**LABOR ARBITRATION TRIBUNAL**

**IN THE MATTER OF ARBITRATION BETWEEN**

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| **COATESVILLE AREA TEACHERS' ASSOCIATION, PSEA/NEA** | : | |
| | : | **Grievance: Suspension and** |
| **and** | : | **Discharge of Anthony Buckwash** |
| **COATESVILLE AREA SCHOOL DISTRICT** | : | |

**GRIEVANCE:** The grievance protests the suspension and dismissal of Mr. Anthony Buckwash as being without just cause.

**HEARINGS:** March 12, 2015
June 12, 2015
Thorndale, Pennsylvania

**ARBITRATOR:** John M. Skonier, Esq.

**APPEARANCES**

**FOR THE ASSOCIATION:**

Annemarie Dwyer, Esq.

**FOR THE DISTRICT:**

Richard B. Galtman, Esq.

## Procedural History

The undersigned was notified by letter of his selection by the Coatesville Area Teachers' Association, PSEA/NEA (Association) and the Coatesville Area School District (District or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, hearings were held on March 12, 2015 and June 12, 2015, in Thorndale, Pennsylvania, at which times both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Following the receipt of the transcripts of the hearings, the parties filed post-hearing legal briefs. The matter is now ready for final disposition.

## Background Facts

The District employed Mr. Anthony Buckwash (hereinafter the Grievant) as a Physics teacher, as well as an Assistant Principal and a Principal in the District at times, for twenty years. (NT-I- 104-106; Exhibit J-10)[1] The Grievant began working for the District

[1] Notes of Testimony for the hearing held on March 12, 2015 shall be referred to as "NT- I", followed by the appropriate page number(s). The Notes of Testimony for the hearing held on June 12, 2015 shall be referred to as "NT-II", followed by the appropriate page number(s). Association exhibits shall be referred to as (Exhibit A-) followed by the appropriate number, District exhibits shall be referred to as (Exhibit D-), followed by the appropriate number, and Joint exhibits shall be referred to as (Exhibit J-), followed by the appropriate number.

on August 31, 1993. The off-duty incidents giving rise to the Grievant's dismissal took place on June 20, 2013 and January 25, 2014. (NT-I-111, 118; Exhibit J-6).

On June 20, 2013, Mr. Buckwash was arrested for driving under the influence (DUI)[2]. (NT-I-111) The incident which led to the Grievant being arrested and charged with driving under the influence (DUI) did not result in a car accident, nor were any other vehicles involved. (*Id.*) Mr. Buckwash informed the then Superintendent, Richard Como, of his June 20th arrest the morning after his DUI arrest. (NT-I- 112) The Grievant asked Superintendent Como, "What's going to happen with employment?" (*Id.)* Mr. Como told him that the Human Resources Director, Erica Zeigler, and the then-solicitor, James Ellison, Esquire, were present in the building and he wanted to speak to them. The Grievant met with Mr. Como, Ms. Zigler and Mr. Ellison. (NT-I-112-113) The Grievant testified that he was assured that, as he would seek admission into the Chester County Accelerated Rehabilitative Disposition Program (ARD) and he would receive counseling , he would not lose his job. (*Id.*) In October 2013, the Grievant was accepted into Chester County ARD for his June 2013 DUI charges. The Grievant did not recall being asked to present a PDE-6004 Form, and did not recall any other requirements made of him at that June meeting.

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[2] In Chester County, Pennsylvania, the Accelerated Rehabilitative Disposition Program (ARD) is a special pre-trial intervention program for non-violent offenders who have limited or no prior record.

Subsequently, on January 25, 2014, the Grievant was arrested for a second DUI charge. The District representatives met with the Grievant on January 31, 2014, regarding his second DUI charge. On that date, the Grievant filled out a PDE-6004 Form. In addition, the District provided the Grievant with a letter dated January 31, 2014 requiring his involvement in the District's Employee Assistance Program (EAP) as a precondition to his reinstatement and continued employment at the District.[3]

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[3] The January 31, 2014 letter reads, in pertinent part, as follows:

It is a primary goal of the Coatesville Area School District to maintain a productive, safe and healthy work environment. We have concerns for you and want to ensure that you get the proper help needed.

Please review the following conditions carefully and sign this agreement if you agree to be bound and abide by the same.

I, Anthony J. Buckwash, agree to comply with all of the following conditions. I understand that my reinstatement and/or continued employment with the Coatesville Area School District is contingent upon my compliance with all terms of this agreement.

1. I will undergo an evaluation through the Coatesville Area School District EAP, Health Advocate Employee Assistance Program. I understand that I am not responsible for the cost of the EAP evaluation.

2. I will contact the EAP no later than 24 hours from receipt of this letter (3 pm, Saturday, 2/1/14) at (866) 799-2728, prompt 2, to schedule an appointment for an evaluation.

3. I will comply with all EAP evaluation recommendations and any further recommendations that may come from the subsequent treatment provider (if any). I understand that the cost of any follow-up treatment or education will be my responsibility. I also understand that my health care insurance may be available to pay for a portion of that cost.

4. I authorize the representatives of the Coatesville Area School District listed on my signed authorization for Release of Information to receive all relevant information regarding my compliance and progress with the EAP and treatment provider's recommendations.

I recognize, accept, and agree that I am responsible for meeting the standards of performance & conduct that are established for employees of the Coatesville Area School District. I understand that failure to comply, in whole or in part with all of the terms and conditions of this agreement will result in further disciplinary action, up to and including termination of employment with the Coatesville Area School District.

[The document was signed by the Grievant and the District's HR Director, Ms. Erika Zigler, on January 31, 2014.]

(Exhibit J-4)

The Grievant continued teaching as a physics teacher until the end of the school year in June 2014. He received a satisfactory evaluation for the 2013-2014 school year.

On July 21, 2014, the Grievant pled guilty to both the January 2014 DUI charge and the previous June 2013 DUI charge. The Grievant was incarcerated in the Chester County Prison on the same day. The Grievant was incarcerated for 18 days and released on August 8, 2014. The Grievant was sentenced to house arrest for an additional 75 days, which he began serving after his release on August 8, 2014. In addition, the Grievant was directed to provide 80 hours of community service. At the time of hearing in this matter the Grievant had completed his house arrest and community service.

Upon learning that the Grievant pled guilty to his DUI charges, by letter dated August 8, 2014, the District requested a meeting with the Grievant on August 18, 2014. (Exhibit J-5) During the August 18th meeting, the Grievant admitted to Administration representatives that he had been convicted on the two DUI charges. (NT-II-15)

Between June 21, 2014 and August 18, 2014, the Grievant did not file another PDE Form 6004 with the District. By letter dated 8/20/2014, the District placed the

Grievant on unpaid suspension pending recommendation to the School Board that he should be discharged. (Exhibit J-6) Subsequently, the Grievant was discharged by the District. On September 9, 2014, the Association filed the instant grievance over the suspension and termination of the Grievant. (Exhibit J-2) The matter was then processed to arbitration for final resolution.

**Relevant Contractual Provision**

ARTICLE II. ASSOCIATION RIGHTS AND RESPONSIBILITIES

* * *

F. JUST CAUSE (EMPLOYEE PROTECTION)

The parties agree that all rights and obligations created by the School Code and the procedures created by the School Code for pursuing, enforcing, or implementing those rights and obligations shall be exclusive. As to any matters not covered by the School Code, any discipline, reprimands or reductions in rank or compensation excluding professional evaluations imposed upon a bargaining unit member employee shall be based upon just cause and any dispute concerning the propriety of such discipline shall be subject to the grievance and arbitration procedure of this Agreement. However, a bargaining unit member who receives an unsatisfactory professional evaluation will be granted, upon his/her request, a hearing at the

Superintendent's (or designee) level only. Nothing contained herein shall be construed to deny or restrict applicable laws and regulations.

* * *

**Position of the District**

The District argues that it had just cause to suspend and subsequently dismiss the Grievant from employment in the District.

The District notes that neither the contract nor the evidence presented reveals any intention by the parties to deviate from the public policy expressed in the School Code. Section 1122 of the School Code sets forth the reasons teachers can be discharged. The parties' just cause provision recognizes that "all rights and obligations created by the School Code and the procedures created by the School Code for pursuing, enforcing or implementing those rights and obligations shall be exclusive." (Joint Exhibit 1) Therefore, the District asserts, the reasons set forth in Section 1122 are "just cause" for dismissal.

As Section 1122 provides that a valid cause for termination of a professional employee includes immorality on the part of the professional employee, the District maintains that, if proven, this charge would justify the Grievant's dismissal. 24 P. S. § 11-

1122. The District notes that the School Code does not define immorality. However, the District points out that "immorality" has been defined by the courts as "a course of conduct that offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate." *Appeal of Flannery,* 178 A.2d 751, 754 ( Pa. 1962); *Horosko v. School District of Mt. Pleasant Twp.,* 6 A.2d 866 ( Pa. 1939); *Metza v. Blue Mountain School Dist.,* TTA 23- 83, 21 SLIE 64 ( 1984). The District points out that the Commonwealth Court recognized that more than one DUI offense may justify a finding of immorality under the school code. *Zelno v. Lincoln Intermediate Unit No. 12 Board of Directors*, 786 A. 2d 1022 (Pa. Cmwlth. 2001) In *Zelno*, the Court stated, in pertinent part, as follows:

> The concept that more than one offense for drunken driving transforms the conduct . . . from a serious mistake to immoral conduct as recognized by Section 3731(e)of the Vehicle Code, 75 Pa.C.S. § 3731(e), which provides:
>
> (e) Penalty.--
>
> (1) Any person violating any of the provisions of this section is guilty of a misdemeanor of the second degree, except that a person convicted of a third or subsequent offense is guilty of a misdemeanor of the first degree, and the sentencing court shall order the person to pay a fine of not less than $300 and serve a minimum term of imprisonment of:
>
> (i) Not less than 48 consecutive hours.
>
> (ii) Not less than 30 days if the person has previously accepted Accelerated Rehabilitative Disposition or any other form of preliminary disposition, been convicted of, adjudicated delinquent or granted a consent decree under the Juvenile Act (42 Pa.C.S. § 6301 et seq.) based on an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.

> (iii) Not less than 90 days if the person has twice previously been convicted of, adjudicated delinquent or granted a consent decree under the Juvenile Act based on an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.
>
> (iv) Not less than one year if the person has three times previously been convicted of, adjudicated delinquent or granted a consent decree under the Juvenile Act based on an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.
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> (2) Acceptance of Accelerated Rehabilitative Disposition, an adjudication of delinquency or a consent decree under the Juvenile Act or any other form of preliminary disposition of any charge brought under this section shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction.

( 786 A. 2d 1022, at 1025)

The Pennsylvania Commonwealth Court has set forth three elements that must be proved by an employer to establish immorality: (1) the underlying acts which it claims constitute immorality actually occurred; (2) the conduct offends the morals of the community; and (3) the conduct at issue is a bad example to the youth whose ideals the educator is supposed to foster and elevate. *Kinniry v. Abington School District,* 673 A.2d 429, 432 (Pa. Cmwlth, 1996), citing *Foderaro v. School District of Philadelphia,* 531 A.2d 570 (Pa. Cmwlth. 1987).

The District points out that the Courts have made clear that conduct that rises to the level of immorality need not rise to the level of a grievous assault on the mores of the

community. *Penn-Delco School Dist. v. Urso,* 382 A.2d 162 (Pa. Cmwlth. 1978). In addition, an employee may be discharged for only a single incident of immorality. *Metza v. Blue Mountain School Dist.* TTA 23- 83 21 SLIE 64 1984 ; *West Chester Area School Bd. v. West Chester Area Educ. Ass'n.*, 9 Pa. D. & C. 4th 125, 1991 WL 320004, 28 SLIE 16 (C. P. 1991). In addition, a dismissal on the basis of immorality does not require a school district to prove that the conduct at issue impacted a specific student or the teacher' s ability to teach. (*Id.*) Furthermore, a school district need not prove intent to establish immorality. *Lenker v. East Pennsboro School District,* TTA 10- 90, 32 SLIE 99 (1995). As the Pennsylvania Supreme Court noted in *Horosko v. School District of Mt. Pleasant Twp.* 6 A.2d 866 (Pa. 1939), the choice of a teacher's vocation deprives the individual of the same freedom of action as enjoyed by other persons in other vocations.

The District points out that a conviction of driving under the influence has been held to constitute immorality. Citing, *Zelno v. Lincoln Intermediate Unit No. 12 Board of Directors,* 786 A. 2d 1022 (Pa. Cmwlth. 2001) wherein a teacher was dismissed for violation of §1122 of the School Code because of both the pattern of conduct that she engaged in resulting in her conviction of a misdemeanor of the first degree as well as the testimony of witnesses that her conduct offended the morals of her community and set a bad example for the students that she is to serve. The court found as sufficient the testimony of five administrators, who were all members of the community within the

jurisdiction of the school district, who testified that Zelno's behavior offends the morals of the community.

The District notes that in the present case, the Grievant was arrested and charged with DUI on two separate occasions and, on July 21, 2014, was found guilty of the two DUI charges. (Exhibits J-7, J-8 and J-9) The District also notes that the Grievant pled guilty as part of a plea arrangement which resulted in the waiver of the lesser graded offenses originally charged in both instances. While the Grievant's guilty plea admits to the conduct as charged, the District maintains that the waiver of the lesser offenses cannot lead to a conclusion that the underlying conduct which gave rise to the original criminal charges did not in fact occur. The District asserts that the fact that the local court accepted a plea deal, dropping the lesser offenses is inconsequential as to the Grievant's conviction of twice driving under the influence, with a Blood Alcohol Count (BAC) of over 0.10 and 0.16 respectively, which are, in and of themselves, acts of immorality. *Zelno v. Lincoln Intermediate Unit No. 12 Board of Directors*, 786 A. 2d 1022 ( Pa. Cmwlth. 2001). As the proven facts demonstrate, the Grievant engaged in the conduct that is alleged in the Notice of Charges.

Regarding the issue of morality, the District offered the testimony of two of its administrators; High School Principal Robert Fischer and Director of High School

Education and Special Education (Grades 6-12) David Krakower. They testified regarding their understanding of the community standards and maintained that the Grievant's conduct clearly offended those standards. The District points out that community standards may be established by administrators' opinions. *See, Lenker v. East Pennsboro School District*, TTA 10- 90, 32 SLIE 99 (1995).

The District notes that even the Association's witness, Ms. Shesko, a life-long resident of the community, acknowledged that she would consider the Grievant's conduct "morally incorrect." (NT-I-101) The District argues that based upon the facts of record, one can infer that the Grievant's conduct was offensive to the morals of the community.

The District argues that it cannot seriously be questioned that the Grievant's double conviction for driving while under the influence of alcohol and incarceration demonstrate a bad example to the youth. The District points out that it provides various student activities to discourage drinking and driving while under the influence. The general student code of conduct and the code of conduct for extracurricular activities each prohibit the use of alcohol. (NT-I- 37-38) Mr. Fischer testified that the Grievant's conduct and DUI convictions are bad examples to the District's students. (NT-I-38) The Grievant's actions contradict the message conveyed by the District to the students regarding drinking.

Messrs. Fischer and Krakower and Ms. Ziegler testified that the Grievant's arrests were reported on the internet and in the local newspapers. (NT-I-2, 40, 53; NT-II-7)

The District maintains that the Grievant does not fully appreciate the seriousness of his actions, nor was he remorseful at the arbitration hearing. He testified that he felt that he was treated unfairly because of a change of leadership at the upper levels of the administration which resulted in him losing his job after his DUI convictions. (NT-I-142) He did not fully comprehend the detrimental nature of his actions.

The District notes that dishonesty has been found to be immoral conduct under Section 1122 of the School Code. See e.g., *Riverview School Dist. v. Riverview Educ. Ass'n., PSEA-NEA,* 652, 639 A.2d 974, 978 (Pa. Cmw1th.1994); *Balog v. McKeesport Area School Dist.,* 136, 484 A.2d 198, 200 (Pa. Cmw1th.1984). The District points out that the Grievant has not been honest with his long-time Alcoholics Anonymous Sponsor, Karl Tribelhorn. Mr. Tribelhorn testified that as sponsor, his relationship with the Grievant is built on trust and the honesty of the Grievant as to his sobriety or lack thereof. (NT-I-171) Mr. Triblehorn testified that the Grievant has never confided to him that he drove under the influence of alcohol at any time other than the two times that resulted in his arrests. (NT-I-177-178) The District points out that on cross-examination, the Grievant admitted that he had driven under the influence of alcohol on other prior occasions. (NT-I-186-187)

The District points out that the Grievant's dishonesty is also apparent in his claim that he had no knowledge that he was to keep the District apprised of the status of his DUI arrests as they were processed through the criminal justice system. He denied that Ms. Ziegler told him of the necessity to keep the District informed as to the status of his DUI arrests. His statement was directly contradicted by the testimony of Ms. Ziegler, who testified that at the January 31, 2014 meeting, she advised the Grievant of his need to obtain new clearances, to enter the EAP program and to fill out the PDE Form 6004. She testified that she told him, if anything changed he had to let the District know. She explained that in January 2014, the Grievant had been arrested for a second DUI but he had not been convicted. She noted that he was to inform them of any conviction. She recalled that she met briefly with the Grievant later the same day as the January 31st meeting to have him sign off on the EAP letter so that he could start that process. She specifically recalled telling the Grievant, "make sure you keep us updated and make sure you let us know when things change. " (NT-II-11)

Based on the above, the District maintains that its determination that the Grievant engaged in conduct that amounts to immorality and willful neglect of duties under 24 P.S. §11-1122 of the School Code has been proven and asks that the grievance in this matter be denied.

**Association Position**

The Association argues that the District lacked just cause to suspend or dismiss the Grievant from his employment.

While the parties collective bargaining agreement contains a just cause provision, the term is not defined. The Association recognizes that when the parties have not defined "just cause" and have not limited an arbitrator's interpretation of the term, the arbitrator has the sole authority to interpret the term and determine whether just cause exists. *Int'l Bhd. of Firemen & Oilers, Local 59 v. Falls,* 688 A.2d 269, 271 (Pa. Cmwlth. 1997) (*citing McKeesport Area Sch. Dist. v. McKeesport Sch. Serv. Pers. Ass'n, PSSPA/PSEA,* 585 A.2d 544 (Pa. Cmwlth. 1990))

The Association notes that just cause has many interpretations, however, it points out that there is generally a common recognition within labor arbitration that certain factors should be considered when determining whether the necessary just cause is present. A just cause provision is, in effect, a negotiated form of job security that restricts an employer's ability to discharge and discipline employees. *Office of Attorney Gen. v. Council 13, American Federation of State County and Municipal Employees, AFL-CIO,* 844 A.2d 1217, 1224-1225, fn. 10 (Pa. 2004).

While the term "just cause" is not specifically defined in the CBA, the Pennsylvania Supreme Court has held that just cause "must be merit-related and the criteria must touch upon competency and ability in some rational and logical manner." *Woods v. State Civil Serv. Comm'n., 912 A.2d 803 (Pa. 2006); Pa. Game Comm'n. v. SCSC (Toth),* 747 A.2d 727, 892 (Pa. 1997). In order to demonstrate sufficient cause for removal, "the cause should be personal to the employ[ee] and such as to render him unfit for the position he occupies ..." *Petition of Bell,* 152 A.2d 731, 743 (Pa. 1959), (citing *Thomas v. Connell,* 107 A. 691 (Pa. 1919)).

In public employment cases, Pennsylvania courts have adopted a seven-factor test to determine whether just cause for discharge exists. The Association argues that the "seven tests" of just cause, first proffered by Chicago arbitrator Carroll R. Daugherty in the 1960's in an attempt to list the necessary elements of just cause, have not been met in the instant matter. Daugherty's tests require that rules be made known, that they be reasonable, that the employer conduct an investigation, that the investigation be fair and objective, that proof be substantial, that penalties be applied evenhandedly, and that the seriousness of the alleged misconduct and the employee's record of service with the Employer be taken into account. *Enterprise Wire Co.,* 46 LA 359 (Daugherty 1966) Should

any one of these requirements not be met, the Association argues, the grievance must be sustained.

In addition, the Association asserts that the District has failed to meets its burden to show conduct violating the School Code which would mandate discharge, *i.e.*, immorality and persistent and willful violation of, or failure to comply with, school laws of the Commonwealth of Pennsylvania, including official directives and established policy of the board of directors). Prior to his suspension and discharge, the District failed to consider his work record and his fitness to continue teaching.

The Association argues that the District did not give the Grievant full warning of the possible disciplinary consequences of his conduct. After his first DUI arrest, the Grievant spoke to the then Superintendent, the Human Resources Director and the then District solicitor, regarding the incident. Afterwards, the Grievant continued to work as a school principal and no employment consequences were imposed. (NT-I-113) At the time, he was told that he was not going to lose his job. The District did not request that the Grievant complete a PDE Form 6004 after his first DUI arrest. In January 2014, after the Grievant's second DUI arrest, the District did require the Grievant to complete a PDE Form 6004, and he complied.

The Association points out that after the Grievant's second DUI arrest in January 2014, he was not suspended. It maintains that the Grievant believed that he need only complete the explicit written instructions regarding the District's EAP in the January 31, 2014 letter to remain employed at the District. (Exhibit J-4) The Association points out that the January 31, 2014 letter did not contain any conditions requiring the Grievant to fill out a separate PDE Form 6004 following a conviction or to keep the District informed with regard to the judicial outcome of his two DUI arrests. The Association points out that the requirements for filing a PDE Form 6004 as set forth on page 3 of the form, indicate that the Grievant was not required to fill out a PDE Form 6004, as he had not received two misdemeanors of the 1st degree. He had received only one misdemeanor of the 1st degree. (Exhibit J-6)[4] The Association asserts that the Grievant followed the requirements of the January 31, 2014 letter and was given no warning of the possible or probable disciplinary consequences of his conduct. Therefore, the District did not have just cause to terminate his employment.

[4] The form explains reportable offenses. (Exhibit J-3). It states, "An offense under 75 Pa.CS. §3802(a), (b), (c) or (d)(relating to driving under the influence of alcohol or controlled substance) graded as a misdemeanor of the first degree under 75 Pa.CS. §3803 (relating to grading), if the person has been previously convicted of such an offense and less than (3) three years has elapsed from the date of expiration of the sentence for the most recent offense." (Exhibit J-3) (emphasis in original). The Grievant's convictions are graded as misdemeanor for the June DUI and misdemeanor of the first degree for the January DUI. The Association argues that the Grievant's convictions did not constitute a reportable offense, which would have triggered the requirement to complete form because he was not previously convicted of a misdemeanor of the first degree.

The Association also argues that the District is guilty of disparate treatment in this matter. The Grievant testified that he was aware of various bargaining unit members who had DUIs yet were not suspended or dismissed. The Grievant referenced two bargaining unit members who he maintained had more than one DUI, yet received no discipline. (NT-I-135-138) By treating employees guilty of the same conduct differently, the District's action with regard to the Grievant does not demonstrate just cause.

The District imposed the penalty of dismissal, a penalty which the Association argues is far too severe when one considers the conduct at issue, the Grievant's work record and the fitness of the Grievant to continue teaching.

The Association points out that the Grievant has given the District years of exemplary service. He has served in the position of principal as well as teacher. He volunteers as a coach for various sports teams that his young son is involved with in the community. The Grievant has remained sober for 200 plus days and is in regular contact with his AA Sponsor, Mr. Triblehorn. Considering the Grievant's history of service and performance in the District, the Association argues that the discipline is too severe in relation to the conduct.

The Association recognizes that in determining just cause in this matter, one must look at the School Code to determine if the dismissal meets the grounds for termination under the School Code. The District has charged the Grievant with immorality under the School Code. The Pennsylvania Supreme Court has defined immorality in this context as "a course of conduct as offends the morals of a community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate." *Horosko v. School Dist. of Mt. Pleasant Township,* 6 A.2d 866, 868 (Pa. 1939) The Association notes that under § 1122 of the School Code and the case law construing it, the arbitrator must determine, based upon the facts and testimony presented, whether the alleged conduct offends the morals of the local community that the professional school employee serves. The Association maintains that the Grievant's conduct did not rise to the level of being immoral under the School Code.

The Association points to a recent decision by the Pennsylvania Commonwealth Court in which the Court reinstated a teacher with a history of DUI violations. *Blairsville-Saltsburg School District v. Blairsville-Saltsburg Education Association,* 102 A.3d 1049 (Pa. Cmwlth. 2014) After an arbitration hearing, the arbitrator made the factual determination that the three incidents "did not constitute a course or pattern of conduct sufficient to support a charge of immortality." While the Common Pleas Court vacated the award, finding that the Grievant remained a threat to school age children, the

Commonwealth Court reversed, finding the arbitrator's award did not violate a well-defined public policy. (*Id.* at 1052) The Court acknowledged the arbitrator's findings that the grievant was a recovering alcoholic who no longer drank and drove, and that he had successfully attended rehabilitation center and had learned from his mistakes. (*Id.*) The Association argues that the Grievant has remained sober and has learned from his mistakes.

The Association argues that the District failed to provide reliable evidence that the Grievant's conduct violated the morals of the local community and that failure to do so results in dismissal of the charges. *Horton,* 630 A.2d at 483; *Fort LeBoeuf Sch. Dist. & Fort LeBoeuf Educ. Ass'n.,* p. 16, Arbitrator Elliot Newman (1999).

The Association points out that only three parents contacted two administrators, Messrs. Fischer and Krakow, regarding the Grievant's DUI arrests. The Association notes that only one of the administrators lives in the District, the other one only works in the District. It asserts that the testimony that the Grievant's conduct was unacceptable in the community was based on the administrators' own personal belief that the community finds drinking and driving unacceptable behavior. No testimony was produced by parents or other unbiased parties to discuss the morals of the community.

The Association stresses the fact that the Grievant completed his EAP counseling and treatment requirements from the Center of Addictive Diseases and that he remains sober today. Further, he is in regular contact with his AA sponsor. (NT-I-139-141) The Association argues that the District failed to meet its burden to demonstrate that the Grievant's conduct violated the morals of the community and, as such, has failed to demonstrate just cause for dismissal.

To prove immorality under the School Code a district must show that the conduct at issue presents a bad example to the youth whose ideals the educator is supposed to foster and elevate. The District failed to present evidence that the Grievant's conduct is a bad example to students. There was no evidence that any students even approached the District regarding the Grievant's conduct. Despite his two DUIs, the District gave the Grievant a satisfactory evaluation, attesting to the fact that the Grievant is an effective and dedicated teacher. By failing to demonstrate how the Grievant set a bad example for his students, the District has failed to meet the third element of a charge of immorality under the School Code.

The District alleged that the Grievant's conduct constitutes "persistent and willful" violation of or failure to comply with school laws of the Commonwealth of Pennsylvania including official directives under §1122 of the School Code. The term

"persistent and willful violation of school law" has come to mean the same as "persistent negligence" because the courts have interpreted the term "school laws" so broadly that it extends to school rules, regulations, and orders of supervisor personnel. *See*, *Horton v. Jefferson County-Dubois Area Vocational Technical Sch.,* 630 A.2d 481, 484 (Pa. Cmwlth. 1993).

In determining whether a persistent and willful violation of school law has occurred, three elements must be examined: persistency, willfulness and a violation of a school law. Persistency is held to exist when the violation occurs either as a series of individual incidents or one incident carried for a substantial period of time. *See, Gobla v. Board of Sch. Directors of Crestwood Sch. Dist.*, 414 A.2d 772 (Pa. Cmwlth.1980); *Horton*, 630 A.2d at 484. Willfulness requires the presence of intention and at least some power of choice. *See, Cowdery v. Board of Educ. of Sch. Dist. of Philadelphia,* 531 A.2d 1186 (Pa. Cmwlth.1987); *Lucciola v. Commonwealth,* 360 A.2d 310 (Pa. Cmwlth.1976); *Equiv. Board of Educ. of School Dist. of Philadelphia,* 530 A.2d 1044, 1046 (Pa. Cmwlth.1987); *Horton,* 630 A.2d at 484. A violation of a school law includes a violation of a school district's rules and orders. *See, Sertik v. School Dist. of Pittsburgh,* 584 A.2d 390 (Pa. Cmwlth. Ct. 1990); *Horton*, 630 A.2d at 484.

Dismissal for persistent negligence is warranted only when a teacher fails to comply with a directive of supervisors on numerous occasions or when a single act is continued

for a period of time. *Lauer v. Millville Area Sch. Dist.*, 657 A.2d 119, 121 (Pa. Cmwlth. 1995) (citations omitted) (*Lauer*). Consequently, "there must be sufficient continuity and repetition of negligent acts to support a charge of persistent negligence." (*Id.)* Under this formulation, one cannot look solely at the employee's conduct to determine whether he has engaged in persistent negligence. This definition necessarily requires that the employer issue clear directives as a prerequisite to dismissal for reason of persistent negligence. As the *Lauer* court stated:

> Nevertheless, it is apparent that negligence alone cannot form the basis of dismissal. We conclude that the word persistent includes some manner of meaningful continuity and, in most instances, such continuity will be in the face of warnings by superiors. To conclude otherwise would certainly diminish the purpose of the statute in providing "the greatest protection possible against dismissal. *Id.* at 121 (emphasis added) (citations omitted).

The Association insists that there was no evidence of persistent and willful violation of school law or District policy.

The Statement of Charges issued by the District states that the Grievant failed to file Form PDE 6004 with the District within seventy-two hours of the DUI convictions, as required by school board policy and as directed by school district administration. The District failed to establish that the Grievant (1) had an obligation to the complete the Form 6004, or (2) that he willfully failed and refused to complete the form upon request. The

Grievant did not intentionally disregard his duty to fill out the PDE Form 6004, rather, he was not aware of the District's assertion that he had an obligation to do so.

Based on the above, the Association maintains that the District did not have just cause to suspend or dismiss the Grievant in this matter. The Association asks that the grievance be sustained and that the Grievant be reinstated without loss of income, benefits, retirement credit or seniority to the date of suspension and termination of his contract, with full back pay and reimbursement for any expenses that would not otherwise have been incurred but for the suspension and dismissal, including statutory interest thereon, as required by the Public School Code, and such other action as the Arbitrator determines just and fair under the circumstances.

**Discussion and Opinion**

The issue in this matter is whether the District had just cause to suspend and discharge the Grievant.

As acknowledged by the parties, the collective bargaining agreement contains a just cause provision but does not define just cause. Pennsylvania courts have generally held that arbitrators are free to define what "just cause" means in the absence of any

definition in a collective bargaining agreement. In the instant matter, the District argues that the standard established by the Public School Code is the standard against which the District's actions should be measured to determine whether the District had just cause in accord with the collective bargaining agreement. (*See*, *Riverview School District v. Riverview Education Association,* 639 A.2d 974 ( Pa. Cmwlth. 1994)) The Association argues that the seven tests of just cause established by Arbitrator Daugherty must be applied to determine if the District had just cause to suspend and discharge the Grievant.

Section 1122 of the School Code sets forth the reasons teachers can be discharged. Section 1122 provides that valid causes for the termination of a professional employee include "immorality" on the part of the professional employee and the "persistent and wilful violation of or failure to comply with school laws of this Commonwealth, including official directives and established policy of the board of directors; on the part of the professional employe."[5]

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[5] Section 1122. Causes for Termination of Contract.--(a) The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality; incompetency; unsatisfactory teaching performance based on two (2) consecutive ratings of the employe's teaching performance that are to include classroom observations, not less than four (4) months apart, in which the employe's teaching performance is rated as unsatisfactory; intemperance; cruelty; persistent negligence in the performance of duties; wilful neglect of duties; physical or mental disability as documented by competent medical evidence, which after reasonable accommodation of such disability as required by law substantially interferes with the employe's ability to perform the essential functions of his employment; advocation of or participating in un-American or subversive doctrines; conviction of a felony or acceptance of a guilty plea or nolo contendere therefor; persistent and wilful violation of or failure to comply with school laws of this Commonwealth, including official directives and established policy of the board of directors; on the part of the professional employe: Provided, That boards of school directors may terminate the service of any professional employe who has attained to the age of sixty-two except a professional employe who is a member of the old age and survivors insurance system pursuant to the provisions of the act, approved the first day of June, one thousand nine hundred fifty-six (Pamphlet Laws 1973). In such case the board may terminate the service of any such professional employe at the age of sixty-five or at the age at which the employe becomes eligible to receive full benefits under the Federal Social Security Act.

By letter dated August 20, 2014, from the School Board President, the Grievant learned that pursuant to the Public School Code, the School Board would be conducting a hearing on August 29, 2014 to determine whether he should be dismissed from employment from the District. The letter reads, in pertinent part, as follows:

> You are being charged by the school district administration with immorality and persistent and willful violation of or failure to comply with school laws of this Commonwealth (including official directives and established policy of the Board of School Directors) as contemplated by the Public School Code of 1949, as amended arising from your alleged commission of the following actions:
>
> - Pled guilty to driving under the influence of alcohol in violation of Pennsylvania law on July 21, 2014.
> - Conviction on July 21, 2014 for driving under the influence of alcohol in violation of Pennsylvania law on June 25, 2013 and January 25, 2014.
> - Confinement in Chester County Prison from July 21, 2014 to August 8, 2014 for driving under the influence of alcohol in violation of Pennsylvania law on June 25, 2013 and January 25, 2014.

- Failure to file PDE form 6004 with the Coatesville Area School District within seventy-two (72) hours of the aforementioned convictions as required by and in violation of the Public School Code of 1949 and /or school board policy;
- Failure to file PDE form 6004 with the Coatesville Area School District within seventy-two (72) hours of the aforementioned convictions as directed by school district administration.

(Exhibit J-6)

The Pennsylvania Commonwealth Court has set forth three elements that must be proved by an employer to establish immorality: (1) the underlying acts which it claims constitute immorality actually occurred; (2) the conduct offends the morals of the community; and (3) the conduct at issue is a bad example to the youth whose ideals the educator is supposed to foster and elevate. *Kinniry v. Abington School District,* 673 A.2d 429, 432 (Pa. Cmwlth, 1996), citing *Foderaro v. School District of Philadelphia,* 531 A.2d 570 (Pa. Cmwlth. 1987).

The Grievant was arrested for DUI twice within an eight month period. This fact is uncontested. The Pennsylvania Commonwealth Court has recognized that a

conviction of driving under the influence may constitute immorality. In *Zelno,* the Court stated found that "more than one offense for drunken driving transforms the conduct . . from a serious mistake to immoral conduct as recognized by Section 3731(e)of the Vehicle Code, 75 Pa. C. S. § 3731(e) . . ." (*Id.* at 1025)

The Association relied on the relatively recent decision by the Pennsylvania Commonwealth Court *Blairsville-Saltsburg School District v. Blairsville-Saltsburg Education Association,* 102 A.3d 1049 (Pa. Cmwlth. 2014) in which the Court reinstated a teacher with a history of DUI violations. The arbitrator made determined that the three incidents "did not constitute a course or pattern of conduct sufficient to support a charge of immorality."

It must be noted, however, that in *Blairsville*, the arbitrator found the three incidents each separated by a "***great expanse of time***, did not constitute a course of conduct sufficient to support a charge of immorality." (*Id.* at 1051) In *Blairsville*, the three incidents were separated by 13 years and 10 years. In the instant matter, the Grievant had two DUI incidents within 8 months

Both Mr. Fischer and Mr. Krakower provided testimony that the Grievant's conduct offended the morals of the community and set a bad example for the students that he is to serve. Mr. Fischer received telephone calls from three parents with students in the

high school who expressed their concern that someone who had been convicted of DUIs was teaching their children. (NT-I-26-30) Mr. Fischer explained that the District has programs in both the elementary schools and the high schools to combat drug and alcohol use. Mr. Krakower also testified that he, too, spoke with several parents regarding their concerns over the Grievant's DUI convictions. He explained that the District has educational programs to teach the students to avoid drug and alcohol use and to make the right decisions. He testified that having the Grievant back would have a negative effect on the students with regard to what the District is conveying regarding making the right decisions. Association witness, Ms. Shesko, a life-long resident of the community acknowledged on cross-examination that she would consider the Grievant's conduct "morally incorrect." (NT-I-101)

The record demonstrated that the Grievant was less than truthful with his AA Sponsor, Mr. Tribelhorn. The Grievant testified that he had driven while under the influence of alcohol on other occasions than the two for which he received the DUI violations. Mr. Tribelhorn testified that the Grievant only told him of his two DUI incidents and never told him that he had driven under the influence on other occasions. Mr. Tribelhorn does not live in close proximity to the Grievant and he and the Grievant only meet face-to-face four or five times a year. Mr. Tribelhorn relies on the Grievant being truthful with him. The fact that the Grievant neglected to inform Mr. Tribelhorn of such

serious occurrences is quite troubling. This is not the type of conduct that one expects from a professional charged with the education of minors.

The Grievant testified that he believed that the change in District administration contributed to the decision to discharge him. He failed to take responsibility for his actions and recognize that it was his actions that led to his discharge, not those of the District.

Contrary to his testimony, the record reveals that the Grievant was aware of the fact that he was obligated to keep the District informed regarding the status of his DUI arrests. Human Resources Director Ziegler credibly testified that on January 31, 2014, after the Grievant had been arrested for his second DUI violation, but had not been convicted, the parties met and signed a letter which set forth the Grievant's obligations with regard to the District's EAP. The focus of this letter was to assure the Grievant's EAP compliance which would enable his immediate reinstatement and continued employment *at that time*. This letter cannot be characterized as a comprehensive document containing all of the obligations of the Grievant with regard to the precarious position he found himself in with the District after being arrested twice for two separate DUI violations within eight months. The January 31, 2014 letter is focused on having the Grievant evaluated and assisted by the EAP. The District is given the right to all relevant information to confirm that the Grievant

is following through with EAP requirements. The letter *does not* indicate that the Grievant's job would be secure by simply following the dictates of this EAP letter. Ms. Ziegler testified that at the conclusion of the meeting, she specifically recalled reminding the Grievant that he was obligated to keep the District informed "when things change." (NT-II-11) The Grievant failed to do so.

At the time of the January 31, 2014 letter, the ultimate disposition of the Grievant's DUI charges was unknown. He had been arrested but he had not been convicted. The disposition of the two DUI charges was not known until July 2014, when the Grievant pled guilty and was incarcerated for 18 days in the Chester County Prison. When that occurred, the Grievant did not inform the District. It was only after it found out from other sources, in mid-August, that the District took action.

While the Association asserts that each of Arbitrator Daugherty's seven tests must be met to achieve just cause, in this matter, the Grievant was convicted of a criminal offense. He spent time in jail. This is not a matter of a violation of the employer's rules, it is a violation of the law of the Commonwealth. The law is known, it is reasonable, there was no need for the District to conduct an investigation as the charges against the Grievant were proven in a court of law. Although the Grievant testified that other teachers had received DUI's without being discharged, no evidence was presented that the Grievant was

disparately treated. The Grievant's conduct was very serious and did rise to the level of immorality. He not only received two DUIs, for which he served jail time and was placed on probation and given community service, he admitted that he drove under the influence on other occasions that he did not report to his AA sponsor, he denied knowing that he was to keep the District informed of changes in his situation or that he was to complete the required forms, and he failed to take full responsibility for his situation. For these reasons, the District had just cause to suspend and terminate the Grievant and the discipline, as assessed, will not be disturbed.

**Award**

Based on the record as a whole and for the reasons discussed, the grievance is denied.

John M. Skonier
Arbitrator

August 15, 2016