IN THE MATTER OF ARBITRATION BETWEEN	)	
JOSEPH E. LANDIS,	)	**Teacher Dismissal**
Teacher,	)	
and	)	**Marvin F. Hill, Jr. Arbitrator/Hearing Officer**
THE BOARD OF EDUCATION OF NOKOMIS COMMUNITY UNIT SCHOOL DISTRICT NO. 22,	)	
Employer.	)	**Hearing Date: March 9, 2005**

APPEARANCES

For the Grievant: Ralph H. Lowenstein
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For the Employer: Douglas G. Griffin
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I. BACKGROUND, FACTS, AND STATEMENT OF JURISDICTION

The significant facts in this case are not in dispute. Joseph Landis, a tenured teacher and the Grievant in this case, was employed by the Nokomis Community Unit School District No. 22 since 1989. (R. 185). For the last four years, he has taught kindergarten through fourth grade, P.E., Art and Library (R. 185).

In addition to teaching, the Grievant was also a coach for a variety of sports. Most recently, he has been the head junior-high school and high-school softball coach (R. 186). As a coach, his accomplishments are noteworthy, as attested to by a number of students who testified at the hearing.

The seven member Board of Education of Nokomis Community Unit School District No. 22 ("Board") operates the public school system in Nokomis, in Montgomery County, Illinois. The District serves approximately 500 students at three attendance centers for pre-kindergarten through grade 12. The Board of Education employs two administrators, Superintendent Jean Chrostoski, who also serves as principal for the middle school/high school, and James Rupert, Principal for the two elementary attendance centers, labeled the North School and the South School.

On Saturday, April 9 (Spring Break), 2004, the Grievant's team had a softball game. The game was over at about 6:00 p.m. After the game, the Grievant locked everything up at school, went home and showered and ate. He then went to visit some friends at a cabin on a lake outside of town (R. 188-189).

After leaving his friends, the Grievant went back into town and stopped at a local tavern called the Corner Cave. He met some friends at the tavern and had some drinks. He left the tavern at about 2:45 a.m. (R. 189-190).

Upon leaving, the Grievant was stopped by a Nokomis patrolman, William Kinney, after Mr. Kinney observed him driving on the wrong side of the street, and turning without signaling. The Grievant staggered toward the officer when he got out of his truck, causing Officer Kinney to administer field sobriety tests, which he failed, prompting his arrest for driving under the influence of alcohol. The Grievant was placed in the squad car, and taken to the Nokomis police department headquarters where, incident to his arrest, a search found him in possession of a vial containing a brass pipe and a vial containing a teaspoon's worth of cannabis (R. 191).

Although the Grievant had cooperated with the arresting officer until the booking process, the Grievant became angry and uncooperative during booking. On one occasion during booking, he retook possession of his marijuana and dope pipe, and tried to conceal them in the holding cell. In addition, the Grievant, who had already volunteered he was a teacher, told Officer Kinney that if he (Landis) ever had his (Kinney's) kids in his class, he would make it hard on them. (Tr. 21-23). Days later, the Grievant attempted to apologize to Officer Kinney.

Because the Grievant refused a breath analysis test at the police station, the level of his intoxication from alcohol was never determined, although the Grievant admitted to the officer having 8 to 10 beers before driving home. The Grievant was released on bail, provided by one of the hearing witnesses, Kevin O'Malley, and returned home about 4:00 a.m.

Later that day, the Grievant went to Superintendent Chrostoski's home to speak to her about his arrest. The Grievant informed her of his arrest and the charges against him. Ms. Chrostoski

instructed him not to attend the varsity softball game to be played Monday, indicating she would need to consult the school district's attorney for guidance on how to handle the situation.

On Tuesday, April 14, 2004, a report of the Grievant' arrest and the criminal charges against him appeared in the Nokomis Free Press – Progress (Bd. Ex. 1). The arrest and charges were also general knowledge, and a topic of questioning and debate, within the school, as well as the community. (Tr. 36-37). The Grievant was placed on paid administrative leave, pending the Board of Education's next regular meeting on April 20, 2004, the agenda for which included a closed, executive session of the Board "to discuss employment/dismissal of personnel." (Board Ex. 2).

After learning of the impending Board meeting, several students on his varsity softball team contacted the Grievant, and he invited the team and any parents of the team members interested in supporting him to a cookout at his home. (Tr. 109, 142). According to several students who attended, the Grievant apologized to the team and parents for letting them down, acknowledging the "profound, negative impact" his conduct had. (Tr. 158-159, 178).

A meeting of the Board of Education was held on April 20, 2004. Normally, two people attend a meeting. On this date, 80 people came to the meeting. Of these 12-13 spoke. All but three supported Landis (R. 37-39, 89-91). According to the news report, "The greatest majority of them in attendance were there to show their support for teacher and coach, Joe Landis" (Bd. Ex. 5).

In spite of the support, the Grievant was dismissed from his coaching duties (Bd. Ex. 3). He was also placed on administrative leave from his teaching duties (R. 40).

On November 17, 2004, the Grievant entered a plea of guilty to driving under the influence and possession of less than 2.5 grams of cannabis charges. Both charges are misdemeanors. He received supervision, had to pay a fine, obtain an alcohol assessment and attend classes (Bd. Ex. 12, 13). At the time of the hearing, he had completed most of the requirements of his supervision (R. 195).

On December 2, 2004, the Board of Education met and approved a Notice dismissing the Grievant from his teaching position based upon his pleas to the driving under the influence and cannabis possession charges. The Board, by a 5-2 vote, found "that the charges, reasons and causes for dismissal are irremediable." (Bd. Ex. 11). In particular, the Bill of Particulars noted "Such notoriety has already had a significant impact on the school system, and if he were allowed to continue in employment it would undermine his position as a role model to students, interfere with the Board's ability to properly discipline students for drug and alcohol related misconduct, create perceptions of disparate treatment between students and teachers, and greatly impede Mr. Joseph E. Landis' ability to maintain discipline and otherwise adequately fulfill his role as a teacher in and for the District." (Bd. Ex. 11).

On December 6, 2004, the Grievant requested a hearing pursuant to §24-12 of the Illinois School Code. On March 9, 2005 the parties appeared through their representatives at a hearing held

at the Nokomis Community School District offices in Nokomis, Illinois. Exhibits and testimony were entered into the record which was transcribed by Laurie Mancione, CSR.

RELEVANT STATUTORY AUTHORITIES

105 ILCS 5/10-22.4 Dismissal of Teachers

> Sec. 10-22.4. Dismissal of teachers. To dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause, to dismiss any teacher who fails to complete a 1 year remediation plan with a "satisfactory" or better rating and to dismiss any teacher whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Section 24-10 to 24-15, inclusive. Temporary mental or physical incapacity to perform teaching duties, as found by a medical examination, is not a cause for dismissal. Marriage is not a cause of removal.

105 ILCS 5/24-12 Removal or dismissal of teachers in contractual continued service

> Sec. 24-12. Removal or dismissal of teachers in contractual continued service. If a dismissal or removal is sought for any other reason or cause, including those under Section 10-22.4 [105 ILCS 5/10-22.4], the board must first approve a motion containing specific charges by a majority vote of all its members. Written notice of such charges shall be served upon the teacher within 5 days of the adoption of the motion. Such notice shall contain a bill of particulars. No hearing upon the charges is required unless the teacher within 10 days after receiving notice requests in writing of the board that a hearing be scheduled, in which case the board shall schedule a hearing on those charges before a disinterested hearing officer on a date no less than 15 nor more than 30 days after the enactment of the motion. The secretary of the school board shall forward a copy of the notice to the State Board of Education. Within 5 days after receiving this notice of hearing, the State Board of Education shall provide a list of 5 prospective, impartial hearing officers. The hearing officer shall hold a hearing and render a final decision. The teacher has the privilege of being present at the hearing with counsel and of cross-examining witnesses and may offer evidence and witnesses and present defenses to the charges. The hearing officer may issue subpoenas and subpoenas duces tecum requiring the attendance of witnesses and, at the request of the teacher against whom a charge is made or the board, shall issue such subpoenas, but the hearing officer may limit the number of witnesses to be subpoenaed in behalf of the teacher or the board to not more than 10. All testimony at the hearing shall be taken under oath administered by the hearing officer. The hearing officer shall cause a record of the proceedings to be kept and shall employ a competent reporter to take stenographic or stenotype notes of all the testimony. The costs of the reporter's attendance and services at the hearing shall be paid by the State Board of Education. Either party desiring a transcript of the hearing shall pay for the cost thereof. If in the opinion of the board the interests of the

school require it, the board may suspend the teacher pending the hearing, but if acquitted the teacher shall not suffer the loss of any salary by reason of suspension.

Before setting a hearing on charges stemming from causes that are considered remediable, a board must give the teacher reasonable warning in writing, stating specifically the causes which, if not removed, may result in charges; however, no such written warning shall be required if the causes have been the subject of a remediation plan pursuant to Article 24A [105 ILCS 5/24-1 et seq.]. The hearing officer shall consider and give weight to all of the teacher's evaluations written pursuant to Article 24A [105 ILCS 5/24-1 et seq.]. The hearing officer shall, within 30 days from the conclusion of the hearing or closure of the record, whichever is later, make a decision as to whether or not the teacher shall be dismissed and shall give a copy of the decision to both the teacher and the school board. The decision of the hearing officer is final unless reviewed as provided in Section 24-16 of this Act [105 ILCS 5/24-16]. In the event such review is instituted, any costs of preparing and filing the record of proceedings shall be paid by the board.

If a decision of the hearing officer is adjudicated upon review or appeal in favor of the teacher, then the trial court shall order reinstatement and shall determine the amount for which the board is liable including but not limited to loss of income and costs incurred therein.

Any teacher who is reinstated by any hearing or adjudication brought under this Section shall be assigned by the board to a position substantially similar to the one which that teacher held prior to that teacher's suspension or dismissal.

105 ILCS 5/27-12 Honesty, kindness, justice and moral courage

Sec. 27-12. Honesty, kindness, justice and moral courage. Every public school teacher shall teach the pupils with honesty, kindness, justice, discipline, respect for others, and moral courage for the purpose of lessening crime and raising the standard of good citizenship.

625 ILCS 5/11-501 Driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof

Sec. 11-501. Driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof.

(a) A person shall not drive or be in actual physical control of any vehicle within this State while:
  (1) the alcohol concentration in the persons' blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2;
  (2) under the influence of alcohol;

(3) under the influence of any intoxicating compound or combination of intoxicating compounds to a degree that renders the person incapable of driving safely;

(4) under the influence of any other drug or combination of drugs to a degree that renders the person incapable of safely driving;

(5) under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds to a degree that renders the person incapable of safely driving; or

(6) there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis listed in the Cannabis Control Act, [1] a controlled substance listed in the Illinois Controlled Substances Act, [2] or an intoxicating compound listed in the Use of Intoxicating Compounds Act. [3]

(b) The fact that any person charged with violating this Section is or has been legally entitled to use alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, shall not constitute a defense against any charge of violating this Section.

ILCS 720 550/4. Possession of cannabis – Violations - Punishment

Sec. 4. It is unlawful for any person knowingly to possess cannabis. Any person who violates this section with respect to:

(a) not more than 2.5 grams of any substance containing cannabis is guilty of a Class C misdemeanor.

II. ISSUE FOR RESOLUTION

The issue for resolution is whether under the Illinois statute the termination of Joseph Landis' teaching contract was for just cause, and if not, what shall be the remedy.

III. POSITION OF THE BOARD OF EDUCATION

The position of the Board of Education, as outlined in its post-hearing brief, is summarized as follows:

A. The Grievant's Conduct Constitutes Legal Cause For Dismissal

The Board first asserts the Grievant's possession of, and conviction for possession of marijuana, as well as DUI, conflicts with, undermines, and interferes with his duty, and that of "every public school teacher (to) teach the pupils honesty, kindness, justice, discipline, respect for

others, and moral courage for the purpose of lessening crime and raising the standard of good citizenship." (105 ILCS 5/27-12).

The Board points out the Grievant's criminal acts have become general knowledge within the District, and have had a deleterious effect on the school system. Moreover, he can no longer adequately fulfill his role as a teacher because of the mixed message that his continued employment would send to students, staff and the public at large.

The Board further asserts that the charges against the Grievant constitute legal cause for dismissal under Section 10-22.4 and 24-12 of the School Code. For authority, the Board cites McCullough v. Illinois State Board of Education by Feuille, 204 Ill.App. 3d 1082, 150 Ill. Dec. 430, 433, 562 N.E. 2d 1233, 1236 (5th Dist. 1990. In that case, the Appellate Court rejected arguments that conviction for failure to pay income tax was not legal "cause" for dismissal under §10-22.4, holding:

> 'Cause' to justify dismissal has been defined as: some substantial shortcoming which renders continuance in employment detrimental to discipline and effectiveness of service; something which the law and sound public opinion recognize as a good reason for the teacher to no long occupy his position.

The Board also notes the following cases as authority:

Chicago Board of Education v. Payne, 102 Ill. App. 3d 741, 58 Ill. Dec. 368, 430 NE 2d 310 (1st Dist 1981)(finding cause for a teacher's conviction for possession of marijuana); Scott v. Board of Education, 20 Ill. App. 2d 292, 156 NE 2d 1(1959)(finding cause in conviction for public intoxication); and McBroom v. Board of Education, District 205, 144 Ill. App. 2d 463, 98 Ill. Dec. 864, 494 NE 2d 1191 (2d Dist. 1986)(finding cause in a conviction of theft, in finding McCullough's conviction was legal cause for his dismissal). See also, Younge v. Board of Education of City of Chicago, 338 Ill.App. 3d 522, 273 Ill.Dec. 277, 788 NE 2d 1153 (1st Dist. 2003),(holding evidence two teachers possessed and were under the influence of marijuana while teaching was "cause" for their dismissal).

B. The Grievant's Conduct Was Irremediable *Per Se*

The Board rejects the Grievant's argument that he was entitled to a notice to remedy pursuant to Section 24-12. The Board discounts his claim primarily because it found the causes to be irremediable in its notice of dismissal (Bd. Ex. 11). The Board's decision followed the dicta of the Court in Younge, *supra*, 273 Ill.Dec. 277, 285, 788 NE2d 1153, which held that possession and being under the influence of marijuana was irremediable conduct, even without any criminal conviction.

Specifically, the Board, citing McBroom, *supra*, had this to say regarding remediable conduct:

> [R]emediable conduct is misconduct by a teacher, in her ordinary course of duties, which, if called to her attention, can ordinarily be remedied. Thus, such conduct has been applied to a variety of fact situations in which the complained of conduct has concerned either deficiencies in teaching performance [citation] or corporal punishment [citation].
>
> We hold the concept was not intended to apply to criminal conduct which has no legitimate basis in our society. Teachers, as leaders and role models, with their education and background, have the duty to implant basic societal values and qualities of good citizenship in their students. To claim that such conduct was remediable distorts the thrust and purpose of the rule. Criminal activity of this nature is conduct which cannot be remedied by a warning. McBroom, 144 Ill.App.3d at 473-74, 98 Ill.Dec. 864, 494 NE2d at 1198.

The Board explained that because the Grievant's conduct was, as these cases hold, irremediable *per se*, a formal warning to remediate was not required. Fadler v. Slate Board of Education, 153 Ill.App.3d 1024, 106 Ill.Dec. 840, 844, 506 NE2d 640, 644 (5 Dist. 1987).

In summary, the Administration submits it was regrettably placed in a position of having to deal with the consequences of the Grievant' poor choices. To this end the Grievant' substantial shortcomings are a detriment to the operation of the school. His dismissal should therefore be affirmed.

IV. POSITION OF THE GRIEVANT

The position of the Grievant, as outlined in his post-hearing brief, is summarized as follows:

A. The Circumstances In This Case Favor The Grievant

The Grievant first asserts that his conduct should not result in termination. He stressed the numerous factors that he feels favors his case. For example, the incident occurred on a weekend during a school vacation. The incident did not occur on school premises. No students were involved. He was not involved in an accident and he did not resist arrest or attempt to flee.

Furthermore, the Grievant asserted that he has never used alcohol or drugs during the school day or at a school event. He has never used drugs or an illegal substance with a student. This is the first and only time that he has ever been arrested.

The offenses to which the Grievant plead guilty and for which he received supervision, were both misdemeanors. The possession offense involved less than 2.5 grams of cannabis (Bd. Ex. 12). To put this in perspective, this is approximately a teaspoonful.

The Grievant pointedly noted that this is a classic case of a good teacher and a good man being involved in a single incident of conduct outside the work place, which did not involve a student. This single incident should not precipitate the end of his teaching career.

B. Under The Nexus Test, The Grievant's Conduct Does Not Merit Dismissal

The Grievant asserts that the Illinois Courts have chosen to adopt the nexus test. Chicago Board of Education v. Payne, 102 Ill.App.3d 741, 430 N.E.2d 310 (1981). This theory essentially measures the affect of the out-of-workplace conduct on the ability of a teacher to effectively do his or her job. It is a balancing of interests and also takes into consideration community standards. Dismissing the "Immoral" Teacher for Conduct Outside the Workplace – Do Current Laws Protect the Interests of Both School Authorities and Teachers? Jason R. Fulmer, 31 Journal of Law and Education 271 (2002).

The Grievant went on to cite cases from other jurisdictions as supporting his position. In Turk v. Franklin Special School District, 640 S.W.2d 218 (Sup. Ct. Tenn. 1982), a teacher was arrested for driving under the influence and plead guilty. The chancellor (hearing officer) who heard the case found that Mrs. Turk was a capable teacher who was viewed as such by other teachers, students and parents. There was no showing that the conviction for DUI would have an adverse impact on her ability to teach. She was ordered reinstated after the Court applied the nexus test.

In Stanback v. Summitt, 1995 WL 370241 (Tenn. Ct. App., 1995), a drivers education teacher was convicted of driving under the influence and had his license revoked as a consequence. When it discovered the offense, the Board dismissed him. The chancellor ordered his reinstatement and the Appellate Court affirmed.

The case of Kibbe v. Elida School Dist., 128 N.M. 629, 996 P.2d 419 (1999), bears some striking similarities to this case. Kibbe had been a teacher who also coached basketball. He was arrested for driving under the influence of alcohol and was terminated. But the Court found that there was no evidence that Kibbe's actions had an affect on his competence as a teacher and coach. Kibbe was reinstated.

In Board of Trustees v. Judge, 50 Cal.App.3d 920, 123 Cal.Rptr. 830 (1975), a teacher was convicted of cultivation of a single marijuana plant which was a felony. The Court held that all felonies were not of equal seriousness and that the circumstances of this particular offense did not constitute moral turpitude, nor did the mere fact of the conviction require dismissal.

In Rogliano v. Fayette County Board of Education, 176 W.Va. 700, 347 S.E.2d 220 (1986), a teacher was dismissed following his arrest for possession of marijuana at his home. Applying the nexus test, the Court found that there was no evidence that his misconduct affected his teaching responsibilities. The Court held that since the evidence showed he was an above-average teacher, who was well liked by his students, the misconduct occurred in private and the offense was only a

misdemeanor, cause did not exist for dismissal. Also see VonDurjais v. Board of Trustees, 83 Cal.App.3d 681, 148 Cal.Rptr. 192 (1978).

The Grievant asserts that, in light of the aforementioned cases, the Board has failed to prove by a preponderance of the evidence a nexus between the his convictions and his ability to teach. This is particularly true in view of his excellent teaching record.

C. District Rules Have Been Unevenly Applied

The Grievant asserts that the District has conveniently skirted its own written rules pertaining to its employees. (Teacher's Ex. 5). With regard to Rule 20 (an employee who commits a felony may be unsuitable for school employment), the Grievant reiterated that his charges were misdemeanors. No mention is made in the rules about conviction of a misdemeanor.

The Grievant next cited Rule 18. Rule 18 prohibits an employee from working under the influence of alcohol or drugs. It also prohibits employees from consuming alcohol during the school work day. The school work day for teachers is from 8 a.m. until 4 p.m. In October 2004 the Superintendent, the Principal and several teachers attended a curriculum meeting in Carlyle. The second day of the meeting ended at approximately 1:30 p.m. and the Superintendent took the teachers, herself and the Principal across the street to a bar where she bought drinks for everyone. She and the Principal both had alcoholic drinks and the Principal drove home.

Despite this incident, no discipline was meted. The Grievant noted that if consistent treatment were truly the issue, other teachers and administrators who violate the clear rule on alcohol consumption during the work day would be disciplined.

D. Even The Marijuana Charge Was Only A Misdemeanor

The Grievant strenuously reminded all that his drug offense was a Class C misdemeanor, the lowest level of misdemeanor offenses. He went on to assert that there is no legislation that would indicate that non-work time possession of a small quantity of cannabis by a teacher, which does not involve a student or the workplace, violates any strong public policy. As an example, the Grievant pointed to 105 ILCS 5/21-23a(a), which lists offenses that result in revocation of a teaching certificate. Specifically exempted from this penalty is a conviction under Section 4(a) of the cannabis Control Act (720 ILCS 550/4(a)), the offense for which he was convicted. If the public policy against possession of a small quantity of cannabis was so strong, why would the legislature allow a teacher to continue teaching in this state?

E. The Drug Cases Cited By The Board Are Distinguishable

The Grievant took issue with the drug cases cited by the Board because they involve fact patterns that are distinguishable from the instant case. In Younge v. Board of Education, 338 Ill.App.3d 522, 788 N.E.2d 1153 (2003), two teachers were dismissed for being under the influence of marijuana while at school. One of them first refused to go to the hospital for drug testing and then attempted to evade the testing by drinking large quantities of water. Both violated specific board policies, particularly being at school while under the influence of drugs. Because that case involved on-premises activities, as opposed to non-work conduct, the case has no relevance to Mr. Landis' situation.

In the other case cited by the Board, Chicago Board of Education v. Payne, 102 Ill.App.3d 741, 430 N.E.2d 310 (1981), the teacher was arrested for possession of a small quantity of marijuana. He plead guilty and received probation. The school district apparently was unaware of this arrest and conviction.

A couple of years later, Payne was once again arrested for possession of marijuana. This time he also had cocaine in his possession. The second arrest generated some newspaper articles. At this point, the school district learned of the earlier drug conviction and moved to dismiss him.

The Grievant specifically pointed out the fact that in Payne, there were two separate offenses, including one involving possession of cocaine. Unlike his own case, there was a proven record and likelihood of recurrence. It was not an isolated incident.

F. The Conduct Was Remediable

The test for determining remediability was stated in the well-cited case of Gilliland v. Board of Education, 67 Ill.2d 143, 365 N.E.2d 322 (1977). It is a two-pronged analysis. First, the Board must prove that the conduct resulted in damage to the students, faculty or school. It must then show that the conduct resulting in the damages could not be corrected if warning had been given.

While the Grievant acknowledges his arrest and conviction is widely known in the community, he asserts that the Board offered no evidence that this would have an affect on his ability to teach. In fact, the evidence was just the opposite. After his arrest, 80 people showed up at a Board meeting, most of whom were there to support him (R.86-91, Bd. Ex. 5). When he was dismissed, 12 people came to the Board meeting to ask the Board to reconsider its action (R. 93-96, Bd. Ex. 6).

Many of the Grievant's supporters testified on his behalf at the hearing. Among them were; Nancy Hagemeier, teacher (R. 120), Jane Miles, teacher (R. 133), Sarah Singler, student (R. 114), Robin Quattlander, student (R.181), Bill Bourke, parent (R. 144), Kevin O'Malley, parent, (R. 147), Cindy Meiners, parent (R.155), and Elizabeth Huber, parent (R. 160).

By contrast, the Grievant pointed to the lack of proof from the Board that damage had been done to the students, faculty or school. The only testimony was from the Superintendent who testified that there was a great deal of talk in the community and publicity in the newspaper.

The Grievant concluded by asserting that the Board failed to prove a substantial nexus between the non-work conduct involved in this case and the his ability to continue teaching in the district. And even assuming that the charges constitute cause for dismissal, the Board has failed to prove that they are irremediable.

For all the reasons noted above, Mr. Landis requests that his position be sustained in full and he be returned to his former status as teacher and coach.

V. DISCUSSION

As noted, the facts in this case are not in dispute. Therefore, the only question to be decided is whether the cause(s) for discharge was irremediable, thus warranting immediate dismissal without a written warning, or remediable warranting a written warning before imposition of discipline. See, *e.g.*, Board of Education v. Harris, 218 Ill. App. 3d 1017, 1022, 578 N.E.2d 1244, 1248 (1991).

A. Introduction – An Illinois Primer On Remediability

The Legal Standard Applicable in Teacher Termination Cases – In *Rosemary Hegener v. Board of Education of the City of Chicago*, 208 Ill.App.3d 701, 724, 567 N.E.2 566, 153 Ill.Dec. 608 (1991), the Appellate Court for the First District, reflecting the law in this area, observed:

> In order to encourage experienced and able teachers to remain within the educational system and to insure that rehiring decisions will be based on merit and not upon political, partisan or capricious reasons, the School Code provides for removal of tenured teachers only for cause. (Ill. Rev. Stat. 1987, ch 122, par. 34-85; Szabo v. Board of Education of Community Consolidated School Dist. 54 (1983), 117 Ill.App. 3d 869, 873, 454 N.E.2d 39, 42.).

The court went on to discuss the criteria outlined in the statute:

> Though the School Code does not define "cause," section 10 –2.4 of the Code does provide some guidance by providing for dismissals of teachers for "incompetency, cruelty, negligence, immorality or other sufficient cause * * * ." (Emphasis added.). (Ill.Rev. Stat, ch 122, par. 10 -22.4.). Additional guidance may be found in case law, which has defined "cause" as "'some substantial shortcoming which render[s] continuance in * * * office or employment in some very way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as good cause for * * * not

longer occupying the place.'" (*Jepsen v. Board of Education of Community School District No. 307* (1958), 19 Ill.App.2d 204, 207, 153 N.E.2d 417, 419, quoting *Murphy v. Houston* (1928), 250 Ill.App. 385, 394.). Case law further requires that the conduct which forms the basis for claiming cause must bear some relationship to a teacher's ability to perform her job. (*Chicago Board of Education v. Payne* (1981), 102 Ill.App.3d 741, 747, 430 N.E.2d 310, 315.). The School Board has the right in the first instance, to determine what constitutes cause, using the best interest of the school as a "guiding star." *Payne*, 102 Ill.App.3d at 747. 430 N.E.2d at 314.

When conduct which forms the basis of the termination is remediable, the statute requires that the Board of Education first give the teacher "reasonable warning in writing, stating specifically the causes which, if not removed, may result in charges." (Ill.Rev.Stat. 1987, ch. 122, par. 34--85). A failure to provide such a warning requires a reversal. *Hegener*, at 725.

Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622* (1977) – Facts In Search Of A Theory.** Under Illinois case law, a teacher's conduct is irremediable if it (1) has caused significant damage to students, the faculty, or the school, and (2) could not have been corrected even if superiors had given the teacher the statutorily prescribed warning. *Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622* (1977), 67 Ill. 2d 143, 153, 365 N.E.2d 322, 326; *Parkman*, 160 Ill. App. 3d at 776, 513 N.E.2d at 849; *Board of Education of School District No. 131 v. State Board of Education (Slavin)* (1983), 99 Ill. 2d 111, 119-21, 457 N.E. 2d 435, 439-40. However, subsequent cases have seen at least two refinements of the *Gilliland* irremediability test. First, individual acts, separately remediable, may be irremediable when considered in totality; they must have long continued, and a court may consider whether the cause for dismissal is itself irremediable and whether the teacher demonstrated willingness to correct the conduct. (*Parkman*, 160 Ill. App. 3d at 779, 513 N.E.2d at 851.) ***Second, criminal and immoral conduct arguably has been held to be irremediable per se regardless of the test. *McBroom v. Board of Education of District No. 205* (1986), 144 Ill. App. 3d 463, 474, 494 N.E.2d 1191, 1198. See also, Younge v. Board of Education of City of Chicago, 338 Ill.App. 3d 522, 273 Ill.Dec. 277, 788 NE 2d 1153 (lst Dist. 2003), where the court gave a "nod" to those cases that synthesized and crystallized the dicta that had been codified by the legislature holding that such conduct was irremediable *per se;* Board of Education v. Harris, 218 Ill. App. 3d 1017, 1023, 578 N.E.2d 1244, 1248 (1991) (teacher's criminal conduct is irremediable *per se* regardless of test); Board of Education of Sparta Community Unit School District No. 140 v. Illinois State Board of Education, 217 Ill. App. 3d 720, 729, 577 N.E.2d 900, 905 (1991) (second prong of test is not appropriate where conduct in question is "immoral conduct"); McCullough v. Illinois State Board of Education, 204 Ill. App. 3d 1082, 1090, 562 N.E.2d 1233, 1238 (1990) (second prong of test is inapplicable to situations involving the criminal conduct of a teacher); Fadler v. State Board of Education, 153 Ill. App. 3d 1024, 1028-29, 506 N.E.2d 640, 644 (1987) (second prong of test is not appropriate in situations involving immoral conduct by a teacher that "has no legitimate basis in school policy or society"); McBroom v. Board of Education of District No. 205, 144 Ill. App. 3d 463, 473, 494 N.E.2d 1191, 1198 (1986) (second prong of test is inapplicable to situations involving criminal conduct of a teacher).

B. The Second Part of Gilliland is Inapplicable Where Criminal Conduct is Involved

Where does current case law leave the Grievant?

Unfortunately, the Grievant relied heavily on the Gilliland test. It was his hope that the outpouring of support he received from faculty peers and students would indicate that his behavior has not damaged students, faculty, or his school.

Gilliland, however, is arguably obviated where it concerns criminal behavior that has a nexus to the goals of the District. Thus, in this case the Grievant's arguments that he is still capable of effectively discharging his duties as a teacher in this District are unavailing altogether. This is not Marvin Hill's rule or sense of industrial justice but, rather, as explained *infra*, the declarations of the Illinois courts.

C. Possession Of Marijuana (Off School Premises) Has Been Held As Cause

There is no Illinois case specifically addressing the question whether off-duty possession of a small quantity of marijuana, coupled with a DUI, is sufficient cause to justify dismissal. Illinois courts, however, have recognized that criminal conduct by a teacher or other persons holding public trust diminishes their effectiveness and warrants dismissal. McBroom, *supra*, 98 Ill.Dec. at 868.

The precedent that arguably puts this case over-the-top in favor of the Board is Chicago Board of Education v. Payne, 102 Ill. App. 3d 741, 430 N.E.2d 310 (1981), although not on all fours with Landis. In Payne, a teacher was arrested for, and pled guilty to, possession of marijuana for which he received a sentence of probation. After the teacher was arrested a second time, for possession of marijuana and a controlled substance, this information came to the attention of school officials from a newspaper article. Although the criminal conduct there did not involve students or occur on the school's premises, the Payne court held that the teacher's possession of marijuana was irremediable conduct for which a warning would not have remedied the damage:

> We are aware of the special position occupied by a teacher in our society. As a consequence of that elevated stature, a teacher's actions are subject to much greater scrutiny than that given to the activities of the average person. ***We do not doubt that knowledge of a teacher's involvement in illegalities such as possession of marijuana would have a major deleterious effect upon the school system and would greatly impede that individual's ability to adequately fulfill his role as perceived by the Board.*** Payne, 102 Ill. App. 3d at 748, 430 N.E.2d at 315 (emphasis mine).

I do not read Payne as relying on the number of times that a teacher is found to be in possession of marijuana, although a reasonable person could find otherwise (there was, after all, two instances in Payne). The infirmity in Mr. Landis' case is the fact of his possession of illegal drugs,

conduct that the Payne court found impedes one's ability to function as an educator and role model for students. Indeed, with respect to the sufficiency of the evidence to establish cause, in Payne the court found:

> **[A] teacher's possession of even a small quantity of marijuana would, once it became a matter of general knowledge, have a major adverse impact upon the teacher's students and fellow teachers.** 102 Ill. App. 3d at 747.

The Board found this to be the case in Mr. Landis' case, and I cannot assert otherwise.

D. More Is Involved Than Mere Possession of Marijuana

In rendering this decision it must be remembered that more is involved than a mere off-duty possession of marijuana by an elementary school teacher. Mr. Landis was charged with DUI, which he plead guilty. Moreover, the Grievant, while in custody, informed the arresting officer that as a teacher he could make things difficult for the officer's children. The Grievant's statements to the Officer, who at all times was simply doing his job, are outrageous and have no place in any community. The comments clearly have a deleterious effect upon the school system and the community. Sad to say, Mr. Landis' honesty and ethical values are called into question when he threatens to make things difficult for an arresting officer's children. By all accounts it is an abuse of his position with the school district, as alleged by the Board in its Motion to Dismiss (Er. Ex. 11).

There is more. At the hearing the Grievant offered no explanation whatsoever regarding the facts surrounding his possession. How did the Grievant come about to possess *this amount* of marijuana and a pipe? Presumptively, it is not sold in this small quantity. Who was his source? A colleague? Student? Was this the first time he used marijuana? Did he have it with him at the softball game? Once the Board demonstrated the Grievant was in possession of marijuana, any mitigating or explanatory factors should have been offered by Grievant. Nothing was forthcoming regarding the possession issue, making it difficult (if not impossible) to find any mitigation.

E. Mr. Landis' 105 ILCS 5/21-23a(a) Argument Regarding His Teacher Certification

What of the Grievant's 105 ILCS 5/21-23a(a) argument? Counsel for Mr. Landis points to this section which lists offenses that result in revocation of a teaching certificate. Specifically exempted from this penalty is a conviction under Section 4(a) of the cannabis Control Act (720 ILCS 550/4(a)), the offense for which he was convicted.

The easy answer regarding this argument is that the possible revocation of Grievant's teaching certificate was not in play at the time of the hearing. Whether Mr. Landis' teaching certificate will be lifted is yet to be determined. At any rate, the statute is not dispositive of the issue

before me, specifically whether the Grievant's conduct is irremediable. As the parties know, a teacher's conduct may be irremediable in one district and not another, unnamed district.

F. The Board Acted Appropriately In Every Respect

In the alternative, if the conduct in question were not irremediable *per se* and the Gilliland test is "in play," the result would be the same.

Under Illinois case law the Board has broad discretion to determine whether the Grievant was capable of being an effective teacher, given the enormous amount of public attention this case received. The issue is not whether the teacher is capable of articulating nouns and verbs or explaining second derivatives to a calculus class but, rather, whether he can operate as an effective educator and role model for impressionable students. The Board should not be placed in the position of telling students that illegal drug and alcohol use should be avoided and (indeed, even providing for suspensions for illegal use), at the same time, defending the continued employment of an elementary school teacher convicted of the same conduct. No Board should have to blow hot and cold when it comes to illegal drugs.

To this end I cannot find that the Board acted capriciously, or that it otherwise acted arbitrarily in any way regarding the Grievant. The Board explained persuasively that it relied upon existing Policy:

> The Board of Education considers that all full-time employees accept their duties with this District as their primary responsibility. Any outside activity or employment that jeopardizes his/her professional or ethical status or interferes with the individual's ability to carry out his/her duties will be cause for discharge. (Bd. Ex. 17, Policy 4114)

Furthermore, the Board relied upon the District's Employee Rules, which prohibit both possession or use of drugs/alcohol while working, as well as providing notice that:

> [N]o employee shall engage in activities during non-school hours which intentionally causes injury or harm or attempts to cause injury or harm to other employees, children, their property, or school district or its property. Employees who commit felony offenses, or other criminal acts involving substantial risk of harm to other persons or property may be unsuitable for school employment, and are subject to discharge in the discretion of the Board. (Bd. Ex. 20, #18 & #20, p. 2).

Should the casual observer think it unfair that a single lapse in judgment (if that is what is at issue here) should bring about such harsh repercussions for the Grievant, it is important to note that he was not dismissed indiscriminately. The record shows that the Board was considerate and afforded Mr. Landis his "day in court." It took notice of the concerned citizens that came to support the Grievant at the meeting where his termination was on the agenda. Likewise, the Board went into

closed session and deliberated for one and one-half hours, indicating that the termination decision was not *a fait accompli*.

Noteworthy is this: All the Grievant needed was four votes out of seven to carry the day, but in the end his efforts, and the efforts of the community at-large that supported him, could only persuade two of the Board members to vote for his retention. Why? The process, in other words, for better or worse, worked. Whatever else may have happened here, this was certainly not a miscarriage of due process.

* * *

It is always a difficult decision when an Arbitrator is asked to rule in a teacher termination, especially in a case like this where a teacher's career is jeopardized and the teacher has otherwise been a good citizen. To a significant extent this case is "trumped" by Illinois case law, especially Payne (1981) and Younge (2003). While no case is directly on point, significant dicta exists indicating that *any* criminal activity is irremediable *per se*, at least any criminal activity with some discernable nexus between the teacher's conduct and the interests of the Board of Education.[1] What was before the Board, and what is now before me, is a teacher who was DUI and in possession of marijuana, albeit a small amount of marijuana in an off-duty capacity. As indicated, no explanation or specifics was offered regarding the possession of the drug, a fact that is puzzling to the undersigned Arbitrator. Moreover, the teacher's comments to the arresting officer regarding his children does not help his case. The Board has demonstrated, by at least a preponderance of evidence, that the District suffered harm when its faculty is DUI and is in possession of illegal drugs. Moreover, I am convinced that the declarations by numerous courts regarding criminal activity controls the outcome in this case, especially when the matter involves illegal drugs and the Board has demonstrated a nexus between Mr. Landis' conduct and the message the Administration has elected to send to its students and faculty. If the Board of Education is, in any way, out of step with the community, the latter will be heard from at election time. In the meantime, applying Illinois case law I cannot hold that this dismissal is in any way impermissible under the statute. The McBroom court summarized it best when it declared the following:

> We hold the concept [of remediable behavior] was not intended to apply to criminal conduct which has no legitimate basis in our society. Teachers, as leaders and role models, with their education and background, have the duty to implant basic societal values and quantities of good citizenship in their students. 98 Ill.Dec. at 871.

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[1] Notwithstanding the dicta, case law cannot stand for the proposition that any criminal activity will suffice to effect the termination of a tenured teacher. Operating a go-cart on a cull-de-sac in front of one's residence is a crime, but no reasonable Board of Education would argue that this criminal activity is irremediable per se. Hence, the nexus requirement is always in play, as I read the law.

Clear and simple, Illinois courts and hearing officers have recognized that criminal conduct by a teacher diminishes his effectiveness as a teacher and role model and, accordingly, warrants his dismissal. A decision in favor of Mr. Landis would require turning on its head the entire concept of criminal activity as grounds for dismissal for teachers as leaders and role models for children. I find no basis in law or logic to issue such a decision.

For the above reasons, the following award is issued.

VI. AWARD

In its Motion to Dismiss Mr. Landis, the Nokomis Board of Education alleged the following:

1. Mr. Joseph E. Landis has committed immoral acts by knowingly possessing cannabis in violation of state law.

2. Mr. Joseph E. Landis has violated and plead guilty to violating Section 550/4(a) of the Illinois Cannabis Control Act.

3. Mr. Joseph E. Landis' possession of cannabis and plea of guilty to violating Section 550/40(a) of the Illinois Cannabis Control Act [has] become a matter of general knowledge within the District and have a major deleterious effect upon the school system and greatly impedes Mr. Joseph E. Landis' ability to adequately fulfill his role as a teacher in and for the District.

4. Mr. Joseph E. Landis has committed immoral acts by knowingly driving under the influence of alcohol in violation of state law.

5. Mr. Joseph E. Landis has violated and plead guilty to violating Section 5/11-501(a)(2) of the Illinois Vehicle Code and has been placed on court supervision.

6. Mr. Joseph E. Landis' violation of Section 5/11-501(a)(2) of the Illinois Vehicle Code and plea of guilty have become a matter of general knowledge within the District and has a major deleterious effect upon the school system and greatly impedes Mr. Joseph E. Landis' ability to adequately fulfill his role as a teacher in and for the District.

7. Mr. Joseph E. Landis has committed immoral acts and abused his position in the district by threatening to use his position to take retribution against the arresting Officer's children.

The Board's charges against Mr. Landis are sustained in all respects. The Board acted appropriately in dismissing the Grievant for irremediable cause under Illinois case law.

Dated this 29th day of May, 2005,
at DeKalb, IL, 60115.

Marvin Hill, Jr. Hearing Officer/Arbitrator