BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GRANTSBURG EDUCATION ASSOCIATION

and

GRANTSBURG SCHOOL DISTRICT

Case 28
No. 66044
MA-13417

(Norma Ryan Grievance)

Appearances:

Attorney Priscilla Ruth MacDougall, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., **by Attorney Andrea Voelker,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

ARBITRATION AWARD

The Grantsburg Education Association (herein the Union) and the Grantsburg School District (herein the District) have been parties to a collective bargaining relationship for many years. At the time of the events set forth herein, the collective bargaining agreement covering the period from July 1, 2003 through June 30, 2005 had expired and the parties were engaged in negotiations over a successor agreement. On July 3, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the District's non-renewal of bargaining unit member Norma Ryan. The undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on October 3, 2006. The proceedings were transcribed and the transcript was issued on October 20, 2006. The parties filed their initial briefs by February 14, 2007 and reply briefs by April 2, 2007, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the School District of Grantsburg have just cause to non-renew the Grievant?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE II - BOARD RIGHTS

The Board shall have the right to discipline, terminate, or deny professional advantage to any employees covered by this agreement for just cause. Without limiting the rights of NUE, and subject to the laws and constitution of Wisconsin and the United States, it is expressly recognized that the Board's operational and managerial responsibility includes the following:

. . .

F. The determination of safety, health and property protection measures where legal responsibility of the Board or other governmental unit is involved.

G. The right to enforce the rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this agreement.

H. The right to direct and arrange all the working forces in the system, including the right to hire, suspend, discharge, discipline, or transfer employees.

. . .

ARTICLE IV – TEACHER RIGHTS

. . .

B. Rules and regulations pertaining to teachers shall be interpreted and applied uniformly throughout the district.

C. Nothing contained herein shall be construed to deny or to restrict any teacher such rights as she/he has under the laws of Wisconsin and the United States.

. . .

OTHER RELEVANT PROVISIONS

2005-2006 Grantsburg School District Staff Handbook

TEACHER CODE OF ETHICS

OVERVIEW

The professional educator strives to create a learning environment that nurtures the potential of all students.

The professional educator acts with conscientious effort to exemplify the highest ethical standards.

PRINCIPLE I: Ethical Conduct Toward Students

The professional educator accepts personal responsibility for teaching students character qualities that will help them evaluate the consequences of and accept the responsibility for their actions and choices. We strongly affirm parents as the primary moral educators of their children. Nevertheless, we believe all educators are obligated to help foster civic virtues such as integrity, diligence, responsibility, cooperation, loyalty, fidelity and respect – for the law, for human life, for others and for self.

The professional educator, in accepting their position of public trust, measures success not only by the progress of each student toward realization of his or her personal potential, but also as a citizen of the greater community of the republic.

. . .

4. The professional educator makes a constructive effort to protect the student from conditions detrimental to learning, health, or safety.

. . .

PRINCIPLE II: Ethical Conduct Toward Practices and Performance

The professional educator assumes responsibility and accountability for his or her performance and continually strives to demonstrate excellence.

The professional educator endeavors to maintain the dignity of the profession by respecting and obeying the law and demonstrating personal integrity.

. . .

2. *The professional educator maintains sound mental health, physical stamina, and social prudence necessary to perform the duties of any professional assignment.*

. . .

4. *The professional educator complies with written local school policies and applicable laws and regulations that are not in conflict with this code of ethics.*

. . .

HEALTHY ENVIRONMENT

The Grantsburg School Board is dedicated to providing a healthy, comfortable and productive environment for staff, students and citizens. The School Board believes that education has a central role in establishing patterns of behavior related to good health and shall take measures to help its students to resist controlled substance abuse. Curriculum related to controlled substance abuse prevention will be developed and introduced at the primary grade levels and given greater in-depth concentration at the secondary level. The School Board is concerned about the health of its employees and also recognizes the importance of adult role-modeling for students during formative years.

Therefore, the Board shall promote non-use among its staff and students. In compliance with Wisconsin Statute 120.12(19) and 97.0, 66.054, 176.01, 161.00 and Wisconsin Act 327, the Grantsburg District will prohibit the use of all tobacco products, alcohol and other drugs, at all times, on school premises. This will include all buildings, grounds, and athletic fields.

All individuals on school premises share in the responsibility for adhering to and enforcing this policy.

DRUG FREE SCHOOLS

The Grantsburg School District will comply with all provisions and federal requirements as outlined in the Drug Free Schools and Communities Act Amendments of 1989. The program, as developed and implemented by the Grantsburg School District, provides for a developmentally based drug and alcohol education and prevention program for students enrolled in all grades of the school district from early childhood level and continuing through the twelfth grade. The program addresses the social and health consequences of drug and alcohol use, as well as the legal ramifications of such use, and provides age

appropriate and effective techniques for resisting peer pressure to use illegal drugs and/or alcohol. Information provided to students shall communicate that the use of illegal drugs and the unlawful possession and use of alcohol is illegal and harmful to one's health.

Students and employees of the School District are hereby notified that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance or the use of alcohol on school district property, including all district owned vehicles, is prohibited at all times. These same provisions shall be in effect at all school-sponsored events or extra-curricular activities while off school premises.

Students or employees who violate the provisions of the district's Drug Free School policy will be subject to disciplinary action, including suspension or expulsion for students and suspension and/or termination of employment for district employees. In addition, referral for prosecution will be imposed on students and employees who violate the standards of the school district's policy. Information regarding drug and alcohol counseling and rehabilitation programs will be made available to students and employees of the school district. Information regarding such programs is available in th school district office or by contacting the AODA

BACKGROUND

Norma Ryan, the Grievant herein, was an elementary teacher in the Grantsburg School District for nineteen years and was teaching third grade at the time of the events leading to the grievance herein. In January of the 2004-05 school year performance concerns about Ms. Ryan were presented to the District Administrator, Joni Burgin, by Ms. Ryan's building principal, Mary Whitrock, relating to possible abuse of alcohol. Ms. Whitrock reported observing odd behavior, glassy eyes, and heavy use of perfume and mouthwash, presumably to cover up another odor. Ms. Burgin subsequently took opportunity to observe Ms. Ryan herself and also noted glassy eyes, and a heavy scent of perfume and mouthwash, but could not determine alcohol use and so did not confront her. Sometime later in May, 2005, Ms. Burgin was contacted by the President of the School Board, who told her a staff member had reported to him that Ms. Ryan was drinking on the job. As a result, Ms. Burgin asked the then acting principal at Ms Ryan's school, Sally Craven, Ms. Whitrock having gone on medical leave, along with another teacher, Sue Helene, to meet with Ms. Ryan to address the concerns. On May 16, 2005, Ms. Craven and Ms. Helene met with Ms. Ryan and told her there were concerns about whether she had a drinking problem. Ms. Ryan displayed surprise at the allegation, denied any problem and indicated a desire to meet with the Administrator to clear the matter up. On May 17, Ms. Ryan emailed the Administrator requesting to meet. Ms. Burgin responded as follows:

Norma,

Wednesday after school I am teaching the New Teacher/Mentor workshop. I can meet Thursday after school?

These concerns that Sally and Sue shared with you have come from Elementary staff (about one month ago) and most recently over the weekend a Board member contacted me. He did not tell me who contacted him about it.

The reports to me have been the same in description from both sources—they report: bloodshot eyes, heavy smell of mouthwash, perfume and gum supposedly covering up some underlying smell (alcohol), bizarre behavior, stumbling. If this is untrue – then we need to get your reputation cleared up! If it is true, then you need to contact someone for help.

Please let me know if Thursday will work…

Joni

Ms. Ryan and Ms. Burgin did meet on May 19, at which time Ms. Ryan adamantly denied the allegations and any suggestion that she had a drinking problem. She was also concerned about who was spreading the rumors about her. Ms. Burgin was unable to confirm the reports and so continued to monitor Ms. Ryan from time to time but took no other action.

During the 2005-06 school year, Ms. Ryan was scheduled for a performance review by her principal, Ms. Whitrock. As part of that process, Ms. Whitrock observed Ms. Ryan's class in October with the result that Ms Whitrock met with Ms. Ryan on November 10 to discuss concerns about her teaching and followed up the meeting with a memorandum to Ms. Ryan on November 18 emphasizing the points discussed and areas of needed improvement. As a result of the meeting, Ms. Ryan tendered her resignation to District Administrator Burgin on November 22, citing personal differences with Ms. Whitrock as the primary reason for her decision. Ms. Burgin met with Ms. Ryan on December 1, 2005, to discuss the situation, with the result that Ms. Ryan agreed to withdraw her resignation for the time being.

On the morning of February 13, 2005, the District middle school hosted an Olympic event to kick off a week of Olympic activities, which was attended by the elementary school students. The opening ceremony of the event featured the middle school cross country team running into the gymnasium with an aluminum foil torch, which was passed from runner to runner and was ultimately used to simulate lighting an Olympic cauldron. Ms. Ryan came to the event with a battery operated torch of her own and asked Middle school Principal Brad Jones if one of her students could use it to light the cauldron. Jones said no and explained that the Middle School track team would be running in with their torch instead. During this ceremony, as the last runner was entering the gymnasium, Ms. Ryan left her seat and began

running with one of her students around the gymnasium waving her torch and pumping her fist behind the middle school student and then returned to her seat. Principal Whitrock was shocked and embarrassed by the display and approached the Mr. Jones, to apologize, at which point Jones, who was upset, told her she had a staff problem and suggested that Ms. Ryan might be intoxicated, due to her bizarre behavior and an unusual odor he had detected in her presence. A short while later Ms. Whitrock and Mr. Jones met at the Elementary school to discuss the situation and, after discussing the situation with Ms. Burgin, who in turn consulted counsel, decided that Ms. Ryan needed to have a blood test performed on her. Ms. Ryan was brought in and Ms. Whitrock and Mr. Jones explained their concerns to her and their decision to order the blood test, to which Ms. Ryan agreed. Ms. Ryan was transported to the local hospital where a blood test was performed at 12:15 p.m. Ms. Ryan was then returned to the school and instructed by Ms. Whitrock to remain in the teacher workroom pending receipt of the test results. The lab later reported to Ms. Burgin that Ms. Ryan registered a blood alcohol concentration of .27%. Ms. Whitrock then went to the workroom to discuss the results with Ms. Ryan and discovered that she had returned to her classroom and was attempting to teach the students. Ms. Ryan was then removed from the classroom and taken home. She was placed on an indefinite medical leave and subsequently checked in to an outpatient alcohol treatment program.

On the evening of February 13, the School Board held it's regularly scheduled meeting. Ms. Ryan was already on the agenda inasmuch as it was a review year for her. Ms. Burgin detailed for the Board the events at the middle school and recommended that Ms. Ryan be issued a preliminary notice of consideration of non-renewal. Following the meeting the Board did issue such a notice, as follows:

> February 13, 2006
>
> **Re: Preliminary Notice of Consideration of Non-renewal**
>
> Dear Norma Ryan,
>
> Pursuant to § 118.22 of the Wisconsin Statutes, you are advised that the Board of Education is considering that your contract not be renewed for the following reasons:
>
> i. Alcohol abuse concerns came from Elementary staff and community members in the spring of 2005. The reports were of bloodshot eyes, heavy smell of mouthwash, perfume and gum to cover up the smell alcohol [sic]. Staff reported bizarre behavior and stumbling.
>
> 1. When confronted with these allegations (May 17, 2005), Norma denied being under the influence of alcohol while on duty as a teacher to Sally Craven, acting principal, and to Joni Burgin (May 19, 2005).

2. Although the allegations were denied, Norma was warned at that time that if these allegations were true, she needed to contact someone for help (treatment).

ii. Alcohol abuse concerns, bizarre behavior (carrying torch during ceremony), and insubordination came from Elementary and Middle school staff on Monday, February 13, 2006. A subsequent alcohol blood test on February 13, 2006 at 12:15 p.m. confirmed a .27% Blood Alcohol level.

Please be advised that, pursuant to § 118.22, Wisconsin Statutes, you have the right to a private conference with the Board of Education if you file a request for a conference within five (5) days of your receipt of this notice.

Should you request a private conference with the Board, you will have the right to be represented by counsel of your choice at that session. You further have the right to provide information and make arguments relevant to the subject of the non-renewal of your contract including the right to rebut any information or arguments which you deem unfavorable to you.

BY DIRECTION OF THE BOARD OF EDUCATION

By David Ahlquist, President

The notice was sent to Ms. Ryan by certified mail on February 15.

On February 15, 2006, Tim A. Schultz, Executive Director of Northwest United Educators, responded to the District's notice, as follows:

Dear Mr. Ahlquist,

On February 15, 2006, NUE received a copy of a letter from the Grantsburg Board of Education to Norma Ryan, a teacher in the District, informing her that the Board is considering non-renewal of her contract. This letter also advises Ms. Ryan of her right to a private conference with the Board if such a request is filed within five days of receipt of the notice. Norma Ryan has asked NUE to represent her in this matter.

Please be advised that Ms. Ryan is on a medical leave of absence and now under a doctor's care to treat her disability. She has voluntarily admitted to the disability and has taken action to combat it. NUE submits that Board action to non-renew Norma Ryan's contract is improper given that she has a disability, admits she has a disability, and is seeking treatment to overcome the disability.

Furthermore, there is no evidence of progressive discipline prior to the recommendation of non-renewal.

Ms. Ryan will not be requesting a private conference with the Board so she can concentrate her efforts in overcoming her disability. However, should the Grantsburg Board of Education take action to non-renew Ms. Ryan's teaching contract, NUE will be submitting a grievance on Ms. Ryan's behalf that the District did not have just cause to non-renew her contract.

Please regard this letter as Norma Ryan's position concerning the matter of the Board's consideration of non-renewal.

Sincerely,

NORTHWEST UNITED EDUCATORS

Tim A. Schultz
Executive Director

On February 14, 2006, and again on March 2, 2006, Ms. Burgin had telephone conversations with Ms. Ryan to discuss her treatment and future plans. Subsequent to those conversations, Ms. Burgin wrote to Ms. Ryan on March 8, 2006, as follows:

Dear Norma Ryan,

As you recall, you submitted a letter of resignation from your teaching position dated November 22, 2005. You and I met on December 1, 2005 to discuss this. At that meeting we agreed to place your resignation on hold for a few weeks and I have not heard back from you. Obviously, since we are already in to Semester 2 you decided not to resign at the end of the 1st semester.

When we spoke on February 14th , you indicated that you did not want to return to teaching. You were not clear on your resignation during our phone conversation on March 2nd. Unless we hear differently in writing by Monday's school board meeting (March 13, 2006), I will recommend that the school Board accept your resignation effective at the end of this school year. If you withdraw your letter of resignation, the recommendation will be to non-renew your contract.

Sincerely,

Joni Burgin ED.D.

Ms. Ryan did not reply to the letter.

On March 13, 2006, at its regularly scheduled meeting, the School Board voted to non-renew Ms. Ryan's contract. Subsequent to that meeting, Ms. Ryan was sent the following notice:

> March 13, 2006
>
> **RE: Final Notice of Non-Renewal**
>
> Dear Norma Ryan,
>
> Pursuant to Section 118.22 of the Wisconsin Statutes, the Board of Education issued you a Preliminary Notice of Nonrenewal on February 14, 2006. Since there was no request for a private conference from you on this issue, a private conference was not held.
>
> Please be advised that at the conclusion of the School Board Meeting on March 13, 2006, the School Board, by a majority roll-call vote of the full membership, decided not to renew your teacher's contract for the 2006-2007 school year.
>
> This letter is being sent to you by direction of the Grantsburg Board of Education.
>
> Sincerely,
>
> Joni Burgin

As a result of the Board's action, the Union filed a grievance on Ms. Ryan's behalf on March 16, 2003, alleging that the Board's decision to non-renew her contract was made without just cause. The grievance was denied and the matter proceeded through the contractual grievance process to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The District

The District asserts that in just cause case, such as this one, there are two essential issues to be determined. The first is whether the Grievant engaged in conduct for which discipline was warranted. Assuming the first question is resolved in the affirmative, the second is whether the degree of discipline imposed was appropriate to the seriousness of the offense.

Here, the District contends there is not serious dispute as to whether the Grievant engaged in serious misconduct. The District has promulgated rules prohibiting the possession or use of drugs or alcohol on school premises, which the Grievant admitted she knew. The District had for some time reason to believe that the Grievant was using alcohol at school and in 2005 the Administrator spoke to the Grievant about her concern and had other staff members do so, as well, but the Grievant denied the reports and the Administrator was unable to prove or disprove at that time whether the Grievant was in fact drinking or under the influence of alcohol while at school. In February 2006, the Grievant's behavior at the Olympic event led to her being tested for the presence of alcohol, which showed she had a blood alcohol concentration of .27% - over three times the legal limit for operating a motor vehicle. The Grievant's behavior in coming to work in an intoxicated state on February 13, 2006 was a severe violation of District policies, which legitimately prohibit the presence or use of alcohol on school premises. Thus, the District had a legitimate disciplinary interest in the Grievant's behavior on the day in question.

As to the penalty, the District asserts that there are certain forms of misconduct so severe that they warrant summary discharge without recourse to the traditional sequence of progressive discipline. Arbitrators have held conduct in the workplace which is destructive of the Employer's interests constitutes just cause for summary discharge and that drinking on the job is such an offense. This standard is particularly important to uphold here because teachers are role models and are placed in a position of trust over the students in their classes. The Grievant's efforts at rehabilitation subsequent to her non-renewal are irrelevant to whether the District had just cause to non-renew at the time. On the other hand, the arbitrator must consider the deleterious effect of the Grievant's conduct on her students, many of whom were having difficulty learning and lagged behind their peers, as well as on the District's reputation in the community, where news of her behavior became a local sensation and caused much anger among parents of the affected students. In applying a just cause standard, the arbitrator should not substitute his judgment for that of the District, but should only set aside the discipline if the District's action was arbitrary, capricious, or discriminatory. That is not the case here. The non-renewal should stand.

The Union

The Union asserts that the appropriate analysis in determining just cause in this case is to apply the seven prong test adopted by Arbitrator Carroll Daugherty in GRIEF BROTHERS COOPERAGE CORP., 42 LA 555 (Daugherty, 1964) and other cases. Those seven inquiries are:

1. Did the employer warn the employee in advance of the possible disciplinary consequences of his/her actions?

2. Was the rule or policy a reasonable expectation of an employee and reasonably related to the safe, orderly and efficient operation of the employer's business?

3. Was there an adequate investigation of the employee's conduct before the imposition of discipline?

4. Was the investigation fair and objective?

5. Was the evidence of misconduct substantial and compelling?

6. Has the employer applied its rules and policies evenhandedly among its employees?

7. Was the level of discipline reasonably related to the seriousness of the misconduct and the employee's work record?

The Union argues that the failure to establish any one of the above factors constitutes a lack of just cause and that several are lacking here.

The District did not forewarn teachers that coming to school while intoxicated could lead to discipline. The faculty handbook only mentions the use or possession of alcohol on the premises, there is nothing in the contract about alcohol use or alcoholism and there is no District education or intervention program about the use or effects of alcohol. There is no rule against coming to school while intoxicated and the Grievant had no way of knowing what the District's response to her actions and behavior might be. Alcoholism is a disease and the District, in effect, fired her for being ill at work without any advance notice that alcoholic teachers were subject to termination if they came work in that state.

The appropriate penalty for the Grievant in this case would be a last chance agreement that would subject her to random alcohol testing on school premises and would require her to resign if she ever tests positive. Arbitrators have reinstated employees who have been terminated for alcohol related offenses and usually only uphold terminations where there has been a violation of a last chance agreement. Further, if the employer does not act when it first learns of an offense, the subsequent discipline may be mitigated. Subsequent treatment for alcoholism has also been seen as a mitigating factor. This is a case of first impression in that there are no Wisconsin cases where a teacher has been discharged for alcoholism where there has been no prior discipline or intervention, therefore, a last chance agreement would be the most appropriate result.

The District in Reply

The District disputes the Union's contention that there was not adequate notice that coming to school while inebriated was a violation of District rules. First, the Grievant admitted at the hearing that she knew her behavior was "a serious violation." Also, while the staff handbook does not specifically state that teachers should not come to school while inebriated, it is the type of conduct that is so obviously improper that arbitrators have held it does not need to be spelled out with specificity. Further, the references to alcohol use on premises in the

handbook were a clear enough indicator of the District's policy that the Grievant cannot reasonably argue she had insufficient notice.

The District does not believe that the Daugherty analysis is the appropriate standard of just cause in this case. It asserts, however, that even under a Daugherty standard it met the seven criteria justifying its action in this case. It also disputes the Union's claim that the Grievant's penalty should be mitigated because the District did not take action when it first learned of the Grievant's behavior. The District's previous concerns were based on second hand reports and could not be verified prior to the events on February 13, 2006. The Grievant was told she needed help if she had a problem, and it acted only once it had proof of her misconduct.

The Grievant caused significant harm to the District's reputation and to her students in ways that can't be measured. Non-renewal, not a last chance agreement, is the appropriate penalty here. The Grievant's actions are unlike other cases cited by the Union because she is a teacher and was teaching students while severely intoxicated. The seriousness of the violation, its effect on the students, her poor job performance as a result, her refusal to accept help when offered and the community's awareness of and reaction to her actions make non-renewal the only feasible consequence.

The Union in Reply

The Union asserts that the District's brief misrepresents the facts and presents the Grievant in an unduly harsh light. It characterizes her as violating specific directions to not participate in the torch ceremony and to not return to her classroom when, in fact, no such instructions were given. Further, she did not intentionally misbehave, but her impairment made it difficult for her to understand what she was and wasn't supposed to do. Also, she didn't violate District policy, because there is no written policy prohibiting coming to school while impaired. The Union does not agree that District policy prohibits coming to work after having been drinking and the Grievant was so ill she did not realize the severity of her condition. Further, despite the District's attempt to characterize her non-renewal as being partially due to performance issues, it is clear from the record that it was solely based on her actions on February 13, 2006. She acknowledged her error and offered a sincere apology to the District at the non-renewal hearing in April.

The staff handbook and contract evince a compassionate policy toward people with disabilities and the Administrator did try to find help for the Grievant after February 13. The Grievant also sought help for herself within a week of the incident. There was not, as the District contends, an intervention in 2005, but only a vaguely described conversation between the Grievant and two other teachers that led nowhere. Finally, as indicated by the Preliminary Notice of Consideration of Non-renewal, the Grievant was terminated for her actions on February 13 and for no other reason.

The Union disputes the District's definition of the just cause standard as disregarding such issues as prior notice, progressive discipline, fair treatment and appropriate discipline. The District's argument that the Grievant's intoxication is a *per se* offense meriting summary dismissal disregards notice, progressive discipline and the Grievant's excellent work history. Further, the cases cited by the District are not on point with this fact situation.

Wisconsin recognizes alcoholism as a disease and arbitrators have returned employees to work who have sought treatment and who agree to future testing. The Grievant is a twenty year employee with an excellent record who would agree to a last chance agreement calling for random testing. She has sought treatment and her counselors feel her treatment has been successful. She has apologized for her behavior and deserves another opportunity.

DISCUSSION

In this case, there is no dispute about the central facts of the matter - that on February 13, 2006 the Grievant came to work in a high state of intoxication, so high, in fact, that when her blood was tested at 12:15 p.m. it still registered an alcohol content of .27%, more than three times the legal limit to drive an automobile. Although there had been reports and concerns on the District's part about the Grievant's drinking for over a year, this was the first time the District had incontrovertible evidence that she had come to school in an intoxicated state. As a result of this occurrence, the Board of Education decided the same day to give the Grievant a preliminary notice of intent to non-renew her contract. After the Grievant declined to meet with Board to discuss the matter, a final non-renewal decision was made one month later. It is the District's contention that the non-renewal decision was appropriate and was based not only on the February 13 incident, but also on performance issues, probably alcohol-related, which came to light in the month between the Board meetings. It is the Union's position that the non-renewal was based solely on the February 13 incident, that it was excessive in light of the Grievant's work history and alcoholism and that she should be permitted to return to work under a last chance agreement.

I have previously observed that a determination of just cause for discipline generally involves two elements – a determination in the first instance of whether the employee committed an act for which discipline is warranted and, if so, a corollary determination of whether the penalty imposed was appropriate in degree to the offense. WOOD COUNTY, WERC Case 162, No. 63666, MA-12663 (Emery, 5/10/05) That is not to say, however, that the penalty must necessarily be the same one I would have imposed, only that the actual penalty imposed be reasonable under the circumstances. The Union has argued for application of the well known seven-step Daugherty analysis, but I am satisfied that all those factors, to the degree they are relevant in a particular case, may be subsumed into the two-prong test I have articulated. Ultimately, fixed rules rarely are universally applicable and an arbitrator will judge the case before him or her on its own merits and tailor the analysis accordingly to determine in some fashion whether the alleged misbehavior took place, and, if so, whether management's response was justifiable.

Here, I think there is no serious dispute that the Grievant committed a serious act of misconduct in coming to school while severely intoxicated. The Union does not deny that the Grievant was at school in an intoxicated state, nor does the Union dispute that being at school in that condition is unacceptable. The Union does contend, however, that the District bears some responsibility here because it did not have adequate education and intervention programs in place for its staff to address the issue of alcohol abuse and alcoholism and because it did not specifically prohibit coming to school after having been drinking or inform staff that there would be consequences for doing so. Within the framework of a Daugherty analysis, this would constitute a lack of sufficient notice to adequately apprise the employee of the potential disciplinary consequences of her conduct. For a variety of following reasons, I am not persuaded by the Union's position.

In the first place, I am unaware of any duty that the District owes to its staff to educate them about alcohol abuse or alcoholism and I certainly do not concur that without such programs in place the District loses any capacity to discipline its employees for alcohol–related misconduct. I don't dispute that such programs might be beneficial, but what an employer may do to improve the functioning of its employees and what it must do before it may hold them accountable for their conduct are two entirely different things. I reject, therefore, the contention that the District's failure to provide staff orientation on alcohol abuse is a mitigating factor in this case. I further observe that this contention runs counter to the Union's alternative argument that the Grievant's alcoholism was so severe that she was unable to control her behavior which, if true, would have made any such orientation pointless.

I also think that there is not any serious doubt that the Grievant knew her behavior was improper. The Union emphasizes that there was no specific rule prohibiting coming to school while intoxicated, but this argument elevates form over substance. First and foremost, the Grievant testified that she knew what she did was wrong. Beyond that, however, the staff handbook is replete with references to the District's drug-free environment policy, its absolute prohibition of the use or possession of controlled substances on school property and its expectation that staff will be primary role models to the students of responsible behavior and the Grievant testified that she was well aware of those rules and policies. If she knew, therefore, that she was potentially subject to termination for the mere possession of alcohol on school premises, it surely would take no stretch of the imagination to further conclude that coming to school while intoxicated would likely carry a similar penalty. Further, there are numerous other rules and standards in the handbook that require teachers to be good role models, to be accountable and accept responsibility for their actions, to respect and comply with the law and District policies and to protect students from conditions that are harmful or detrimental to learning. All of these expectations bear on the Grievant's conduct. Finally, as other arbitrators have held, some expectations are so obvious and fundamental that an employer has a right to expect staff to know and adhere to them without its needing to promulgate specific rules regarding them. [Cf. SAWYER COUNTY, WERC CASE 103, NO. 48834, MA-7729 (Jones, 11/15/93)] To my mind, not drinking to excess before going to work in an elementary school is one such concept. To recapitulate, therefore, I find that the Grievant's action on February 13 in coming to work while intoxicated was clearly misconduct,

that the Grievant was aware that her action constituted misconduct and that the District had just cause to discipline her for it.

Having found just cause for discipline, I move to the second question of whether the discipline imposed was appropriate, which, to my mind, is a much more difficult issue. Both sides make potent arguments in support of their positions. The District points to the serious nature of the Grievant's offense on February 13, the effect of her alcohol abuse on her job performance and, by extension, her students and the difficulty created for the District by the widespread public knowledge of these circumstances within the local community, and especially among the District's parents. The Union emphasizes the Grievant's otherwise good work record, the fact that this was the Grievant's first alcohol-related offense, her efforts at rehabilitation and her contrition for her behavior in mitigation of her actions.

I am sympathetic to the Grievant's situation. She testified to a number of personal problems arising within the last several years that added stress to her life, including the death of a brother, a sister diagnosed with Huntington's Disease, having to teach a new age group in the last few years and loneliness from having her adult children move away. Mr. Paul Pacheco, Assessment Manager for Dane County Mental Health Center, evaluated the Grievant and reported that she began compensating for her life problems by drinking increasing amounts of alcohol in 2001 or 2002. Her drinking accelerated over time to a point where in February 2006 she was in an advanced state of alcoholism. By that time she was secretly drinking as much as a liter of brandy per week in addition to social drinking and was occasionally drinking in the mornings to maintain a level of alcohol in her bloodstream to ward off withdrawal symptoms, such as the shakes. This is what she did on the morning of February 13 and it was Mr. Pacheco's professional opinion that she had come to school after drinking on previous occasions, as well. This would explain the reports from other staff members in 2005 of the Grievant having glassy, bloodshot eyes and an unsteady gait while at school. The fact that she still had a .27% blood alcohol level at 12:15 on February 13 indicates that she must have had an extreme amount to drink before coming to school and Mr. Pacheco reported that the fact she was able to function at all at that level is indicative of advanced alcohol dependence. I am satisfied, therefore, that the Grievant's behavior on February 13 was not a random occurrence, but was the last of a series of like occurrences and was symptomatic of an alcohol dependent person whose condition finally became too serious and obvious to hide.

I am also of the mind that the Grievant is truly remorseful for her actions, that her written apology to the District was sincere and that she has made and is making a good faith effort at rehabilitation. Both Mr. Pacheco and the Grievant's AODA counselor, Bruce Everson, testified to her determination to overcome her condition and their belief that she has a good chance at being successful. I have no reason to doubt their opinions, although I do note that both admitted in their testimony that, even among alcoholics whose recovery is deemed successful, occasional relapses are not uncommon.

Finally, I am aware of the body of arbitral opinion, noted by the Union, that holds that alcohol or other drug dependent employees who are disciplined for alcohol or drug-related

offenses are sometimes entitled to a modified just cause standard. One learned treatise has articulated the standard, as follows: "Where a troubled employee (defined as an employee who is addicted to drugs or alcohol) has engaged in dischargeable conduct (because of the trouble), the arbitrator expects the employer to assess the employee's potential and willingness for rehabilitation prior to opting for discharge; that is, before discharging the troubled employee, the employer must (1) have given the employee an adequate opportunity to become rehabilitated and (2) have concluded, with reason, that the employee is not salvageable." *The Common Law of the Workplace*, BNA Books, 1995, p. 226, (Theodore J. St. Antoine, ed.) – Mr. St. Antoine's commentary on the rule states, in pertinent part:

> "In determining whether the employee was given adequate opportunity for rehabilitation, the arbitrator will expect the employer to have actively encouraged the employee's rehabilitation. The extent of the employer's obligation in this respect may vary. A relevant consideration will be the employer's awareness of the problem, or whether the employer had reason to be aware of the problem. If the employer was not aware of the problem and had no reason to be aware of the problem prior to the discharge, arbitrators generally will not find the employer liable for a violation of the just cause provision. Other relevant considerations include the employee's prior efforts at rehabilitation; the availability and utilization of an employee assistance program (EAP); the employee's awareness or denial of the problem; and the existence of, or nonexistence of, a contract clause encouraging rehabilitation."
>
> Id at 227-228

As I have previously stated, rules and legal constructs, such as that above, are useful guides for analysis and often encapsulate the thinking of a body of arbitrators in concise form. Blanket rules rarely cover all eventualities, however, and in each case the individual arbitrator will have to assess the applicability of the rule to that specific fact situation

Here, there is no doubt that the Grievant fits the definition of a troubled employee, nor is there doubt that the incident on February 13, which led to her non-renewal, was a result of her alcohol dependency. It is clear in hindsight that warning signs were apparent as much as a year beforehand that the Grievant had a problem in the form of reports made to the Administrator about her suspected drinking on the job. It is also true, however, that prior to February 13 the District had no proof of her alcohol abuse, due in large part to the Grievant's successful efforts to mask it by the liberal use of perfume, mouthwash and chewing gum, which might have been explained by other things than an attempt to hide the smell of alcohol. So, the Administrator did what she could. She observed the Grievant herself, but was unable to find conclusive evidence of alcohol use. She had other staff members speak to the Grievant about the District's concerns, which the Grievant adamantly denied. In testimony, the Grievant admitted to lying to them about her alcohol abuse. She counseled the Grievant that if the reports of alcohol abuse were true she needed to seek help, but the Grievant again denied that she had a problem.

Meanwhile, the Grievant's condition was taking a severe toll on her job performance, much of which came to light only after she was placed on administrative leave following the February 13 incident. In the fall of 2005 the Grievant's principal observed her and had numerous concerns about her teaching methods and classroom management. As a result, she met with the Grievant and followed up with a memorandum containing concrete recommendations for presenting the curriculum more effectively, as well as for additional professional growth. While certainly not complementary, the memo was not harsh, but was what might be characterized as a work directive from a supervisor to an underperforming employee. The Grievant's response, which can only be explained in the light of the effects of her condition, was to tender her resignation, which the Administrator encouraged her to reconsider. Other teachers, as evidenced by the testimony of Sarah Gothblad, were noticing that she gave her students an unusual amount of recess time, that she frequently left school early and that she was disinterested and non-participatory at teacher planning meetings. After she was replaced by a substitute it was discovered that she had no lesson plans, no grade book and no objective means by which the substitute was able to discern what had been taught or the level of learning of the children in her class. Subsequently, Principal Whitrock reviewed the standardized testing results for 4th grade students in 2005-06, who had been in the Grievant's class the previous year, and found them to be significantly below the established benchmarks for students at that grade level in the areas of math, language arts and reading.

What emerges is a picture of a well-concealed deterioration that had profound consequences not only for the Grievant, but for the District, as well, and especially for the students in her classes for at least the last two years of her tenure, and perhaps longer. The parents of those students are reportedly angry about the situation and who can blame them? Other parents have expressed concerns about the quality of education their children will receive if the Grievant returns and who can blame them? The Grievant herself testified that she understands how they feel.

Teaching is in a special class of professions from the standpoint of expectations of moral and ethical behavior precisely because of the critical role of the teacher as a guide and model in the formation of values and behaviors for the children in his or her charge. As previously noted, this important role is highlighted in numerous places in the District's staff handbook. Notwithstanding that alcoholism is a condition over which the sufferer may have little or no control, those expectations exist for good reason and they existed not just at the point at which the Grievant hit the nadir, but at the outset, as well, when her decision making about alcohol use was not impaired. Furthermore, because education is a process wherein each year's curriculum and learning builds on what has come before, students who, through no fault of their own, are deprived an adequate education may be handicapped for years to come in comparison to their peers. Abusing that trust is, therefore, a most serious offense. With that higher level of expectation, unfortunately, comes a higher degree of accountability, as well. Unlike another type of employer, a school district, which is charged with the nurturing and education of a community's youth and is accountable to their parents and the other taxpayers of the district, does not always have the luxury of taking a wait and see attitude and hoping for the best. In this instance, it is my view that prior to February 13, 2006 the District acted

proactively in regard to the Grievant, given its limited knowledge of her condition, her refusal to seek help and the limited number of options at its disposal, by seeking to correct her observed teaching deficiencies and recommending that she seek help for her suspected alcohol problem. She resented and rejected those efforts. After February 13, it is my view that the District, if it so chose, could have offered her a last chance agreement, but it was not under compulsion to do so. Thus, while a last chance agreement was certainly an available option, and might have been successful if employed, I cannot and will not on this record overrule the District's determination that non-renewal of her contract was the appropriate action under the circumstances.

It is my hope that the Grievant is successful in her efforts at recovery and I wish her well. It is also to be hoped that one day she may return to teaching, perhaps in another setting, if that is her desire. Nevertheless, for the reasons set forth above, and upon the record as a whole, I hereby issue the following

AWARD

The School District of Grantsburg had just cause to non-renew the Grievant. The grievance is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 6th day of July, 2007.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
7159