

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

FLIN FLON SCHOOL DIVISION,

Employer,

- and -

UNITED STEELWORKERS, Local 7975

Union.

RE: MARK PANAGABKO - DISCHARGE GRIEVANCE

**AWARD**

BEFORE: MICHAEL D. WERIER, Arbitrator

APPEARANCES: DAVID A. SIMPSON, Counsel for the Employer  
LESLIE McNABB, Union Representative

DATE OF ARBITRATION: August 25, 26 and 27, 2014

LOCATION OF ARBITRATION: Flin Flon, Manitoba

## **INTRODUCTION**

The Grievor, Mark Panagabko, was terminated from his position with Flin Flon School Division on December 20, 2013. He was employed as a day man in the Maintenance Department. His dismissal arose from an incident in which the Employer concluded he was in possession of marijuana and smoking it on the premises of Hapnot School in Flin Flon during working hours.

The Grievor denied the allegations and the Union filed a grievance on January 14, 2014 stating that the Grievor was unjustly terminated from his position and that he should be reinstated with full redress.

The Employer has in place a Code of Conduct policy which states that staff are to adhere to the "Safe Schools Charter of Manitoba". The Charter states that certain behaviour will not be tolerated including using, possession, or being under the influence of alcohol or illicit drugs.

## **ISSUES TO BE DETERMINED**

1. Is there just cause for discipline?
2. Is termination appropriate in the circumstances?
3. Are there mitigating circumstances which would justify an alternate penalty?

**EVIDENCE**

The Employer called the following witnesses to testify:

- Terry Fisher (“Fisher”)
- Dave Naylor (“Naylor”)
- Bruce Fidler (“Fidler”)
- Blaine Veitch (“Veitch”)

The Union called the following witnesses to testify:

- Kim Bryson (“Bryson”)
- Mark Panagabko (“Grievor”)

In addition, sixteen exhibits were filed at the hearing, including the following:

- (a) video taken from the security cameras outside the day room and a summary of the video from 8:22 a.m. until 2:50 p.m. on December 17, 2013;
- (b) report from RPC Testing Laboratory confirming the presence of THC in the residue sample taken from the desk in the boiler room;
- (c) photographs of the boiler room;
- (d) photographs of the marijuana residue on the desk in the boiler room;
- (e) Flin Flon School Division Code of Conduct;

- (f) termination letter dated December 20, 2013;
- (g) grievance dated January 14, 2014.

### **EVIDENCE OF THE EMPLOYER**

Terry Fisher testified as a witness for the Employer. He is a member of the bargaining unit and is employed as a maintenance helper. He works at all four schools in the School Division. He knows the Grievor through work and met him when he was the evening custodian at the school and the Grievor was a day man.

Fisher indicated that he attended the school on December 17<sup>th</sup> to fix the railing on the stairway and he was there in the morning to help set up a X-mas event at 7:00 a.m. with Naylor. Fisher stated that after 9:00 a.m. he went to fix the railing with Naylor. At 10:00 a.m. he went to get the socket set and ratchet to fix the railing and the Grievor was there at the coffee table in the day room. He said "hi" and had a brief chat and then went back upstairs to take the railing off the wall and then subsequently left the school. At 11:10 a.m. he went into the day room to obtain an extension cord for a drill, and at 11:21 a.m. he returned to hang up the extension cord. He stated that there was no smell at that time and he believes that the Grievor was present when he put the extension cord back.

Fisher stated that he subsequently came back with Naylor and went to the day room

and the boiler room and did not see the Grievor. He was going to check the pumps and the pressure on the boilers because there had been issues recently with the system.

Fisher testified that he noticed a strong smell of marijuana in the boiler room. He knows what marijuana smells like because he has been around it. He was 100% sure that it was marijuana.

Fisher said to Naylor "Wow, that's ballsy". Naylor did not say anything and walked out. Fisher saw the Grievor near the vent in the storage area. It is a spot where there are extra bulbs, etc. Fisher confirmed that at approximately 11:23 a.m. was the first time he smelled marijuana that day. He descended the stairs and saw the Grievor come around the corner by the vent. The Grievor ducked under the vent as Fisher and Naylor were coming down the stairs. Fisher identified a number of pictures that had been taken of the area. He indicated where the desk was located that had marijuana on it.

Fisher descended the staircase and saw the Grievor. The Grievor was in his uniform, ducking under the vent. Fisher asked the Grievor how it was going and he said "good" and had a giant grin on his face. Fisher said that the Grievor looked like his son when he was getting away with something. He described that the Grievor had a big goofy grin.

Fisher started to walk to the boilers on his left. The Grievor went up the stairs into the day room. Naylor was at the pumps and Fisher said that he then went into the boiler

room. There was a smell of marijuana in the room.

All that the Grievor said to him was "good" and Fisher said that that was not common because usually he chats a bit with the Grievor when he sees him.

Fisher went to check the pressure on the boilers and Naylor called him over to where he was at the pumps beside the vent. Naylor pointed to the desk and told him to look. Fisher noticed a pile on the desk which was a small pile of roaches around 1½ inches high about the size of a toonie. Fisher bent over and smelled the roaches and believed it 100% to be marijuana.

Fisher spoke to Naylor about what to do and Naylor said that he would talk to the Grievor after lunch and tell him not to do it or to bring drugs to work. He indicated that he would tell him that that would get him fired. The Grievor did not enter the boiler room again. Fisher and Naylor checked the pumps, and then Fisher went home for lunch.

At 12:30 p.m. Bruce Fidler called Fisher to go to Hapnot School to clean the cafeteria because the Grievor had gone home. Fisher was not provided with any other details.

At 12:58 p.m. Fisher went to see if the pile of roaches was still in the room and it was not there. The Grievor was the only person who had entered the day room. The room did not smell anymore and there were crumbs left on the desk which he believed to be marijuana.

Fisher identified photos which were taken of the scene. He returned at 1:05 p.m. with Naylor to confirm the pile was gone. Fisher and Naylor discussed that they should call Fidler because marijuana use was interfering with the Grievor's work and something should be done about it. Fisher and Naylor went to the cafeteria. Fidler came in and Fisher told him to go see Naylor. Fisher and Naylor had earlier discussed that Naylor would be the one to discuss the matter with Fidler.

On cross-examination, Fisher confirmed that he entered the day room at 11:10 a.m., but he did not believe that he saw the Grievor, nor was there a smell. At 11:21 a.m. he entered the day room carrying an extension cord and left a minute later at 11:22 a.m. At 11:23 a.m. he came back with Naylor. He confirmed that he was hit by a marijuana smell in the day room. While he acknowledged that he had last smoked marijuana many years ago, he had been around it within a year and was absolutely sure that it could not be anything else but marijuana because it has its own smell. He indicated that he did not see any smoke, nor did he see anyone smoking, but that he smelled a really strong smell.

Fisher stated that he was in the boiler room for just a few seconds before he saw the Grievor. He stayed there for approximately 30 minutes checking the boilers and Naylor was checking the pumps. He was asked as to what he thought people might think by staying there for half an hour. He replied that it never crossed his mind and they just stayed there. He was shocked when he walked in. He was completely taken aback and never expected to walk into that kind of situation. Approximately five minutes after

the Grievor had walked out, Naylor pointed out that there was something on the seat of the desk which was the marijuana roaches. He did not tell anyone right away and his exact words were "Holy, what do we do?" He was in shock and if it happened again the first thing he would do would be pick up the phone. After five minutes you get used to the smell and he smelled it when he bent over.

Fisher reiterated that in his opinion the Grievor looked high and giddy with a goofy grin. He was six feet away from him and in his view the Grievor had gone home high. Fisher said he did not know where the Grievor went after he left the boiler room. He confirmed that he did not recall seeing anything on the desk earlier in the day and he knew it was marijuana on the desk. He subsequently discussed with Naylor that they should tell someone. It was put to him that he decided to tell once the marijuana was gone and he replied that hindsight is 20/20. During lunch he thought about the severity of bringing marijuana to school and that something should be done. It was obviously interfering with the Grievor's job. Fisher stated that Naylor was the one who was showing Fidler where everything was. He left when the investigation was ongoing because he figured it was out of his hands. He discussed with Naylor the fact that it was shocking that someone would bring marijuana into the school and what could happen.

He was frustrated that he had to do the Grievor's work. He was frustrated that the Grievor had said he was "good" and all of a sudden he was sick and he did not appear to be sick earlier. Fisher stated that he did not know why the Grievor went home, but he

was frustrated because the Grievor was working in the boiler room where there was marijuana and then he went home and he had to do his job.

He confirmed that Fidler had offered him beer at the maintenance shop, but that it was not common.

He indicated that the next day he took a letter to the Grievor's residence with Naylor. He did not know what the letter stated, but had an idea. Fidler never indicated what was in the letter. He indicated that he did not know what would happen to the Grievor once he had been reported.

Dave Naylor testified on behalf of the Employer pursuant to a subpoena. He is employed as a plumber and deals with plumbing and heating issues and checking pressure levels for the boilers, air flow, thermostats, and rooftop units. He has been employed as a maintenance plumber for four years with the School Division and prior to that was employed as a plumber.

He works with Fisher when he needs help and he has known the Grievor since he started with the School Division. He services four schools and the storage facility.

On December 17<sup>th</sup> he attended Hapnot School for a number reasons. There was a function for the children and a handrail had fallen off. He was also checking the heating systems because there had been problems with the pumps.

Naylor identified Exhibit 4 being the chronology of events as seen from the security camera. He was aware of its existence and agreed with the chronology of events. He reviewed some of the earlier events of the day and stated that at 11:23 a.m. he and Fisher went to the day room to check the pumps before lunch. He did not see the Grievor. They then went to the boiler room through the day room and used the keys to get into boiler room. They unlocked the door and walked in and he turned to Fisher and said "holy". There was a very rank smell and the smell was marijuana. Naylor said he noticed the smell as soon as he opened the door and he was 100% certain that it was marijuana because "everyone in this town knows the smell". It was very pungent.

Fisher said to him that "it is very ballsy" and that he believed him to be saying that someone was up to no good. He did not see anyone at first as they descended the stairs and then he saw someone to the right out of the corner of his eye. It was the Grievor. He was to his right behind some cabinets underneath a vent. He was in front of a desk and Naylor went straight to the pumps and did not say anything to the Grievor and he did not say anything to him. The Grievor left shortly after they arrived and did not say anything. They noticed a pile of something on the desk and Naylor said he knew what it was. It was smoked roaches about half the size of an egg. He smelled it and was certain that it was marijuana. He did not touch it. The room still smelled of marijuana at this time.

He had Fisher look at it. They were in shock. He discussed it with Fisher and it was

decided that Naylor would talk to the Grievor to give him a chance to explain himself.

He did not consider reporting him to the Employer at the time because he did not want to get the Grievor in trouble and he was giving him the benefit of the doubt.

He and Fisher left for lunch and he did not see the Grievor when he exited the boiler room and did not see him the rest of the day.

Naylor explained that he was called back to work to clean the cafeteria because the Grievor called in sick and he was called in by Fidler. He went to the mechanical room with Fisher at 1:15 that afternoon and noticed that the marijuana was gone. There were just crumbs and traces left. He could not recall whether the pile was on the desk or the seat, but thought that it was on the seat. He was in kind of a shock, but he certainly saw a pile.

He confirmed that there was only one entrance to the day room and boiler room. He and Fisher left at 1:08 p.m. and he talked to Fisher and they decided to report the Grievor because he did not show up for work because he was high. He felt the marijuana had been smoked because judging by the smell someone had to have been smoking it.

He and Fisher discussed that he would phone Fidler and did so at around 1:15 p.m. At some point he met Fidler in the hallway where they discussed what happened and he

took him into the boiler room and went through the occurrence and told him the story. There was a very faint smell. He has a good nose and he showed Fidler where it was. Fisher joined them at 1:43 p.m. and then left at 1:49 p.m.

Naylor confirmed that he knew the Grievor was a user and there were other instances where he had smelled it on him. He never saw him smoke, but there was an instance last September where he was away for a long weekend and there had been a roach left in the truck. The Grievor was the only person travelling in the truck at that time.

Naylor stated that he was aware that there was a zero tolerance policy for drugs on school property. He explained that while he originally stated that he would talk to the Grievor before discussing it with the Employer, he changed his mind because the Grievor had had enough chances. Naylor maintained that he had not fabricated the story or colluded with Fisher or Fidler to get the Grievor fired.

He confirmed that after December 17<sup>th</sup>, he was asked to deliver a letter in a sealed envelope and he did not know what was in the letter.

Lastly, he confirmed once again that there was no doubt in his mind that what he smelled in the boiler room was marijuana.

On cross-examination, Naylor confirmed that while there was a strong smell in the boiler room, he could not see any smoke. He did allow that the room was vented and it was a

large room. He confirmed that he was asked by Fidler to check the pumps and had been there everyday checking them because it was really cold outside. Once he reached the middle of the stairs, he noticed the Grievor underneath a vent behind some cabinets. The Grievor came from under the vent, and when he first saw him, it was a peek-a-boo kind of thing. Even though there was a strong smell, he stated that he did not want to ask him about it as he wanted to get to the pumps, and if Fisher wished to talk to him, he could go ahead. While he was checking the pumps the odour was still strong.

Naylor stated that when he went back with Fidler the smell was faint, but he could smell it when he was getting closer to the area of the desk. It was suggested to him that he had told the Union representative that he could only smell it at 11:23 a.m. He maintained that he could smell it when he got closer to the particulate. He could see specks on top of the desk and that was not what he saw before. When he initially looked over, he thought it was on the seat and now it was on the desk. It was the same type of material.

He did not phone anyone because he wanted to talk to Fisher, but things had changed when they came back after lunch. He confirmed on cross-examination that if the Grievor wanted to go home high it was out of his control and that he had a problem that needed to be addressed. Naylor stated that he felt the Grievor looked stoned. He was avoiding them and he usually talked to him. He left the room almost instantaneously.

Naylor stated that in his life he had experienced persons who avoid something usually have something to hide. The Grievor usually talked to people, but he did not know what he said to Fisher. He maintained and was adamant that the Grievor had left because he was stoned. In the past he had smelled marijuana on the Grievor's work jacket. He could not give the specific dates, but it happened more than on a few occasions and a co-worker had once mentioned it before.

Naylor stated that there is beer in the fridge at the maintenance shop. Fidler puts it in there, and if he has had it, it is when he is done work on Division property.

Bruce Fidler testified. He has been the supervisor of the Maintenance Department of the Division since March, 2007, and has been employed since October 31, 1988. He reports to the Superintendent.

He attended the school on December 17<sup>th</sup> arriving at approximately 1:30 p.m. He received a message in his office from the Grievor saying that he was not feeling well and was going home and would not be back for the afternoon. Fidler telephoned Fisher at home and told him to attend Hapnot School and begin cleaning the cafeteria and that he would send Naylor to give him a hand. He could not recall if he said that the Grievor would not be at school. Fidler planned to go back to the school after 1:00 p.m. to see how they were doing. He arrived at approximately 1:30 p.m. and saw Fisher in the cafeteria who told him that he should go speak to Naylor.

He went down the stairs and saw Naylor coming in the back door. Naylor said he had something to show him and took him to the boiler room. He took him around the corner to the desk and noticed marijuana residue on the desk. As well, when they first entered, there was a faint smell of marijuana as they went down the stairs and it was a little stronger near the desk.

He was certain that it was marijuana and he knows what it smells like. Naylor stated that when he and Fisher came down, the Grievor came from back around where the desk was. He said the smell was relatively strong when they came in and they commented to each other that it was ballsy and brazen.

He was told that they first saw a larger pile of cut up roaches or cut up residue. He stated that when he reported that he had attended at 12:30 p.m., he was incorrect as he got flustered and mixed up on the timing.

He stated that he took a photo of the residue afterwards on the date in question and he told Fisher and Naylor to go back to work. He went back to the administration office and told Veitch and proceeded to phone Morgan Whiteway ("Whiteway") who advised them on labour matters. He did not discuss with Fisher as far as he could recall.

He was unsure as to how to proceed as it was the first time he found marijuana in the school. He collected the debris, but not right away. Whiteway advised him not to remove it away right away because it was an illegal substance. It was ultimately

retrieved on December 17<sup>th</sup> from the same location on the desk. He delivered the marijuana to Veitch. He indicated that there had been prior discipline issues with the Grievor with respect to attendance. One day he had filled out his timesheet that he had been there for the whole day when in fact he had left after a few hours. He had not been formally reprimanded as he liked to give him a chance. He stated that the decision to discipline was based on advice and that he had no personal animosity towards the Grievor. He further confirmed that he had absolutely not set out to have the Grievor fired.

On cross-examination, Fidler said that he was mistaken when he told Veitch that he had been there three times. It was pointed out to him that he had indicated that he noted the smell around lunch time when he went by himself and that he later returned to the office and then heard the Grievor's message. He acknowledged that he could not remember where he was before lunch. He further confirmed that he did not remember what he told Bryson in an interview, but he recalled that he had not spoken to Fisher and Naylor prior to arriving at the school. He did not say that when he arrived that there was a very strong odour, but he detected a faint smell. He maintained that there was no exhaust fan in the area where the marijuana was present. He indicated that he got confused about certain events because he was flustered and got mixed up and made a mistake. He did not remember telling Bryson that he took pictures of what people were doing and could not produce them. He confirmed that he was interviewed at least four times with respect to the incident; the first being on December 18<sup>th</sup> and then on December 20<sup>th</sup>.

He confirmed that a letter was taken to the Grievor's home and that he should not have had his guys take the letter over. He was on his way out of town to attend a meeting in Prince Albert and he was mistaken that only Naylor had taken it. Fidler confirmed that he knew the smell of marijuana because he has been around it. The last time though that he had personally smoked it was some 35 years ago. He confirmed that he has had alcohol on Division property if they are having a staff party, but has never offered beer after work. He has not seen beer in the fridge. He said he would be very surprised if others testified that there had been beer in the fridge. He confirmed that he had not entertained that someone else other than the Grievor could have been smoking marijuana because he was going on the information that was given to him. Fidler stated that after seeing the video, it did not occur to him that it could have been someone else and it was not his business to suspect Fisher or Naylor of using marijuana, nor was it his business to ever think the Grievor used marijuana. Fidler denied ever saying to anyone that he would fire people before he retired.

He recalled doing Halloween patrol with the Grievor in October, 2007, but he did not remember offering anyone a beer. If someone testified to that effect, they would be lying.

On re-examination, Fidler stated that he believed Fisher and Naylor to be credible. He did not recall in that his meetings with the Grievor and Bryson that the Grievor ever said that he smelled marijuana. He confirmed that he had no firsthand knowledge of what

had taken place on that day and that he relied on Fisher and Naylor. He absolutely had not conspired to get the Grievor fired.

Blaine Veitch testified. He is a Superintendent at schools for the Division and has been so employed since 2002. He reports to the schools' Board of Directors and oversees all the schools in the Division and their operation.

Fidler reported to him on what had occurred and he attended with Fidler, Fisher and Naylor and asked what they saw. They went over to the desk and observed small dark flakes on the desk which smelled like marijuana. Veitch said he was familiar with what marijuana smelled like. A photograph of the residue on the desk was taken in the presence of Fidler. At the time he received advice from their advisors not to touch any of the flakes.

He subsequently met with the Grievor on December 20<sup>th</sup>, further to his having sent the Grievor a letter. The Grievor related that he was a recovering addict because of alcohol. The Grievor denied having been in possession or smoking marijuana on school premises.

Veitch related that he met with the Grievor in private. The Grievor related that the last time that he had used marijuana was the summer of 2013. He indicated that marijuana use had affected his employment status seven years earlier and it would be unrealistic for him to do it again.

The Grievor suggested that the smell in the room may have been due to gas from his stomach. He wondered if when he went out for a cigarette at 10:00 that morning they may have mistaken the smoke on his body for marijuana. He speculated that perhaps it had been Fisher and Naylor, but he did not blame the two of them but laid it out as an option.

The Grievor expressed some fear about Naylor and he related the conversation that he had had with Naylor about his girlfriend obtaining employment. He speculated that perhaps Naylor wished to get back at him. He did not suggest any ill motives on the part of Fisher and suggested that he got along well with him.

In a private meeting Veitch suggested that the Grievor take a drug test. If he is clear, the allegations would not then be true. In the meeting the Grievor said he would agree to take the test if the maintenance crew would undergo the test. Veitch stated that he did not have the right to require such a test. While the Grievor never underwent a test, at one point he informed Bryson that he would take it. This was much later on and too late to be of any effect. Subsequent to this meeting, Veitch met with Fisher and Naylor. He had no reason to doubt their credibility and their story.

As a result of this incident, the Grievor's employment was terminated. Veitch referred to a zero tolerance policy in place and an employee cannot have drugs on school premises. He also referred to the Code of Conduct which prohibits the use of drugs.

Veitch referred to the fact that the residue was collected in April and was subsequently tested revealing it to have the presence of THC.

On cross-examination, Veitch stated that he talked to Fidler who told him that he went to the boiler room himself, but was not sure about the time. Fidler indicated that he talked to Fisher afterwards about what had happened.

Veitch indicated that he was told by the RCMP that there was not a sufficient quantity of marijuana to send it out. However, he got it tested at legal counsel's request. He acknowledged that from the time of the incident to the time the marijuana was removed there would have been people in the boiler room from time to time. Veitch was questioned at some length about the inconsistencies in Fidler's story. Veitch indicated he was not sure as to why Fidler was mistaken, but stated that he was not having the best week. There were a number of circumstances which may have contributed. Overall, Veitch stated that he felt Fidler was confused about the timing. He talked to Fidler about the video evidence after Bryson interviewed him and pointed out the inconsistencies.

Veitch stated that if he had walked in at the time and had smelled marijuana, he would have investigated it right away. Veitch stated that the Grievor told him that the guys were constantly in the boiler room so why would he risk smoking marijuana. In the

meeting Veitch confirmed again that the Grievor could not explain the smell, but stated the smell could have been as a result of his upset stomach.

Veitch confirmed that subsequent to the incident in question, the Grievor's locker was searched and no drug paraphernalia was discovered.

Veitch was asked why Naylor chose to report it and he said that Naylor told him that it was a third strike scenario on the Grievor's part.

Veitch confirmed that after he had heard about the inconsistencies and mistakes that Fidler had made about what happened, he talked to Fisher and Naylor again. Their testimony remained consistent and rang true. Fidler's inconsistencies did not change what Veitch believed happened. Veitch acknowledged that the Union began to have doubts about the evidence because of Fidler's inconsistencies.

Veitch allowed that it was bothersome that Fisher and Naylor did not report it right away, but the fact they did not leave with the smell of marijuana in the room speaks to their innocence. When Veitch attended at 2:30 in the afternoon he did not smell anything, although he acknowledged that he does not have a sensitive nose.

Veitch was questioned with respect to the use of alcohol at the maintenance shop. He stated that as far as he was aware, alcohol was on the premises for staff both at the end of the school year and at Christmas.

Veitch acknowledged that on December 17<sup>th</sup> he did not think to bring Bryson in as part of the investigation. He stated that it was Fidler's job to handle discipline matters in the Maintenance Department. If a situation like this arose again, he would have thought of using video evidence earlier.

On re-examination, Veitch confirmed that he had no doubts about Fisher and Naylor's credibility. When he reviewed the video after having interviewed them, the video was consistent with their story and rang true. The inconsistency between Fidler's evidence and the video would not have changed the discipline that was imposed on the Grievor.

### **EVIDENCE OF THE UNION**

Kim Bryson testified for the Union. She has been employed by the Division for approximately 29 years and is President of the local bargaining unit. Her office in Hapnot Collegiate is next to the maintenance room. On December 17<sup>th</sup>, the date of the incident, she was not approached to take part in any investigation.

She received a call from the Grievor on December 18<sup>th</sup> and he was not sure why he had received a letter from the Division to attend a meeting. She said that she would inquire and attempted to get a hold of Fidler and Veitch. On December 19<sup>th</sup> she saw Veitch and they both went into the boiler room. She observed the marijuana residue and there was no smell. Veitch informed her about what took place based on Fisher and

Naylor's version of events and that they both smelled marijuana and saw a pile on the seat of the desk.

She called the Grievor and told him about the seriousness of the allegations and that they involved marijuana use. He told Bryson that he did not smoke marijuana in the room and he was kind of shocked. At the time he did not offer any explanation for the smell.

On December 20<sup>th</sup> Bryson attended an interview of the Grievor in the presence of Veitch and Fidler. The Grievor denied being responsible for the smell and smoking marijuana or being in possession of it. He did allow that he was a recovering addict and stated that he had had a problem seven years ago and would not risk his employment over the use of marijuana in the school. The Grievor related that he was sick on December 17<sup>th</sup> and that was the reason why he left the school and went home.

In his subsequent interviews, his story did not change. Bryson discussed the grievance procedure with the Grievor and also reviewed with him the possibility of being accommodated by an employer if he had an addiction and suffered from disability. The Grievor denied having an addiction and his story remained consistent. At the time Bryson stated she had no reason to doubt his story.

She subsequently interviewed Fisher and Naylor and their story did not change. The Union decided to take the matter forward through the grievance procedure and to

arbitration because of credibility issues with Fidler's story as to when he was there and the timing and also in view of the fact that Fisher and Naylor were in the boiler room when they detected the smell and did not report it right away.

Bryson was questioned as to whether or not there was anything between the Grievor and Fisher and Naylor that would be a motive for them reporting him. She referred to the fact that the Grievor mentioned there had been an issue between himself and Naylor with respect to Naylor's girlfriend and the fact that the Grievor indicated to Naylor that one gets a job based on who you know, not what you know.

Bryson elaborated on the inconsistencies with respect to Fidler's story. In particular, he originally stated on a number of occasions that he had attended during the lunch hour to check the pumps and boilers and could smell marijuana. He then heard the Grievor's message and came back later. The video subsequently showed that he had not attended at that time and only attended later on in the afternoon.

As to any problem between the Grievor and Fisher, Bryson stated that she was at a meeting with Fisher, Fidler and the Grievor with respect to a cleaning issue under the bleachers. The Grievor alleged that he was being left to do work that had not been done by Fisher overnight. The matter was ultimately resolved and it had happened years ago.

Lastly, in direct examination, she testified that she asked Naylor when he walked in after

lunch whether he could smell anything and said that the only smell at the time was at the desk.

On cross-examination, Bryson acknowledged that she did not have any firsthand knowledge of the events and that her testimony was just based on what others had told her. She confirmed that Fisher, Naylor and the Grievor remained consistent in their stories and that the Union's concern was with respect to the time that Fisher and Naylor spent in a room that smelled of marijuana. She stated that, in her view, Fisher and Naylor must have been mistaken about the reason for the smell. She did allow that only three people, Fisher, Naylor and the Grievor, entered the room on the morning and early afternoon in question.

Bryson indicated that the Grievor offered to be tested if everyone else was tested. She agreed that she would have encouraged the test if it could establish the Grievor's innocence, but it was a huge cost being approximately \$300.00-\$400.00.

The Grievor never came forward ultimately to offer up a test. He said he would take the test if he got his job back.

The Grievor testified. He has been employed with the Division for approximately seven years and enjoys the work environment. On December 17<sup>th</sup> he began work at 6:40 a.m. He awoke feeling sick, but because it was a busy day with the X-mas event, he thought he should go in. He attended various duties and had a brief interaction with Fisher

around 10:00 a.m. He was back and forth to the washroom because of the way he was feeling.

Later on in the morning he was checking the fan in the back because there had been problems with it and he walked near the vent by the desk. There was nothing on the desk. He saw Fisher and Naylor enter and he walked by them and smiled and nodded and then went up the stairs. He filled out the log book and got up and left. This was just after 11:30 a.m. The door to the boiler room was open and Fisher and Naylor left it open when they came in.

The Grievor testified that he did not smell anything at all, nor did Fisher or Naylor say anything to him about any smell. At 11:35 a.m. he went to the bathroom and at 11:41 a.m. he returned down the hallway back into the day room. He was there for approximately one minute and then left the day room and returned to the bathroom at 11:42 a.m.

He went to the gym to see if everything was okay. He could not take it any longer due to his illness and he returned from the gym stairs and entered the day room at 11:56 a.m. He phoned Fidler, his supervisor, to tell him that he had to leave and that he needed to get a replacement. He got dressed and left the school.

The Grievor testified that he was sick that night and called in sick the next day. He was delivered a letter personally by Fisher from the Division and he noticed Naylor sitting

outside in the truck. He thought he was receiving a letter with respect to attendance management because he was sick and would be placed on the first step of the program. He subsequently spoke to his Union representative, Bryson, as to the nature of what was doing and his reaction was one of shock.

He was interviewed on December 20<sup>th</sup>. He informed Veitch that he had nothing to do with marijuana smoking nor was he in possession of marijuana. He told them that he was a recovering addict from alcohol. He had not had a drink for fifteen years. The last time he smoked marijuana was the summer of 2013.

The weekend before the incident in question he had been in his neighbour's garage. His neighbour is constantly smoking tobacco and marijuana and the Grievor is familiar with the smell of marijuana.

The Grievor confirmed that in the interview Fidler indicated that he smelled marijuana in the room when he attended at 12:30 in the afternoon.

The Grievor was questioned as to whether or not he had had any conflicts with Fisher and Naylor. He indicated that he had asked Naylor if his girlfriend had got a job in Flin Flon. She was newly arrived in the town and Naylor said that she had obtained a job. The Grievor responded that it is who you know, not what you know. The Grievor said that Naylor got mad when he heard this and walked out of the room.

He did allow that he had a good working relationship with Naylor and just had little quarrels with him. They occasionally cut each other off when they were talking to each other.

As to Fisher, the Grievor related an incident in 2008 when he was working as a day man and Fisher was employed as a night custodian. The Grievor complained to Fidler about the fact that he was having to clean under the bleachers in the gymnasium and that Fisher had not done an adequate job. A meeting was subsequently held and the solution was for the Grievor to come in earlier and leave earlier.

Other than that, the Grievor stated there was petty stuff with Fisher and that he once had raised his voice with him. He did state in direct examination that for the most part they got along.

The Grievor was questioned as to his understanding of school policy. He understood that there was no tolerance for drugs being on the school premises.

He did say that if he would have taken the drug test, he would have wanted everyone else to take the test. He was worried about second-hand smoke and ultimately he refused to do so. He also did not have the funds for the test which were in the neighbourhood of \$300.00-\$400.00. He further allowed that he had received advice (not from the Union) that he should not take the test. He did allow that maybe he should have received better advice.

The Grievor confirmed that he was fired on December 23, 2013. Since his termination he has been living on Employment Insurance and has had difficulty paying his bills. His firing has affected his family and his children and he is receiving counseling for depression. It has been difficult for him to be able to visit his elderly mother in Saskatchewan.

On cross-examination, the Grievor said he did not challenge the chronology of events that was entered into evidence and reproduced from a viewing of the video.

He stated he was aware of the severity of the allegations against him and even more so now and he acknowledged the seriousness of them. He agreed that substance abuse in Flin Flon is a serious problem. He stated that he was aware of the Code of Conduct that was applicable to employees working for the Division.

He again denied that he smelled anything at all on the day in question and did not smell marijuana. He stated that he got within 25 feet of Fisher and Naylor when they entered the room on the day in question. He did not see the pile of roaches and the marijuana on the desk and he would have walked within two feet of the desk. He again reiterated that there was no smell of marijuana in or around the desk.

The Grievor stated that he had actually not watched the video, but acknowledged that he, Fisher and Naylor were the only three people that were in the day room and the

boiler room on the day in question. It was put to him that Fisher and Naylor testified that a pile was left behind in the room at 11:53 a.m. and was gone when they returned. The Grievor stated that he believed Fisher lied at the interviews and he perjured himself at the arbitration. Although Fisher lied, the Grievor felt that Fisher did not think that he would get fired.

It was asked of him whether he believed that Naylor had planted the resin and conspired with Fisher. He stated that he could not make that assumption.

The Grievor admitted that he used to smoke cigarettes at the back of the boiler room, but had not done so since June, 2013. He was aware that that was against school policy.

When Fisher and Naylor entered the room at 11:23 a.m. he did not say anything to them about the fan not working even though they were the maintenance crew and that is what he had been doing when they entered.

The Grievor was cross-examined at length about the chronology of events starting from 11:35 a.m. He went to the bathroom at that time. At 11:41 a.m. he exited out of the bathroom up the hallway and went into the day room. It was put to him that he looked at the day room first and then walked up the hall, and he stated that he was not sure what he was doing as he could not remember. One minute later at 11:42 a.m. he said he left walking with a "grip step" to the bathroom because of his stomach problems.

At 11:48 a.m. he exited the bathroom, looked down the hallway to the north, and walked down the hallway and looked left to the staircase and walked into the day room. At 11:49 a.m. he walked back to the bathroom, but denied that at anytime went back to retrieve a pile of marijuana. At 11:53 a.m. he acknowledged that Fisher left the day room, and at 11:54 a.m. he left the bathroom, looked at the day room, and then went up the gym stairs. He returned at 11:56 a.m. from the gym stairs, looked down the hallway and entered the day room. This was after Fisher and Naylor had left, but the Grievor denied that he was waiting for them to leave.

The Grievor was questioned as to why he did not take a drug test. He acknowledged that he was aware of the ramifications involved, yet he did not do it. He indicated there were a number of reasons for not taking the test, including the fact that he could not afford it and he also stated that he did not think he would pass the test because of second-hand smoke.

He acknowledged that Veitch said to him that if he passed the test this would prove that he was innocent, yet he did not pursue being tested.

### **SUBMISSION OF THE EMPLOYER**

On behalf of the Employer, Mr. Simpson reiterated that the case was about probability. We are not dealing with a standard of proof that you need in a criminal case. In sum,

the Employer's position is that the grievance should be denied.

Based on a review of the evidence, the only logical conclusion that one can make is that the Grievor was in possession of marijuana. The Union argued that no one saw him with the marijuana, but the Employer submitted that looking at the circumstantial evidence it is of the clear and cogent variety.

Both Fisher and Naylor testified that the Grievor used marijuana on the day in question. In looking at the jurisprudence, it is clear that arbitrators rely on circumstantial evidence even if there is no direct eyewitness evidence.

The Employer referred to the video surveillance which was independent in nature and reliable. It shows the timelines. It shows that areas of entry and exit which was the only access to the area and the surveillance videos corroborate the testimony of Fisher and Naylor.

They testified that they both smelled marijuana and observed the Grievor near that area. Marijuana was also observed and then was ultimately removed from that area. The only one that had the opportunity to remove the marijuana was the Grievor and there was no suggestion or evidence that any other individual entered that area during the relevant time period. Naylor, Fisher, and the Grievor were the only ones entering the area. Fisher and Naylor testified that they attended the day room and saw the Grievor at 11:23 a.m. when entering into the boiler room. They opened the door and

descended the stairs and were overwhelmed by the strong smell. It was a very pungent smell and both stated that they could identify the smell of marijuana.

All of the witnesses testified that they would be able to identify the smell of marijuana and this is consistent with the case law which indicates that lay people are able to give evidence with respect to the identification of the smell of marijuana.

Both Naylor and Fisher were 100% certain it was marijuana and Fisher said to Naylor "that's pretty ballsy".

They did not see the Grievor at first because as you walk down the stairs the ductwork to the right prevents you from seeing the area in which he was located. Naylor and Fisher went down the stairs and to their right observed the Grievor come out from behind the ventilation pipe.

Both said the Grievor sort of popped up and Fisher stated that the Grievor was grinning. Fisher stated that he felt the Grievor was grinning because he was caught doing something he should not be doing. Fisher asked the Grievor how he was doing and he said "good" and exited. The Grievor testified that he said nothing, but left.

Both Fisher and Naylor stated that it was unusual for the Grievor to leave without talking to them. The Grievor stated that he was checking the fan, but did not tell the maintenance crew, and there was no notation to that effect in the day book.

Fisher and Naylor observed a pile of marijuana in the area where the Grievor had been. The marijuana was on the chair of the desk. They approached it and smelled it and were certain that it was marijuana. There was a pile of roaches and marijuana. Both Naylor and Fisher were consistent in their description of what they observed and the fact that it was marijuana.

Any suggestion that these two witnesses were mistaken is ridiculous. Both testified that they were shocked and their evidence was consistent to each other and uncontradicted. While Fisher and Naylor were checking the pumps, the Grievor acted strangely.

The Employer reviewed the pertinent chronology of events as was reflected on the video and went through the timeline.

The following times were identified:

- a) 11:35 a.m. - the Grievor exited says that he went to the boiler room doorway to the bathroom which is also the custodial room;
- b) 11:41 a.m. - the Grievor exited and looked down the hall to the day room and then went down the hallway and then exited the north doors away from the day room. He said he was checking the hallways;
- c) one minute later he entered the day room and then left a minute later;

- d) he left the boiler room at 11:48 a.m. and looks up the hallway and walks to the day room and looks to the stairs and enters the day room;
- e) 11:49 a.m. - the Grievor leaves again and enters the boiler room;
- f) 11:53 a.m. - Fisher and Naylor leave the day room;
- g) 11:54 a.m. - after Fisher and Naylor leave, the Grievor exits the boiler room and comes out around slowly, peeks around the corner (which he denies) and walks to the day room and stares at the day room door. The Grievor exits to the staircase to the left rather than going in. He says he was checking on the gym. The Employer submitted that he goes to the gym and then realizes Fisher and Naylor are gone and returns to the day room at 11:56 a.m. He again looks to the north doors and enters the day room. Within six minutes he picks up and leaves.

The Employer argued that from 11:35 a.m. to 11:56 a.m. the Grievor's actions are consistent with someone who was waiting for Fisher and Naylor to leave. The Grievor is observed earlier on in the morning and he is not looking around, but during this relevant twenty-one minute timeframe, he is looking around.

After 11:23 a.m., at which time the Grievor is observed in the room that has a smell like marijuana with an observed pile of marijuana. The Grievor leaves, goes back for one minute, leaves, comes back and leaves, and comes back for a third time and realizes that Fisher and Naylor are not there and he leaves.

Fisher and Naylor testified that they did not touch the marijuana which was there when they left. No one enters the room other than the Grievor. At 12:58 p.m., Fisher comes in and states that he went into the boiler room and the marijuana was gone. That was unchallenged and it was never put to Fisher that he removed the pile himself. Debris was found in the area.

The only conclusion to be drawn from the evidence is that the Grievor removed the pile of marijuana and left for the day claiming that he was sick. Marijuana was seen on the desk, and Fisher testified that prior to 11:23 a.m., there was no smell in the room. This was unchallenged. The Employer witnesses testified that the smell dissipated, and at 1:35 p.m. there was a faint smell, and at 2:44 p.m. Beach testified that there was no smell. This version of events is consistent with the video and the Employer witnesses and consistent with the fact that the pile appeared at 11:23 a.m. and after the debris was removed the smell dissipated.

The Employer argued that the Grievor waited and then removed the pile and knowing he was caught left for the day. He had to have taken the marijuana and the only other possibility is that Fisher and Naylor fabricated their story about the presence of marijuana.

However, the Employer submitted that this version of events was never put to Grievor and he was not impeached.

Fidler observed the marijuana and smelt it. He let Veitch know, who also observed the marijuana. Fidler took photos and Veitch was present at the time the photos were taken.

It is critical that the Union did not challenge Fisher and Naylor in any material way. It was not put to them that they planted the marijuana. It was put to them that they took the marijuana. It was not suggested to them that they smoked marijuana. It was not suggested to them that they fabricated the events or colluded in any way. Therefore the Grievor's theory of what took place was never put to them.

The only issue raised with them was that they stayed in the room when it smelled of marijuana. The Employer stated that it is logical that innocent people would stay and only a guilty person would leave, such as the Grievor. Naylor testified that there was an issue with respect to the heat pump and each confirmed that there was pressure on the staff to resolve this issue. When Fisher and Naylor were questioned on why they did not report, they were both clear and consistent in that they wanted to talk to the Grievor and give him the benefit of the doubt. They did not want to have him fired and Naylor said that he liked the Grievor. This does not support a conspiracy theory to get the Grievor fired. According to Bryson's evidence, Fisher and Naylor's evidence in their version of events never changed. Both had a story to tell and the Grievor simply denied it and said he was in the boiler room a lot.

Fisher and Naylor's evidence is consistent and each time they told the story their

version of events was consistent with the previous version that had been provided and it was consistent with each other's evidence. Further, it was also consistent with the video evidence. The Employer stated that that is notable because at the time they gave the version of events, they had not reviewed the video. This gives credibility to their version of events and the Employer maintained that the reason why their evidence is consistent is because it is the truth.

Fisher and Naylor are both uninterested witnesses. They are members of the bargaining unit and their version remains unchallenged on cross-examination.

As to Fidler's evidence, the Union went to great lengths to discredit him. The Employer questioned as to what end the discrediting was done for. Fidler was an after-the-fact witness and whether he is mistaken is of no importance. He had attended in the boiler room after the material events and his evidence has no bearing on the main witnesses. The evidence that he presented was that the material removed from the room contained THC and was conclusive proof that there was marijuana on the desk.

While the Union challenged the timelines involved with respect to the delay in getting testing done, the Employer pointed out that this was not a criminal case. The suggestion that someone else placed the marijuana there is contradicted by all the other evidence provided at the hearing. Fidler testified the sample was retrieved from the same desk and was retrieved after Veitch instructed him to do so.

Fidler may have been mistaken in parts of his evidence, but he was under stress and there is evidence that there were problems with the pumps and that Fidler had attended on prior occasions. In any event, his evidence in no way bears on the credibility of both Fisher and Naylor.

The Employer reviewed the applicable law in the area and noted that the onus was on the Employer to prove on the balance of probabilities based on clear and cogent evidence that the Grievor had committed the acts as alleged.

The Employer argued that the case law is clear that in a situation like this circumstantial evidence can be relied upon in proof of the allegations.

The Employer referred to the following authorities and statutes as being relevant to the issues in question:

1. *Ainsworth Lumber Ltd. and IWA-Canada, Local 1-3567 (Re)*, L.A.C. (4<sup>th</sup>) 402;
2. *Gregg River Resources Ltd. and International Union of Operating Engineers, Local 955 (Re)*, 23 L.A.C. (4<sup>th</sup>) 410;
3. *Ottawa-Carleton District School Board and Ontario Secondary School Teachers' Federation*, [2004] O.L.A.A. No. 16;
4. *Genfast Manufacturing Company and United Steelworkers of America, Local 3767 (Bielak) (Re)*, 135 L.A.C. (4<sup>th</sup>) 375;
5. *Canada Safeway Ltd. and United Food and Commercial Workers' Union, Local 247 (Chisholm) (Re)*, 190 L.A.C. (4<sup>th</sup>) 432;
6. *The Controlled Drugs and Substances Act*, S.C. 1996, c. 19;
7. *Browne v. Dunn* (1893), 6 R. 67 (H.L.);

8. *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

The Employer referred to a portion of the decision in *Ainsworth Lumber Ltd.* in which Arbitrator Hope referred to Arbitrator Blasina's decision in *Re Finlay Forest Industries Inc. and I.W.A., Loc. 1-424 (Cooper)*, [1999] B.C.C.A.A.A. No. 77 (QL) where the following observation was made:

"The grievors denied having smoked marijuana at the workplace on January 4, 1999. They were not actually observed smoking marijuana. No physical evidence of marijuana was found which could be identified as having been in the actual possession of the grievors. This is a case of circumstantial evidence.

Circumstantial evidence may be sufficient to establish proof of the misconduct alleged. One must however be satisfied that the circumstances are consistent with guilt, and render any other possible conclusion improbable.

Where the employer has established a *prima facie* case of misconduct, and where the employee fails to provide an adequate explanation, a finding of culpability may be made. In other words, where the circumstances are sufficiently suspicious, the employee is obliged to provide a reasonable explanation. Simple denial would not be an explanation. The employee must by his words or conduct provide some basis to doubt the cogency of what otherwise would be a *prima facie* case.

The Employer suggested that any other explanation given by the Grievor is improbable and his mere denial in the circumstances is insufficient.

The Employer argued that the only individual who could have removed the marijuana in this case is the Grievor. Based on the video evidence, there is reliable evidence to prove that the Grievor was responsible. To suggest that Fisher and Naylor conspired

and then told a story is illogical. Commonsense suggests that if they were trying to frame the Grievor this was not the way to go about it.

The facts are not consistent with the frame-up. Fisher and Naylor smelled the marijuana, saw it, and then it was removed. If these two individuals wished to frame the Grievor they could have put it on him in his locker. The only logical conclusion to draw is that the Grievor at the very least was in possession of marijuana and further that he was smoking it.

The Employer referred to the seminal authority of *Faryna v. Chorny*. The Grievor was an interested witness, the others were not. Even if they were interested, their evidence was consistent with the surrounding circumstances.

As to the issue of credibility, this was not a case of someone smelling something and being uncertain as to whether it was marijuana. The eyewitnesses were certain of what they smelled, and that they saw a pile of marijuana. This is not a mistaken case, but a situation where one has to find that someone is lying.

In this case there are two possible outcomes:

- a) the Grievor brought marijuana into the school, or
- b) two individuals colluded and claimed they smelled marijuana, planted it, and lied.

The second possibility involves the two individuals perjuring themselves and lying with the purpose of no possible gain. As well, they have to be consistent with the video evidence. There has been no motive alleged or evidence of motive to frame the Grievor. Furthermore, there has been motive proof that they would perjure themselves.

The Grievor offered an explanation that he had insulted Naylor's girlfriend and also that there had been petty issues (his words).

Although it was not put to Fisher and Naylor, the intention of this evidence appeared to imply that there was a motive. The Grievor discussed at length his issues with Fisher. He said they were petty and one could conclude that this was in fact the case. One of the instances happened several years ago and it simply does not add up or make sense. Therefore, conclusion is not possible and so improbable that it should be rejected in its entirety.

The Employer maintained that the simplest explanation is often the correct one and that is the one offered by Fisher and Naylor.

The Employer submitted that the Grievor was caught doing something that he should not have been doing, and rather than admit to it, he blamed it on others. He was not forthright then and later on in alleging misconduct on behalf of other individuals. In the Grievor's evidence he made a mistake on timeframes at the beginning, but notably he says there was no smell. He says that he was in the area where other witnesses

testified there was a smell and a pile of marijuana two feet from the desk. To suggest he did not smell it is difficult to believe.

The Grievor says he last smoked marijuana in the summer of 2013 and in his testimony he talked about a couple “pulling” on a joint. These were words he used when he was a marijuana smoker in Saskatchewan.

The Grievor testified that he believed the school had a zero tolerance policy. He readily acknowledged that using marijuana is grounds for discipline. He said it was against the rules to smoke cigarettes and yet he had smoked in the school prior to June, 2013.

The Grievor was not concerned about the rule. He said that he did not smoke around children yet he did smoke in the school contrary to the rule. The Employer noted that despite the fact that he alleged that he was ill on the day in question, he never provided any medical note to his Employer, and then when he was notified by his Employer regarding a suspension, he still did not obtain a medical note. After speaking to his Union representative, he did not obtain a medical note.

The Employer stressed that the drug testing evidence given by the Grievor is concerning. Originally he said that he would agree to a drug test if everyone else he worked with had had a test as well. He was aware of the allegations against him, and despite being told that it would help him, his only explanation was that it was too expensive. He never inquired about the cost, and then said he needed money to visit

his mother. He knew it could help and he loved his job, yet he would not submit to a \$300.00-\$400.00 test. The Employer submitted that the only reasonable thing to do in this situation was for the Grievor to have submitted to a test.

As to the authorities relied upon by the Union, the Employer noted that the focus in each of these cases was the onus placed on the employer to prove its case. The facts of each of these cases differ and one has to look at the evidence in each case.

The Employer argued that bringing marijuana into the school is a fundamental breach of the Grievor's employment and there was no debate over this point. By analogy, a school is a safety sensitive environment and this has to be considered in the situation.

In the *Ottawa-Carleton District School Board* case, reference was made to paragraph 30 of the decision where Arbitrator Brown stated:

"If the grievor was a custodian in some setting other than a school, I might be inclined to reinstatement him to employment. The educational setting is different than most others. That difference is reflected in the Senate committee's warnings about the special danger that cannabis poses to young people."

The Employer stated that that statement is relevant to the case at hand because in Flin Flon there is great concern over marijuana use by youth. Rather than admitting what he did and showing remorse and trying to repair his employment relationship, the Grievor in the instant case blamed others and was less than forthright.

The Employer referenced the *Ainsworth Lumber Ltd.* case and, in particular, referred to paragraphs 20 and 24 where Arbitrator Hope stated the following:

“In the submission of the employer, those comments are apropos the facts present in this dispute. In its submission, the circumstantial evidence led only to the conclusion that the grievor had been smoking marijuana in the washroom. Following a review of the facts, Arbitrator Blasina concluded that the grievors had been smoking marijuana. He made the following comments on p. 7 with respect to that particular offence:

The smoking of marijuana at the workplace is a serious offense. The workplace is an inherently dangerous environment. Marijuana is smoked for the purpose of altering one’s senses, and this presents a potential danger to oneself and one’s fellow employees. Its very possession is a criminal offence, and its possession and use at the workplace is entirely inconsistent with the employment contract.

The grievors compounded the offense by carrying forward their false denial through their testimony at the arbitration hearing. At this state, they could have honestly admitted their wrongdoing under oath or affirmation without fear their admission would be used against them in a criminal prosecution. Their denial militates against restoration of the employment relationship: *Re Fraser Lake Sawmills -and- IWA-Canada, Local 1-424 (Grievors: T. Murdoch and M. Martin)*, Unreported: December 27, 1996 (A.P. Devine).

.....

On those authorities the employer submitted that the facts relied on to support the allegation that the grievor had been smoking marijuana were circumstantial in nature, but that they constituted a *prima facie* case that the grievor’s explanation, being a mere denial, was not sufficient to negative the conclusion that he had been smoking marijuana at the work site. In saying that the grievor offered no explanation, I have discounted suggestions he made that the smell detected in the washroom came from external sources in the area of the plant. At best, that explanation was speculation. At worst, it demonstrated an inventiveness on the part of the Grievor that did not bode well for his credibility.

The Employer stated that the saying is true in the case at hand. A denial by a grievor in the face of evidence is a severe aggravating circumstance. The Grievor did present evidence for mitigation in the form of financial hardship and the impact on his children and his other family. The Employer stated that these factors are irrelevant as the Grievor engaged in this conduct and lied about it. Substitution of a lesser penalty is inappropriate in the circumstances. The Employer maintained that the employment relationship has been irreparably damaged and there is no trust left. In the circumstances, the grievance must be denied.

### **SUBMISSION OF THE UNION**

The Union stated that there was evidence from Fisher and Naylor, Union members and co-workers of the Grievor, that there was a strong odour of marijuana and they both had remarkably similar evidence. However, they did not immediately report it to their superiors, nor did they determine where the smell came from. Further, they did not confront the Grievor. Fisher said he could not smell it on the Grievor, and if he could not, why would he not ask the Grievor about the pile. Also, the Union pointed out that the Grievor did not leave the day room which was only steps away and never left for twelve minutes even though there was a strong smell allegedly of an illegal substance.

Fisher and Naylor never told anyone about what they had allegedly seen, including Bryson, the Union representative who had an office just outside the door because they

said they did not want to get the Grievor in trouble. Although Naylor said that he would ultimately speak to the Grievor, the question remained as to why he would not have done it right away. The two of them chose to hang out and say nothing, although both were aware of the school policy. Fisher had been in the room for only one minute alone. Both said they saw no smoke and they would have us believe that within a minute there had been this odour. Fisher and Naylor said they left the substance in the boiler room and they did not think about telling anyone after the Grievor left for the day. They were both frustrated and they knew it was not right.

The Union referred to the timelines. Fisher went in by himself at 12:50 p.m. for five minutes. Two minutes later Fisher and Naylor go in for another three minutes. Seven minutes later they leave. Naylor then returned for two minutes. Fisher said he checked for the pile and showed Naylor. Naylor had no reason to return at 1:15 p.m. He did not recall why he went. He could have put something on the desk at that time according to the Union.

The Union noted that Fisher and Naylor's evidence was that the pile was on the chair of the desk, and then there was resin or ashes on the desk top. Fidler goes to the day room at 1:35 p.m. with Naylor. Overall, the Union stated that Fidler's evidence was not plausible and he was mistaken about how many times he had attended the day room. As far as the testing being done on the residue, the Union highlighted that the RCMP had stated that the sample was too small to test. The Union had asked for testing to be done and the marijuana was unattended for four months. Fidler obtained it and the

fragments were very small. Overall, the Union stated that no weight should be given to the testing that was done on the sample and, furthermore, no weight should be placed on any evidence provided by Fidler.

The Union noted that the Grievor had not had any discipline on his record in seven years of employment, although evidence coming from a supervisor was that 60% of the staff had had problems.

The Union stated that the investigation that was done prior to termination was a hurried affair and the Employer was trying to get everything finished before Christmas. A firing took place before Christmas instead of a suspension pending further investigation. The Union referred to the following authorities:

1. *British Columbia Maritime Employers Association and International Longshore and Warehouse Union, Canadian Area*, March 15, 2001, 95 L.A.C. (4<sup>th</sup>) 317 (Munroe);
2. *Brunswick Mining & Smelting Corporation and United Steelworkers of America, Local 7085*, May 24, 1988, 11 C.L.A.S. 45 (Stanley);
3. *Horti-Pak Inc. and United Food and Commercial Workers Union, Local 1993*, May 6, 1998, 52 C.L.A.S. 451 (Welling);
4. *General Tire Canada Inc. and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 536*, December 9, 1991, 25 C.L.A.S. 560 (Blair);
5. *Louisiana Pacific Canada Ltd. and I.W.A.-Canada, Local 1-424*, August 22, 1995, 40 C.L.A.S. 296 (Devine);
6. *Government of the Province of British Columbia (Ministry of Forests) and B.C. Government and Service Employees' Union*, March 23, 2004, 78 C.L.A.S., 90 (Jackson);

7. *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

The Union referenced paragraphs 13 and 16 of the *British Columbia Maritime Employers Association and International Longshore and Warehouse Union, Canadian Area* case cited above which states as follows:

“The allegation against the grievor is one of criminal as well as industrial misconduct. For that reason, the burden on the Association is to prove its case by clear and convincing evidence. It is not the criminal burden of proof beyond a reasonable doubt. Rather, it is the civil burden of proof to a preponderance of probabilities. However, as noted in *Indusmin Ltd.* (1978) 20 L.A.C. (2d) 87 (Picher) at page 90, arbitration boards “...have applied the flexibility inherent in the civil burden in requiring that criminal or quasi-criminal misconduct must be proven by clear evidence or with reasonable probability commensurate with the gravity of conduct alleged and the seriousness of the consequences to follow if the allegations are proved”. Arbitration boards generally recognize that a work record which includes discipline for criminal misconduct can be a significant impediment to an employee’s job advancement or job mobility (more so than some other disciplinary notations). That is something that arbitration boards take into account under the general heading of “seriousness of the consequences”. No doubt, the required sufficiency of proof in a case of this nature may occasionally produce a different adjudicative result than would have been the case had the burden of proof been either more relaxed or differently located. In a discipline case, the onus is on the employer to prove the cause alleged. And as I have said, what is required in this case for the discipline to stand is proof of the alleged misconduct to a clear preponderance of probabilities.

.....

I acknowledge, too, that some of the conversation between Mr. Macri and the grievor might be construed as inculpatory against the grievor. It must be said, as well, that in ordinary circumstances, I would expect an employee accused of smoking marijuana on the job to make a vigorous on-the-spot denial if wrongly accused. Indeed, at least in the abstract, what was said and not said between Mr. Macri and the grievor stands out as the strongest evidence connecting the grievor to the earlier-detected odour of marijuana i.e., apart from the proximity of the grievor to the location in the dumper at which the odour was

detected. However, the exchanges between Mr. Macri and the grievor - what was said and not said must be appraised in the light of their relationship as described in the evidence. In that light, I find the evidence to be more equivocal than might otherwise have been found.”

The Union noted that in the case at hand the Grievor denied the allegations immediately once being confronted.

The Union referred to the *Brunswick Mining & Smelting Corporation and United Steelworkers of America, Local 7085* decision cited above. In this case Arbitrator Stanley allowed a grievance and held that there were no physical remnants retrieved and there was insufficiency of evidence surrounding the incident to satisfy the standard of clear and cogent proof. Ultimately the Arbitrator stated that the evidence against the grievors was circumstantial and was not sufficient to convict them of a criminal charge and their denial of the incident raised serious doubts and therefore there was not clear and cogent evidence.

The Union pointed out that in the case at hand the RCMP said that there was not enough marijuana to provide sufficient test results.

In *Horti-Pak Inc. and United Food and Commercial Workers Union, Local 1993* cited above, Arbitrator Welling determined that there was no other evidence other than the witness statements to prove that the grievor had used marijuana, and the Board ultimately concluded that the two main union witnesses were not lying and the main

employer witness must have made an honest mistake. It was noted in that case there was no smoke detected. Reference was made Professor Hunter's decision in *Re Camco Inc. and United Electrical, Radio and Machine Workers of Canada, Local 550*, unreported, in which he stated "there is no evidence of how long the odour of marijuana might linger" and in that case he was "not prepared to find, on the basis on an odour, that it was being used by the Grievor ....".

In *General Tire Canada Inc. and U.R.W., Local 536*, Arbitrator Blair held that the employer did not establish to a sufficient degree that the grievors were in possession of marijuana. The Arbitrator held that the marijuana joint in question could have been dropped by any number of people and the evidence of smell by itself was not sufficient to establish that the grievors were smoking marijuana.

Arbitrator Blair held stated that "circumstantial evidence adduced by the employer in support of its contention that the two grievors were smoking illegal drugs on the night in question lacks the overall cogency and consistency which would have been necessary for it to make out a *prima facie* case".

In *Louisiana Pacific Canada Ltd. and I.W.A.-Canada, Local 1-424*, Arbitrator Devine found that there was no physical evidence supporting the witness's claim and evidence therefore fell short of clear and convincing proof that the grievors were smoking marijuana.

In *British Columbia (Ministry of Forests) and B.C.G.E.U. (Re)*, Arbitrator Jackson upheld the grievance against one grievor because the employer had failed to demonstrate by clear and cogent evidence that the grievor had committed wrongdoing.

The Union submitted that the Employer had not proven that the Grievor had marijuana or smoked it on the day in question. The Union pointed out that Fidler was mistaken in the evidence he provided to the arbitration hearing. The video reveals that the Grievor went to the bathroom on six occasions with a “grip step”. This points to the fact that he was suffering severe gastro intestinal problems on the day in question and was sick. He was not avoiding his two co-workers, and he came in to do a job. Fisher and Naylor made large assumptions based on very little contact with the Grievor.

Fisher testified that he did not smell smoke on the Grievor even though he was in close proximity to him. Fisher stated that the Grievor grinned and nodded. He did not escape, but was outside with the door open.

Fisher and Naylor were frustrated because the Grievor eventually went home and they felt this was not fair. Naylor was going to speak with the Grievor, but he readily admitted to turning in a co-worker. Fisher stated that he did not think the Grievor would be fired. Overall, the Union submitted that there was no proof on clear preponderance of probabilities that the Grievor was in possession of marijuana or was smoking marijuana. The two main witnesses for the Employer testified that they did not see him

smoking or see it in his possession. They also had access to the room before a picture was taken.

The Union submitted that the Grievor's story should be believed. He denied his involvement and held fast to his story. His story has not changed throughout and it is consistent with the video proof of the events in question.

The Union distinguished the cases relied on by the Employer.

In the *Re Ainsworth Lumber Ltd. and IWA-Canada, Local 1-3567* case smoke was detected and the person complaining went immediately to the foreman. The grievor's eyes in that case were red and glazed and there was evidence that the grievor had been warned on a number of occasions about smoking marijuana. In the case at hand, of course, there had not been any prior accusation made against the Grievor with respect to this kind of conduct.

In the *Ottawa-Carleton District School Board* case, the grievor had admitted smoking marijuana and had originally been charged with possession for the purpose of trafficking.

In the *Gregg River Resources Ltd.* case, a supervisor had smelled a strong odour of marijuana and had seen smoke and found a roach. There was clear and cogent

evidence in that case as compared to the case at hand where the grievor admitted to being a user of marijuana.

In the *Genfast Manufacturing Company* case, the Arbitrator found that the evidence was clear and cogent and the grievor was caught smoking marijuana at work.

In the *Canada Safeway Ltd.* case, there was no undue delay in reporting such as in the case at hand. The Union acknowledged that if Fisher and Naylor had come and got someone immediately or brought the Union representative, there would have been no grievance.

In summary, the Union argued that the Grievor's story has not changed and it is consistent with the video evidence. While the Employer put weight on the Grievor going to the bathroom three times, this should be discounted because he had been going all morning. He checks the hallways all the time and he testified that he went to check on the school events in the gymnasium. He could not have known whether his co-workers had left when he returned.

The Union requested that the Grievor be reinstated with full compensation and back pay. He has been unable to find work since the time of his dismissal.

**REPLY SUBMISSION OF THE EMPLOYER**

In reply, the Employer noted that the parties were generally agreed on the legal tests to be applied to the evidence. The Employer must establish on the balance of probabilities that the Grievor was in possession of marijuana or was smoking marijuana. Each case turns on its specific facts, and the Employer submitted that in this case the facts establish that the Grievor was in possession of marijuana.

The Union attacked the interview process as being in some way insufficient, but the Employer noted that Veitch interviewed every individual. To suggest there was a need for multiple interviews does not change the quality and nature of the evidence that was provided.

While the Union attempted to discredit Fidler's evidence, it was pointed out that they did not discredit the two key witnesses being Fisher and Naylor. There was no question that Fisher or Naylor colluded or conspired and therefore their evidence must stand.

Allegations that marijuana was put on the desk by someone other than the Grievor came too late in the day. For witnesses to be challenged with respect to their evidence, the evidence must be put to them so that they can respond and the rule in *Browne v. Dunn* should apply in the circumstances.

The Employer further submitted to find collusion among the witnesses testifying for the

Employer, there must be some motive on their part. Any suggestion of motive only came out through the evidence of the Grievor, and any motive suggested by the Grievor was woefully inadequate.

The Employer stated that the suggestion that Naylor would have put marijuana on the desk was pure speculation. Further, it was pure speculation that Fisher would have taken the pile of marijuana away himself. To believe anything that suggests that they would have done something is to find that Fisher and Naylor were lying in their testimony. The Employer replied that there was no basis whatsoever to find that its two key witnesses were lying.

### **THE LAW**

Before turning to an analysis of the facts in this case, an overview of the relevant legal principles is warranted.

The following areas are particularly applicable:

1. Standard of proof;
2. Circumstantial evidence;
3. Test of credibility;
4. Opinion evidence from witnesses on marijuana odour.

5. Seriousness of drug possession and use of marijuana by an employee on school property;
6. Issues to be determined in discipline cases.

1. **Standard of Proof**

There is no dispute that in a case like this, the Employer bears the onus to establish that the employee engaged in an activity that warrants discipline. It is also clearly established in the jurisprudence that that standard of proof is the balance of probabilities. The Supreme Court in *F.H. v. McDougall*, 2008 SCC 52 clarified that there are not different standards based on the seriousness of the case and evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

2. **Circumstantial Evidence**

Circumstantial evidence is distinct from direct evidence, but the law is clear that a judge or arbitrator may make certain findings based on inferences found in the evidence.

As stated in *The Law of Evidence in Canada*, 3d Ed. at p. 7:

“In civil cases, the treatment of circumstantial evidence is quite straightforward. It is treated as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact.”

In the *Ainsworth Lumber Ltd.*, cited above, Arbitrator Hope referred to Arbitrator Blasina's decision in *Re Finlay Forest Industries Inc. and I.W.A., Loc. 1-424 (Cooper)*, [1999] B.C.C.A.A.A. No. 77 (QL) where he was dealing with a case involving employees smoking marijuana. The evidence was circumstantial and the employees denied the accusations.

Arbitrator Blasina confirmed that circumstantial evidence may be sufficient to establish proof of the conduct alleged. One must be satisfied that the circumstances are consistent with guilt and render any other possible conclusion improbable.

### 3. **Test of Credibility**

In cases involving conflicts in the evidence of witnesses from both parties, arbitrators are called to make credibility findings.

The leading case cited is *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) where Justice O'Halloran wrote:

"The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

4. **Opinion Evidence from Witnesses on Marijuana Odour**

Arbitration Boards in Canada have accepted evidence from witnesses, who are not experts in the legal sense, who identify the smell of marijuana (see *Canada Safeway Ltd.* cited above at p. 11 and other cases cited therein).

Therefore, civilian witnesses who are certain they have smelled marijuana can provide evidence which establishes a prima facie case with respect to the smell of marijuana.

5. **Seriousness of Drug Possession and Use of Marijuana by an Employee on School Property**

Arbitrators will consider the setting where an employee has engaged in the misconduct of smoking marijuana. A school setting, of course, falls into that category where there is little, if any, tolerance for this type of behaviour.

This is because of the exposure to students and also due to the nature of the work performed (servicing mechanical equipment) and the facilities where students attend.

Also, in cases such as this one, the Employer policies of drug possession in the workplace must be considered and considerable weight is placed on them.

6. **Issues to be Determined in Discipline Cases**

Three issues are to be addressed in discipline cases:

- (a) Has the employer proved that it had just cause for discipline?
- (b) Is the discipline appropriate or is it excessive in view of the circumstances of the case?
- (c) If the discipline is excessive, what is a just and equitable penalty to substitute?

These tests are set out in the seminal case of *Wm. Scott & Co. Ltd. v. Canadian Food and Allied Workers Union, Loc. P-162 (Re)*, [1977] 1 C.L.R.B.R. 1 (Weiler). In this case the main issue to be addressed is the initial one. The Union did not argue if the Employer established just cause that termination was not excessive in the circumstances.

### **ANALYSIS AND DECISION**

Against this legal backdrop, I turn now to an analysis of the facts in this case. After a consideration of all the evidence, I am satisfied, on balance, that the Employer established the alleged misconduct and had just cause for discipline.

Further, in light of the nature of the workplace, the Division policies, and the Grievor's simple denial, termination is appropriate and there are no mitigating factors justifying arbitral interference. I note that the Union did not really challenge the fact that if the allegations were provided, termination was appropriate.

My reasons for so finding follow.

The onus was on the Employer to prove that there was just cause for discipline. I am satisfied that the Grievor was in possession of marijuana on the school premises while working and that he smoked marijuana.

The Employer's case was based on circumstantial evidence. There was video evidence from the security cameras which shows the entrance and exit of Fisher, Naylor and the Grievor from the boiler room. They are the only ones to enter the room. Also, there was the evidence of Fisher and Naylor as to the smell of marijuana, the presence of the Grievor, and their viewing of a pile of marijuana roaches, which was subsequently removed and the results of lab testing which confirmed the remnants was marijuana.

While there was no direct evidence of the Grievor either smoking or in possession, the circumstances are consistent with the Grievor being guilty and any other conclusion is improbable.

A very important part of this case is an assessment of the credibility of the Grievor and that of Fisher and Naylor.

I believe the evidence given by the Employer's two main witnesses. I found them to be credible and there was a consistency between the two on the material points. I did not get the impression that they had rehearsed their evidence. They were not shaken on

cross-examination. Nor was anything put to them on cross-examination to suggest that they conspired to make up this story and that they “planted” the marijuana in the boiler room. The Union’s theory of a conspiracy was not put to Fisher and Naylor.

Also, a motive for Fisher and Naylor lying and planting marijuana was not established. There was no proven history of ill will between them and nothing of any significance which would in any way cause Fisher and Naylor to lie.

Also, Fisher and Naylor’s evidence as to the timing of events coincides with the video recording of the entrances and exits into the room.

Accordingly, I accept that Fisher and Naylor entered the room shortly after having exited it. They noticed a strong smell of marijuana that had not been there before. I accept that they were familiar with the smell of marijuana and could properly identify it.

The only person in the room was the Grievor who was hidden out of view when Fisher and Naylor entered. He was in the area where the pile of marijuana was seen by Fisher and Naylor. I accept Fisher and Naylor’s evidence that the Grievor’s conduct was unusual. He exited the room quickly and looked like he was under the influence.

When Fisher and Naylor returned later, the pile had been removed. The only person to have been in the room was the Grievor.

The Grievor's conduct after leaving as picked up by the security cameras is suspicious and consistent with a person who was checking to see if Fisher and Naylor had left the room.

The Grievor explained that he left the school because he was sick. He simply denied that any of the events happened. I do not believe him. He had a lot to lose and his evidence was obviously of a self-serving nature.

Further, the Grievor had a chance to establish his innocence. He could have been tested. He chose not to do so. His explanation about his being possibly exposed to second-hand smoke does not ring true nor is the cost of the test a reasonable excuse. He had the chance to exonerate himself and chose not to do so.

The Union raised a number of points which they argue casts doubt on the allegations.

Firstly, they point out that Fisher and Naylor did not go to management immediately upon witnessing these events.

While there was some delay, I accept their evidence that they were initially reluctant to report on their co-worker. It was only after he left for the day that they decided to take action.

While the Grievor said he was sick, he never told this to Fisher and Naylor. In fact, his

only comment to them was that he was “good”.

I can understand Fisher and Naylor’s frustration with the Grievor. I do not find that the relatively short delay in reporting impacts on their credibility and my earlier findings outlined above.

Secondly, the Union refers to the fact that there is no direct evidence of the Grievor being in possession or smoking. While this is true, as I have outlined, the overall circumstances are totally consistent with his guilt.

Thirdly, the Union argued that Fidler’s evidence was inconsistent and should not be relied upon.

I agree with their submission. Unfortunately, for the Grievor, Fidler’s evidence was not material to the Employer proving the allegations. Regardless of Fidler’s obvious issues, it did not affect the findings in this case.

Fourthly, the Union references the small amount of marijuana tested and argues that the RCMP would not normally use this quantity for testing purposes. While this may be so, I find that the other evidence consisting of the smell of marijuana and the pile of roaches, combined with the testing, all contributes to my concluding that it was marijuana.

Lastly, while the Grievor did testify, he was required to provide a reasonable explanation in light of Fisher and Naylor's evidence as to the circumstances. He failed to do so. He failed to establish why Fisher and Naylor would go to such great lengths to fabricate a case against him.

As stated earlier, I cannot accept the Grievor's evidence at all.

In sum, just cause for discipline has been established. Termination was appropriate. The Grievor works in a school. The school policies are clear as to not having drugs on school property. The consequences were known to the Grievor.

He works in close proximity to children. He works on equipment in the school. His behaviour gave rise to a risk which could not be tolerated.

There were not sufficient mitigating circumstances raised to warrant interference with the penalty imposed.

While the Grievor and his family have and will suffer financial hardship, these are the usual consequences of a termination. I note that he did not offer that he suffers from a disability which, if proven, may have had a bearing on the outcome.

Therefore, the Union's grievance is denied.

I wish to thank the parties for their comprehensive and helpful presentation of the evidence and the arguments.

DATED at the City of Winnipeg, in Manitoba, this 8<sup>th</sup> of December, 2014.



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MICHAEL D. WERIER