

69-1302-8572-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF TEACHING

In the Matter of
the Teaching Licenses
of Jon A. Falgren

RECOMMENDATION
ON MOTION FOR
SUMMARY DISPOSITION

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on a Motion for Summary Disposition made by the Board of Teaching (the Board). The Licensee, Jon Falgren, requested oral argument if that would be beneficial to the Judge's understanding of the issues.

Harley M. Ogata, Attorney at Law, Minnesota Education Association, 41 Sherburne Avenue, St. Paul, Minnesota 55103 represents Licensee in this matter. Nancy J. Joyer, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130 represents the Board. The Judge concludes that oral argument would not materially aid the Judge in deciding the issues raised in this Motion. Therefore, the record closed on this motion on May 3, 1994, upon receipt of the final submission from the parties.

Based on the record herein, and for the reasons set out in the attached Memorandum,

IT IS RESPECTFULLY RECOMMENDED THAT:

The Board's Motion for Summary Disposition be GRANTED.

Dated: May 25, 1994.

/s/

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Summary Disposition

Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. R. 1400.5500K. Summary judgment is appropriate where there is no genuine issue

as to any material fact and the moving party is entitled to judgment as a matter of law. *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn.App. 1985); Minn.R.Civ.P. 56.03 (1984).

In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case and assert that no material issues of fact remain for hearing. *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. *Minnesota Mutual Fire and Casualty Company v. Retrum*, 456 N.W.2d 719, 723 (Minn.App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. *Id. Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

Facts

An arbitration hearing was held on February 10-11 and March 11-12, before a neutral arbitrator. The issue at the hearing was whether Licensee should be immediately discharged from employment by Independent School District No. 492 (ISD 492) for immoral conduct, insubordination, and conduct unbecoming a teacher. On July 9, 1992, the arbitrator issued an Opinion and Award. The arbitrator found that Licensee engaged in sexual contact with a minor student of Licensee's. The arbitrator concluded that ISD 492 properly discharged Licensee.

While the arbitrator's Opinion and Award is not organized into findings of fact and conclusions, it is nevertheless possible to determine what facts were found by the arbitrator. Insofar as they are relevant to this matter, those facts are as follows:

1. Jon Falgren was employed by ISD 492 as a licensed counselor.
2. On July 23, 1991, Falgren telephoned a female student's residence and arranged for a driving lesson for her with the student's mother. Falgren drove over and picked up the female student.
3. After the driving lesson, Falgren took the female student to his home. Falgren informed her that his wife would be gone overnight. He brought her up to his bedroom, where Falgren told her that he should not be in such a place with a "pretty girl like you." They then left Falgren's house.

4. After leaving Falgren's house, they went to a restaurant to eat. After leaving the restaurant, Falgren and the student returned to the student's house. Falgren knew that the student's mother was not in the residence and not due back for some time.
5. Once inside the student's residence Falgren placed his arms around the female student and hugged her. After hugging her for a few seconds, Falgren began to kiss her and rubbed her breasts with his hands. Falgren then took the student's hand and began to rub the back of her hand against his groin. After rubbing for some time,

-2-

Falgren rubbed her hand against his groin hard and fast, and then stopped. Falgren then grasped the student's breast again, at times rubbing her nipples, while saying that he liked them and they were firm. The student initially resisted this contact, then stood inert during the remainder of the contact. At no time did the student express consent to the contact.

6. The female student had shown marked improvement in her psychological condition until July 23, 1991, when she showed a "precipitous drop in self-esteem and other related conditions." Opinion and Award, at 33-4.

The Board has moved for summary disposition on the ground that the arbitrator's decision collaterally estops the Licensee from disputing the facts which underlay his discharge and, as a matter of law, justifies revocation of his teaching licenses. Licensee disputes the arbitrator's decision and maintains that collateral estoppel cannot be afforded to any issue involved in that decision.

Collateral Estoppel Standard

To collaterally estop a party through an agency determination, five elements must be demonstrated:

1. The issue must be identical to the issue determined in the prior adjudication.
2. The issue must have been necessary to the prior agency determination.
3. There must be a final adjudication on the merits that was subject to judicial review.
4. The estopped party was a party in the prior adjudication, or in privity with a party in that adjudication.
5. The estopped party was given a full and fair opportunity to

be heard on the adjudicated issue.

Graham v. Special School District No. 1, 472 N.W.2d 114, 116, (Minn. 1991).

In this matter, the mechanism for arriving at the "agency determination" is an arbitration. While arbitration operates under different authority from agencies in conducting hearings, the result constitutes the last determination of parties rights under the teachers employment statute. Minn. Stat. 125.17, subd. 10.

Licensee was a party to the prior case through his collective bargaining representative, the Minnesota Education Association (MEA). The Licensee, through the MEA, was represented by counsel, could examine and cross-examine

-3-

witnesses, introduce documents into evidence, and make legal arguments. The ultimate decision was made by the neutral arbitrator. Licensee had a full and fair opportunity to be heard on the adjudicated issues.

Licensee asserts that the arbitrator's decision is not subject to judicial review, and therefore an element in Graham is not met for collateral estoppel. Under Minn. Stat. ch. 572 (the Uniform Arbitration Act), the portions of the arbitrator's decision that can be reviewed are somewhat limited. However, the Licensee had a choice between a hearing before the school district or before an arbitrator. Minn. Stat. 125.12, subd. 9a. Such a hearing before a school district is subject to full judicial review. Minn. Stat. 125.12, subsd. 10 and 11. The Licensee's choice of arbitration constitutes a voluntary limiting of the review available for the administrative decision and does not render the arbitrator's decision unavailable for collaterally estopping any applicable issue. See Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 653-54 (Minn. 1990).

An element of the Graham analysis is that the issues be identical between the present matter and the prior adjudication. The issue before the Board is whether Licensee's conduct justifies discipline. The ultimate issue in the arbitration proceeding was whether Licensee's conduct justifies his discharge by ISD 492. The Court of Appeals has expressly stated that the issue in teacher discharge cases is whether the statutory grounds for discharge are met, not whether the teacher is fit to teach. Nicholson v. ISD No. 363, Docket No. C0-91-1404, Finance and Commerce, March 23, 1992 (Minn.App.)(unpublished, copy attached). Since the ultimate issues differ in the two proceedings, the conclusions drawn by the arbitrator cannot collaterally estop a party from asserting that the facts result in a different conclusion.

While the ultimate issues in the discharge arbitration and this matter are different, one issue is identical. That issue is whether the alleged conduct occurred. That issue was necessary to the arbitrator's decision and is necessary to a decision in this matter. With respect to whether the conduct occurred, all of the Graham elements are met.

Collateral Estoppel Effect of Arbitrator's Opinion and Award.

Licensee argues that arbitration is not an appropriate proceeding to accord collateral estoppel effect. *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) is cited for the proposition that arbitration is not given preclusive effect in subsequent judicial proceedings. In *McDonald*, the Supreme Court declined to interpret the Full Faith and Credit Act to extend to arbitration decisions.

In reaching its decision, the *McDonald* court relied upon two other cases, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). *Gardner-Denver* denied the use of an arbitration decision to collaterally estop a litigant in a subsequent Title VII action. *Barrentine* involved a wage claim under the Fair Labor Standards Act. In *McDonald*, the Supreme Court noted that a separate judicial remedy had been established under the Fair Labor Standards Act and Title VII and arbitration decisions are inadequate substitutes for judicial proceedings under those statutes. *McDonald*, 466 U.S. at 292.

-4-

In this matter, arbitration is not being used as a substitute for a judicial proceeding. Arbitration is the only statutory alternative to an administrative hearing before the school board. The Minnesota Supreme Court has already concluded that arbitration decisions may be afforded collateral estoppel effect. See *Aufderhar*, *supra*. The other elements of collateral estoppel are met in this matter as to factual issues. The facts found by the arbitrator are accepted in this matter and Licensee is collaterally estopped from re-litigating those facts.¹
Genuine Issues of Material Fact

Having decided that the Licensee is collaterally estopped from disputing the facts found in the arbitrator's decision, the only remaining question is whether any genuine issues of material fact remain for hearing. The non-moving party's obligation is succinctly stated in *Albert v. Paper Calmenson & Company*, N.W.2d (Minn.App. April 12, 1994):

To resist summary judgment, the evidence must be significantly probative, not merely colorable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2511 (1986); see also *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.App. 1989).

The only facts asserted by Licensee are a categorical denial of the incident found to have occurred by the arbitrator. The Licensee is collaterally estopped from denying the incident. Clearly, nonconsensual sexual contact with a minor student requires revocation of a teacher's licenses. It is difficult to imagine any facts that could require a lesser discipline. No other facts have been introduced to show genuine issues of material fact remain to be decided. The Board has demonstrated that summary disposition is appropriate.

1/ In McDonald, the Supreme Court noted that arbitral decisions may be introduced as evidence and afforded "great weight." McDonald 466 U.S. at 292-93 (footnote 13). The factors cited to determine the weight to be given that decision relate to the due process protections and fairness of the arbitral proceeding. Id. In the arbitration at issue here, the due process protections have been thorough and the proceeding fair. Thus, even if Licensee's argument about collateral estoppel was accepted, the arbitrator's decision would be admitted into evidence and afforded great weight. Since the rule in Minnesota is that arbitral decisions may collaterally estop issues and the Judge agrees that limited estoppel is appropriate here, the factual issue on Licensee's conduct is decided and no further evidence need be introduced on the issue.

-5-

Conclusion

An arbitrator found, after a full hearing with witnesses, counsel, and cross-examination, that Licensee engaged in nonconsensual sexual contact with a minor student. The arbitrator's decision is appropriate for collaterally estopping Licensee from disputing those facts found in the arbitration. Nonconsensual sexual contact with a minor student establishes a prima facie case justifying revocation of a teacher's license. Licensee has not introduced any evidence to rebut that prima facie case or to show that any genuine issues of fact remain for hearing. The Board's Motion for Summary Disposition should be GRANTED.

S.M.M.

