



Employment Issue

Off-Duty Misconduct

CONTENTS

General Information.....	1
Teachers Can be Held to a Higher Standard.....	1
Does the Same High Standard Apply to Other School Employees?.....	2
Cases Testing Nexus	3
Shoplifting affected teacher’s ability to be a good role model.....	3
Extramarital affair away from school does not affect teaching ability.	3
Drug possession conviction provided “just cause” even though roommate had the drugs.	3
Household member’s possession of drugs is insufficient by itself to establish teacher’s inability to serve as role model.....	4
School custodian convicted of sexual assault is reinstated.....	4
When Your District Has an Off-Duty Misconduct Offense.....	5

General Information

This information was originally published in December 2001.

Due to the high degree of trust the public places in those working with and around Iowa’s children, handling off-duty misconduct of school employees presents significant challenges.

Iowa law requires “just cause” for terminating teacher contracts and some

union agreements also include “just cause” requirements for discharging other school employees. Therefore, it is important for districts to determine whether off-duty misconduct constitutes “just cause” for discharge.

The concept of just cause is flexible. In Iowa, “just cause” means a cause, which directly or indirectly significantly and adversely affects the ultimate goal of every school system: high quality education for the students. *Board of Directors of the Lawton-Bronson CSD v. Davies*, 489 N.W.2d 19 (Iowa 1992). See also *Board of Education of Fort Madison CSD v. Youel*, 282 N.W.2d 677 (Iowa 1979) for a detailed discussion of the “just cause” requirement.

Teachers Can be Held to a Higher Standard

Courts have consistently held teachers to a higher standard of conduct than most employees because of the nature of the work they perform. As the United States Supreme Court said in *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1978):

“Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society.... Further, a teacher serves as a role model for his [her] students exerting a subtle but important influence over their perception and values.”

The Iowa Supreme Court has agreed with this principle. In *Erb v. Iowa State Board of Public Instruction*, 216 N.W.2d 339, 343 (Iowa 1974), the court acknowledged the role model aspect of a teacher's position and stated:

"[a] teacher occupies a sensitive position. Since students are taught by example as well as lecture, the teacher's out-of-school conduct may affect his classroom fitness."

The Iowa Supreme Court has set forth the following criteria to help determine whether off-duty conduct constitutes "just cause" for discharge, or the loss of a teaching license:

- a. The likelihood that the conduct may have adversely affected students of teachers;
- b. The proximity or remoteness in time of the conduct;
- c. The type of teaching certificate held by the involved;
- d. The extenuating or aggravating circumstances, if any, surrounding the conduct;
- e. The praiseworthiness or blameworthiness of the motives resulting in the conduct;
- f. The likelihood of the recurrence of the questioned conduct; and
- g. The extent to which disciplinary action may inflict adverse impact or chilling effect upon the constitutional rights of the employee involved.

Briggs v. Board of Directors of the Hinton CSD, 282 N.W.2d 740, 742-43 (Iowa 1979).

While there are notable exceptions, most felonious off-duty misconduct by teachers sufficiently diminishes their ability to serve as effective role models and probably constitutes "just cause" for termination. The commission of lesser crimes can make it more difficult to establish the link between the teacher's off-duty misconduct and its affect on the classroom. In those cases, the teacher's entire record should be considered, along with any mitigating factors. In all cases, school districts are well advised to

consult with their school attorneys before discharging any teacher for off-duty misconduct.

Does the Same High Standard Apply to Other School Employees?

While teachers are held to a higher standard, other school employees may not be. A distinction is sometimes drawn between teachers and other employees who do not necessarily serve as role models or do not have regular and direct contact with students. The need for these employees to serve as effective role models is not assumed. Therefore, a school district must prove that some connection exists between an employee's off-duty misconduct and his or her ability to perform job duties. Some arbitrators call this a question of "nexus."

In the context of labor relations, the question of "nexus" is not new but it is difficult to define. Various authorities on labor relations have identified factors that neutrals use to decide whether off-duty misconduct and job performance are connected enough to justify discharge. Examples are:

The Arbitrator finds no basis...to justify a discharge for misconduct away from the place of work unless:

- a. [the] behavior harms [employer's] reputation or product...
- b. [the] behavior renders employee unable to perform [his] duties or appear to work, in which case the discharge would be based upon inefficiency of excessive absenteeism...
- c. [the] behavior leads to refusal, reluctance or inability of other employees to work with [him]....

How Arbitration Works, Elkouri & Elkouri, 4th Ed., BNA (1985) at p. 658.

Summarization of the standard used by arbitrators:

- a. Was there injury to the employer's business?
- b. Did the conduct result in an inability to work?
- c. Was the employee unsuitable for continued employment?
- d. Did the other employees refuse to work with the employee?

Employee Lifestyle and Off-Duty Conduct Regulation, Hill & Wright, p. 171, BNA (1993)

Arbitrator Harvey Nathan was quoted by Hill & Wright:

"The generally accepted standard among arbitrators is that proof of off-duty misconduct, even when serious and/or criminal, does not justify automatic discharge. An employer must show that the conduct has a demonstrable effect on the employer's business. In this regard, saying it does, doesn't make it so. An employer must do more than simply make the pronouncement that it has or will be injured by retaining an employee who has engaged in off-duty misconduct." Id. p. 170.

Cases Testing Nexus

There have been several Iowa cases that have tested the concept of nexus between the employee's position and the off-duty misconduct. These cases have applied to both teachers and other employees and confirm that courts, adjudicators and arbitrators do hold teachers to a higher standard of conduct than employees who do not hold a professional license and do not instruct students.

Shoplifting affected teacher's ability to be a good role model.

A case that dramatically demonstrates the high standards to which teachers are held is *Board of Directors of Lawton-Bronson CSD v. Davies*, 489 N.W.2d 19, (Iowa 1992). The case involved a teacher who was arrested for shoplifting and was later terminated by the school district. In upholding the discharge, the Iowa Supreme Court held that the illegal conduct, together with additional incidents of poor role-model behavior in the classroom, provided "just cause" for termination. The court dismissed the teacher's argument that medication for a psychiatric condition caused a mania that made her shoplifting impulse irresistible.

Extramarital affair away from school does not affect teaching ability.

In *Erb v. Iowa State Board of Public Instruction*, 216 N.W.2d 339 (Iowa 1974), the Iowa Supreme Court found no nexus between a teacher's position and an adulterous affair with another teacher off-campus. In this case, there were no facts suggesting that the affair was conducted at or during school hours. While *Erb* involved the revocation of a teaching certificate, its principles can be applied to the employment relationship.

Drug possession conviction provided "just cause" even though roommate had the drugs.

Board of Directors of DMACC v. Simons, 493 N.W.2d 879 (Iowa App. 1992) is a case involving a community college teacher who shared a house with another individual who was heavily involved with drugs. The teacher's roommate was selling drugs from the home and the neighbors were well aware of it. The teacher, however, claimed not to be aware of it.

The teacher was arrested and later convicted of possession of illegal drugs. The community college suspended the teacher after she was arrested and then its board terminated her employment after she was

convicted. An adjudicator disagreed with the board, but on appeal the board prevailed.

In upholding the termination, the Iowa Court of Appeals agreed without much discussion that the teacher's leadership and role model effectiveness had been adversely affected by allowing drug sales to occur in her home. It did not seem significant to the Court of Appeals that the teacher had been convicted of a crime. The board's finding that the teacher did know about the drug sales at her home was supported by a preponderance of the evidence. The board's reasons for terminating the teacher were not arbitrary or unfair, according to the Court of Appeals, but were based on legitimate concerns of the college about her continued effectiveness as a teacher.

Household member's possession of drugs is insufficient by itself to establish teacher's inability to serve as role model.

An adjudicator reversed a school board's decision to terminate a teaching contract in the case of *Fielder v. Carroll CSD*, 4-16-2001. *Fielder* involved a teacher whose son was arrested and convicted for possession of drugs at the teacher's home. The teacher had also been charged with criminal possession, but the charges were still pending.

While this case has been appealed to the district court, the adjudicator's ruling sheds light on how arbitrators view the nexus requirement. In her lengthy opinion, Adjudicator Ellen Alexander ultimately concluded that the school board had failed to prove by a preponderance of the evidence that the discovery of her son's drugs at her home made her a poor role model or tainted her excellent reputation as an outstanding English/speech teacher and speech coach.

The Carroll school board had relied upon opinion testimony of the administrators that the teacher could no longer be effective as a role model against drug use once the students learned that she had possession of drug paraphernalia herself. The board had also questioned what it perceived to be the teacher's permissive attitude toward drugs, as they felt was shown by the extent of the

marijuana pipes and bongs strewn about the house.

The adjudicator ruled that the board should have had more concrete evidence of the impact on her ability to serve as a role model, more than mere speculation. No parents or students provided testimony to support the administrators' conclusions. On the contrary, according to the adjudicator's ruling, there had been many letters of support from parents and students presented by the teacher.

The adjudicator's decision is not final. The case is now pending before the Carroll County District Court on the board's appeal. It remains to be seen whether the Iowa courts will agree with the adjudicator that mere speculation that admitted drug possession will erode the public trust in the teacher is insufficient to show harm.

School custodian convicted of sexual assault is reinstated.

In *Fielder*, the adjudicator found no nexus because the administration did not show actual complaints by the public. An arbitrator in a case involving a school custodian, on the other hand, stated that a sufficient nexus was not shown because it was his opinion that a school custodian who worked after school and evenings did not have sufficient contact with the students.

In *Postville CSD v. Postville Education Support Employees Association*, 7-27-94, a school custodian had been indicted and convicted of sexual assault involving two junior high students who babysat for the custodian's children. Arbitrator Habbo Fokkena reinstated the custodian with back pay, contingent upon a complete psychological evaluation and counseling, if recommended.

Although the arbitrator found that a school custodian does not hold such a position of trust that would make it impossible to continue employment even with rehabilitation, it appeared to be significant to the arbitrator that the administration did not act immediately upon learning of the indictment. The employee had immediately reported his situation to his supervisor. He had been told he could

continue to work, which he did until the students' parents complained that he was still employed at the school, seven months later. The arbitrator also held that the school's sexual harassment policy did not clearly apply to off-campus conduct.

The custodian case would appear to be inconsistent with the adjudicator's decision in *Fielder*. It would seem that the *Fielder* adjudicator would have found no nexus at the time the employer in *Postville* learned of the custodian's indictment because there were no complaints until later. Yet, when the school district waited for the complaints, a labor arbitrator found it was too late. Hopefully this inconsistency will be resolved, or at least explained, with the *Fielder* appeal.

When Your District Has an Off-Duty Misconduct Offense

- a. You are not required to rely upon the findings of local authorities and do not always have to wait until an employee is convicted of a crime before imposing discipline or recommending discharge. You can, and often should, conduct your own investigation into the allegations of improper off-duty conduct.
- b. You can initiate termination proceeding without first conducting a detailed investigation, or waiting for a conviction, if the employee admits to engaging in the off-duty misconduct and the misconduct is severe enough to constitute just or sufficient cause for the teacher's or employee's immediate discharge.
- c. Discuss with the district's local attorney the propriety of suspending the employee with pay pending the outcome of your investigation. Teachers must be suspended with pay if the district's administration wishes to reserve its ability to initiate termination proceedings after the investigation is completed.
- d. Affording a teacher or employee accused of off-duty misconduct appropriate due process is imperative. Among other things,
 - e. you should talk with the teacher or employee accused of engaging in off-duty conduct before taking any action regarding his or her employment. During that conversation, you must give the employee an opportunity to give his or her side of what happened. The teacher or employee may, however, refuse to give you any information if criminal charges are pending.
 - f. If allegations of off-duty misconduct are supported by credible evidence and the teacher or employee cannot or will not refute them, you may consider the allegations to be true.
 - g. If there are criminal charges, you may request information from the county attorney's office regarding the status of those charges. You may also get a copy of any criminal charges that have been filed or any police report or other information that has been prepared to support those charges. Waiting on the outcome of those charges is not necessary for the district to proceed.
 - h. You should retain copies of any newspaper articles concerning the offense. Depending upon how detailed they are, the articles can assist you in gathering the relevant facts, and can sometimes be used to show the necessary nexus between the offense and the teacher's or employee's continued ability to satisfactorily perform his or her job duties. Newspaper articles are not a substitute for a thorough investigation.
 - i. If the district receives any complaints from students, co-workers or community members regarding the employee's ability to continue effectively working in the district, you should keep those letters in a file and use them to demonstrate the necessary nexus between the off-duty misconduct and the teacher's or employee's job performance.
 - j. If a teacher is involved in off-duty misconduct, you must consider filing

a complaint with the Board of Educational Examiners if the behavior at issue amounts to a violation of the professional ethics code.