BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL 40, LOCAL 1749-B,
PLYMOUTH SCHOOL DISTRICT SUPPORT STAFF EMPLOYEES,
AFSCME, AFL-CIO**

and

PLYMOUTH SCHOOL DISTRICT

Case 60
No. 61571
MA-11988

Appearances:

Ms. Helen M. Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Davis & Kuelthau, S.C., 605 North Eighth Street, Suite 610, Sheboygan, Wisconsin 53081, by **Mr. Paul C. Hemmer**, appearing on behalf of the Employer.

ARBITRATION AWARD

Plymouth School District, hereafter District or Employer, and Wisconsin Council 40, Local 1749-B, Plymouth School District Support Staff Employees, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so designated on March 11, 2003. A hearing was held in Plymouth, Wisconsin on April 9, 2003. The hearing was not transcribed. The record was closed on June 10, 2003, upon receipt of post-hearing written arguments.

ISSUE

The parties have stipulated to the following statement of the issues:

Did the Employer violate the contract when it gave Dale Laack a one-day suspension on May 31, 2002?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE TWENTY-FOUR – GRIEVANCE PROCEDURE

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3. STEP THREE: If a satisfactory settlement is not reached as outlined in Step Two, either party may request that the matter be submitted to arbitration. The Union Committee and/or the Union Representative shall submit the grievance at Step Three within fifteen (15) working days after the date it was answered at the previous step. The parties shall request the Wisconsin Employment Relations Commission to name the arbitrator. The arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. The arbitrator's authority is limited to the application and interpretation of this contract.

. . .

ARTICLE TWENTY-SEVEN – MISCELLANEOUS CONDITIONS

. . .

G. No employee who has satisfactorily completed the initial probationary period will be subject to reprimand, suspension, or discharge without just cause.

RELEVANT BACKGROUND

On May 31, 2002, Elizabeth E. Kane, the District Manager of Business Services, issued the following to Dale Laack, hereafter the Grievant:

> As discussed at our meeting this morning, I am issuing you a suspension without pay as of 8:00 a.m. May 31, 2002. You may return to your regular shift on Monday, June 3, 2002. At the conclusion of my investigation into a May 17, 2002 complaint, I have determined that you were in violation of state

> law and district policy by smoking in the high school building. This conclusion and your record of violations of smoking provide cause in this situation for discipline.
>
> Again, I need to remind you of the seriousness of your insubordinate behavior in repeated violations and defiance of the law and district policy, which prohibits the use of all tobacco products. Any further violation of law and/or inappropriate behavior will result in further disciplinary action up to and including civil citation and/or, suspension and/or termination of your employment with the Plymouth School District.

A copy of this letter was provided to Union President Chris Kline.

On June 17, 2002, a grievance was filed alleging that the Grievant's one-day suspension without pay for alleged smoking violates the just cause provision of the contract, Article 27-G, and any other provisions that may apply. The remedy sought in the grievance was "That Dale Laack be made whole". The grievance was denied at all steps and, thereafter, submitted to arbitration. The parties have stipulated that there are no issues of arbitrability.

POSITIONS OF THE PARTIES

District

Wisconsin Statutes and District policy prohibit smoking on school property. Prior to May 16, 2002, the Grievant was aware of these prohibitions and had received one verbal and two written warnings regarding smoking in violation of law and/or District policy. Additionally, the Grievant has been fined for violating a municipal ordinance that prohibits smoking on school property.

Head Custodian Ed Butzen credibly testified that, at approximately 8:15 a.m. on May 16, 2002, he observed the Grievant in the pump room; that no other individual was in the pump room at that time; that the Grievant immediately got up off of the box on which he was sitting and leaned over the injection pump pit cover; that the Grievant placed a cigarette through the small opening in the pit cover; that, as the Grievant dropped the cigarette through the pit cover, he stated "I heard a pump squeaking"; that as the Grievant spoke, smoke came out of his mouth; and that, thereafter, the Grievant promptly left the pump room. Although the pump room is ventilated, the ventilation system in the pump room would not have immediately removed cigarette smoke from the room as the Grievant was smoking.

The Grievant acknowledged, during the course of his testimony, that he knew of no reason that would prompt Butzen to falsely accuse the Grievant of smoking on school

premises. The record demonstrates that Butzen did not want to be involved in the controversy involving the discipline of the Grievant. Thus, Butzen's conduct in delaying his initial report to the administration regarding the conduct of the Grievant and the student is reasonable. Neither this delay, nor Butzen's inability to identify the student, reasonably suggests that Butzen is not credible. The Grievant, however, has a motive to testify falsely in order to avoid a one-day, uncompensated disciplinary suspension.

The only reasonable conclusion to be drawn from Butzen's credible testimony is that the Grievant was smoking in the high school pump room when discovered by Butzen. The conclusion that the Grievant was smoking on school property is also confirmed by the statement of the student who commented that he thought smoking was illegal on school property, as well as by the parent who telephoned to complain that his son had commented upon custodians smoking on school property. There is no evidence that anyone other than the Grievant was smoking in that area at that time.

Notwithstanding a verbal warning, two written reprimands and a $186.95 fine, the Grievant was again smoking on District premises on May 16, 2002. Lesser forms of discipline have prompted the Grievant to attempt to conceal his misconduct behind closed doors, but have not had the effect of securing his compliance with the prohibition against smoking on District property.

The Grievant has either not received the message conveyed through lesser forms of disciplinary action, or he simply refuses to comply. The District has just cause to discipline the Grievant by suspending the Grievant for one-day without pay.

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Although a specific just cause provision was not included within the collective bargaining agreement until an agreement was reached upon the terms of the 2000-2002 collective bargaining contract in November, 2001, the District previously applied and adhered to the concepts of just cause and progressive discipline. If this had not been the case, the Grievant would have been summarily discharged for one of his prior smoking violations, rather than progressively disciplined. Moreover, the absence of a specific just cause provision does not insulate the Grievant from the consequences of his prior misconduct.

The 1998-2000 collective bargaining agreement contains a grievance procedure, including the right to final and binding arbitration. The Grievant invoked this grievance procedure to contest disciplinary actions related to the prohibition against smoking on school grounds and, in one instance, the grievance was sustained by the Board of Education when it concluded that the complaining witness was too far away to be certain that the Grievant was smoking.

The absence of a specific just cause and progressive disciplinary provision did not preclude the Grievant from contesting the disciplinary actions that were administered to him. The Union cannot accept the benefit of the District applying just cause principles and now assert that the prior discipline may not be considered because of the absence of a just cause provision.

Nothing within the collective bargaining agreement, or the just cause standard, as commonly understood, leads to the conclusion that the person investigating employee misconduct may not be the person imposing discipline. The relevant consideration is whether or not a fair and objective investigation was conducted. The District's Manager of Business Services conducted a fair and objective investigation.

The text of the Board of Education's grievance decision reflects nothing more than that it rejected the Grievant's assertion that he was not smoking on District grounds on May 16, 2002. Moreover, the hearing before the arbitrator is conducted de novo.

The Grievant was smoking on school grounds on May 16, 2002 in contravention of the Wisconsin Statutes, as well as written work directives. Even without consideration of the prior disciplines, a one-day disciplinary suspension was an appropriate response to the Grievant's misconduct. The grievance is without merit and must be dismissed.

Union

The applicable labor contract contains a just cause for discipline standard. Under such a standard, arbitrators give consideration to notice, reasonableness of rule alleged to have been violated, equal treatment and fair investigation, proof and penalty. The Union challenges the discipline on the basis of the fairness of the investigation and insufficiency of proof.

Given Kane's involvement in the prior disciplines and the investigation of the events of May 16, 2002, she is biased against the Grievant and her suspension was a foregone conclusion. The Board's prior decision to overturn a prior discipline of the Grievant for smoking on school property because it was not possible for the complaining witness to observe the Grievant indicates that there have been prior unwarranted attempts to cause trouble for the Grievant. The Employer's investigation was not conducted fairly and objectively and, thus, the Employer's discipline is without just cause.

As set forth in the School Board's denial of the grievance, the Board did not place any burden on Employer agents to prove guilt, but rather, the grievant was denied because "the contention of the grievant was not proven through testimony or evidence received, therefore the grievance is denied." It is for the employer to prove the employee "guilty" and not the employee who must prove himself "not guilty".

The disciplinary letter that gave rise to this grievance and the Employer's Step 1 grievance response establishes that the Employer relied upon the Grievant's "record of violations" and "the statements of Ed Butzen, Pam Harney, and Officer Todd Kronberg, the corresponding complaint by a parent, the circumstances of Mr. Laack's whereabouts on May 16, as well as Mr. Laack's record of violation and/or complaints" as proof that the Grievant was smoking on school property. Examination of this "proof", as well as of the testimony adduced at hearing, warrants the conclusion that the Grievant is the more credible witness.

The Employer seems to use Kronberg's position to add credence to its version of events. Kronberg, however, did not testify at hearing

Given the Grievant's position in the District it is credible that, as the Grievant claims, he entered the pump room to investigate strange pump noises. The fact that, within a few days, the pumps had to be replaced supports the Grievant's claim. The Employer's total disregard for this claim of the Grievant is unreasonable.

Butzen's credibility is diminished by the testimony of the Grievant, as well as Butzen's delay in reporting that the Grievant was smoking; Union President Kline's testimony that there were discrepancies in the two statements that Butzen made to Kline; the anonymity of the complaining student and parent; the confusion about when and at whose direction Butzen prepared his written statement; the illogic of Butzen claiming that he was concerned that, if the anonymous student complained of janitors smoking, that Butzen would be in trouble when Butzen does not smoke, did not bring Union representation when he made his report to administration, and the student was not in a position to observe anything that occurred in the pump room; the likelihood that the ventilation system in the pump room would exhaust any cigarette smoke; Butzen's admission that he did not reference the "box" business prior to the hearing; the reasonable conclusion that the noise of the unlocking of two doors would have warned the Grievant in time for the Grievant to discard his cigarette before Butzen entered; and Butzen's failure to recall that the Grievant closed the doors. Butzen's failure to give any credence to the Grievant's claim that the pumps were making an unusual noise establishes that Butzen was fixated upon a smoking mindset.

Prior to November 13, 2001, the contract did not have a just cause standard and the contract stated:

> A grievance is an issue concerning interpretation or application of the provisions under this contract or compliance herewith.
>
> The arbitrator's authority is limited to the application or application of the provisions.

Given this language, there was no mechanism to grieve disciplinary action. Although the Employer asserts that it previously applied the principles of just cause and progressive discipline, it has offered no examples.

The last time that the Grievant was accused he was able to grieve under the just cause standard. The Grievant won this grievance because the administration had made an illogical conclusion.

The Union submits that the Arbitrator should not give any consideration to the prior disciplines that could not be grieved. If the Arbitrator gives any consideration to these prior disciplines, they must be viewed in light of the bias demonstrated in the most recent illogically smoking accusation.

The record establishes that the Employer is so biased against the Grievant that, if the Grievant were observed to be in anyplace unusual, the Employer would come to the conclusion that the Grievant was smoking. The Employer has not met its burden of proof. The grievance should be upheld and the Grievant made whole.

DISCUSSION

By letter dated May 31, 2002, the District suspended the Grievant for one day without pay for violating state law and district policy by smoking in the high school building. The Union does not deny that it is a violation of state law and district policy to smoke in the high school building. Rather, the Union denies that the District has established that the Grievant has committed such a violation.

The parties are in agreement that the District is required to have just cause to suspend the Grievant. In arguing that the District has not established just cause for discipline, the Union asserts that the administration's investigation was unfair and that the Employer's "proof" that the Grievant was smoking on school property is insufficient.

The Grievant was disciplined for smoking in the High School pump room on May 16, 2002. The Grievant acknowledges that Head Custodian Ed Butzen entered the pump room while the Grievant was in the pump room and that he spoke with Butzen. The Grievant denies that he was smoking in the pump room.

The only individual in a position to refute the Grievant's denial is the individual who was in the pump room at the time of the Grievant's alleged misconduct, i.e., Butzen. At hearing and in statements made prior to hearing, Butzen recalled the following: he entered the pump room at approximately 8:16 a.m.; the pump room was smoky; he observed the Grievant throw a cigarette down a hole in the pump cover and he observed smoke coming out of the

Grievant's mouth. If these statements are credible, they are sufficient to rebut the Grievant's denial that the Grievant was smoking on school property.

Butzen and the Grievant are both members of the Union's collective bargaining unit. The Grievant was not able to provide any reason why Butzen would fabricate his statements regarding the Grievant's conduct in the pump room. Avoidance of discipline provides the Grievant with a reason to fabricate his claim that he was not smoking in the pump room.

The Union argues that Butzen could not have smelled or observed smoke because any smoke would have been ventilated from the room. Although it is evident that the pump room had a ventilation system, it is not evident that the system would have removed cigarette smoke so quickly that Butzen could not have detected it.

The District has employed the Grievant for more than 35 years. Given his Maintenance I position within the District, as well as the evidence that the pumps were replaced within a few days of May 16th, the Grievant's claim that he entered the pump room for the purpose of checking out an unusual pump noise is, on its face, a reasonable claim. However, given the isolation of the pump room, and the nature of Butzen's observations in the pump room, including his observation that he did not hear any unusual noises, Butzen's refusal to give any credence to this claim of the Grievant's is understandable and does not provide a reasonable basis to infer that Butzen is prejudiced against the Grievant.

The Union argues that Butzen's testimony is diminished by Butzen's delay in reporting the incident. Butzen's testimony and statements, however, provide a reasonable explanation for this delay, *i.e.*, Butzen mulled over the ramifications of making a report against a fellow employee and felt the need to first consult with a Union representative.

Butzen has consistently maintained that, after he left the pump room, he encountered a student in a hallway who commented about smoking being illegal on public property. The fact that Butzen was not able to identify this student, even after review of school records, does not provide a reasonable basis to discount Butzen's claim that he had such an encounter. As the District argues, Butzen's testimony that such an encounter occurred is supported by Assistant Principal Harney's testimony that, on the afternoon of May 17, 2002, she received a telephone call from an irate individual, claiming to be a parent, who wanted to know why it was ok for janitors to smoke in the building and who claimed that his son had smelled smoke at the same time that the son observed a janitor exiting a room in the high school.

As the Union argues, the student was not in a position to observe what happened in the pump room and Butzen is not a smoker. Neither fact, however, means that the student could not have identified Butzen as a "smoking" janitor and, thus, precipitated a District investigation. Inasmuch as such an investigation could lead the District to conclude that

Butzen had failed to report a violation of state statute and District policy, Butzen's claim that he was concerned about the consequences of not reporting what he had observed in the pump room is reasonable. That Butzen did not bring a Union representative with him when he made his report to administration does not require a contrary conclusion.

Notwithstanding the Union's argument to the contrary, there is no significant confusion regarding the genesis of Butzen's written statement of May 17, 2002. Butzen's testimony at hearing is consistent with his written statement of May 17, 2002, *i.e.*, he prepared this written statement because a Union representative advised him to do so.

There is evidence of tension between the Union representative who gave such advice and the Grievant. There is no evidence, however, that Butzen was aware of this tension at the time that he prepared his written statement, or that any of Butzen's statements have been influenced by this tension.

Union President Kline's testimony does not demonstrate, as the Union argues, that Butzen initially denied that the Grievant was smoking, but rather, establishes only that the Butzen did not state that the Grievant was smoking and that the Grievant emphatically stated that he had not told Kane that the Grievant was smoking. This conduct of the Grievant is consistent with the Grievant's May 17th written statement, which reveals that Butzen did not state that the Grievant was smoking, but rather, stated that he saw the Grievant place a cigarette butt down a hole in the pump cover and observed that the pump room was very smoky.

Kline also testified that it was not until the second Union interview, that Butzen stated that he saw smoke coming out of the Grievant's mouth. This latter statement is not contained in Butzen's written statement of May 17, 2002, but is consistent with a statement that Butzen made to Assistant Principal Harney on May 17, 2002. The evidence of the inconsistency in Butzen's statements to the Union establishes that Butzen was less candid with the Union President than he had been with the District, but does not provide a reasonable basis to discredit the statements that Butzen made to the District.

As a review of the written statement of May 17, 2002 reveals, the majority of this written statement is devoted to explaining why Butzen was making the report and there are limited references to the Grievant's conduct. The content of this report, as well as Butzen's testimony at hearing, indicates that Butzen was far more interested in protecting himself from fallout if the anonymous student made a complaint to administration than he was in accusing the Grievant of misconduct. Thus, it is not "suspicious" that Butzen's initial written statement regarding the Grievant's conduct does not contain all of the detail of his subsequent statements.

As the Union argues, it was not until the arbitration hearing that Butzen recalled that the Grievant was sitting on a box when he first observed the Grievant. Butzen, however, reasonably explained that he did not recall this fact until he viewed the pump room in preparation for the arbitration hearing.

In summary, contrary to the argument of the Union, the record provides no reasonable basis to discredit Butzen's statements that the pump room was smoky; that he observed the Grievant throw a cigarette down the pump hole; and that he observed smoke coming out of the Grievant's mouth. The record does provide a reasonable basis to discredit the Grievant's claim that he was not smoking in the pump room. Butzen's statements are sufficient to provide the District with just cause to conclude that the Grievant engaged in the misconduct for which he was disciplined, *i.e.*, violating state law and district policy by smoking in the high school building.

The Union claims that, if the Grievant had been smoking, then he would have disposed of the cigarette when he heard Butzen open the two doors that lead into the pump room. Given Butzen's credible testimony that he observed the Grievant putting a cigarette down a hole in the pump cover, one may reasonably conclude that the Grievant did not hear Butzen until it was too late.

The undersigned turns to the Union's claim that the District's investigation was biased. As the record establishes, Butzen provided Kane with his written statement; Kane discussed this written statement with Butzen; thereafter, Kane met with the Union President to discuss what Butzen had reported; and that Kane met with the Grievant on May 31, 2002. It is not evident that the Grievant or the Union was precluded from presenting their version of events to Kane, or before the Board of Education.

As reflected in Kane's letter of July 3, 2002, she gave consideration to the anonymous parent complaint. The hearsay statements of the anonymous parent complainant do not provide a reasonable basis to conclude that the Grievant was smoking in the pump room. The record, however, fails to establish the weight given to this anonymous complaint. Moreover, it is unclear whether the parental complaint was considered "proof" that the Grievant was smoking, or was considered supportive of Butzen's claim that he had encountered the student.

The letter of July 3, 2002 also reflects that Kane gave consideration to such factors as the statements of Ed Butzen; the statements of other individuals who were present when Butzen made statements regarding the events of May 16, 2002, such as Pam Harney and Todd Kronberg; and the Grievant's "whereabouts" on May 16, 2002. As the Union argues, Todd Kronberg did not testify at hearing. However, given the evidence that Kronberg was present at the time that Butzen made his report to Harney and the fact that both Harney and Butzen testified at hearing, the record provides no reasonable basis to conclude that Kronberg's testimony would be other than cumulative.

As the Union argues, District representatives failed to give any credence to the Grievant's claim that he had a legitimate purpose to be in the pump room. There are circumstances in which an employer's disregard of a reasonable claim may be evidence of bias or bad faith. However, given the seclusion of the pump room; Butzen's credible observations; and the District's belief that the Grievant had previously engaged in misconduct by smoking on school property, the failure to give any credence to the Grievant's claim is reasonable. Moreover, having a legitimate purpose to enter the pump room does not preclude the Grievant from also using the room for illegitimate purposes.

By letter dated August 26, 2002, the District's Personnel Committee informed the Grievant that the grievance is denied because "the contention of the grievant was not proven through testimony or evidence received." The Union argues, that by making this statement, the District's Personnel Committee has established that it applied an incorrect standard of proof when it concluded that the Grievant had engaged in misconduct. However, given the evidence that the Grievant's "contention" is that he was not smoking, and the statements of District witnesses, the more reasonable construction of this language is that the District is stating that it does not find the Grievant's denial to be credible.

The fact that Kane investigated the allegation of misconduct; decided that misconduct had occurred; and imposed a discipline for this misconduct does not warrant the conclusion that the District's disciplinary procedure is biased and unfair. Neither the fact that the District Board previously overturned a discipline for smoking because they decided that there was insufficient proof, nor any other record evidence, establishes that Kane, or any District Representative involved in the disciplinary process, is biased against the Grievant, or that the District disciplined the Grievant for any reason other than a good faith belief that the Grievant had violated state law and district policy by smoking in the high school building.

In summary, the undersigned rejects the Union's argument that the District's investigation of the misconduct allegation was unfair, or that the District's proof is not sufficient to establish the alleged misconduct. As the District argues, it has just cause to discipline the Grievant. The undersigned turns to the issue of whether or not the level of discipline imposed by the District, i.e., a one day suspension without pay, comports with the requirements of just cause.

The District argues that it has just cause to suspend the Grievant for one day without pay because the Grievant knew that smoking on school property was prohibited and the Grievant had previously received a verbal warning and two written warnings for violating statutory and/or district prohibitions against smoking. The District further argues that, even in the absence of any other progressive discipline, the Grievant's misconduct was of such a nature as to warrant the suspension. The Union argues that it is inappropriate for the Arbitrator to consider the prior verbal and written warnings because the accusations that gave

rise to these disciplines could not be contested by the Grievant because there was no just cause standard at that time and the existing grievance procedure, on its face, did not allow grievances to be filed on disciplinary matters.

Bill Johnson, District Supervisor of Building and Grounds, testified, without contradiction, that on or about March 22, 1999, the Grievant was provided with written notice that "As of March 22, 1999 there is to be "No Smoking" in company vehicles." Johnson also testified, without contradiction, that, on December 21, 1999, he observed the Grievant smoking on school grounds while driving a school vehicle and, as a result, issued a written "verbal warning" of December 21, 1999 that included the following:

> Today at 6:55 A.M I walked out to my vehicle which was parked by the high school maintenance shop and observed you smoking on school grounds while driving the school district maintenance van. This is a direct violation of state statutes and a direct violation of a memo given to you on March 22, 1999 stating "No Smoking" in company vehicles.
>
> This letter is issued as a verbal warning. Any further infractions of the No Smoking statue will result in further disciplinary action.

Although the Grievant refused to sign a copy of this "verbal warning," it is evident that the Grievant received a copy of this warning.

Johnson testified, without contradiction, that, on or about January 25, 2001, he reviewed with District maintenance staff, including the Grievant, a series of work directives, including that there is no smoking on school grounds or in school vehicles. Johnson testified, without contradiction, that, on March 27, 2001, he observed the Grievant smoking on school property. As a result of this observation, the Grievant, on April 3, 2001, received a "written reprimand" from Kane that states as follows:

> On March 27, 2001, at approximately 12:30 p.m., Buildings and Grounds Supervisor Bill Johnson reported you smoking on school property. As you are well aware, the use of tobacco products on school property and in school owned vehicles is prohibited by law (§120.12). Compliance of the law by employees of the school district is not only expected; it is especially significant in the example you set for the students of this district.
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> This letter will serve as notice of a written reprimand in this matter. Any further violations of the law and/or inappropriate behavior will result in disciplinary action up to and including suspension and/or termination of your employment with the Plymouth School District.

Although the Grievant refused to sign a copy of this "written reprimand," it is evident that he met with Kane and was provided with a copy of this reprimand. Kane does not recall that this reprimand was grieved.

Johnson testified, without contradiction, that, on May 2, 2001, he observed the Grievant smoking on school property. As a result of this observation, the Grievant, on May 3, 2001, received a second "written reprimand" from Kane that states as follows:

> On May 2, 2001, at approximately 6:30 a.m., Buildings and Grounds Supervisor Bill Johnson reported you smoking on school property. As you are well aware, the use of tobacco products on school property and in school owned vehicles in prohibited by law (§120.12).
>
> You received a verbal reprimand on December 21, 1999, were again informed in a meting held by Bill Johnson, Supervisor of Buildings and Grounds, on January 25, 2001 that smoking is prohibited, and then issued a written reprimand for smoking on school grounds on April 3, 2001. In less than a month you have chosen to ignore the law and the policies of the school district. Therefore I am issuing you a second written reprimand regarding your refusal to comply with the law and the policies of the Plymouth School District. In addition I will be forwarding a complaint to Police Liaison Officer Todd Kronberg for issuance of a citation for this infraction.
>
> Any further violation of the law and/or inappropriate behavior will result in disciplinary action up to and including suspension and/or termination of your employment with the Plymouth School District.

Although the Grievant refused to sign a copy of this "written warning," the Grievant was provided with a copy of this warning. Kane recalls that the Grievant grieved this warning and that the Board upheld this warning. As a result of this incident, on September 11, 2001, the Grievant was found guilty of violating a municipal ordinance that bans smoking on school property and was fined a total of $186.95.

The Union's argument that the Grievant could not contest these prior "verbal" and "written warnings" is contradicted by Kane's testimony that she met with the Grievant on both written warnings; that the Grievant was provided with an opportunity to rebut these disciplines; and that, at least one of these disciplines, *i.e.*, the second written warning, was grieved. As the District argues, the fact that prior disciplines were issued before the collective bargaining agreement contained a just cause provision does not, in and of itself, warrant the conclusion that the arbitrator may not give any consideration to these prior disciplines.

In summary, the record provides no reasonable basis to discredit Johnson's claim that he personally observed the Grievant engage in the misconduct for which the Grievant received the "verbal warning" of December 21, 1999; the "written warning" of April 3, 2001; and the "written warning" of May 3, 2001. The record establishes that, prior to receiving each of these disciplines, the Grievant had been placed on notice that the conduct for which he was disciplined was prohibited conduct. The disciplined imposed by the District was progressive. Notwithstanding the Union's argument to the contrary, the District may rely upon these prior disciplines when determining the level of discipline to be imposed upon the Grievant for his misconduct of May 16, 2002.

Conclusion

In conclusion, the Grievant has received reasonable notice that smoking on school property is misconduct. The Grievant's prior verbal and written warnings for misconduct involving smoking on school property have not been sufficient to dissuade the Grievant from engaging in such misconduct.

The District has just cause to suspend the Grievant for one day without pay for smoking on school property on May 16, 2002. Accordingly, the grievance has been denied and dismissed.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

AWARD

1. The Employer did not violate the contract when it gave Dale Laack a one-day suspension on May 31, 2002.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 18th day of November, 2003.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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