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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SHENENDEHOWA CENTRAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Appellant,

-against-

No. 8

CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 1000, AFSCME, AFL-CIO, LOCAL 864,

Respondent.

20 Eagle Street
Albany, New York 12207
January 3, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 8, Matter of
2 Shenendehowa Central School District.

3 Counselor, would you like any rebuttal
4 time?

5 MS. BOURASSA: Yes, I would, Your Honor.
6 I'd like to reserve two minutes for rebuttal, please.

7 CHIEF JUDGE LIPPMAN: Two minutes. Go
8 ahead.

9 MS. BOURASSA: Thank you. Beth Bourassa
10 for Shenendehowa Central School District. May it
11 please the court. In furtherance of the district's
12 legal obligation to protect the safety of children
13 whose parents entrust them to the care and
14 safekeeping of a single bus driver - - -

15 CHIEF JUDGE LIPPMAN: Counselor, was the
16 zero-tolerance policy that you had consistent with
17 the collect - - - the alleged zero-tolerance policy
18 consistent with the collective bargaining agreement?

19 MS. BOURASSA: Yes, it was, Your Honor.
20 The zero - - -

21 CHIEF JUDGE LIPPMAN: And the written
22 materials that you put out relating to people's
23 rights?

24 MS. BOURASSA: Yes. Let me address those
25 separately, if I may.

1 CHIEF JUDGE LIPPMAN: Please, go ahead.

2 MS. BOURASSA: First of all, with respect
3 to the written drug-testing policy. That policy
4 tracks the federal U.S. Department of Transportation
5 regulations and contemplates that in some
6 circumstances there could be a return to duty
7 following a violation. However - - -

8 JUDGE PIGOTT: Should you have moved to
9 stay - - -

10 MS. BOURASSA: - - - the U.S. DO - - -

11 JUDGE PIGOTT: - - - I'm sorry, I
12 apologize. Go ahead, finish.

13 MS. BOURASSA: The U.S. DOT regulations do
14 not determine discipline. And instead, as the United
15 States Supreme Court noted in the Eastern decision,
16 those regulations leave decisions regarding
17 disciplinary action for a drug or alcohol test
18 violation to collective bargaining.

19 JUDGE PIGOTT: Should you have, then, moved
20 to stay the arbitration? Why'd you go in the first
21 place?

22 MS. BOURASSA: No, Your Honor. We're not
23 contesting in any way that a drug-test violation
24 termination is arbitrable. But the policy itself
25 refers to the collective bargaining agreement for

1 disciplinary action.

2 JUDGE PIGOTT: Well, if you say the
3 arbitrator has the right to review this, then why
4 aren't we stuck with the arbitrator's decision?

5 MS. BOURASSA: Because the arbitrator in
6 this case used a standard, particularly a just cause
7 standard, that is unrelated to the contract, and that
8 he told us, in his own words, he was applying for
9 reasons that have nothing to do with the - - -

10 CHIEF JUDGE LIPPMAN: But once you get - -
11 -

12 JUDGE GRAFFEO: Why is - - -

13 CHIEF JUDGE LIPPMAN: Go ahead, Judge.

14 JUDGE GRAFFEO: Why isn't the central issue
15 in front of us whether the arbitrator exceeded his
16 authority?

17 MS. BOURASSA: We think that is the central
18 issue in front of this court, Your Honor. We submit
19 that the arbitrator's decision was both irrational
20 and in excess of his authority.

21 CHIEF JUDGE LIPPMAN: How did it exceed - -
22 - how did the arbitrator exceed - - -

23 MS. BOURASSA: Because the ar - - -

24 CHIEF JUDGE LIPPMAN: - - - the authority?

25 MS. BOURASSA: I apologize, Your Honor.

1 CHIEF JUDGE LIPPMAN: No, go ahead.

2 MS. BOURASSA: The arbitrator's authority,
3 in this case, as in all cases, was confined to the
4 meaning and interpretation of the agreement. Rather
5 than confining himself to the meaning and
6 interpretation of the agreement, the arbitrator
7 imported a just cause standard that has no place in
8 this agreement. And he told us that he was doing so
9 for three reasons.

10 One, he said, I need to have a just cause
11 standard here to prove end to at-will employment.
12 But clearly these CSEA members - - -

13 JUDGE SMITH: Well, haven't courts - - -

14 MS. BOURASSA: - - - were not - - -

15 JUDGE SMITH: - - - done that in the past?
16 They have read a just cause standard into an
17 agreement that doesn't have one to prevent - - -
18 because they don't think anyone intended at-will
19 employment?

20 MS. BOURASSA: They have done so, Your
21 Honor, in other states. That has been permitted, but
22 only when the contract - - -

23 JUDGE SMITH: Are those other states - - -

24 MS. BOURASSA: - - - was silent - - -

25 JUDGE SMITH: - - - all irrational?

1 MS. BOURASSA: I apologize, Your Honor.

2 JUDGE SMITH: But you would agree the other
3 states aren't necessarily irrational. And if they
4 can do it, then this arbitrator can do it.

5 MS. BOURASSA: In the other states where it
6 has been allowed, the contract at issue has been
7 silent with respect to discipline. The contract has
8 contained no contractual standards for discipline.
9 And - - -

10 JUDGE SMITH: Well, but okay. This - - -
11 so this does have language. And the language is,
12 "Suspension without pay or discharge may be invoked
13 with less than two written warnings, where the
14 employee's conduct creates a danger." And then it
15 goes on to say that "a positive drug test is such
16 conduct."

17 Why does that have to - - - why can't that
18 mean may be - - - can't that be read to mean, may be
19 invoked in an appropriate case? Why does it have to
20 mean, may be invoked at the employer's absolute
21 discretion?

22 MS. BOURASSA: We're not contending that
23 it's at the employer's absolute discretion, Your
24 Honor. But we do contend that the zero-tolerance
25 practice or informal policy is limited to

1 circumstances such as this one where the drug test is
2 entirely unmitigated.

3 CHIEF JUDGE LIPPMAN: Yes, but is that - -
4 -

5 JUDGE SMITH: Where does it say that?

6 CHIEF JUDGE LIPPMAN: - - - consistent with
7 the agreement? And isn't it the arbitrator's role to
8 look at the agreement and to make that kind of
9 judgment?

10 MS. BOURASSA: Yes, Your Honor. But that's
11 not, in fact, what he did.

12 JUDGE PIGOTT: What decisions could he have
13 made? What were his options after hearing all of the
14 testimony?

15 MS. BOURASSA: The parties disputed what
16 standard he should apply in reviewing the narrow
17 question of whether the district's penalty should be
18 upheld. The district argued that like any municipal
19 action, it had a discretionary right to terminate,
20 and therefore the discretionary decision should be
21 upheld unless it was arbitrary and capricious.

22 JUDGE GRAFFEO: But why couldn't the
23 arbitrator look at the agreement and say, my
24 understanding of this agreement is that there's
25 progressive discipline, and based on this employee's

1 record, the arbitrator determines that she's entitled
2 to one further chance?

3 MS. BOURASSA: Because the parties
4 expressly agreed in this agreement - - - and it is a
5 very unusual provision - - - that a positive drug
6 test or alcohol test, per se, creates a danger to the
7 safety and welfare of the students - - -

8 CHIEF JUDGE LIPPMAN: But aren't there - -
9 -

10 MS. BOURASSA: - - - and others.

11 CHIEF JUDGE LIPPMAN: - - - other
12 provisions in the agreement that could lead one to
13 conclude, as Judge Smith indicated, that yes, in
14 appropriate circumstances, you do that, and where
15 it's not appropriate, you don't? Isn't there other
16 language that might lead the arbitrator, or anyone
17 else looking at it, to think that this is not
18 automatic, no matter what, at your whim?

19 MS. BOURASSA: It was not automatic, Your
20 Honor. The district does not impose termination
21 automatically. Before the grievant was terminated,
22 the district waited for the confirming second split
23 test they - - -

24 JUDGE SMITH: But isn't what zero - - -
25 isn't that what zero tolerance means, that it's

1 automatic?

2 MS. BOURASSA: No, Your Honor. It does
3 not. First of all, the zero tolerance really is
4 embodied in section 47(c)(4) of the contract.
5 Discharge does not have to be the only penalty option
6 in order to be a permitted penalty option. If a
7 party has bargained for the right - - -

8 CHIEF JUDGE LIPPMAN: Wait. Say that
9 again. That - - -

10 MS. BOURASSA: Discharge - - -

11 CHIEF JUDGE LIPPMAN: - - - under zero
12 tolerance, discharge does not have to be the only
13 penalty?

14 MS. BOURASSA: Discharge does not have to
15 be the only penalty permitted - - -

16 CHIEF JUDGE LIPPMAN: Then how is it zero
17 tolerance if it's not the only penalty?

18 MS. BOURASSA: Perhaps I - - - perhaps I
19 misunderstood the question, Your Honor. What I was -
20 - -

21 CHIEF JUDGE LIPPMAN: If it's always - - -
22 if it doesn't have to be discharge, how is it zero
23 tolerance?

24 MS. BOURASSA: The zero tolerance applies
25 when the drug test is unmitigated, which we know it

1 was in this case, because the arbitrator specifically
2 rejected each one of the grievant's implausible
3 excuses for her drug test, which included blaming her
4 own teenaged daughter. Once he - - -

5 JUDGE SMITH: Did he say they were untrue,
6 or did he just say they weren't good enough excuses?

7 MS. BOURASSA: I believe he said that they
8 were unpersuasive, and that there was no basis, based
9 on the testimony in the record to conclude that she
10 had inadvertently inhaled her daughter's secondhand -
11 - -

12 JUDGE PIGOTT: I'm missing - - -

13 MS. BOURASSA: - - - marijuana smoke.

14 JUDGE PIGOTT: - - - I'd like to go back to
15 the chief judge's question. I thought zero tolerance
16 meant if you're driving with drugs, you're fired.

17 MS. BOURASSA: Zero tolerance, as the
18 district has enacted it, means that when the drug
19 test is entirely unmitigated - - -

20 JUDGE PIGOTT: I don't know what that
21 means, "unmitigated". I mean - - -

22 MS. BOURASSA: When - - -

23 JUDGE PIGOTT: - - - were you driving with
24 - - - never mind.

25 MS. BOURASSA: Unmitigated means that it is

1 - - - the egregiousness of the offense is not reduced
2 in any way.

3 JUDGE SMITH: I mean - - - I think the
4 reason some of us are having trouble with this, is
5 that the idea of zero tolerance and mitigation sound
6 like opposites. I mean you either have zero
7 tolerance or you listen to mitigating evidence. But
8 you can't have both.

9 MS. BOURASSA: I would respectfully
10 disagree, Your Honor. The district - - -

11 JUDGE PIGOTT: So the arbitrator had some
12 discretion. He could have said you may think that
13 this is - - - what's your word - - - unmitigated. I
14 think it's mitigated. So I'm going to say that you
15 were wrong.

16 MS. BOURASSA: The only way that he
17 reinstated the grievant was by consideration of her
18 prior work record.

19 JUDGE PIGOTT: Yes, but that's up to him.

20 MS. BOURASSA: And in conclu - - - in
21 reviewing her prior work record, the arbitrator
22 concluded that the grievant did not pose a danger to
23 students. The parties, however, had expressly agreed
24 in their contract that a positive drug test, standing
25 alone, does present a danger to students. And the

1 arbitrator came to a contrary conclusion by - - -

2 JUDGE PIGOTT: That happens all the time in
3 arbitration. It drives management nuts.

4 MS. BOURASSA: But in this case, he did it
5 and in his own words told us that he was adding to
6 and rewriting the contract. Again - - -

7 JUDGE SMITH: Suppose we disagree with your
8 interpretation of the contract. Suppose we read the
9 contract to be a waiver of the district's right to
10 impose a zero-tolerance policy, whatever that means.
11 Is that against public policy, that contract as we -
12 - - as I've just suggested it?

13 MS. BOURASSA: A reinstatement award that
14 allows a drug - - -

15 JUDGE SMITH: No, my question is whether
16 the contract that I just imagined is contrary to
17 public policy.

18 MS. BOURASSA: If the contract permitted -
19 - -

20 JUDGE SMITH: Because the contract says I
21 here - - - I, the school district, hereby waive my
22 right to enforce a zero-tolerance policy. Is that
23 contrary to public policy for them to do that?

24 MS. BOURASSA: Such that the arbitrator
25 could reinstate a driver with an unmitigated positive

1 drug test who - - -

2 JUDGE SMITH: Unmitigated positive drug
3 test? I mean, I guess I - - -

4 MS. BOURASSA: That's what we had in this
5 case, Your Honor. That's absolutely what we had in
6 this case. All of the grievant's - - -

7 JUDGE SMITH: But the arbitrator obviously
8 thought it was mitigated enough that he reinstated
9 her.

10 MS. BOURASSA: But he thought it was - - -

11 JUDGE SMITH: Presumably he wouldn't have
12 reinstated her if he'd found she was a hopeless
13 junkie who drove stoned all the time. So that - - -
14 isn't that mitigation?

15 MS. BOURASSA: No, Your Honor. Because of
16 - - - because the parties expressly agreed that the
17 positive drug test, standing alone, presents a danger
18 to students, it could not be mitigated by her prior
19 work record, because a prior work record couldn't - -
20 -

21 JUDGE SMITH: What could it be - - -

22 MS. BOURASSA: - - - change - - -

23 JUDGE SMITH: - - - mitigated by?

24 MS. BOURASSA: It could have been mitigated
25 if the drive - - - if the arbitrator had believed

1 that she had inadvertently inhaled or ingested an
2 illegal substance. That could potentially happen.

3 JUDGE READ: So if it's unintentional?

4 MS. BOURASSA: That's one potential way.
5 And that is, indeed, the way that this grievant
6 argued that her drug test was - - -

7 JUDGE SMITH: Are you really saying that
8 what you've just said is the only possible way to
9 read this agreement?

10 MS. BOURASSA: No, Your Honor. But the way
11 that the arbitrator did read it, is by importing a
12 just cause analysis that does not belong in the
13 agreement. He also concluded that if a penalty was
14 not mandatory, it was not permitted at all without
15 just cause. But that standard is not - - -

16 CHIEF JUDGE LIPPMAN: If he'd read - - -

17 MS. BOURASSA: - - - in the agreement.

18 CHIEF JUDGE LIPPMAN: - - - it in a less
19 rigid way, is it surprising that he would read into
20 it a just cause requirement?

21 MS. BOURASSA: Yes, it is, Your Honor.
22 Because the parties' agreement states that most
23 serious offenses are exempt from any just cause - - -
24 from any progressive discipline requirement. And as
25 every one of the justices of the Appellate Division

1 concluded, both majority and dissent, the 47(c)(4)
2 offenses, specifically including a positive drug
3 test, are the most serious offenses, because - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
5 hear from your adversary, and then you'll have your
6 rebuttal time.

7 MS. BOURASSA: Thank you.

8 MR. RYLEWICZ: Happy New Year and good
9 afternoon. Daren Rylewicz for the respondents. Your
10 Honors, this - - - the Appellate Division was correct
11 in reversing the lower court. And the arbitrator's
12 decision here is clearly rational. He did not exceed
13 his authority. And - - -

14 CHIEF JUDGE LIPPMAN: What about the zero-
15 tolerance policy?

16 MR. RYLEWICZ: Well, the zero-tolerance
17 policy doesn't exist. There's no evidence that it
18 exists. They had testimony that they would like to
19 have a zero-tolerance policy.

20 JUDGE SMITH: Well, suppose it did exist.
21 Would that change the result?

22 MR. RYLEWICZ: Well, no, Your Honor.
23 Because they agreed to go to arbitration on this.
24 And the limitations on the arbitrator, as contained
25 in the collective bargaining agreement, are simply

1 saying.

2 MR. RYLEWICZ: Yes.

3 CHIEF JUDGE LIPPMAN: Then the arbitrator
4 couldn't do it?

5 MR. RYLEWICZ: I believe if the zero-
6 tolerance policy was set forth in such a way, then
7 the only issue would be was the grievant guilty of
8 the failed drug test, and he would not - - -

9 JUDGE READ: So the penalty - - -

10 MR. RYLEWICZ: - - - have a penalty issue.

11 JUDGE READ: - - - the penalty wouldn't be
12 arbitrable.

13 MR. RYLEWICZ: That's what - - - if that
14 was so set forth in that way. Yes.

15 JUDGE GRAFFEO: So what was the stan - - -
16 what's the standard that you think is appropriate
17 under the terms of this CBA?

18 MR. RYLEWICZ: I believe just cause is a
19 proper standard. As pointed - - -

20 JUDGE GRAFFEO: Where do we find that in
21 the agreement?

22 MR. RYLEWICZ: Well, it is not in the
23 agreement. The arbitrator did imply the just cause
24 standard. But this arbitration - - - or this
25 contract doesn't contain the explicit standard.

1 Now, what's interesting here is that at
2 arbitration and in the lower court, the district
3 wants the arbitrary and capricious standard, which
4 was specifically rejected by the arbitrator. But for
5 the first time, in their reply brief, in this
6 proceeding, they now say there is a just cause
7 standard.

8 JUDGE PIGOTT: That aside, is it true that
9 if you look at this, the arbitrator said I don't
10 believe that the marijuana was in the fake butter.

11 MR. RYLEWICZ: The butter, right.

12 JUDGE PIGOTT: And I don't believe it's
13 secondhand smoke from her daughter, which would be a
14 heck of a testimony anyway. Therefore, she must have
15 ingested it intentionally herself, and we're going to
16 say she ingested it intentionally herself. They have
17 a zero-tolerance policy, whatever this mitigation
18 means. But what they want to say is therefore, with
19 the zero-tolerance policy that we have, we decide - -
20 - nobody else; no arbitrator, no one else - - - we
21 decide whether to fire her, suspend her, or fine her,
22 or whatever.

23 MR. RYLEWICZ: That's correct - - -

24 JUDGE PIGOTT: And it shouldn't go to an
25 arbitrator.

1 MR. RYLEWICZ: That's what the district
2 wants, correct.

3 JUDGE PIGOTT: And what you're asking is
4 that we're going to say that somebody who
5 intentionally ingests marijuana and drives little
6 kids around on a bus is okay.

7 MR. RYLEWICZ: Well, that's what I - - -
8 that is not exactly what we're saying, Your Honor.

9 JUDGE PIGOTT: I know.

10 MR. RYLEWICZ: But first of all - - -

11 JUDGE PIGOTT: I knew you'd correct me.

12 MR. RYLEWICZ: - - - first of all, there is
13 no finding in this proceeding that the grievant was
14 under the influence of marijuana at the time of the
15 test or was she smoking marijuana that day. As you
16 know, marijuana can stay in your system for up to
17 sixty-seven days, as pointed out by - - -

18 JUDGE PIGOTT: Yes, that kind of makes it
19 worse than the days that she was driving before.

20 MR. RYLEWICZ: Well, again, what's also in
21 this case is - - - and it also came into evidence, is
22 that she had - - - having finding out that she failed
23 the test on the Thursday, she immediately went to her
24 doctor and had another test done. So within a week,
25 it was out of her system.

1 But what's interesting to note, if you read
2 article 47 as a whole, 47(c)(1) and (2), okay, has
3 other penalties. It has written warnings and a
4 suspension of less than three days. Those penalties
5 actually are not reviewable by an arbitrator.
6 Because that's the way the district negotiated that,
7 and that's what the union agreed to. On those
8 penalties, actually, the district does have the last
9 say. It only goes to step 3 of the process, which
10 ends in the Superintendent of Schools or his
11 designee.

12 So if the district wanted the absolute
13 power to terminate employees who fail drug tests,
14 then they should have negotiated that into the
15 contract where it would not be reviewable by an
16 arbitrator. But that's not what they did here. In
17 fact - - -

18 CHIEF JUDGE LIPPMAN: So you're not saying
19 that in all circumstances they have to go through
20 those steps before they can discharge somebody, or
21 are you saying that?

22 MR. RYLEWICZ: No, not at all. In fact,
23 47(c)(4), the issue here, is that that dispenses with
24 the written warnings and the suspension of less than
25 three days. The union never took the position that a

1 bus driver who fails the drug test should only get a
2 written warning. That's not what we're here for.

3 But what did happen here is the arbitrator
4 hit a bus driver with a more than six-month
5 suspension without pay, but also, keeping in mind the
6 district's concern about children's safety, required
7 return-to-duty testing, follow-up testing, and
8 consultation with a substance-abuse professional.

9 CHIEF JUDGE LIPPMAN: So your point is that
10 that's a rational - - -

11 MR. RYLEWICZ: Very rational. Very
12 rational - - -

13 JUDGE PIGOTT: But none of that provi - - -
14 none of that's policy for the school. I mean, he's
15 saying sure, you could fire her, but I'm telling you,
16 you can't, and I'm also telling you that you've got
17 to educate her and you've got to do all this - - -

18 MR. RYLEWICZ: Well, no. That's - - - all
19 of what he awarded is precisely contained in the
20 district's drug and alcohol policy.

21 JUDGE PIGOTT: Oh, I see. Okay.

22 MR. RYLEWICZ: And that's the problem. The
23 district - - -

24 CHIEF JUDGE LIPPMAN: And that is - - - and
25 that - - -

1 MR. RYLEWICZ: - - - wants one thing, but
2 their policies say something else.

3 CHIEF JUDGE LIPPMAN: - - - and your
4 argument is that that contradicts a zero-tolerance
5 policy?

6 MR. RYLEWICZ: Absolutely it does. There's
7 absolutely not a zero-tolerance - - -

8 CHIEF JUDGE LIPPMAN: So is your argument
9 that there is no zero-tolerance pol - - -

10 MR. RYLEWICZ: There is no zero-tolerance
11 policy. That is correct. Not in this case.

12 CHIEF JUDGE LIPPMAN: Okay. Thank you,
13 counselor.

14 MR. RYLEWICZ: Thank you.

15 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?
16 Is there a zero-tolerance policy?

17 MS. BOURASSA: When there is no excuse for
18 the driver's test, the district has consistently
19 interpreted - - -

20 CHIEF JUDGE LIPPMAN: But how could there
21 be, in light of the other provisions that counsel
22 just referred to?

23 MS. BOURASSA: The (c)(1) through (c)(2)
24 and (c)(3) are applicable for other offenses. (c)(4)
25 has its own standard for discipline. And the parties

1 have agreed that that standard for discipline applies
2 when there is a positive drug test result without
3 more. We don't have to show that the grievant was
4 actually under the influence of marijuana. We don't
5 know whether she was or she wasn't. All we know is
6 that as soon as she finished driving her children to
7 school that day, she was sent for a drug test and
8 tested positive for marijuana. And that conduct,
9 standing alone, per se, the parties have agreed, is a
10 danger to the welfare - - -

11 JUDGE PIGOTT: Well, I'm - - -

12 MS. BOURASSA: - - - and health of
13 students.

14 JUDGE PIGOTT: - - - missing it again. So
15 why did you go to arbitration? What did you expect
16 an arbitrator to do?

17 MS. BOURASSA: The arbitrator could have
18 agreed with the grievant that she somehow
19 accidentally or unintentionally inhaled or ingested
20 her daughter's marijuana.

21 JUDGE PIGOTT: And that's okay with you?

22 MS. BOURASSA: If he - - - we would have
23 disagreed with those findings. But I think it would
24 have been very hard for us - - -

25 JUDGE SMITH: Where - - -

1 MS. BOURASSA: - - - to.

2 JUDGE SMITH: - - - where in the agreement
3 does it say that he can do that, but not do what he
4 did?

5 MS. BOURASSA: The agreement doesn't give
6 him the right to use a just cause standard, Your
7 Honor. And - - -

8 JUDGE SMITH: Well, it doesn't give him the
9 right to use an excuse standard, either. But you say
10 he could have found an excuse, he just couldn't find
11 a just cause standard?

12 MS. BOURASSA: He couldn't find a just
13 cause standard, because by his own words, he did it
14 because - - - not because it was part of the parties'
15 contractual relationship, not because he was
16 interpreting the meaning of any part of the contract,
17 but because he believed it was the better standard to
18 be applied.

19 JUDGE PIGOTT: So if he finds that it was
20 accidental, that really was in the fake margarine or
21 whatever, what then?

22 MS. BOURASSA: Then a lesser penalty, such
23 as suspension, could have been appropriate. Because
24 if somebody did unintentionally ingest illegal drugs,
25 it presents significantly less risk that they may do

1 dispute that the penalty is reviewable. We do
2 contend that the arbitrator - - -

3 CHIEF JUDGE LIPPMAN: You don't dispute
4 that the penalty is reviewable?

5 MS. BOURASSA: No. We do not dispute that
6 the penalty is reviewable. But the arbitrator had to
7 use a rational standard that was based on the meaning
8 and interpretation of the agreement.

9 JUDGE PIGOTT: Well, if he said - - - if he
10 said I believe her that the dog ate her homework,
11 essentially, but I think that rather than being
12 fired, she should have been given a letter of
13 warning, you'd have been happy with that?

14 MS. BOURASSA: We wouldn't have been happy
15 with that, Your Honor. But that would have been the
16 kind of factual finding by an arbitrator that is
17 almost impervious to review and that this court has
18 declined to review.

19 Here, the arbitrator found that the
20 grievant did, in fact, intentionally consume
21 marijuana. There was no other possible explanation
22 for her positive drug test. And yet he put her right
23 back - - -

24 JUDGE PIGOTT: It could have been in the
25 peanut butter. I mean, she just said it was in the

1 margarine.

2 CHIEF JUDGE LIPPMAN: Okay, counsel,
3 thanks. Thank you both. Appreciate it.

4 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Shenendehowa Central School District Board of Education v. Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Local 864, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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