BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PULASKI EDUCATION ASSOCIATION

and

PULASKI COMMUNITY SCHOOL DISTRICT

Case 34
No. 65151
MA-13137

Appearances:

Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, appearing on behalf of the Association.

Robert Burns, Attorney at Law, Davis & Kuelthau, appearing on behalf of the District.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2003-2005 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Debra Parent. A hearing was held on January 10, 2006, in Pulaski, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on April 3, 2006.

ISSUE

The parties ask:

> Did the Pulaski Community School District have just cause for the discharge of the Grievant? If not, what is the appropriate remedy?

BACKGROUND

The Grievant is Debra Parent, a teacher in the District since 1982. Her termination was based on events of April 29, 2005. At the time of her termination, she was teaching alternative education programs. She was responsible for the GED alternative program, the GEDO Number 2 program, the alternative diploma program, the PLATO program, the WIA grant, and the in-school suspension program.

About 9:00 a.m., on April 29, 2005, the Grievant called the attendance office and asked to speak to the secretary who secures substitute teachers. She requested a substitute, saying that she had a headache. The secretary was unable to find a substitute. At 10:00 a.m., that day, the associate principal, John Matczak, went to see the Grievant to let her know that they could not find a substitute. He spoke with her in the hallway and smelled alcohol on her breath. He went to find the principal, Glenn Schlender, and told him about it. Schlender called the District's human resources director, who directed him to have someone cover the Grievant's class while she came to the office.

When the Grievant spoke with Schlender and Matczak in the office, they were in close proximity. The Grievant did not request a Union representative to be present. Schlender smelled alcohol on the Grievant's breath. He asked her about it, and she said she had been drinking the night before. He asked her if she would be willing to take a breathalyzer test, and she agreed to do that. Schlender did not observe any other signs of the Grievant being under the influence of alcohol.

The Police School Liaison Officer, James Tinlin, was contacted and asked to administer the breathalyzer test. Tinlin first saw the Grievant in Matczak's office, and he detected the odor of alcohol on her. He also noticed that her speech was very labored and more slurred than he had known her to speak in the past. She took the test willingly, and Tinlin reported that her breath tested a blood alcohol contact of .149%. In Wisconsin, it is illegal to operate a motor vehicle with a level of .08%. Tinlin reported the results to Schlender.

Schlender told the human resources director, who told him to have her escorted home and to stay home until the District notified her of how it would proceed. The following Monday, May 2nd, Schlender hand delivered the Grievant a letter informing her that she would be on paid administrative leave pending further action by the District.

Schlender was involved in the decision to terminate the employment of the Grievant. He took her disciplinary history into account. He also took into account the employee handbook which describes the professional responsibilities of a classroom teacher in a public school, the position description, the District's ethics' policy and another District policy which calls for an alcohol, tobacco and other drug-free school zone. It prohibits employees from being under the influence of alcohol. Another District policy on alcohol, tobacco and drugs

refers to disciplinary procedures for employees. It states that if the employee acknowledges that he or she is under the influence of alcohol or illegal drugs, the employee may use a reimbursable absence in lieu of suspension without pay. The employee then must undergo assessment at a site agreed upon by the District and employee, and follow the recommendation of the treatment provider before being allowed to return to work. Employees may be asked to submit to a breathalyzer test.

Schlender did not review the evaluations or other letters in the Grievant's personnel file before recommending her termination. He did not review awards, commendations or the performance record of the Grievant. The Superintendent of Schools is Kristine Martin. She started with the District in July of 2003. She testified that the rationale to terminate the Grievant was based on her conduct of not calling in on time and coming to work under the influence of alcohol. She stated that the District had taken several attempts at intervention and worked with the Grievant since the Last Chance Agreement of 1999. The decision to terminate the Grievant was not based on her job performance.

Prior Discipline

The Grievant's history is important in this case. On September 28, 1998, a student and staff member told the middle school principal, William Derricks, that something was happening in a classroom and he should check it out. He noticed the Grievant was speaking loudly, and he called the District Administrator, who at that time was Tom Beattie. Both of them noticed an odor on her breath. The Grievant first denied that she had been drinking, but later said she had been drinking the previous day. Derricks drove her home. Beattie sent the Grievant the following letter on September 30, 1998:

> This letter is concerning your personal crisis at Lannoye School this past Monday, September 28, 1998. You will recall that Mr. Derricks removed you from your class of 7th grade students because you were acting somewhat bizarre and because the smell of alcohol had been detected on your breath. The bizarre actions included incoherent speech patterns (i.e. unconnected sentence structure, slurred words, inappropriate loudness). You will also recall that once you, Mr. Derricks and I were in his office, we expressed our concerns and offered our help. You told us that you had not been drinking that day, but had indeed been drinking the previous day and had been, unfortunately, picked up for drunk driving. You stated that you were in a state of crisis and didn't know where to go for support. You agreed that we could call your psychiatrist, Dr. Orman, which we did, and we both were able to talk to him. He suggested that we take you home and that you and he would talk sometime later. Mr. Derricks drove you home in your car and I followed in mine. While standing in your driveway, I told you that you may not return to your job until your psychiatrist says that you are able to. This had also been told to you previously in Mr. Derricks' office.

> In this letter I am once again telling you that you are to get help and medical clearance before I will allow you to return to work. I am currently researching various options that you have for medical leave that will enable you to have money and benefits while you recover. The Pulaski Community School District considers you to be on medical leave as of Monday, September 28, 1998. The forms for this leave will be mailed to you on Monday, October 5. When you are feeling well enough, I would like you to schedule a meeting in my office to discuss these benefits.
>
> Good luck with your recovery.

The Grievant testified that she had been stopped for driving under the influence on September 27, 1998. Following the incident on the next day, the Grievant went to an outpatient program and into individual counseling and entered a program called Recovery Works.

On February 10, 1999, Beattie wrote the Grievant asking for assurance of her ability to return to work. On May 10, 1999, Dr. Orman wrote Beattie to tell him that the Grievant would be able to return to work in August of 1999. In February of 1999, the Board notified the Grievant that it was considering the recommendation of the Administration that her employment contract not be renewed. During July of 1999, the District, the Association, and the Grievant signed a "Last Chance Agreement." It states:

> This Agreement is made between the Pulaski Community School District and Debra Parent as a "last chance" attempt to cure the attendance deficiencies of Debra Parent and allow her to continue her employment with the Pulaski Community School District.
>
> Ms. Parent recognizes that this Agreement is of critical importance and that it will be strictly enforced and failure to fulfill the Agreement will be cause for immediate termination of her employment from the Pulaski Community School District.
>
> The conditions of this Agreement are:
>
> 1. No absences beyond accumulated sick leave of ten (10) days per year for the 1999-2000 and 2000-2001 school years will be allowed for any reason, including disability.
> 2. Attendance at school must be punctual at all times.
> 3. Attendance at school must be without alcohol or other controlled substances being detected in her body, without smelling of alcohol and without bizarre actions such as incoherent speech patterns, unconnected sentence structure, slurred words, and inappropriate loudness.
> 4. Upon reasonable suspicion of being under the influence of alcohol or controlled substances, Ms. Parent may be requested to submit to a breathalyzer test or a urine test to determine the presence of alcohol or controlled substances in her body.

5. Refusal to submit to a Breathalyzer or urine test to detect the presence of alcohol in her body shall be cause for immediate termination if there is reasonable suspicion of being under the influence of alcohol or controlled substances.
6. Ms. Parent will be paid at her appropriate salary level for time employed as a teacher in the Pulaski Community School District for the 1999-2000 and 2000-2001 school years.
7. Ms. Parent will be assigned to a teaching position within the District as directed by the District Administrator for the 1999-2000 school year, taking into consideration the best interests of the students.

   Ms. Parent agrees that she has read this "last chance" agreement and has had the opportunity to consult with her union representative and legal representative of her choice and fully understands the seriousness of this Agreement.

The Grievant testified that she understood the Last Chance Agreement to expire after one year, or that it was for absences beyond accumulated sick leave of 10 days per year for the 1999-2000 and 2000-2001 school years. She also understood that the agreement was to save her job when a nonrenewal proceeding was pending.

On March 31, 2003, the Grievant was given a discipline form regarding her attendance. The Grievant did not call in her absences before 5:45 a.m., as expected. Schlender warned the Grievant in writing in the discipline form that he would recommend her termination if there were further absences without an excuse from a physician.

Schlender met with the Grievant on February 5, 2004, again about not reporting absences before 5:45 a.m. Schlender recommended that she was to be suspended for one day. On February 12, 2004, the District Administrator, Kristine Martin, issued the notice of a one-day suspension for failing to report her absences from work before 5:45 a.m. Following the suspension, the Grievant did not call in after 5:45 a.m., again.

The Grievant's Physical and other Problems

In November of 2003, the Grievant notified Schlender that she had been diagnosed with polycystic ovarian syndrome and would be taking medication for it. She also told him that she was being treated for depression.

Karla Roth is a physician at Prevea Family Clinic in DePere and the Grievant has been her patient since 2003. Roth testified that the Grievant had a history of depression but was relatively stable at that time. The Grievant also had several other sources of stress in her life, such as a divorce, legal issues regarding her ex-husband, two adopted teenaged children, and a son with a learning disability. There were behavioral issues with the Grievant's daughter that

intensified to the point of truancy, theft, legal issues, physical threats to the Grievant, and some violence. The Grievant was coping with all of this as a single parent while her ex-husband was incarcerated. Roth further testified that she was concentrating first on helping the Grievant with insomnia. Then in November of 2003, depression became more of an issue. Roth became aware of the Grievant's alcoholism and a relapse in April of 2005.

Roth testified that the Grievant had a lot of stressors going on in April of 2005, such as coping with losing her vision in her right eye. The Grievant initially told people that it was an accident, but later admitted that her daughter had hit her. The daughter's behavior had escalated to the point that the Grievant did not feel safe staying at home alone with her. In Roth's opinion, these stressors led to the Grievant's relapse.

Roth noted that the Grievant's ability to metabolize alcohol would not have been as strong as when drinking regularly and the alcohol would stay around longer in her system. If she had taken a prescription pill called Ambien the night of April 28, 2005, it would accentuate the effect of the alcohol. The Grievant may have a behavioral tolerance and not have been acutely aware that she was still intoxicated the next morning, according to Roth. Alcoholics frequently underestimate their condition and don't feel as if they are impaired. The Grievant had a treatment plan by the time Roth saw her on May 4, 2005, and Roth believed that the stressors that contributed to the relapse were no longer there or were changing.

The Grievant testified that her problems with alcohol went back to October of 1994 when she and her husband were separated. Prior to the incident on April 28, 2005, which led to her termination, the Grievant had been able to abstain from using alcohol for more than one year. She noted that her typical symptoms of a hangover were sickness, vomiting but not headaches. She got headaches from her eye injury when her daughter hit her in February of 2004. In the spring of 2005, she was taking Prozac for depression and Ambien for insomnia.

During the week of April 24, 2005, the Grievant's daughter got into a fight at school. On April 27, 2005, the Grievant and her ex-husband met with the principal who said that her daughter could not go to the prom. The daughter went to school on April 28, 2005, got into another fight and was suspended for another three days. When the Grievant got to her home in Green Bay after working, her daughter threw a chair at her and blamed her for not going to the prom. The Grievant's ex-husband was also living in her house at that time. The Grievant left and went to her other house in Pulaski. On her way, she stopped and bought a bottle of vodka. She got to Pulaski about 7:00 p.m., and started drinking the vodka. She drank the whole bottle, 750 milliliters, by herself. She finished drinking it by 11:00 p.m., and took an Ambien pill and went to bed. The next morning, she woke up with a bad headache, but felt fine otherwise and thought she could function. She would not have gone to work if she thought she was drunk. When the Grievant called for a substitute on April 29, 2005, she asked the secretary to see if Officer Tinlin could give her a ride home. She would not have done that if she thought she was under the influence of alcohol.

At the time of the hearing, the Grievant was seeing a counselor and going to AA meetings and taking antidepressants. She had not had a drink since April 28, 2005. There were still situations going on with her daughter but she was dealing with them by locking herself in her room or going to a meeting or calling friends. The Grievant also believes she can handle stress better now because she is willing to take antidepressants.

THE PARTIES' POSITIONS

The District

The District asserts that the Grievant's reporting to school while under the influence of alcohol is sufficient misconduct to warrant discharge for cause. Her testimony that she did not realize she was still under the influence of alcohol at the time she chose to go to school is not credible. She testified that she had not had a single drink in over one year prior to April 28, 2005, and her physician reported that she had lost the ability to metabolize alcohol at the same rate as she had when she was drinking. The Grievant also testified that she had not eaten anything for dinner that night and she had taken Ambien before she went to bed. Roth testified that drinking alcohol on an empty stomach and taking Ambien in conjunction with alcohol both accentuate the effects of alcohol. While it is hard to believe that someone with such an elevated blood alcohol content who has not drank in over a year would feel no impairment, the real cause for concern is the fact that the Grievant was unable to assess her own situation. The District is troubled that a teacher could report to work with a blood alcohol level nearly double the legal limit and not even realize that she is impaired. Tinlin recognized signs of impairment, and both Schlender and Matczak smelled alcohol on her. Moreover, there is no reason to believe that the Grievant will not engage in the same conduct in the future.

The District states that the Grievant was not discharged because she is an alcoholic but rather because she came to work and was teaching students while severely intoxicated. The District has a disciplinary interest in this conduct, particularly in light of the Grievant's history. The District had given the Grievant previous opportunities, such as the Last Chance Agreement.

The collective bargaining agreement provides that a teacher may be discharged provided the discharge is for just cause and is not arbitrary and capricious. The Grievant was placed on notice that reporting to work under the influence of alcohol was contrary to District policy. She was on notice that her use of alcohol in such a manner would not be tolerated by the District. The prohibition of intoxication at school is a reasonable work rule. The investigation of the Grievant's conduct was conducted fairly. The District had sufficient proof of her intoxication. There was no evidence that the District has treated other employees differently. The only dispute is whether the Grievant's termination was the proper course of discipline. The Grievant was discharged both for the events of April 29, 2005 and for her prior disciplinary history.

The prior disciplinary history consisted of an incident in which the Grievant was in school under the influence of alcohol. At that time, she agreed to the Last Chance Agreement. After that, she was twice disciplined for failing to call in sick on time. All prior disciplinary incidents and the incident of April 29, 2005 involved the Grievant's effective presence in the classroom. The decision to terminate her employment was after consideration of the prior progressive discipline and the interconnectedness of those incidents.

The District contends that the Grievant violated the Last Chance Agreement for the prior incident involving being under the influence of alcohol at work. That agreement is not limited to the 1999-2000 and 2000-2001 school years, except for the provisions restricting the Grievant's use of sick leave in those years. The fact that the provisions relating to the use of sick leave are expressly limited to two years implies that the remaining provisions are not so restricted. The agreement was entered into between the District and the Grievant who had the assistance of Union representation. An arbitrator is obligated to respect and enforce a last chance agreement. The Agreement states that it was of critical importance, designed to allow her to continue her employment, and would be strictly enforced. The Agreement further explicitly states that the Grievant's violation of the terms of the Agreement will be cause for immediate termination. It is not unreasonable to require that the Grievant report to work absent the influence of alcohol or other drugs for the duration of her employment.

The District submits that the decision to terminate the Grievant should be upheld on any of three grounds. First, the severity of the conduct on April 29, 2005 is in and of itself grounds to warrant discharge. Second, the District has engaged in progressive discipline and intervention strategies with the Grievant concerning her effective presence in the classroom. Third, the Grievant violated a valid Last Chance Agreement.

The Association

The Association asserts that the arbitrator has the authority to overturn the discharge even in light of the seven-year-old Last Chance Agreement. The language of that Agreement does not state that the enforcement, application and terms were not to be subject to the grievance process. The arbitrator may review the Agreement, especially in light of mitigating factors, including those that the Employer failed to consider at the time of its decision due to its inadequate investigation. The Association submits that the record, when considered in its entirety, does not support the termination of the Grievant.

The District's improper assumptions resulted from its failure to afford the Grievant due process. A proper investigation would have revealed that the Grievant was a successful and productive teacher who's medical and personal issues mitigate the work performance issues she had. The Grievant acknowledged that she made a serious mistake in reporting to work on April 29, 2005. The District assumed that an individual with such an elevated BAC would know she was impaired and could not conduct a class while not letting on to her students that she was under the influence. However, the Grievant was able to perform her duties and

supervise students. The District failed to give the Grievant an opportunity to present her position, and it failed to interview any students or co-workers with first-hand knowledge of the events of that morning. The meeting with the Grievant on April 29, 2005 hardly meets the minimal standards of due process. The District simply asked her if she had been drinking and asked her to submit to a breathalyzer test. Once it had the results of the test, it believed it needed nothing more.

The Association states that had the District asked certain questions, it would have discovered that the Grievant consumed alcohol the night before, that she did not consume any on that morning, that she did not drink on school premises, that she had only three students in her classroom that morning, that she was able to do her basic duties, that no students suspected her to be under the influence, that her medical conditions prevented her from assessing her actual state, that she suffered from a number of medical conditions which contributed to her relapse, and that she is a respected teacher who is needed and valued by the at-risk population. There were no safety concerns that morning, no behavioral concerns, and at least based on one student's account, the Grievant was not suspected of being under the influence of alcohol. No student indicated that he or she would not enroll in the Grievant's program because of her conduct, and no parent refused to have his or her child in the Grievant's classroom because of her conduct. No colleague refused to work with her. Instead, a student, parent and colleague testified that they would welcome her back to work. There is no support for the District's assertion that the Grievant's behavior caused her to lose the respect of her students.

Under the District's own policy, it was required to provide the Grievant with the opportunity to use a reimbursable absence, undergo assessment and follow the recommendations of the provider before being able to return to work. This policy was not contemplated by the District on April 29, 2005.

The Association states that the Grievant was a talented and gifted teacher who formulated and ran a successful program. The Grievant's overall employment record should be considered in the context of alleged misconduct. Her students were those who had been unsuccessful in the traditional classroom setting – children with behavioral and/or emotional problems. Despite the less than ideal backgrounds of these students, the Grievant managed to inspire them to remain in school and achieve their high school diplomas. Her students were successful and all but one in the program graduated. The District was required to consider this evidence.

Moreover, the Association contends that the Grievant's medical and personal issues mitigate her work performance issues. Arbitral precedent views alcoholism as a disease which requires special attention from the employer. Before being discharged, employees should be provided an opportunity to seek treatment and rehabilitation. The District did not solicit an expert medical opinion. The medical evidence shows that the Grievant would not have reasonably known she was intoxicated that morning, nor can she be held to have known that she was in fact under the influence that morning. She is not a chronic alcoholic, and has been

known to go long periods without having relapses. That factor along with her fatty liver causes her to metabolize alcohol much slower and she stays intoxicated longer. Had the District solicited Roth's diagnosis before its discharge decision, it would have learned that the Grievant took a prescription sleeping pill the night of April 28, 2005, which further prevented her body from metabolizing the alcohol at a normal rate. The Grievant had not eaten that day, which also affected her ability to metabolize alcohol. Furthermore, on the morning of April 29, 2005, she did not experience her normal hangover symptoms. Her headache was associated with her eye injury. The Grievant did not believe she was intoxicated for she would not have contacted the administration or asked Tinlin to drive her home.

The Association does not believe that the District has established a case for progressive discipline. The District cannot have it both ways – it cannot argue that no prior warning was necessary due to the severity of the Grievant showing up to work under the influence and then offer her prior work record to show that she was a bad employee. In any event, the record does not support jumping from a one-day suspension over one year ago to termination. Where prior disciplines are unrelated to the instant disciplinary action, they should not be considered. Rather than come out and say that it believes the Grievant's alcoholism caused her to call in sick late, the District sets forth a politically correct argument by relating the two disciplinary issues with the theme of reliability. There is no evidence that alcohol consumption was at issue in March 2003 or February 2004. In assuming that the Grievant could never be rehabilitated, the District failed to recognize that the incremental discipline meted out has corrected her behavior. There is no evidence that the Grievant had ever reported to work before April 29, 2005 under the influence of alcohol. Nor had she ever been disciplined for reporting to work under the influence prior to that date.

The Association contends that the District has not established a meaningful violation of the Last Chance Agreement. The District cannot establish that the Last Chance Agreement was discipline for any alcohol-related concern. Its terms show that it was to correct the Grievant's attendance concerns. While the District may have suspected the Grievant to be under the influence in September of 1998, there was no evidence that she was in fact so. Eight years later, the District now contends that she was under the influence at school that day. But the District did not conduct an investigation at the time to verify its speculation about alcohol. Absent some objective evidence, employer observations that an employee allegedly smelled of alcohol, was acting bizarre and was more talkative than usual will not substantiate a finding that the employee was under the influence of alcohol. Such allegation was not the impetus for the Last Chance Agreement, which notes that it was the Grievant's attendance deficiencies that caused the parties to enter into it. This is confirmed by the District counsel's letter for the proposed nonrenewal, which was based on attendance. Furthermore, the District ignores the considerable passage of time between the 1998 conduct and the 2005 conduct. The Grievant can be rehabilitated and retained as a productive member of the work force.

The Association argues that it is unreasonable and contrary to notions of due process to enforce the harsh terms of a last chance agreement against an employee into perpetuity when the employee has substantially complied with their terms for a substantial amount of time. Arbitrators may overturn discharges under last chance agreements where enforcing the agreement would be unfair under the circumstances. Here, the Agreement itself is vague and confusing as to its duration, and the Grievant's medical conditions make rigid enforcement of it unfair. The District acted in a manner to suggest that the Agreement ended in 2001, as it had the opportunity to enforce several provisions beyond the 2000-2001 school year but chose not to. The District claims that the Grievant routinely called in late with her absences, but it did not terminate her for that. It also failed to enforce the terms when it suspected the Grievant to be under the influence in October 2003. The District did not require the Grievant to submit to a breathalyzer test at that time. Such conduct does not communicate that the District believed the Agreement to be in effect. Last chance agreements are intended to apply for a reasonable period, and agreements in perpetuity are not favored and make no sense in this case.

In Reply, the District

The District replies that the Grievant's performance as a teacher was not in question. The Association's suggestion that putting a drunk teacher in a classroom simply because she can function at some level while being drunk is poor policy. The only assumption made by the District is that a teacher who is in the classroom intoxicated cannot properly do her job and is in violation of District policy and expectations for its staff. There is a substantial difference between a discharge based on an individual consuming alcohol outside of work and a discharge based on an employee coming to work under considerable influence of alcohol. The latter is purely gross misconduct, a settled matter in the context on unemployment compensation. While the Association asserts that the Grievant could not control herself or assess her own level of intoxication, it overstates the testimony of Roth. Roth testified that the Grievant was stressed out and chose to deal with it through drinking. She also testified that alcoholics can develop a behavioral tolerance towards the effects of alcohol and it would be possible for the Grievant to be unable to assess her intoxication level, but that was an observation about alcoholics in general.

The District asserts that a teacher cannot come to work drunk even if he or she can still control the classroom. It is the District's right to assure that it provides a positive learning environment. It has a right to develop work standards for the school. It has established a work rule against drunkenness in school. The District need not consider the Grievant's particular functioning capability when intoxicated no more than a police officer must consider the same when he finds a motorist with elevated BAC. It is unacceptable to teach children when intoxicated. Teachers are held to a higher standard as role models, and they cannot be intoxicated in the workplace. The principal, the associate principal and Officer Tinlin readily smelled alcohol on the Grievant. While no student noticed her intoxication in April of 2005, the District should not be required to wait until a student is actually affected.

The District sums up the Association's position as this: the Grievant is a competent teacher who benefits the students she teaches but cannot control herself on rare occasions from consuming large amounts of alcohol on a night before school such that she will unquestionably still be intoxicated in the morning. Further, she lacks the capacity to evaluate her own inebriation and therefore will go to school while still under the influence of alcohol. However, she can manage her classroom just fine so the District has no reason to be concerned. That is an unacceptable position for the District. The District may not have a legitimate basis to discipline an employee who drinks outside of work but whose alcoholism does not affect their attendance or performance at work. But it has a disciplinary interest in the employee whose drinking causes the employee to come to work while still intoxicated.

The District notes that even if there were a flaw in the investigation, this is a case where just cause exists anyway. The Grievant was given the opportunity to discuss her situation in the principal's office. There is no dispute that misconduct occurred. The Grievant was not aggrieved by any perceived failure of process. The disciplinary incidents in 1999 for being under the influence of alcohol at school, in 2002-2003 and 2004-2005 for failing to call in by the appointed time, and being intoxicated at school on April 29, 2005, are related to progressive disciplinary purposes.

The District finds the Association's position on the Last Change Agreement puzzling. The Agreement clearly states in paragraph three that the Grievant's attendance at school must be without alcohol or other controlled substances being detected in her body. The parties understood at the time that any occurrence of the Grievant coming to school while under the influence would result in termination. The Association's argues that the Last Chance Agreement cannot now be applied because the Grievant was not discharged previously for attendance related matters, and that she was lulled into believing that the Agreement no longer applied. The Agreement was explicit about what types of violations would trigger its application. Failing to timely call in sick for work was not on the list. Coming to school under the influence of alcohol was on the list. The Association had the opportunity to negotiate over the terms of the Agreement. The provision related to alcohol had no time limit attached. The parties applied a time limit only to the sick day provisions.

It is not necessary for the Arbitrator to decide whether the conduct at issue here was egregious enough to warrant immediate discharge. Either the District engaged in progressive discipline or it correctly applied the Last Chance Agreement. In either case, its decision to discharge the Grievant was justified.

In Reply, the Association

The Association contends that the District continues to improperly rely on baseless, stereotypical assumptions about alcoholics to support its decision to terminate the Grievant. Just as there is no guarantee that she will not relapse again, there is no guarantee that she will relapse again. The District offered no scientific evidence that she will relapse should she be

reinstated. The District's assumption is contrary to Dr. Roth's testimony wherein she testified that it is unlikely that the Grievant would experience an extraordinary situation of simultaneous extreme stressors which laid the basis for her relapse on April 28, 2005. The District failed to recognize that alcoholism is a medical condition. According to the District's stand, an epileptic teacher would be required to guarantee that he would not suffer a seizure, a diabetic teacher that she would not have a severe insulin reaction, or a cancer patient have no reoccurrences.

The Association claims that the District ignores the fact that even if the Grievant had a relapse, a relapse in and of itself will not undermine the District's educational mission or cause harm to its students. The District also ignores the evidence that the Grievant is responding well to treatment, that she is handling the stressors in her life and that she continues to adhere to her antidepressant therapy.

Not only does the District exaggerate the Grievant's disciplinary record, but it also continues to improperly contend that her overwhelmingly satisfactory tenure must be disregarded. Arbitrators recognize that prior discipline can be considered where relevant, but also recognize that an employee's positive performance history must also be considered. The District attempts to claim that the Grievant reported to work drunk in 1998 but there is no evidence in the record to substantiate such a claim. The Grievant went almost 20 years with no disciplinary record in the District. Her first disciplinary issues occurred in 1998. Some seven years later, she reported to work under the influence. The first discipline she received subsequent to the 1998 incident occurred almost five years later. The District would have the Arbitrator believe that this is a chronically troubled employee who cannot see her way to a successful employment record. There is no connection between reporting her absences from work untimely and reporting to work under the influence of alcohol.

The Association submits that the Last Chance Agreement is relevant but not controlling here. The District offered no collateral evidence and no testimony as to the Agreement's duration at the hearing and waited to argue in its brief that the Agreement continued into perpetuity on the issue of alcohol impairment. The Employer had the opportunity through Board member McKeefery to show that the Board contemplated and communicated to the Grievant and the Association that the Agreement continued into perpetuity on some conduct, although not on others. No such testimony exists. The lack of such testimony from McKeefery requires the Arbitrator to draw an adverse inference as to why she failed to testify as to this interpretation. The District had two opportunities since 1999 to enforce the Agreement and failed to do so. The Agreement requires that the Grievant's attendance be punctual at all times, and there is no doubt that she was disciplined in 2002-2003 and 2003-2004 for not being punctual in her attendance. She received only a written reprimand and a one-day suspension, and the disciplinary documents fail to even acknowledge the Agreement. Furthermore, Schlender testified that in October 2003, it was reported to him that teachers suspected the Grievant to be under the influence of alcohol, but he did not require her to submit to a breathalyzer test despite the reasonable suspicion. If the Agreement was to be strictly enforced, then the District's actions did not reflect such a belief.

The Association contends that the Agreement is invalid because such an interpretation would be unreasonable, harsh and overbearing. The cases cited by the District do not involve situations where a medical condition contributed to the respective grievant's misconduct. It would be inherently unfair and even heartless to enforce the terms of this Agreement against the Grievant.

DISCUSSION

The Last Chance Agreement of 1999 is of critical importance in this dispute. The Grievant, the Association, and the Employer all entered into this Last Chance Agreement in order to save the Grievant's job after an incident in 1998. As Arbitrator Gratz stated in KENOSHA COUNTY, MA-10213:

> It is a well established arbitral principle that "an arbitrator must abide by the terms of a last-chance agreement fairly negotiated between an employer, and employee and where applicable) the union representing the employee." St. Antoine, et al., The Common Law of the Workplace – The Views of Arbitrators (BNA, 1998) at 161. That treatise elaborates with the following "Comment:"
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> a. Occasionally parties may settle a disciplinary grievance with a "last-chance" agreement. These agreements vary in terms but usually grant the employer discretion to discharge the employee for any subsequent offense (sometimes for a subsequent similar offense) and commonly state or imply that the usual procedural protections will not apply. One of the most common occasions for last-chance agreements is the reinstatement of an employee discharged for problems related to substance abuse. (citations omitted)
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> b. Preclusive Effect. Depending on its exact phrasing, the last-chance agreement may definitively resolve the question of whether a given offense provides a legitimate basis for discharge. Such an agreement may bar an arbitrator from imposing a further requirement of proportionality or progressivity, but it normally would not bar inquiry into the question of whether the employee committed the final offense charged by the employer.
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> c. Relationship to the "Just Cause" Requirement. Depending on its wording, the agreement may or may not replace the just cause requirement. Because the just cause requirement is so fundamental, an arbitrator should not, without express language,

> presume the parties intended to abandon it. If the agreement does not replace the just cause requirement, the arbitrator's authority may be limited to interpreting the last-chance agreement itself and determining whether the employee actually violated that agreement.
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> d. Necessary Parties. In a unionized workplace, no employee may enter into an agreement that conflicts with the collective bargaining agreement. The union, however, is generally free to modify the collective agreement, even in the context of a last-chance agreement affecting a single employee. If the last-chance agreement conflicts with the collective agreement, the union must be a party to it before it will be fining.
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> e. Duration. A well-drafted last-chance agreement will specify an expiration date, after which the employee will be subject to the same disciplinary rules and procedures applicable to other employees. If the agreement does not state how long it lasts, an arbitrator should find that the parties intended it to last a "reasonable" time, depending on the nature of the offense, the parties' practices, and other relevant factors.

As to the element of duration, the party's agreement here shows a mixed result. Clearly, the parties intended to limit the duration for absences beyond accumulated sick leave of 10 days per year. They agreed that no absences would be allowed for the following two school years after signing the agreement. However, they did not limit the duration for attendance being punctual (oddly enough) or for attendance being without alcohol or other controlled substances being detected.

There are several issues regarding the duration of the Last Chance Agreement. The Grievant claimed that she did not understand it to be for more than one year or that absences beyond accumulated sick leave of 10 days per year would be for the 1999-2000 and 2000-2001 school years. That claim is inconsistent with the document itself. The Association was also a party to the Agreement and knew or should have known that to limit the term for one thing but not another would mean there was no limit on that thing. Where there is a specific time limit for absences but no time limit for matters related to alcohol, a plain and common sense reading of the Agreement would show that the parties intended to limit the duration for absences but not for being under the influence of alcohol. Where the parties had an opportunity to set a term but did not, an arbitrator would have to either determine that the term is for the duration of the employee's employment or find that there is some other reasonable term to be implied.

This Arbitrator does not have to determine that the term is to be for the duration of the employee's employment or determine that some other term would be reasonable. The parties entered into this Last Chance Agreement in 1999 and the violation of the requirement regarding alcohol came about in 2005, only six years later. Certainly it is within the realm of reason to expect a teacher to come to school free of the influence of alcohol for six years. It may even be reasonable to hold that expectation for the duration of a teacher's employment under such a last chance agreement, especially since teachers may be viewed as a role model for students.

Therefore, the Last Chance Agreement has not expired and the 3rd requirement of it was valid at the time of the termination of the Grievant.

The Association has also argued that the District lulled the Grievant into a false sense of security to believe that the Last Chance Agreement had ended. The Association views the District's failure to terminate the Grievant for routinely calling in her absences in a tardy manner as evidence that the District did not enforce the Last Chance Agreement. However, the Agreement does not speak to calling in absences in a tardy manner. If the Association is reading the second requirement of the Agreement – that attendance at school must be punctual at all times – to mean the same thing as calling in an absence later than the expected time, I would disagree. The second requirement speaks to "attendance at school" – and the District's concern was that the Grievant was calling later than 5:45 a.m. There is no evidence on the record about the Grievant being punctual at school or not. Also, the Association points to an incident in October of 2003 when a staff member reported that the Grievant was driving erratically and parked her car at an odd angle. The District did not require her to submit to a breathalyzer test then. However, the District did question her and had no evidence or reason to ask her to take a test. There was no smell of alcohol, the Grievant denied it, and the District admitted that its suspicions proved to be untrue. Thus, the District did not abandon the Last Chance Agreement by its conduct, and it continued to be aware of the Agreement and concerned about the Grievant's adherence to it.

When the Grievant came to school in April of 2005, she was intoxicated, because she drank a bottle of vodka the night before. The conduct clearly violates the Last Chance Agreement's third requirement – that attendance at school must be without alcohol or other controlled substances being detected in her body, without smelling of alcohol and without bizarre actions such as incoherent speech patterns, unconnected sentence structure, slurred words, and inappropriate loudness.

The Association has also contended that attendance issues were the impetus for the Last Chance Agreement, not alcohol related concerns. It is true that the District cannot prove that in September of 1998, the Grievant came to work intoxicated. While the District did not get absolute proof such as a breathalyzer test in 1998, the Grievant admitted that she had been drinking the previous day and had been picked up for drunk driving. People noticed the smell of alcohol on her breath at that time. The Grievant immediately went to an outpatient program

and into individual counseling and entered a program called Recovery Works. Obviously, alcohol abuse was a concern for both the Grievant and the District. And despite the fact that there was no breathalyzer test and no proof of intoxication or the level of such, the parties – including the Association – all agreed to the Last Chance Agreement's requirement that the Grievant's attendance at school be free of alcohol.

As to the argument regarding due process, I do not find that there is a lack of due process that has been prejudicial to the Grievant or the Association in this case. The District did not need to interview students or co-workers regarding the Grievant's conduct and ability on the morning of April 29, 2005. The Association cannot seriously believe that a teacher may come to work under the influence of alcohol and that conduct may be mitigated because no students or parents or colleagues objected. The fact that the Grievant could function while under the influence is irrelevant. How well an individual may function while under the influence may differ from person to person or day to day. The District does not have to tolerate anyone coming to work under the influence of alcohol, no matter how well he or she manages to pull it off and function. The fact that the Grievant was not slurring her words or speaking too loudly or showing obvious signs of intoxication does not mitigate her coming to work under the influence. That fact that no students objected to her conduct is irrelevant. People could smell the alcohol on her breath. She WAS under the influence.

While the Grievant may have misjudged her state of intoxication on the morning of April 29, 2005, she was still heavily intoxicated. Thus her appearance at school while under the influence of alcohol became a *per se* violation of the Last Chance Agreement.

The District's investigation was sufficient in that it obtained proof of the intoxication. The Grievant's intent is not at issue either. She probably did not realize that she was still intoxicated because she asked the police school liaison officer to drive her home when she called the office for a sub, and it's not likely she would have done that and risk detection.

The Grievant may even deserve another chance to teach. She is likely a good teacher and has provided much needed services for at-risk students. However, the issue before the Arbitrator is not whether the Grievant is a good teacher and should be given another chance. Unfortunately, she was on her last chance back in 1999 when she entered into the Last Chance Agreement. The Arbitrator cannot now say, well, how about a second last chance. The issue before the Arbitrator is whether the District had just cause to terminate her employment, and clearly it did have just cause. It would be up to the District to show leniency at this point.

The Association argues that the Grievant should be provided an opportunity to seek treatment and rehabilitation. The Last Chance Agreement was such an opportunity. It is a very troubling matter for a person suffering from alcoholism to sign a last chance agreement. That person does so under the gun of being fired. However, for the alcoholic, the chances of a relapse during recovery are pretty good and fairly normal. That's what makes the signing of a last chance agreement so tough on the alcoholic. The chances of breaking such an agreement are fairly high. However, the parties entered into this agreement knowingly. The Association was also a party to it.

This is an unfortunate case. Everybody loses something here. The Arbitrator has had much experience with this very insidious disease that has cost so many so much; their jobs, their families, and their lives. The Grievant has had extraordinary troubles in her life. I wish her well in her recovery.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 16th day of June, 2006.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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