BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MELROSE-MINDORO AREA EDUCATION ASSOCIATION

and

MELROSE-MINDORO SCHOOL DISTRICT

Case 21
No. 55238
MA-9942

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, by **Attorney James G. Birnbaum,** appearing on behalf of the Grievant.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn,** appearing on behalf of the District.

ARBITRATION AWARD

Melrose-Mindoro Area Education Association, hereinafter referred to as the Association, and the Melrose-Mindoro School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Melrose, Wisconsin on September 5 and October 13, 1997 and January 9, 1998. The hearing was not transcribed and the parties submitted post-hearing briefs and reply briefs, the last of which were exchanged on April 16, 1998.

BACKGROUND

The grievant, Gordon Bornitz, was employed by the District for twenty (20) years until his discharge on May 30, 1997. Just prior to his discharge, the grievant was a Junior High Science teacher. The grievant resides in the City of Onalaska. The events leading up to the grievant's discharge began on January 12, 1997. The grievant returned home at around 11:00 p.m. after watching and celebrating the Packer's NFC Championship game victory. The

grievant was intoxicated and got in a dispute with his wife. He pushed her around and she called 911 and Officers Roh and Lounsbury and Sergeant Kobishop responded. After speaking to the grievant's wife, the grievant was placed under arrest. The grievant was asked to change out of his pajamas and put on clothes which he did. The officers noted a box in his right front pants pocket and although asked twice what it was the grievant did not say. The grievant was searched and the officers found a small cardboard box containing two vials which were empty but contained a white powder substance which tested positive for cocaine. The grievant's wife consented to a search of the premises and told them to check the garage. Officer Holm arrived at the residence and he and Officer Lounsbury searched the garage. Lounsbury searched the west side of the garage and in a fishing tackle box, found a wooden pipe with marijuana residue in it, two partially smoked marijuana cigarettes and a plastic zip-lock bag with remnants of a marijuana plant and seeds. Officer Holm searched the east side of the garage and inside another tackle box found a baggie with a green leafy substance which later tested positive for marijuana. Holm also found what appeared to be a homemade measuring tool, a roach clip and two packs of cigarette rolling papers.

On January 23, 1997, the grievant was charged with Battery, Possession of Cocaine, Possession of Marijuana, Possession of Drug Paraphernalia and Disorderly Conduct. At 7:45 a.m. on January 24, 1997, the grievant met with the District Superintendent Stephen Fredrick and told him the circumstances giving rise to the charges and hoped they would not be publicized. The grievant stated he had used drugs infrequently on out of town trips. At 10:45 a.m., the grievant met with the Superintendent and Principal Ron Perry and was placed on paid administrative leave. On February 26, 1997, a local newspaper reported the charges and the allegations set forth therein.

On March 3, 1997, the grievant entered into a diversion agreement wherein he pled no contest to Battery and Possession of Marijuana but judgment of conviction was withheld for one year provided the grievant complied with certain conditions.

On April 29, 1997, the grievant was placed on a suspension with pay pending a hearing before the District Board on the Administration's recommendation that the grievant be terminated for:

1. Possession of Marijuana on January 13, 1997
2. Possession of Cocaine on January 13, 1997
3. Admissions on January 24, 1997, to Ron Perry and Steve Fredrick that the grievant used marijuana and cocaine.

After a hearing on May 29, 1997 before the District's Board of Education, the Board on a 4-3 vote terminated the grievant. The matter was grieved and waived directly to the instant arbitration.

ISSUE

The parties stipulated to the following:

> Did the District have just cause to terminate the employment of Gordon Bornitz?
>
> If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE XXIII DISCIPLINE PROCEDURE

. . .

B. Upon completion of the probationary period, no teacher shall be non-renewed, discharged, suspended, reprimanded, reduced in rank or compensation, or otherwise disciplined without just cause. Any such action, including adverse evaluation of teacher performance asserted by the Board or representative thereof, shall be subject to the grievance procedure set forth herein. Information bearing on any disciplinary action will be made available to the teacher and only upon request of said teacher to the Association. The teacher must, however, be notified in advance of the meeting, in writing, that a disciplinary procedure is involved, and that he/she has the right to representation by the Association should he/she want it.

District's Position

The District contends that the key facts are not in dispute. It states that based on the record, the grievant was in possession of cocaine and marijuana on January 13, 1997 and on January 24, 1997, admitted to his supervisors that he used marijuana and cocaine. The District argues that the grievant's testimony at the hearing is not credible. It submits that the grievant could not keep his story straight regarding the use and possession of marijuana. It further observes that the grievant added time and distance regarding his use of cocaine and the evidence failed to establish how the grievant came to be in possession of the cocaine. It observes that the grievant told Superintendent Fredrick that the grievant's spouse knew he used drugs yet his spouse testified she was not aware of the marijuana until February, 1997. It claims that the grievant has attempted to modify and misrepresent the facts at the hearing so as to obfuscate the relevant facts that he possessed cocaine and marijuana on January 13, 1997 and was a user of both illegal drugs.

The District maintains that the grievant's termination is supported by the record. It notes that arbitrators have applied different standards of just cause and it believes that just cause requires that it demonstrate misconduct by the grievant and the discipline it imposed is reasonable.

The District, citing the Student and Teachers' Handbooks, insists that it has taken a strong stand regarding the expectations for its students and staff and has expended considerable time and resources to implement the D.A.R.E. program. It rejects the grievant's argument that because the District does not have an express policy that teachers will be terminated for off-duty use and/or possession of drugs that he is off the hook. It cites arbitral support for its position that the failure to have an express rule does not bar the District from imposing discipline for non-workplace drug-related activity. It claims that school teachers are held to a higher standard and occupy the position of a role model and it suggests that the grievant knew and understood this as reflected in his concern that his possession and use of drugs would become public and the grievant was concerned about what the community and students were saying about the incident. It points out that two newspapers which serve the District publicized the January, 1997 arrest and students expressed disbelief that a teacher would have engaged in such conduct. It asserts that it is ludicrous to argue that there is no "nexus" between the grievant's conduct and his role as a teacher. It observes that the grievant is a veteran teacher with the District for 20 years and can be held accountable for understanding a teacher's position as that of a role model. It rejects the grievant's contention that he can now be a better role model regarding the dangers of drug use and insists that the grievant had the responsibility as a role model for avoiding the use and possession of illegal drugs.

The District distinguishes the grievant's termination from the conviction of another employe for disorderly conduct on the grounds that illegal drugs were not involved in that incident and it was a one time error in judgment; whereas, the grievant had the opportunity over a long time to get rid of the illegal drugs and cease using them. It states that the presence of drugs was the result of a series of deliberate decisions made by the grievant over a long period of time. The District stated that it was compelled to address the grievant's strategy with respect to the police reports and the decision of the District Attorney not to prosecute. It asserts that the claim that the police reports were embellished was not supported by the evidence and the Assistant District Attorney's testimony was quite startling in that she dropped the cocaine possession charge without knowledge of the amount of cocaine in the grievant's possession and did not even ask whose cocaine it was. It notes that the Assistant District Attorney worked for the County for less than one year. It argues that the reasons the cocaine possession charge was dropped is irrelevant because the District's decision was based on the grievant's admissions and was independent of the prosecutor's interests and policies.

The District suggests that the arbitrator should not substitute his judgment for that of the District absent a finding that the penalty is excessive, unreasonable or an abuse of discretion. It asserts that the District determined that the grievant's conduct was contrary to the role and mission of the school and the grievant could not reasonably believe that it had no concern with employe's off-duty use and possession of illegal drugs. It requests the grievance be dismissed in its entirety.

Grievant's Position

The grievant contends that there is no nexus between the asserted reasons for his discharge and his employment with the District. It submits that there is no evidence that the grievant's use or possession of drugs was in any way connected with the school premises, school time, a school function or individuals from the school. It further asserts that the grievant's conduct in no way impaired or interfered with his ability to teach. The grievant argues that the District's desperation to support its case and connection to the school is demonstrated by the testimony of Connie Sprinkel. It asserts that Sprinkel is not an unbiased witness on several grounds. It characterizes her testimony as both bizarre and irrational. It states that given the undisputed facts, to call a witness who engages in fanciful speculation shows how desperate the District is to establish just cause for the grievant's discharge.

The grievant alleges that while there is no direct connection between the grievant's conduct and his employment, the District will suggest that the nature of his conduct impairs his ability as a teacher. The grievant claims the evidence utterly fails to establish this. It points out the close 4-3 vote to discharge the grievant is unusual and the 3 dissenters apparently felt the grievant's actions were not sufficiently connected to the school to discharge him. It notes that no parent who testified supported the District and no teacher except Ms. Sprinkel offered testimony to support the District. It observes that at least two petitions were circulated among students in support of the grievant and his return to the classroom. It notes that the Superintendent's own daughter supported the grievant. It contends that the newspaper articles reporting the charges introduced by the District to suggest impairment of the grievant's ability to teach proves nothing and it would be frightening if job rights of public employes were dependent upon the accuracy and integrity of a newspaper whose standards are questionable and whose accountability is non-existent. It asserts that the District failed to establish by any direct evidence that the newspaper articles had any impact at all. It concludes that the District failed to establish a direct or indirect connection between the totally private and off-duty conduct of the grievant and any duty and responsibility he has to the District.

The grievant acknowledges that his conduct was not appropriate but was not egregious nor dangerous. The grievant insists that the charges as originally made were inconsistent with the facts as the grievant's wife testified that the officers' reports were exaggerated as did the Assistant District Attorney. It claims that the testimony of all of the professionals was that the grievant's actions presented no danger to students and the District never attempted to establish there was any clear and present danger or risk to students.

The grievant submits that the amount of marijuana and cocaine seized was de minimus and the grievant established that the cocaine vials were not his. It concludes that two empty vials and the remnants of marijuana is hardly egregious conduct justifying the grievant's discharge. The grievant argues that his use of marijuana and cocaine was de minimus and not egregious. The grievant notes that the evidence establishes that he is not drug dependent on marijuana or cocaine and would not place at risk any students and nothing in the facts of the case support the drastic and irrevocable consequences of discharge.

The grievant contends that the grounds for his discharge are contrary to the express written policy of the district. It submits that the policy clearly confines the improper use of drugs to school time, school functions and school activities and teachers have never been advised that any off-duty encounter with illegal drugs could give rise to discipline and/or discharge.

The grievant also asserts that his discharge is contrary to the District's standards for chemical dependence. The grievant notes that the District has a policy for those who suffer from a chemical dependence and it subscribes to a therapeutic approach encouraging individuals to self-report and seek treatment. The grievant claims that he relied on that policy and went to his Superintendent and Principal on January 23, 1997 and disclosed to them his chemical dependence. The grievant contends that the actions giving rise to his discipline were precipitated by his alcoholism which was linked to his infrequent drug use. The grievant states that the District did not follow its own policy but embarked on a course of punitive action. Such action, according to the grievant, can have substantial adverse consequences with regard to remediation of chemical dependencies as no one will self-report. The grievant takes the position that the District's conduct is contradictory to its express written policies and there was no just cause for what the District did.

The grievant claims that his prior and subsequent actions mitigate against discharge. According to the grievant, arbitrators traditionally look to mitigating factors in assessing the appropriateness of discipline. He points to the following factors:

1. Full disclosure to the District the circumstances surrounding the January 12, 1997 event as well as prior use of marijuana and cocaine.
2. Demonstrated remorse and conversion for his chemical dependence.
3. Compliance with all therapy recommendations.
4. His prior record with the District with 20 years as an outstanding teacher.
5. His other activities working with children.

The grievant argues that these factors suggest he deserves to be reinstated and be fully compensated.

The grievant insists that his reinstatement would not constitute any risk to students and this is supported by the prosecuting attorney, a fellow teacher, his pastor, parents and his wife. The grievant suggests that the failure to reinstate him will have catastrophic consequences for him, as besides the loss of income, he will be effectively precluded from obtaining a comparable teaching position, an occupation for which he is gifted and talented. The grievant argues that this is an unusual case raising serious and compelling questions concerning the invasion of the District into the private life of an employe and presenting extraordinary results. The grievant concludes that the record fails to show that the District had just cause to discharge him and the only just solution is reinstatement and full back pay.

District's Reply

The District contends that the grievant's brief contains many distortions and misrepresentations of the facts. The District lists the following 14 misrepresentations:

1. Onalaska is 20 miles from the District and is in a different County.
2. The grievant's use of pot occurred only when he was hundreds of miles from the District.
3. The grievant's friends brought the marijuana to social gatherings.
4. The cocaine vials belong to Mike Doyle.
5. The cocaine vials were empty and one was washed out.
6. The grievant "discovered" the cocaine vials in his truck.
7. The grievant cooperated fully with the police.
8. The incident reports are exaggerated.
9. The grievant voluntarily reported to the District the circumstances giving rise to the charges and fully disclosed the circumstances of January 12-13, 1997.
10. The Assistant District Attorney specifically rejected the District's efforts to exhort (sic) from the grievant a resignation.
11. During the April 9, 1997 meeting, the grievant specifically answered any other questions truthfully.
12. Superintendent Fredrick possessed illegal drugs and offered illegal drugs at a social gathering with other District employes.
13. The grievant was never afforded the opportunity to avail himself of the Employee Assistance Policy.
14. No other teacher has been disciplined as a result of an arrest or conviction and the resulting publicity.

The District states that these are only some of the distortions and misrepresentations but reveal the degree to which the grievant is willing to cloud the record. As to other arguments of the grievant, the District points out that Connie Sprinkel does not stand to replace the grievant and she testified that the District had made no promises to her and she could be fired tomorrow. It asserts she had nothing to gain and a lot to lose by her testimony. The District notes that at p. 19 of the grievant's brief, it stated that the "District suggested that the grievant was making frequent trips to his car in the parking lot." It asks where did this come from? The District does not believe there is anything in the record to this effect. The District asserts that the fact three Board members voted against termination means nothing as the hearing before the Arbitrator is de novo. The District points out that only one parent, not parents, testified on behalf of the grievant and was under the impression that the grievant's drug use was 20 years ago. It also observes that the reference to "teachers" translates to one teacher who was subpoenaed and is a deeply religious person who believes that if one repents, there should be no impact on one's employment. The District claims that parents were not privy to all the facts because the grievant did not want an open hearing. The District asserts the grievant's argument that returning him to

work would not present a danger to students misses the point which is that the grievant held a position of trust and influence and the District should not be compelled to employ a teacher who was in possession of cocaine and marijuana as recently as January 13, 1997 and admitted he used both. The District notes that the grievant repeatedly asserted he was not dependent on cocaine and marijuana and he was not terminated because of his use of alcohol but possession of illegal drugs. As to the grievant's arguments regarding the treatment of actions related to chemical dependence being remedial rather than punitive, the District asserts there is a distinction between legal and illegal drugs and the grievant is seeking to secure the benefits and protections which attach to the use of legal drugs to his use of illegal drugs.

The District recognizes that the consequences from the grievant's actions are severe and they should be. It argues that if the grievant's conduct would not be acceptable to other districts, it should not be acceptable to the Melrose-Mindoro School District. The District insists that this case is not about disabilities, handicaps related to chemical dependency or intrusions into employes' bedrooms; rather it is about a public school teacher caught in possession of marijuana and cocaine who admitted he used both illegal drugs. It seeks dismissal of the grievance in its entirety.

Grievant's Reply

The grievant contends that there were several factual assertions which need clarification. The grievant denies there was any hesitancy to retrieve his trousers and the record establishes that the grievant was at all times cooperative. The grievant maintains that the police officers exaggerated and invented his wife's suspicion of drug use. The grievant states that voluntarily and before any charges were brought, he notified the School District of the events of January 12 and 13, 1997. The grievant indicates that he will not be convicted of any offense whatsoever and although he entered a plea, the plea was not accepted. The grievant asserts the vote of the board on his discharge was a sharply divided 4-3 vote. The grievant takes great exception to the District's assertion that he lacked credibility based on inconsistencies in his testimony. The grievant points out there was no transcript of the Board hearing so any attempt to impeach him with a non-existent transcript is improper. The grievant claims no inconsistency with regard to statements made to Connie Sprinkel. The grievant also submits that the evidence shows that the grievant is not a habitual or regular drug user and he has been forthright about the events of January 12 and 13, 1997 as well as his alcohol abuse and infrequent use of marijuana and cocaine.

The grievant insists that the mere possession and use of small amounts of illegal drugs totally unconnected with District employment does not constitute just cause for his discharge. The grievant states that the District cited no authority for its position. The grievant submits that the District failed to meet even one of Arbitrator Daugherty's seven tests set forth in ENTERPRISE WIRE CO., 46 LA 359 (1966). The grievant states that there was no notice that this behavior

could give rise to discipline as the only written policy relates to on-duty, on school premises type behavior. The grievant asserts that a zero-tolerance rule is not reasonable for off duty conduct. The grievant alleges that the District did not conduct a fair investigation in that it did not accept

the grievant's offer of a drug test, did not consult with his counselors, did not allow the grievant to confront parents who expressed concern about the grievant and did not investigated the degree of support for the grievant among parents and students. The grievant contends that the District lacks consistency in the application of off duty conduct. The grievant argues that the punishment is totally disproportionate to the offense.

The grievant submits that the District failed to prove sufficient impact for the District to sustain any discipline, much less discharge. He claims mere publication of the charges is not sufficient, there is no proof of harm to the District, mere speculation is not enough, there is no showing that employes would be reluctant to work with the grievant and there is no issue of safety as the evidence fails to suggest the grievant poses any risk to students.

The grievant claims that case law does not support discipline or discharge. The grievant distinguishes the three cases cited by the District on the grounds these cases involved large quantities of illegal drugs, their manufacture for sale or the involvement of young people in illegal drugs. He states that here the drugs were minuscule, no evidence of manufacture, sale or distribution and no young person was involved.

The grievant argues that the "role model" basis for discipline is flawed. The grievant alleges that the role model standard reflecting community attitudes was rejected with regard to teacher licensing and furthermore it is overboard. The grievant maintains that even if this standard is adopted, the District did not prove that the grievant failed to meet the role-model standard sufficiently to justify his dismissal. It asks that the grievance be granted and the grievant reinstated and made whole.

DISCUSSION

The factual underpinnings of this case are not in dispute. The evidence established that the grievant on January 12 and 13, 1997 had vials in his pocket which contained trace amounts of cocaine. A search of his garage on January 13, 1997, revealed small amounts of marijuana. On January 24, 1997, the grievant admitted to his Superintendent and Principal that he used both cocaine and marijuana. Thus, the issues related to the credibility of the police, the grievant, and other witnesses related to the drugs and their discovery are irrelevant.

The grievant was later charged with possession of cocaine and marijuana which was reported in local newspapers. These events occurred off-duty and off school premises and the District terminated the grievant for possession of these illegal drugs and their use because such conduct was contrary to the role and mission of the school. The grievant contends that his off-duty conduct has no connection to the school and his discharge must be set aside. Generally, arbitrators express concern over discipline or discharge based on off-duty misconduct and require some "nexus" or relationship to the job.

Marvin Hill and Mark L. Kahn, in an address before the National Academy of Arbitrators, have summarized most of the criteria arbitrators apply in off-duty cases as follows:

> Whether the nexus is sufficient to overcome the presumption that an employee's off-duty behavior is not subject to the employer's control is, dependent on many considerations. The characteristics of the employer may be critical. If it is claimed that the off-duty misconduct had adversely affected or will harm the company's reputation or sales, or both, this may be of greater concern for firms that operate in highly competitive, consumer-oriented, markets (e.g., airlines, retail stores, private schools, health clubs, day-care centers) than for oligopolistic firms with produced-oriented markets.
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> The location of the employer may be a factor. A prominent employer in a small isolated town may be legitimately more sensitive to scandal based on off-duty misconduct than an anonymous employer in a large metropolitan area.
>
> The nature of the misconduct: Violent, destructive, or perverted actions may reinforce the nexus more than crimes of the so-called white-collar variety (e.g. tax evasion). A misdemeanor (e.g., marijuana possession) is much less likely to be considered just cause for discharge than a felony (e.g., marijuana sales).
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> The occupation of the offender. Many decisions [in the off-duty area] have hinged on a link between the employee's job duties and obligations and the content of the misconduct. It is not hard to demonstrate a nexus when a police officer commits a felony off-duty, when a teacher molests a child off-duty, when a sales clerk is convicted of shoplifting (from someone else's store), or when a bank teller has embezzled funds from his church's treasury. The extent and nature of the grievant's customer contacts are important, especially if they relate to the type of misconduct. Committers of sex crimes or property thefts will probably not be retained in jobs that entail entering customers' homes.
>
> Finally, there is the extent and kind of publicity. When the public's attention has focused on the misconduct and the miscreant has been clearly identified with the employer, the nexus is reinforced. Often, of course, it is the publicity that caused the employer to become aware of the off-duty misconduct. (Hill & Kahn, "Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards," in *Arbitration 1986: Current and Expanding Roles.* Proceedings of the 39th Annual Meeting, National Academy of Arbitrators. 121-154, 153-154.

In the instant case, the grievant is a teacher in a rural school district and the charges of cocaine and marijuana possession were reported in two local newspapers.

The number of cases involving teachers and possession of drugs is not great but a few are instructive. In COMINGS V. STATE BOARD OF EDUCATION, 23 Cal. App. 3d 94 (1972), Selwyn

Jones, while visiting Hawaii, was charged with possession of marijuana to which he pleaded nolo contendere and was convicted. Upon his return to Westmoor High School in the Jefferson Union High School District in Daly City, California, where he was an art teacher, the District sought his dismissal. Jones testified his arrest and conviction were reported in the San Francisco Chronicle. No parent, student or fellow teacher testified in the matter, only the Vice Principal. The Court upheld Jones' discharge. In CHICAGO BOARD OF EDUCATION V. PAYNE, 430 N.E. 2d 310 (Ill. App. 1981), Payne was arrested for possession of a small amount of marijuana. Payne was a teacher in the Chicago School System which discharged him despite the support of fellow teachers and students. The District Court overturned a hearing examiner's finding that Payne's dismissal was improper. The Court of Appeals affirmed the District Court and upheld the dismissal stating:

> We are aware of the special position occupied by a teacher in our society. As a consequence of that elevated statute, 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. This conclusion is especially true where, as here, the teacher holds a certificate to educate children ages 10 to 13 who are, according to testimony in this case, very impressionable. We can only find that general awareness of possession of marijuana by a teacher in Payne's position directly and adversely affects that individual's ability to effectively perform as a teacher.

In WEST MONONA COMMUNITY SCHOOL DISTRICT, 93 LA 414 (Hill, 1989), a K-12 guidance counselor was convicted of vehicular homicide. The facts indicated that he was driving a car at a high rate of speed which crashed killing one passenger and severely injuring another resulting in permanent paralysis. The driver's blood test indicated .095 grams of alcohol per 100 milliliters of blood and also cocaine was detected of .17 milligrams/liter. The guidance counselor was discharged and arbitrator Hill upheld the discharge. With respect to the cocaine in the blood sample, Arbitrator Hill stated:

> Judge Walsh's cocaine finding is completely at odds with the notion of teacher as guidance counselor and role model, and no reasonable person would argue to the contrary. A finding of cocaine use by the elementary school's guidance counselor would, in any other case, be dispositive of the just cause issue.

Teachers not only teach what they know but teach by example. The District prohibits illegal drugs on its premises (Ex-9) and is a drug-free school and has a program to address and prevent the use of illegal drugs. (Ex-10). The grievant's possession of marijuana and cocaine and his admission of the use of illegal drugs is an example contrary to the message the District is

trying to instill in its students. Clearly, there is a sufficient nexus with the District's efforts to

have students understand and appreciate the dangers of illegal drug usage and the grievant's conduct. As stated, by the Court in SUMMERS V. VERMILLION PARISH SCHOOL BOARD, 493 So. 2d 1258 (La. App. 3 Cir., 1986).

"Involvement with illegal drugs is a plague that most often pursues our youth, even on school grounds. The school board would be remiss in its duties if it did not properly dismiss Summers for his involvement with illegal drugs."

As Arbitrator Yaeger stated in SHAWANO-GRESHAM SCHOOL DISTRICT, (UNPUBLISHED, 8/97):

> It also had the effect 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.

The grievant has argued that the role model basis is flawed. I respectfully disagree. The Court in THOMPSON V. DEPARTMENT OF PUBLIC INSTRUCTION, 197 WIS.2D 688 (WIS. CT. APP. 1995) rejected the role model standard for the revocation of a teacher's license pursuant to the state statute which required state wide uniformity because the role model standard by its nature varied from District to District. Here, the role model standard is not being applied state wide but rather locally and, as arbitrator Yaeger noted, the role model standard which is a local decision without statewide application is appropriate. Arbitrator Malamud in MILWAUKEE BOARD OF SCHOOL DIRECTORS, WERC NO. A/P M-95-355 (5/96) opined that the role model status was overbroad. This was dicta which is in itself an overbroad statement. The District did not discharge the grievant because he stayed out past 10:00 p.m., exceeded the speed limit or committed just any minor criminal offense. Certain offenses carry with them a stigma that others do not and those with a stigma may directly effect the work of a teacher. With regard to drug related offenses, whether on or off school property, they have developed such a stigma which does affect the District. The grievant was discharged because of marijuana and cocaine possession and his admitted use of these illegal drugs. Just as arbitrators determine whether just cause exists for discipline or discharge, they can determine whether or not a District properly applied the role model standard.

The grievant's arguments that he is not a risk to students does not infer that his discharge for illegal drug possession and use was not for just cause. The safety of students is not an issue in this matter rather it is the grievant's ability to provide a role model and example that they should not use illegal drugs. Thus, it makes no difference what the opinions of the grievant's wife, pastor, case worker, fellow teachers or the Assistant District Attorney are as regards safety

of students because that issue misses the point. The grievant's reliance on the Board's 4-3 vote is also misplaced. Just cause is not determined by how the Board voted just as any law is not

more or less enforceable because it passed the legislature by a single vote or is upheld by a 4-3 vote of the Supreme Court.

It may be true that the grievant has an excellent record with the school and can teach science to students very effectively. This is certainly a factor in his favor. The grievant has asserted that his post arrest actions have all been positive. This may be true but it must be recognized that many of these actions are under the threat of imposition of criminal sanctions and this argument must be given less consideration. The grievant has argued that the District's written rules only prohibit use of illegal drugs at school or at a school function and not to off duty, off premises drug use or possession. The grievant was not discharged for violating this specific rule and there is no evidence he used or possessed drugs at school. However, that does not mean that he cannot be discharged for off duty conduct. There is no need to warn the grievant of conduct that is illegal as he already knew that. No employer is required to incorporate the criminal code in its work rules as murder, rape, armed robbery, etc., are known to be prohibited. The District may take action based on just cause for conduct that is not part of the written District policy. TRANE COMPANY, 96 LA 435 (Reynolds, 1991).

The grievant testified he was not dependent on marijuana or cocaine and the evidence supports this, however, he argued that the District's actions were contrary to its standards for chemical dependency. The evidence fails to support this argument. The grievant is not dependent on illegal drugs and the record fails to show any support for the argument that the use of illegal drugs was dependent on his alcoholism. Had the grievant killed someone while driving drunk, his alcoholism would be no defense. The grievant simply cannot have it both ways. Thus, this argument is rejected.

The grievant has asserted that his conduct will allow him to give students first hand knowledge of the danger of drugs. This is a call for the District to make and not the undersigned. WEST MONONA COMMUNITY SCHOOL DISTRICT, 93 LA 414 (HILL, 1989) AT 422.

The grievant has also noted that another teacher who was convicted of disorderly conduct which was published in the local newspaper was not discharged. According to the newspaper, that teacher became angry when he saw his wife talking to another man at a bar and struck the man in the face. This case is distinguishable as it is more akin to a spontaneous action than the grievant's possession and use of illegal drugs. This is very similar to the situation distinguished in SHAWANO-GRESHAM SCHOOL DISTRICT, SUPRA. Inasmuch as the two factual situations are different, the argument that there was disparate treatment is not persuasive. It should be noted that the charge against the grievant in court included battery but that was not a basis for his termination.

The undersigned is persuaded that the grievant's possession and use of illegal drugs has been shown to have adversely affected his ability to teach in the District. The grievant's

continued employment would send the wrong message to students and fellow teachers and thus his discharge was proper.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The District had just cause to terminate the employment of Gordon Bornitz, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin this 24th day of June, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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