

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL CURRY, a minor, by and through
his parents PAUL AND MELANIE CURRY,

Plaintiffs,

v.

Case Number: 04-10143
Honorable David M. Lawson

SCHOOL DISTRICT OF THE CITY OF
SAGINAW, and IRENE HENSINGER,

Defendants.

**OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The parents of Joel Curry, a fifth-grade student at a public school in Saginaw, Michigan, became upset at Joel's teachers who would not let him display a Christian message on a school project. Taking offense at this perceived slight, they filed a federal lawsuit against the school district and the grade school principal alleging that Joel's constitutional rights were violated. The parties have filed cross motions for summary judgment. The United States filed a brief *amicus curie* on Joel's behalf. The Court heard oral argument on October 6, 2005. The Court now finds that although the defendants did not violate Joel's constitutional rights under the Fourteenth Amendment or the Free Exercise Clause of the First Amendment, the actions did abridge Joel's First Amendment speech rights. However, the plaintiffs have not demonstrated that the school district failed to train its personnel in dealing with such issues or otherwise established municipal liability. In addition, the Court finds that the school principal is entitled to qualified immunity. Finally, the request for declaratory and injunctive relief is moot. Therefore, the Court will deny the plaintiffs' motion for

summary judgment, grant the defendants' motion for summary judgment, and dismiss the case with prejudice.

I.

The parties have stipulated to the facts of this case, which are summarized as follows:

Joel Curry, the plaintiff in this matter through his parents, was a fifth grade student at the Handley School in Saginaw, Michigan during the 2003-2004 academic year. At the time, Bridgitte Benjamin was Joel's homeroom teacher, Lisa Sweebe was his social studies instructor, and Shelly Dawson was his mathematics teacher. As part of the fifth grade curriculum, students participate in an exercise called "Classroom City." Classroom City takes a multi-disciplinary approach to learning by incorporating lessons on literature, marketing, government, civics, economics, and mathematics. The exercise culminates in a three-day event held in the school's gymnasium.

Sweebe, who manages the exercise, sent out packets describing the assignments to students and their parents in early November. The 2003 Classroom City event, which provoked the controversy here, was held on December 11, 12, and 16, 2003. The guidelines for assignment stated:

You will need to create, market, and sell a product for the simulation Class Room City.

- You cannot sell or use food products.
- You cannot play or sell games of chance.
- Your product must be something that is handmade.
- Materials and supplies cannot exceed \$10.00 in cost.
- You can sell as many as three different products.
- You will need a sample of your product(s) to do an all[-]school market survey. *You will receive more details from your math teacher concerning the market survey.*
- Your market analysis will help you determine how much inventory you will need to start your business.
- Remember as you prepare for your business that part of the spirit of the competition is to have a product that stands out from all the others.

Stip. Facts Ex. 1, Classroom City Project Guidelines. The assignment also asked students to construct a fictitious city in the gymnasium from cardboard refrigerator boxes. The students then elected a mayor, city counsel members, several sheriffs, and a postmaster. The students, either by themselves or with a partner, constructed a storefront and made products to sell during the three-day event. They also drew up a description of their products in order to purchase a business license. Students advertised their products in the Classroom City newspaper. Students received a fixed amount of fictitious money to purchase advertising, pay for their business licences, and settle any fines assessed by the elected sheriffs.

Before a product could be approved for sale, students were required to conduct a market survey in advance of the event. Participants created a prototype of their products, and one-third of the student body decided which products they might purchase at the event. During the actual three-day event, the entire student body, under the supervision of the physical education instructor, attended Classroom City and made purchases at the mock storefronts with fictitious script. The stores were monitored to see which one had the most money at the end of the exercise.

Apparently unable to generate his own idea, Joel took the suggestion of his mother and decided to make ornaments made out of pipe cleaners and beads in the likeness of candy canes. Joel's father offered to create cards to attach to the ornaments after finding a glass candy-cane-like ornament in their home that came with a religious conjuration of its symbolism. Joel's father evidently had given out the glass candy cane ornaments at work. However, when Joel submitted his ornament prototype for the market survey, he did not attach the card his father offered to make.

Sometime after the market survey was completed, Joel added the card to the ornaments he planned to sell during Classroom City. The card read:

The Meaning of the Candy Cane

Hard Candy: Reminds us that Jesus is like a “rock,” strong and dependable.

The Color Red: Is for God’s love that sent Jesus to give his life for us on the cross.

The Stripes: Remind us of Jesus’ suffering—his crown of thorns, the wounds in his hands and feet; and the cross on which he died.

Peppermint Flavor: Is like the gift of spices from the wise men.

White Candy: Stands for Jesus as the holy, sinless Son of God.

Cane: Is like a staff used by shepherds in caring for sheep. Jesus leads us and watches over us when we Trust him.

The Letter “J”: Is for the Name of Jesus, Our Lord & Savior, born on Christmas day

Stipulated Facts at ¶ 11. Joel and his parents brought the ornaments to school a few days prior to the event; however, they did not alert school administrators to the addition of the card. Nonetheless, Joel was not fined by the elected “sheriffs” during subsequent inspections.

Joel’s partner for the exercise was a child of Asian Indian descent, Siddarth Reddy. The two decided that Siddarth would prepare the storefront and Joel would prepare the products to sell. When Siddarth learned of the card, he informed Joel that “[n]obody wants to hear about Jesus.”

Stipulated Facts at ¶ 15. Siddarth subsequently decided to make his own products for sale, resulting in his bearing the burden of constructing both the storefront and the product. During the event itself, Joel manned the storefront during the morning hours and Siddarth during the afternoon.

On December 11, 2003, the first day of the Classroom City event, Jennifer Harris, the gym teacher and student supervisor of Classroom City, sought the counsel of Lisa Sweebe, the event manager, when she discovered that Joel was “selling religious items.” Stipulated Facts at ¶ 17. Sweebe proceeded to Joel’s storefront to see what Joel was selling. Joel showed Sweebe his ornament with the attached card. Sweebe asked Joel if the card had been attached at the time of the market survey, and Joel indicated that it had not. Sweebe then looked at Joel’s business license and noted that the ornament with the card fell within the product’s description. Although Joel was not subject to a fine on that basis, Sweebe told Joel that he could not sell the card until she had a chance

to talk with the principal, Irene Hensinger. She further stated that he had done nothing wrong, but she was concerned about the card's religious content and whether other students might be offended. For the rest of the day, Joel sold his ornaments without the card.

Sweebe initially was unable to locate Hensinger and left a message to speak with her. Around 12:20 p.m., Joel's mother arrived at the school. After learning that Joel was not allowed to sell the ornament with the attachment, she spoke to Sweebe. She told Sweebe that the use of the cards fell within Joel's constitutional rights as a student. Joel's mother indicated that she would bring in some literature regarding his rights; Sweebe agreed to review it and pass it along to Hensinger. Joel's mother stated that she knew the card had not been attached to the prototype at the time of the market survey.

Later that afternoon, Sweebe left a note for Hensinger, which contained a copy of the card's content along with the question, "Can this be sold? Mom says this is within Joel's rights? I need your okay." Stipulated Facts at ¶ 24. Eventually, Sweebe discussed the matter with Hensinger; Sweebe also provided Hensinger the information that Joel's mother furnished. Hensinger, in turn, passed the information on to Dr. John Norwood, the assistant superintendent for school performance.

That evening at home, Joel told his mother that he wished to sell the ornaments with the card so that others could learn about Jesus. His mother believed that Joel had a constitutional right to sell the pipe-cleaner candy canes with the attachment. On December 12, 2003, Joel's mother placed a copy of an article written by attorney Mathew Staver entitled "Students' Rights on Public School Campuses" in Sweebe's school mailbox. She include a note informing Sweebe, "[t]here is just a ton of info on the internet [sic] from various organizations. Some of the groups are even offering free

counsel to anyone who may have questions about students' rights to free speech." Stipulated Facts at ¶ 27.

This article along with the note was forwarded to Dr. Norwood by Hensinger. At some point, between December 12 and 16, 2003, Hensinger finally spoke to Dr. Norwood about Joel's ornament and attached card. Both agreed that the use of the card was inappropriate. On the morning of December 16, 2003, Hensinger met with Joel's mother and informed her that after consideration, the school would not permit Joel to sell the ornaments with the attached card. Hensinger further stated that Classroom City was considered instructional time and because the cards contained religious content, they could not be permitted. If Joel still wished to sell the candy canes with the card, he could do so after school in the parking lot. Joel did not attempt to sell his ornaments with the cards in the parking lot. Instead, he sold the ornaments without the cards during the exercise.

Joel generously received a grade of "A" for his parents' efforts during the assignments and was not disciplined for attempting to sell the candy canes with the religious cards. The parties agree that Hensinger's actions were taken in her official capacity as principal of the school.

During the event itself, students had the "free choice" to buy the various products for sale at the fifty-six mock storefronts. Stipulated Facts at ¶ 9. Therefore, to obtain Joel's ornament, a student would have had to purchase the ornament during the Classroom City event. Parents and non-students were encouraged not to make purchases.

On June 16, 2004, the plaintiffs filed a five-count complaint pursuant to 42 U.S.C. § 1983 alleging violation of the First Amendment's freedom of speech guarantee (count one); violation of the First Amendment's Free Exercise Clause (count two); violation of the Establishment Clause (count three); violation of the Due Process Clause of the Fourteenth Amendment (count four); and

violation of the Equal Protection Clause of the Fourteenth Amendment (count five). The plaintiffs seek monetary damages, injunctive relief, and attorneys fees. On January 28, 2005, the parties filed cross motions for summary judgment. The parties have submitted responses in opposition to the respective motions, and the Court heard oral argument on the motions on October 6, 2005. The matter is now ready for decision.

II.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” Fed. R. Civ. P. 56(c). The parties have filed cross motions for summary judgment, and neither suggests that there are facts in dispute. Nonetheless, the Court must apply the well-recognized standards when deciding cross motions; “[t]he fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate.” *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003). Therefore, when this Court considers cross motions for summary judgment, it “must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party.” *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003).

A motion for summary judgment under Fed. R. Civ. P. 56 presumes the absence of a genuine issue of material fact for trial. The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party and determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). When the “record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,”

there is no genuine issue of material fact. *Simmons-Harris v. Zelman*, 234 F.3d 945, 951 (6th Cir. 2000) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Because motions were filed by and against both defendants, and the bases of liability are not identical for the two defendants, the Court will examine the evidence as it applies to each one separately.

A. School District's liability

To establish a claim under 42 U.S.C. § 1983, the plaintiff must satisfy two elements: (1) that there was a deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under of color of state law. *Wittstock v. Mark A. Van Sile, Inc.* 330 F.3d 899, 902 (6th Cir. 2003). Municipalities are considered “persons” within the meaning of section 1983; however, a city “cannot be held liable *solely* because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). Rather, a plaintiff asserting a section 1983 claim against a municipality such as a school board “must show that the School Board *itself* is the wrongdoer.” *Doe v. Claiborne Cnty.*, 103 F.3d 495, 507 (6th Cir. 1996) (citations omitted). Therefore, to succeed on their claims against the school district, the plaintiffs “must demonstrate both: (1) the deprivation of a constitutional right, and (2) the School District is responsible for that violation.” *Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006) (citing *Claiborne Cnty.*, 103 F.3d at 505-06).

Among the ways a municipality, such as a school board, can be found to have violated constitutional rights itself under section 1983 are: (1) legislative action by the municipality's legislative body; (2) actions of municipal agencies or boards that exercise authority (such as a board

of education), *see Monell*, 436 U.S. at 694; (3) actions by individuals with final decision-making authority for a municipality, *see Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (holding that “those officials . . . who speak with final policymaking authority for the local governmental actor” can render the municipality itself liable); (4) a municipal policy of inadequate training or supervision, *see City of Canton v. Harris*, 489 U.S. 378, 383 (1989); and (5) a municipal custom, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 n.10 (1986) (observing that a municipality “‘may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such a custom has not received formal approval through the body’s official decisionmaking channels”’) (quoting *Monell*, 436 U.S. at 690-91). The plaintiffs do not claim that the school district can be found liable under any of these theories except its alleged failure to train the teachers and principal on dealing with religious issues that might arise during the instructional day.

“To succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality’s deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.” *Ellis*, 455 F.3d at 700 (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir.1992)). In this case, the parties do not dispute the fact that the school district has not provided specific training on how to accommodate religious speech. Ms. Sweebe, who supervised the Classroom City project, acknowledged in her deposition that she has received no such training, and Ms. Hensinger, the principal, confirmed that there is no written policy on the subject. Taking the evidence in the light most favorable to the plaintiff, the Court concludes that the first element of the failure-to-train claim is satisfied.

The Court believes, however, that the plaintiffs have not brought forth any evidence that the school district was deliberately indifferent to the issue or that the training shortcoming was a result of indifference on the part of the district. In *City of Canton*, the Supreme Court recognized two fact patterns by which a citizen could establish deliberate indifference. That case involved the training of police officers. The Court first observed that the nature of the officers' duties could be such that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need" in not providing training. *City of Canton*, 489 U.S. at 390. The Court identified the need to apprehend fleeing felons and the possession of firearms by officers who might be called upon to use deadly force as indicating to a "moral certainty" that proper training would be required. *Id.* at n.10. Second, municipal employees may have violated constitutional rights so often that the need for further training must have been "plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Ibid*; *see also id.* at 397 (O'Connor, J., concurring) (finding that such behavior constitutes "tacit authorization" of the officers' conduct). The Sixth Circuit regularly applies these factors to failure-to-train claims. *See Ellis*, 455 F.3d at 700-02; *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999).

The plaintiffs in this case have presented no evidence that there has been a series of violations of religious rights at the school or that the school board knew or should have known that they should train teachers in that area. In fact, there is no evidence that there *ever* has been an incident of this type in the school district. In *Ellis*, the court of appeals rejected an argument that ten prior incident reports of teacher abuse established deliberate indifference to the need to furnish training on the subject. *Ellis*, 455 F.3d at 701. In *Thomas v. City of Chattanooga*, 398 F.3d 426,

430-31 (6th Cir. 2005), the court held that evidence of forty-five lawsuits alleging excessive force against the Chattanooga Police Department did not establish deliberate indifference by that department. This Court cannot conclude in the absence of *any* prior incident of religious confrontation that a jury could find that the need to offer training in the area was “plainly obvious to [district] policymakers,” or the failure to train could be ascribed to their deliberate indifference to that need. *City of Canton*, 489 U.S. at 390 n.10.

Nor have the plaintiffs presented any evidence that the need for training was so obvious that the failure to train would result in a constitutional violation. There is no evidence from which the Court or a jury could conclude that it was inherently foreseeable that teachers would violate the speech or religious rights of students or that specific training was necessary to avoid the deprivation of constitutional rights. Although the absence of prior complaints addresses a different aspect of the failure-to-train proofs, that fact also has a bearing on the inherent foreseeability of the issues that might arise in the classroom. The point, of course, is that the lack of prior incidents reinforces the conclusion that a reasonable administrator cannot be found to have been deliberately indifferent to the need to train for unlikely happenings. Although a training program of the type the plaintiffs advocate may help school administrators in their tasks, there is no basis for school board liability based on the sole fact that no training existed.

The plaintiffs have not brought forth any evidence supporting municipal liability under section 1983. Therefore, the school district’s motion for summary judgment will be granted and the plaintiffs’ motion for summary judgment against this defendant will be denied.

B. Liability of individual defendant – qualified immunity

Defendant Irene Hensinger contends that she is entitled to qualified immunity in this case. Qualified immunity is an affirmative defense that protects government actors performing discretionary functions from liability for civil damages when their conduct does “not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has held that a claim of qualified immunity must be examined in two steps: “[f]irst, a court must consider whether the facts, viewed in the light most favorable to the plaintiff, ‘show the officer’s conduct violated a constitutional right,’” and “the court must then decide ‘whether the right was clearly established.’” *Solomon v. Auburn Hills Police Dept.*, 389 F.3d 167, 172 (6th Cir. 2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The Sixth Circuit has expanded that inquiry into a three-step sequential analysis, stating: “The first inquiry is whether the [p]laintiff has shown a violation of a constitutionally protected right; the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and the third inquiry is ‘whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights.’” *Tucker v. City of Richmond, Ky.*, 388 F.3d 216, 219 (6th Cir. 2004) (quoting *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002); see also *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004) (citing *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003)). That court later explained that although the Supreme Court continues to use the two-step approach, see *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (per curiam), “the three-step approach may in some cases increase the clarity of the proper analysis.” *Swiecicki v. Delgado*, __

F.3d __, __ (docket no. 05-4036, September 15, 2006) (quoting *Estate of Carter v. City of Detroit*, 408 F.3d 305, 311 n.2 (6th Cir. 2005)). It appears that when the state actor's conduct is obviously "objectively unreasonable" and violates a constitutional right, the court will "collapse" the last two steps. *Ibid.* (quoting *Caudill v. Hollan*, 431 F.3d 900, 911 n.10 (6th Cir. 2005)). Where a more exacting analysis of the facts may be necessary, the court tends to employ the third step, since "[i]t is important to emphasize that [the step-two] inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198 (internal quotes and citation omitted). However, because the defendant raised the qualified immunity defense, the burden is on the plaintiffs to prove that defendant Hensinger is not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006) (holding that "[o]nce the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity").

1. Constitutional right

In their complaint, the plaintiffs allege that Joel Curry's constitutional rights to free speech, the free exercise of religion, due process, and equal protection were violated. However, during oral argument on the motion, the plaintiffs' attorney acknowledged that the main thrust of the case was the alleged violation of the boy's First Amendment speech rights.

a. Speech

"Ever since the Supreme Court decided *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the notion that students do not 'shed their constitutional rights to freedom of expression at the schoolhouse gate' is beyond debate." *Smith ex rel. Smith v. Mt. Pleasant Pub. Sch.*, 285 F. Supp. 2d 987, 993 (E.D. Mich. 2003). However, a student's right to

speak out on public or private matters is subject to limitations. School administrators have the right, and perhaps the obligation, to prohibit speech that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,” or that “would substantially interfere with the work of the school or impinge upon the rights of other students,” *Tinker*, 393 U.S. at 509 (internal quotes and citation omitted). The First Amendment rights of students in school are not as broad as those of adults expressing themselves in public. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (noting that “[i]t does not follow . . . that simply because the use on an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school”).

The latitude that the Constitution gives school administrators to regulate student speech has depended in large measure on the context in which the speech is made. Supreme Court and Sixth Circuit precedent has established three general frameworks for analyzing student speech at school. First, when “a student’s personal expression . . . [merely] happens to occur on the school premises,” *Hazelwood*, 484 U.S. 260, 271 (1988), the speech is analyzed under *Tinker* and may only be censored if it would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Tinker*, 393 U.S. at 509 (citation and internal quotation marks omitted). Second, a student’s speech that occurs when the school opens up a limited public forum for free expression by students is subject to more restrictions. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 347-49 (6th Cir. 2001) (en banc) (describing different types of fora generally, and holding that college yearbook was limited public forum). In such a forum, content-based restrictions are allowed, but they must be “narrowly drawn to serve a compelling interest.” *Id.* at 348. Third, student speech that occurs when the school creates, under its auspices, the mechanism for student

expressive activities such as school plays and publications where the school retains editorial oversight is subject to the most comprehensive restrictions. *Hazelwood*, 484 U.S. at 272-73. In this context, “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. The principle that emerges from these cases is that the more likely it is that student speech will be attributed to the school itself, the more control over the content of the speech will be tolerated.

The parties do not agree on which approach ought to be applied in this case. The plaintiffs maintain that the Court ought to apply the more liberal pronouncement of *Tinker*, and the defendants insist that the more restrictive regulation of *Hazelwood* is the appropriate standard because Classroom City is a closed forum. Both arguments have merit. On one hand, the school did serve as the vehicle for the expressive activity and thereby could be considered to have created a closed forum: without Classroom City, an assignment managed by the school, the question of Joel’s ornaments would not have arisen. On the other hand, the school could have created a limited public forum by practice. After all, Classroom City was designed to be a mock city that resembled a town’s market place where free speech traditionally is allowed. Further, students were encouraged to be creative and come up with a unique product. The Court need not resolve that dispute, however, because the Court finds that the defendant’s restriction of Joel Curry’s speech cannot be justified even under *Hazelwood*’s more generous standards.

There is no dispute that the religious card attached to Joel’s ornament constitutes speech and therefore implicates the First Amendment. The defendants argue that there can be no constitutional violation here because Joel received an “A” for his efforts and was never disciplined for selling the

