate an underlying problem more intractable than simple fatigue. In sum, Jazdzewski had reasonable cause to suspect the Grievant might be under the influence of an illegal substance on July 16.

The evidence does not manifest coercion regarding the drug test. Jazdzewski requested a blood test, but did so in the presence of a Union steward, and did nothing beyond requesting that the test be taken. The Grievant voluntarily agreed to a urine test, and contended he would test clean. His assent was twice confirmed in writing. There is no basis to conclude the Board coerced him into submitting to the test.

The Union contends that the Board improperly seeks to extend its legitimate disciplinary interest in on-duty conduct into the Grievant's personal life. The implications of this argument

are forcefully argued and troublesome. However, the broader policy concerns advanced by the Union are not supported by the facts of the grievance. The conduct underlying Jazdzewski's request for a test and the test itself are traceable to the Grievant, not to the Board. The Grievant's unexcused absences on July 15 and 16 prompted the meeting on July 16 which kept the Grievant from performing work on July 16. There is no dispute the Board acted within its rights by investigating the basis for his absences and for his failure to call in. The fact remains that he reported for work on July 16. As he approached his supervisors on that date, he was acting as an employe on the work site, not as a private citizen. Each facet of the process from that point was volitional on the Grievant's part. There is no persuasive evidence the Board took any disciplinary interest in his off-work conduct. Rather, the Board acted to determine why he failed to call in and whether he had reported for work fit to work. The events which followed the Board's assertion of these legitimate, on-duty concerns were within the Grievant's control. The policy implications argued by the Union are not posed on these facts.

Nor can these implications be posed by denigrating Silvers' response. As the Grievant's personnel file manifests, he had received prior warnings regarding reporting to work late; regarding failing to call in; and regarding reporting for work under the influence. Silvers was involved in the warning concerning the Grievant's conduct on August 11, 1994. That Silvers would view the test requested on July 16, 1996, as a means to either clear the Grievant or to confront him with a problem requiring treatment is a defensible opinion. Whether it was the best course of advocacy for the Grievant is debatable. This cannot obscure that the Grievant willingly took the test.

The results of the test should not be exaggerated, but cannot be dismissed as insignificant. The evidence will not establish that the Grievant was intoxicated on July 16, 1996. There is, however, no persuasive evidence to undercut Baker's and Jazdzewski's conclusion that the test confirmed that the Grievant had not passively ingested marijuana and that his behavior reflected its effects.

In sum, the Board has established that the Grievant failed to report for work on time on July 16, 1996; failed to call in to report or to excuse his tardiness; and reported for work under the influence, within the Board's view of its obligations under the Drug Free Workplace Act, of an illegal drug. This is conduct in which the Board has a disciplinary interest.

The issue now posed is whether discharge reasonably reflects the Board's disciplinary interest. As preface to examining this point, it should be noted that the August 1, 1996 letter of discharge focuses on the Grievant's "being under the influence of a controlled substance while on the job." This conduct cannot, however, be examined independently of his tardiness and failure to call in on July 15 and 16, since that behavior played a role in Jazdzewski's request for a drug test.

The parties' arguments on this element of the cause analysis focus on whether any provisions of Article XIV should be interpreted to prevent the discharge. Beyond the requirement for just cause, those provisions must be considered less than clear and unambiguous.

For example, Section 14.01 defines cause to be "the violation of one or more reasonable rules of conduct one or more times." This implies that a significantly serious offense, standing alone, can warrant discharge. The first sentence of Section 14.02 would appear to underscore that interpretation by specifying types of conduct warranting a summary discharge. How the specific conduct of Section 14.02 is reconciled to the general reference of Section 14.01 is not, however, immediately apparent. Beyond this, Section 14.02 read with Sections 14.03 and 14.04 can be read to mandate that a discharge be preceded by an oral warning, a written warning and a suspension within a six-month period. This interpretation is itself strained by the more open-ended reference in Section 14.04 that discharge is warranted whenever "other means of reprimand seem to be exhausted or ineffective."

The precise relationship of these provisions cannot be meaningfully addressed in the abstract, but must be interpreted on the facts of each grievance. On the facts of this grievance, Sections 14.01 and 14.04 assume primary significance, with Section 14.02 playing a secondary role. Read together, these provisions demand an evaluation of a discharge decision based on the severity of the conduct alleged and on the amenability of that conduct to modification through progressive discipline. In this case the failure of the Grievant to test clean is arguably significant enough to support the discharge standing alone. The presence of repeated tardiness aggravates the level of misconduct, but would not seem sufficient to warrant discharge outside of the steps noted in Section 14.03.

The reasonableness of the Board's discharge decision can be debated, but the record will not support considering it unreasonable. As noted above, the Board's need to comply with the Drug Free Workplace Act is undisputed. The Board's interpretation of unfitness for duty based on behavioral symptoms warranting a drug test combined with a positive reading from a test cannot be characterized as unreasonable. Discharge based on the Grievant's being under the influence of marijuana on July 16 does constitute a reasonable reflection of the Board's disciplinary interest in his conduct. That this conduct is aggravated by his tardiness and failure to call in on that date cannot be ignored. Under Section 14.01, the Grievant had violated "one or more reasonable rules of conduct" at least one time.

Nor will Section 14.04 warrant a different conclusion. The Grievant had received prior warning or discipline regarding tardiness (August 11, 1994 memo; May, 1996 evaluation and July 15, 1996 incident), failing to call-in (August 11, 1994 memo; February 21, 1996 memo and March 18, 1996 memo) and reporting to work under the influence (September 2, 1994 memo). The repetition of the warnings would not seem to have been effective. The Grievant had not brought his behavior under control and had declined at least three offers of assistance through the Employee Assistance Plan. The positive result from the drug test he represented would prove him clean indicates his inability to acknowledge a problem. Against this background, a conclusion that "other means of reprimand seem . . . ineffective" cannot be dismissed as unreasonable.

In sum, the discharge reasonably reflects the Board's proven disciplinary interest in the Grievant's conduct. Both elements of the just cause analysis have been met, and the grievance must be denied.

Before closing, it is necessary to tie this conclusion more closely to the parties' arguments. The Union's reading of Section 14.02 cannot be faulted. That provision does not, strictly read, apply to being under the influence of marijuana unless it was consumed "on the job." The provision is not, however, dispositive here. By its terms, it applies to the need to "orally warn an employee who has, for the first time, violated a rule before any written notice or other reprimand is given. . . ." The Grievant had received prior warnings concerning the conduct underlying his discharge. Nor is it persuasive to read the provision as strictly as the Union urges. It governs, by its terms, "Reprimand." The list of offenses warranting summary discharge in that section are more persuasively viewed as a reference to the severity of conduct which warrants summary discharge than as an exhaustive list. It would be a strained reading of the section to conclude, for example, that an employe who used heroin off site on his lunch break would be less susceptible to discharge than an employe who used it "while on the job" or an employe who reported for work "under the influence of alcohol."

The Union points out that the Grievant tested clean on August 5, 1996. This test cannot, however, obscure that he reported for work other than clean on July 16. He was not discharged for habitual use, but for reporting for work on July 16, 1996, under the influence. His conduct on that date, and the absence of mitigating factors such as solid work performance over time undercut his position more than a single clean test can address.

AWARD

The Employer did not violate the contract when it discharged the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 23rd day of October, 1997.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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