

**IN THE MATTER OF AN ARBITRATION
UNDER THE COLLECTIVE AGREEMENT
AND THE ONTARIO *LABOUR RELATIONS ACT***

BETWEEN:

SUDBURY CATHOLIC DISTRICT SCHOOL BOARD

("the Employer")

AND

ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION

("the Union")

AWARD

Arbitrator:	Barry Stephens
Union Counsel:	David Bloom, Cavalluzzo LLP
Employer Counsel:	Dolores M. Barbini, Hicks Morley Hamilton Stewart Storie

**Heard in Sudbury, Ontario on
May 17, October 6, 2016; March 9, 29, 30, April 25,
May 24, 25, October 25, 2017; September 11, 28, 2018**

AWARD

[1] This case involves the termination of the grievor, who worked as a teacher in automotive technology with the Board for a period of about three years. The letter of termination sets out five grounds for the termination all arising from the relationship between the grievor and two female students, identified herein as X and Y. The letter of termination alleged that the grievor:

“... failed to maintain a professional relationship with appropriate boundaries with at least two students, which violates the trust parents and the public place on teachers and demonstrates that you do not understand the requirements and expectations of the teaching profession and the crucial roles a teacher plays in the development of children and in our duty to protect them from harm.”

[2] The grievor was suspended in June 2015, and ultimately terminated by the employer on January 26, 2016.

[3] It should be noted that the grievor was charged in June 2015 with sexual misconduct related to X. The grievor was not convicted on the charges. The criminal case was still ongoing at the time the grievor was terminated but the employer decided it would not rely on the criminal charges in terminating the grievor.

Employer Submissions

[4] The employer alleged in the letter of termination that the grievor had failed to maintain proper boundaries with X and Y, and that his responses to the various allegations were vague and unacceptable. The employer argued that the grievor put at risk the wellbeing of two young, vulnerable female students, and that he had repeatedly

demonstrated “depraved judgement” in his contacts with them. In addition, the grievor tried to hide the true nature of his actions and was dishonest with the employer during various investigation interviews, as well as during his testimony at arbitration.

[5] In addition to the above, the employer alleged in the letter of termination that the grievor had committed misconduct with respect to first different factual findings, as set out below.

1 - Discussion With X About STD

[6] The letter of termination alleges that the grievor had a discussion with X about a STD, and the he said to her she would have to advise future sexual partners that she had the disease. He did not contact X’s parents, nor did he discuss the issue with school administration.

[7] The employer argued that during an investigation meeting held on October 30, 2015, the grievor did not give an immediate explanation of his discussion with X about the STD. Initially he stated he “could not respond” to the allegations, and only admitted to having the discussion with X after taking two breaks to confer with his union advisors. The employer characterized the grievor’s responses as “evasive.” The employer also challenged the credibility of the grievor’s responses because several key details that formed part of his evidence were not mentioned during his interviews, including:

- He did not state during the interview that it was well known in the school that X had the STD
- Similarly, he did not state during the interview that he thought X was under the care of a doctor
- He did not advise the employer during the interview that he had known for about one year that X had the STD before he talked to her about it

2 – The Tattoo

[8] The letter of termination alleges that grievors actions went “well beyond” the appropriate teacher-student relationship when he became involved in assisting Y in getting a tattoo, including giving input into the design of the tattoo, driving X and Y to the tattoo parlour, and paying for all or part of the tattoo. The employer also relied on the fact that the grievor took no steps to consult with Y’s parents about any of this activity, including whether they approved of Y getting a tattoo.

[9] The employer pointed to several concerns about how the grievor handled the issue of the tattoo when it was first raised in February 2015. The grievor left the impression that “girls were stuck” and had contacted him at the last minute. He did not tell the employer that he had helped to design the tattoo, that he had stayed at the tattoo parlour throughout the process, and that he had taken the girls back to X’s house afterwards. The evidence also suggested that the two girls had colluded with the grievor to limit the details of the story, since their statements were consistent with the grievor’s original evasive misrepresentation of events.

[10] The employer alleged that the grievor had been less than forthright about his involvement with X and Y regarding the tattoo, and that the notes of the October 30, 2015 interview indicate that the grievor initially attempted to mislead the employer by minimizing his role in the tattoo process. The notes for the meeting (which were confirmed by employer witnesses) indicate that the grievor understood the tattoo was meant as a Christmas surprise for Y's mother, commemorating the fact that her mother had survived a serious illness. When asked about his involvement with the tattoo, the grievor initially responded that he and his wife had given X and Y a ride to the tattoo parlour. He was asked if that was the only role he played in the tattoo, and he replied, "Correct, I took them there." When asked if he helped to design the tattoo, he said he could not remember, but that maybe he did. He was then asked if he helped pay for all or part of the tattoo and he said Y was \$45 short, and he had paid the balance for her. The grievor also indicated that Y's father was aware of the plan to get the tattoo, but when asked for details about how he knew this, he admitted that he did not discuss the matter directly with Y's father, and he had accepted Y's word that she had her father's approval.

3. Sex Toy and Money for Bus Ticket

[11] The employer alleges that the grievor gave X money for an inappropriate purpose, and that he provided two different explanations for giving X the money. When he was first asked about the incident by Principal Patty Mardero and Vice Principal Mitch Smet in February 2015, the grievor stated that he had given X money to purchase food, as he

often did for other students, and that he had no idea that she used the money to purchase a sex toy. Then, during a later interview on October 25, 2015, the grievor denied he had given X money to purchase a sex toy, but that he did recall giving her money to take a bus trip to London, Ontario to visit her boyfriend. The employer further alleges that during an interview in February 2016 the grievor repeated the story about lending X money for a bus ticket, and he further confirmed that he did not have any communication with X's parents about either lending her the money or about her going to London.

[12] The employer alleged that the incident and the grievor's explanations gave rise to a reasonable inference of collusion among the grievor, X and Y since they all told the same story in February 2015 that the money had been given to X to purchase food. The employer asserted the grievor's behaviour was unacceptable, that he showed no remorse or understanding of his actions, that he lied and misled the Board in an attempt to coverup his wrongdoing. Finally, the employer argued that the grievor's evidence in chief demonstrated that he still did not understand why his actions were wrong with respect to this incident, when he stated it was wrong to lend money and trust it would not be used for another purpose.

4. Nature of Communications with X

[13] The employer alleged that the grievor engaged in frequent and inappropriate text communication with X, including the use of code words to describe body parts. In its final submissions the employer did not rely on the allegation with respect to the use of code

words. However, the employer alleged that the grievor was not forthright and honest in that he failed to explain how he became aware of the X's father's anger over the weekend in February 2015 that prompted the grievor to call Mardero and advise her that she might be getting a call about the fact that the grievor picked up X as part of the events related to Y's tattoo. The employer also submitted that the facts indicate that the grievor and X exchanged personal text messages, and that this was a sign of an inappropriate relationship, as well as a means by which the grievor was able to collude with X in order to mislead the Board.

[14] The Board also asserted that the grievor had been dishonest when, after initially refusing several times during the October 2015 interview to explain about his communications with X, he told the employer during a subsequent interview on January 15, 2016 that a curriculum consultant, Michael Grandmont, had advised him to create business cards that included his personal cell phone number. He had done so, he said, and students had access to this card on his desk in his classroom. Grandmont denied this story, and the employer relied on Grandmont's evidence as proof that the grievor had fabricated the evidence in order to cover his inappropriate actions.

5. The Planner Entry re Threesome

[15] The final incident relied upon in the letter of termination was that in March 2015 the grievor had responded inappropriately when he became aware that X and Y participated in a "threesome" with an older male. The grievor drew up a contract in a

notebook that X and Y signed stating they were not “having sex.” The employer relied on the fact that the book contained entries from other students, which was an indication that the “contract” was accessible by other students. The employer also faulted the grievor for not contacting the parents of X or Y, and for not speaking to school administration about the issue. The employer stated that the incident was most concerning given that it happened shortly after the matter involving X’s parents and the grievor’s involvement with Y’s tattoo, especially since both the principal and vice-principal had warned him at that time about inappropriate relationships with students. In addition, the employer alleged that the grievor had not been immediately forthcoming when first asked about the issue in October 2015, in that he initially failed to divulge that the contract was in his handwriting. Later during that same interview, it was revealed by the union representative that the contract has been the grievor’s idea.

[16] The employer argued that the incident regarding the threesome showed a “complete lack of judgement”, that he failed to maintain a professional relationship with appropriate boundaries with X and Y, and his involvement with the girls placed them both at risk.

Summary Employer Arguments

[17] In summary, the employer argued that the grievor was not honest during the various investigatory interviews, and that he colluded with both girls in order to mislead and deceive the Board. The employer also asserted that the grievor was dishonest during

his testimony at the hearing and his overall behaviour during the hearing was not consistent with that of a genuinely remorseful person who appreciated his inappropriate behaviour. The employer argued that the grievor stated under cross examination that he did not tell Mardero facts “until they became relevant”, and that he did not advise Mardero about the reason for the tattoo because he was “lazy.” The employer submitted that there was no reason for the grievor to withhold information during the investigation process, since that was his opportunity to tell the truth, and that his explanations for not telling the whole story at the times when he was questioned did not enhance his credibility. The pending criminal charges did not hamper his ability to tell the truth, given that the employer’s allegations were separate and distinct from the criminal charges, and he maintained he had done nothing wrong.

State of Mind Indicating no Remorse

[18] The employer argued that the grievor’s behaviour demonstrated that he lacked rehabilitative potential. Although he had “dodged a bullet”, as he put it, in the way he had handled the problem in February 2015 regarding the incident triggered by the tattoo, he engaged in similar inappropriate behaviour with the same two girls within a matter of weeks. His evidence about this period was that he behaved as he did because he felt like he was “the man”, that his “ego was being fed”. and he was having “too much fun” in spite any warnings he had been given. The employer characterized this attitude as reflecting a fundamental character flaw, and asserted that there was no evidence that the grievor truly appreciated the inappropriate nature of his behaviour, let alone that he

could change. Employer counsel argued that the grievor's "apology" was prompted by union counsel with a series of questions, and the grievor's responses did not reflect those of an individual who understood his wrongdoing and who was genuinely remorseful.

Grievor's Lack of Credibility

[19] The employer asserted the grievor's credibility was undermined by the fact that he provided explanations in his evidence that he had not previously mentioned. For example, when asked about why he had not taken any steps to contact any responsible Board official after the incident regarding the threesome and the sex contract, he stated for the first time that the rest of the school was aware of the fact that X and Y had been part of a threesome, and no other staff member had taken action. Most significantly, the employer argued, the grievor stated in his testimony regarding the STD incident, that he had not given X advice about telling future partners about her STD, and suggested that the advice came from X's mother. This was inconsistent with the statement he made to the employer during his interview on October 30, 2015.

Considerations Regarding Reinstatement

[20] The employer asserted that the necessary conditions for reinstatement of the grievor in all of these circumstances were that he would have to demonstrate that he could be trusted as an employee and a teacher in the future, that he understood his behaviour was wrong, that he was committed to changing his behaviour, and that he expressed genuine remorse. The employer argued there was no evidence to support any

of these conclusions, much less all of them, and that indeed the evidence suggested the opposite in each instance. In addition, the grievor's behaviour was extremely serious, and yet he was a very short-term employee, having only been hired by the Board in September 2012. The grievor's behaviour was "egregious and depraved" and he demonstrated a "complete lack of integrity" in his dealings with his employer and with respect to his responsibilities toward X and Y. The employer argued that the grievance should be dismissed. The employer also submitted that, even were I to conclude that termination was excessive, damages in lieu of reinstatement should be ordered.

Union Submissions

General Submissions

[21] The union asserted that the grievor was a very effective teacher. He had gone to teacher's college in his middle age due to his commitment to teaching and, at the school where he taught, he had quickly revitalized the automotive program. The union also argued the grievor was well liked by students and had created a safe social space in his auto shop where many students spent their lunch periods.

[22] The union pointed out that the grievor admitted that he had lost sight of appropriate boundaries with his students, but argued that his conduct was not intended to harm either X or Y, and that he did not cause any actual harm to either student. The grievor apologized to the employer and at the hearing that his conduct was not appropriate, and he demonstrated insight with respect to his errors in judgment. The

union relied on that fact that the grievor had successfully completed the OECTA Boundaries Course since his termination. The union also relied on the fact that the employer did not call either X or Y to testify, so that no weight could be given to any allegation they made during the investigation. Moreover, since they were not called as witnesses, an adverse inference could be drawn that the Board had no confidence that either girl would prove a credible witness.

[23] The union argued that the employer's submissions included allegations that were not articulated in the letter of termination, including collusion with the students; the allegation of a false alibi regarding the business cards and other difference in evidence. The Association argued that it would be improper to allow the employer to rely on any of these allegations as they were not part of the letter of termination.

[24] The Association addressed each of the allegations included in the letter of termination.

1 - Discussion With X About STD

[25] The grievor testified he had become aware of X's STD after her boyfriend made public statements that she had given him the disease. Later, he had a conversation with X about the STD, and advised her that she had to be responsible, and the grievor's belief was that he was reinforcing the advice X's mother had given her. The Association asserted that the grievor had accepted his actions in this regard were not "best practice", and that

he should have referred X to a counsellor. However, the grievor testified that he understood that X had already discussed the matter with her mother, and that she had already seen a doctor. The employer failed to make any efforts to see if this was in fact the case. The union pointed out that X's boyfriend told Mardero, Vice-principal Barry, and another teacher, Teddy Bubalo, that X had given him the disease, and none made efforts to contact X's parents. The union also argued that there was no clear Board policy governing what to do when a student discloses an STD, and that the grievor's comments to X were consistent with the Ministry's Health and Physical Education curriculum. Given all of this, the union argued it was unreasonable for the employer to be critical of the grievor's response.

2. The Tattoo

[26] The union argued that the evidence disclosed that Y told the grievor in class about the planned tattoo, which Y wanted to get as a sign of solidarity with her mother, who was battling a serious disease. She told the grievor she needed a ride because her father was working nights. The grievor told Y he would discuss the matter with his wife. The grievor gave his opinion on the proposed design of the tattoo, suggesting the ribbon on it could be larger. The union submits that the grievor did not offer to pay for the tattoo. The grievor picked up X and Y with his wife in the car and drove the girls to the tattoo parlour. He and his wife waited at the parlour while Y got the tattoo. The grievor paid \$45 towards the tattoo because Y was short and the grievor felt Y had "put him on the spot." The grievor testified that Y told him that her mother and father approved of the

tattoo, although the grievor acknowledged that he made a “very bad choice” by failing to confirm that the father had in fact agreed in advance. The union pointed out that the Board had faulted the grievor for his actions but had not taken any steps to determine whether Y’s father did, in fact, approve the tattoo in advance, and that this undermined the suggestion that the employer considered the grievor’s actions to be very serious. There was no evidence that Y’s parents were in any way concerned about the grievor’s conduct, and the grievor had stated that, if faced with similar circumstances in the future, he would not comment on the design of the tattoo and would not offer a ride to the tattoo parlour.

3. Sex Toy and Money for Bus Ticket

[27] The union argued that the grievor had given X money to buy a bus ticket to visit her boyfriend in London. The union acknowledged that the grievor failed to disclose to Mardero in February the purpose for which the money was given to X. The grievor testified that his decision to give X the money showed poor judgment on his part. The union argued that the evidence did not show that the grievor acted with malevolent intent.

4. Nature of Communications with X

[28] The union acknowledged that the grievor engaged in text communications with X that were not related to regular school business, and the grievor agreed that this activity demonstrated a “poor choice” on his part. The union asserted there was no evidence the

messages were in any way sexually oriented or that the two used code words to describe body parts, as the employer alleged. The suggestion about the use of code words appears to have come out of the employer's interview with X and Y, but neither were called as witnesses at the arbitration.

5. The Planner Entry re Threesome

[29] The union pointed to the grievor's evidence that it was not uncommon for X and Y to speak openly in class about their sexual exploits. The grievor did not approve of such discussions and went so far as to ban X from the class for doing so. With respect to the specific incident, the grievor testified he overheard X and Y talking about a threesome they had with a man who was in his late 20's or early 30's. The grievor stated he intervened and told the girls they should not be having the conversation in school, and that he expressed concern about X giving Y her STD. He suggested they sign a celibacy contract, which was drawn up in a notebook the grievor kept on his desk.

[30] The union also relied on the grievor's evidence that he acknowledged that he should have not used the contract, that he should have banned the girls from class for the conversation, and should have referred them to the school administration. The grievor also agreed that he got "too intimate" with their personal lives. These statements, the union argued, showed that the grievor understood why his actions were not appropriate. Further, the celibacy contract was well-intentioned and there was no evidence of any

malevolent or depraved intent. Finally, although the contract was in a book on the grievor's desk, there is no evidence any other student saw it.

Conclusions and Decision

[31] The union took the position that the employer could not rely on any conflict of evidence between the grievor and other witness with respect to various issues, as these had not been stipulated in the letter of termination. I not agree with this submission to the extent that the letter of termination includes allegations that the grievor failed to accept responsibility and provided explanations that were vague or unacceptable. I have noted below conflicts of evidence that support this allegation. In addition, I have concluded that inconsistencies between the grievor's evidence and past statements, as well as inconsistencies between his evidence and that of others (for example Grandmont), impact his credibility as a witness as well as his trustworthiness as an employee in the future.

[32] I accept the union's submission that the grievor was generally regarded as a particularly effective and well-liked teacher by students and other staff members, and this is an appropriate factor to be weighed in assessing the appropriateness of the penalty of termination.

[33] I will first address the five incidents set out in the termination letter.

1 - Discussion With X About STD

[34] I find that the grievor did not handle this issue properly. He would have been aware of that the subject of a STD was very sensitive and should have known that any advice he provided should be minimal and limited to guiding X toward appropriate assistance and support, if such was needed.

[35] Regardless of whether the grievor's advice was sound, it does not strike me as the kind of advice that should have been given by the grievor for two main reasons. First, the grievor has no medical expertise, and his advice, even if sensible in isolation, may well have been harmful without further information or guidelines, and he should have been aware of this. The grievor took a risk in giving this advice, and that was not a risk to which X should have been exposed. He was hired an automotive teacher, and he was not hired by the Board to provide medical, psychological or health advice of any kind. He ought to have known that he should have restricted his statements to offering to assist X to find professional help and support, to the extent it was necessary.

[36] Secondly, the employer's concern was with respect to the nature of the conversation the grievor had with X. His advice to her touched on the intimate subject of X's sexual health and well-being, and went beyond what could be considered a normal discussion between a teacher and a teen-age student. I believe the Board has good grounds to be concerned that the grievor failed to maintain appropriate professional

boundaries with X in this situation. He engaged in a discussion with a teenage student about an intimate topic, and he kept the conversation private between them. The import of the discussion included the grievor's assumption and tacit approval of X's ongoing sexual activity in the context of providing advice that he was not qualified to provide.

[37] In my view the circumstances were straight forward. It was not appropriate for the grievor to engage in an intimate discussion with the X about her sexual activity. Indeed, the grievor's evidence indicated that he understood this, given that he stated he cut off discussions touching on sexuality when such discussion took place in the classroom, and asked students to leave if they continued. Yet, when such a topic came up in private conversation, the grievor did not draw an appropriate line.

[38] I accept the union's assertion that the employer does not seem to have a firm policy requiring teachers to notify a student's parents directly when a student discloses intimate sexual health issues. Indeed, it may well be that it should not be the teacher who makes that decision. Some Board officials were made aware that X's boyfriend was openly stating in the school that X gave him a STD, but this was not reported to X's parents. Similarly, Mardero did not contact X's parents even after X reportedly told her directly about the STD. It is my view that it is fair to state that, in spite of the fact that much of this communication was second or third hand, the Board's failure to follow up in other instances indicates that the grievor's failure to notify X's parents, standing on its own, would not likely have supported much or any discipline.

[39] However, the grievor engaged in a discussion that included a statement that was inappropriate both as to the potential risk arising from his lack of expertise, and that was problematic given its intimate nature. In my view, it is the nature of the conversation that is important. There were ways in which the grievor could have, and should have, handled the discussion that would have been less intimate and more appropriate. This is clearly an instance where the grievor, in my view, “failed to maintain a professional relationship with appropriate boundaries”, as set out in the letter of termination.

[40] Given all of these considerations, I have concluded that the Board had cause to be concerned about the grievor’s statement in the discussion with X about the STD, and that his actions amounted to just cause for discipline.

2. The Tattoo

[41] One troubling aspect of the grievor’s participation in the tattoo process was that he aided and assisted Y in getting the tattoo without any knowledge that her parents would approve. The fact that the girl’s mother was reportedly happy with the tattoo when it was revealed is not relevant to whether his actions were appropriate. The grievor had no way of knowing how Y’s parents would react. Even if he wanted to respect Y’s desire to keep the tattoo a surprise from her mother, he had no way of knowing that Y’s father approved.

[42] It is also notable that, when he was asked about this part of the incident during the October interview, the grievor stated categorically that he was aware that Y's father knew. His response was not accurate. When he was questioned further on the subject and asked if he had spoken directly to Y's father, he acknowledged that he had not, and that he had simply taken Y's word when she said her father approved. His initial statements also left the impression that the ride to the tattoo parlour had been a last-minute arrangement, because the girls were stuck, and also that he had merely dropped them at the parlour and carried on with his shopping. This was not a true or accurate description of events. The drive had been pre-planned, and the grievor had stayed with the girls during the tattoo process.

[43] As mentioned above, one of the allegations contained in the first paragraph of the letter of termination was that during the investigation process the grievor denied allegations and provided "rationales" that were "unacceptable and/or vague." After reviewing the notes and the testimony, it is my conclusion that the grievor's responses in February 2015 and at the beginning of the interview in October 2015 tended to suggest that he had only driven the two girls to the tattoo parlour. In October 2015, he added the details that he might have helped design the tattoo, and that he had helped pay for the tattoo. He failed to mention that the rides had been planned in advance; that he had stayed throughout the tattoo process, (that was why he was present at the end and able to pay for at least part of the tattoo); and that he drove the girls back to X's house afterwards. The manner in which these facts were shared with the employer left the

impression that the grievor was attempting to minimize his involvement with the two girls in relation to the tattoo, and also indicated that the grievor must have been aware at the time that his involvement with the tattoo was not appropriate. In my view, this tends support for the employer's allegation that the grievor acted improperly by denying allegations and providing unacceptable or vague responses, and the employer had reason to have less trust in the grievor as a result of his statements during the interviews about the tattoo incident.

[44] The evidence discloses that the grievor encouraged and participated in Y's decision to get a tattoo, without taking the step of ensuring that she had parental approval for such a decision. Even though tattoos are quite common and widely accepted, parents who are otherwise accepting of tattoos may balk when it involves their child. A reasonable teacher could at the same time appreciate the depth of the loving sentiment associated with Y's idea, without losing sight of the fact that this was a decision that required parental involvement. The grievor did not respond appropriately to the circumstances. In essence, he assumed the role more of an older and uncritical peer in the process, and he accepted the risk (a risk that involved the Board as well as himself) that Y's parents did not and would not approve. He offered in advance his time to help X and Y attend at the tattoo parlour, and he ultimately paid for at least part of the cost. In my view, his actions with respect to the tattoo were outside acceptable norms of the teacher/student relationship. The grievor did not need training to avoid this situation, in

that common sense would dictate that it was not his role to aid and support Y in her decision to acquire a tattoo without parental participation and approval.

[45] It is my conclusion that the tattoo incident demonstrated a lack of trustworthiness, attempts by the grievor to avoid the true extent of his involvement by providing unacceptable and or vague responses, as well as a lack of judgment and commitment to professional norms, and the employer had just cause to discipline the grievor as a result.

3. Sex Toy and Money for Bus Ticket

[46] In my view there is no question that the grievor acted inappropriately with respect to the money he gave to X, and with which she ultimately purchased a sex toy. The evidence establishes that the grievor did not tell Mardero in February that he had given X money to take a trip to see her boyfriend. The grievor acknowledged that it would have been inappropriate to give X the money for this reason, and that he should have confronted X when he discovered that she had used the money for another purpose.

[47] I note the evidence did not demonstrate that the grievor gave the money to X knowing that she would use it to buy a sex toy. However, it is not relevant to my consideration of the allegation that X's mother advised the Board that she approved of her daughter's purchase. In other words, I do not attach weight to the fact that there was no harm or prejudice to X for her purchase of the sex toy. What is more relevant, from a

disciplinary standpoint, is the decision the grievor made and the manner in which he disclosed the incident to the Board.

[48] It is difficult to trust the grievor's explanations about this incident, since he provided two wholly different explanations, stating first that he had given X the money to purchase food, and later asserting that he had given her the money to take a bus trip to London to see her boyfriend. (His evidence that he misled the employer about this key point by "taking advantage" of the fact that the conversation had been diverted to another topic during his interview, was troubling in its own right.)

[49] The grievor's failure to provide a consistent and credible response to the employer's questions about why he gave X the money is enough to undermine the trust a Board must necessarily place in a teacher. The explanation the grievor testified to, that he had given X \$50 to take a bus trip without discussing the matter with her parents or a supervisor, even if true, is unacceptable behaviour. The trip would have been several hours each way, and was scheduled to extend over a weekend. The grievor apparently made no effort to check with X's parents about whether they were aware of the planned trip, let alone whether they approved. A teacher should not give his 16-year-old student money so that she can take a lengthy bus trip alone, without regard to whether she had advised or obtained the approval of her parents, in order to visit her 18-year-old boyfriend in a distant city. In my view, the grievor's explanation is an example of poor judgement and demonstrates a lack of common sense and reasonableness.

[50] Indeed, the grievor's explanation of his behaviour is such that it strikes me as difficult to accept. I have tried but failed to imagine a scenario where a responsible adult in X's life would have given her money in these circumstances without the knowledge and approval of her parents. I am driven to conclude that it is hardly credible that a teacher would make this decision. If the grievor's story about the money is not true, I have to assume that the truth is more damaging to him. Regardless, if it is true, it is an example of an exercise in judgment that was ill-advised and inappropriate, and that demonstrates a degree of lack of judgment that would require clear evidence to overcome.

[51] It is my conclusion that, even accepting the grievor's explanation about the planned trip, his actions were inappropriate and showed a lack of judgement, a disregard for the wellbeing of X, disrespect for her parents, and disregard for his responsibilities to his employer. The grievor also engaged in an act of significant dishonesty when he gave Madero an explanation for the money in February 2015 that he now acknowledges was untrue. There is question in my mind that the grievor's actions with respect to the money given to X was worthy of a serious disciplinary response.

4. Nature of Communications with X

[52] The grievor attempted to construct an explanation about how a student might have acquired his cell phone number based on an instruction that he said came from Grandmont. Grandmont testified, and he refuted the allegation that he gave the grievor

an instruction to include his personal cell number on his business card. I have set out above my finding that the grievor had attempted to mislead the employer's investigations by providing partial or misleading information, evasive responses and dishonest explanations. This impacted his credibility as a witness. I had no reason to harbour any doubts about the evidence of Grandmont, who gave his testimony in a straight-forward manner, and who did not appear to have anything to gain or lose as a result of the outcome of this case. I have concluded that the employer was correct to assert that the grievor had provided a false alibi in his statements to them and in his testimony. This goes to the grievor's credibility, but does not, in and of itself, prove improper communication.

[53] The employer's main allegation with respect to the issue of communication related to the weekend of February 23, 2015, when the grievor contacted Mardero to advise her that X's father was going to call the school about the grievor giving X a ride. It is apparent that someone gave the grievor prior warning that X's father would call. It seems obvious that X would have been the person most likely to have advised the grievor, but the grievor declined to explain how he found out when questioned by the employer on October 30, 2015. At the hearing he stated that X had called him. However, he also conceded that he texted with students, including X, about non-school related matters, participating in what he described as "social media" type texts about social activities. He acknowledged this was a "poor choice" on his part.

[54] Given the above considerations, I have concluded the employer has demonstrated that the grievor engaged in inappropriate communication with students, and established just cause for discipline for this transgression.

[55] Having said that, one allegation is that the grievor's communication included the use of code words to describe body parts, but the only evidence of this allegation came from the Board's interviews with the two students, neither of whom testified. Thus, the evidence is hearsay and it would not be appropriate to rely on hearsay evidence to prove a fact alleged against the grievor.

5. The 'Threesome' Planner Entry

[56] After reviewing the evidence, I am inclined to agree with the employer's conclusion that the grievor was indirect when first questioned about the entry in his classroom notebook regarding X and Y's sexual activity. When asked about it, he responded that the two girls had made a deal "with each other", and when asked about who had written the contract and his involvement in the incident, he responded that, "it looks like they are promising to not have sex", and did not mention that he had suggested the idea of a contract. The fact that the contract was the grievor's idea was revealed by the union representative, Dan Charbonneau, later during the interview. The grievor's evasiveness when confronted with this issue undermines his assertion that his actions were an error in judgment. It is more likely that the grievor had an understanding at the

time that what he did was wrong, and he initially sought to avoid admitting the full extent of his participation when he was interviewed

I also accept that the employer had cause for concern given that the grievor kept this incident to himself, especially since it happened so soon after the incident in February 2015, when X's parents complained to the school about the grievor giving X a ride in his car. Similar to the discussion regarding the X's STD, this encounter with X and Y involved the grievor engaging in an intimate discussion, this time with both girls, about their sexual activity and sexual health, while also failing to take any steps to notify their parents or a responsible school official. As mentioned above, the evidence disclosed he had on previous occasions ejected students from his classroom for engaging in inappropriate discussions. As was the case with the discussion about the STD, there is no reasonable explanation as to why he thought the "contract" was an appropriate response in this instance.

[57] I have concluded that the grievor's actions with respect to the 'contract' were similar to those regarding his discussion with X about the STD. I adopt the same reasoning in deciding that the grievor was also subject to discipline for this interaction with the two students. In this case, however, the breach was more serious, because there is no evidence that other teachers or school officials were made aware of the "threesome" and failed to respond or responded in a manner similar to the grievor. In addition, the grievor's lack of a forthright explanation to his employer when the issue was raised was

evidence of the grievor's tendency to be less than honest with the employer in the investigation of his behaviour.

Decision Regarding Termination

[58] After reviewing all of the evidence, I do not accept that all of the grievor's admitted actions outlined above can be viewed as errors in judgment. In my view, an error in judgement should be at least comprehensible, so that a reasonable and objective observer could understand how an individual could made the error. Some of the evidence might be viewed in this light. For example, assuming the grievor's testimony about the tattoo was complete and accurate, his explanation of how he came to contribute to some of the cost for the tattoo appears to fall within the category of an error in judgement. While one may disagree with his decision, it is possible to understand that action in the narrow context of the moment. I cannot reach the same conclusion about some of the grievor's other actions, and in particular the decision, as he described it, of giving X money to take a bus trip. It is my conclusion that, when reviewing the grievor's admitted actions, he established relationships with X and, to a lesser extent, Y, that went beyond the teacher-student relationship, and that these relationships demonstrated what I would characterize as a fundamental lack of judgment that goes beyond episodes of poor choices that could be reliably corrected through training.

[59] The evidence does not persuade me that the grievor understands the nature of his actions or that he will not repeat them in the future. As can be seen above, when his

standing with X and Y came to the attention of the parents and the Board, the grievor lied or was evasive when questioned. The manner in which he responded to these incidents indicated that he was aware that his relationship with the two girls was not appropriate, and that he decided to take steps to conceal or explain the conduct in order to avoid consequences that he was aware might otherwise be imposed.

[60] This behaviour creates in my mind a concern about the grievor's potential to change. Three examples that give rise to this concern are his decision to fabricate a story about the money given to X; his decision to minimize his behaviour in order to mislead X's parents and the Board about the ride to the tattoo parlour; and his failure to respond appropriately when dealing with topics of sexuality privately with X and Y. These examples represent incidents where the grievor engaged in behaviour about which the employer has a right to be concerned, but where he did not demonstrate honesty or trustworthiness. These were acts that went to the heart of the grievor's relationships with students, and which undermine the trust necessary in the employment relationship of any teacher.

[61] I do not consider it exculpatory, or of significant mitigating value, that there is no evidence that the parents were upset by the grievor's behaviour with respect to the tattoo or the money given to X. For one thing, the grievor initially minimized his behaviour with respect to the drive to the tattoo parlour, and he fabricated at least one story about

the money. Moreover, as set out above, the grievor's admitted behaviour was such that he placed X and, to a lesser extent, Y at risk for harm.

[62] The grievor's evidence with respect to the money for the bus trip is most troubling. The first explanation he provided, that the money was for food, he admits was not true. The second explanation, that he gave her money for a bus trip, stretches credulity. Even if true, the decision does not strike me as an understandable mistake or error in judgment. He could have exposed X to obvious dangers on the journey, or in her relationship with her parents, which could have had major and even life-altering consequences for her. I do not accept that a responsible or reasonable adult would think it appropriate to fund such a trip. If the grievor engaged in this plan with X, he ran the risk that his employer would ultimately be held responsible for the consequences of his reckless actions.

[63] The union argued that, in some cases that can be found in the relevant jurisprudence, a teacher may not be subject to termination for non-sexual "boundary violations" with students if the teacher recognizes and appreciates the culpable nature of the conduct. Cases of this nature turn on the specific facts, of course, and the nature of the specific facts naturally leads to the emphasis on certain aspects of the relevant legal principles that may vary from case to case.

[64] In this case, I am focused on the consideration that the grievor should have acknowledged and accepted responsibility for his behaviour in such a way as to create the confidence that he could be trusted in the future. Given his admitted actions, there was a need for countervailing evidence that established a basis for trust. This is crucial for any employee, but particularly so for teachers who are trusted with the wellbeing of children.

[65] There are cases where a lack of candour or lack of full acceptance of responsibility does not preclude reinstatement, but I do not think that is appropriate in the case before me. The grievor has been dishonest and evasive, and he has attempted to minimize his actions. His dishonesty with the employer and failure to demonstrate an understanding and acceptance of his actions, up to and through the arbitration process, weigh against him. A school board should be in a position to know that a teacher will act in a way that is consistent with the standard of trust placed in teachers with respect to their student relationships. While the evidence discloses that the grievor had a history of good relationships with other students, his duty was owed to all of his students, not all but one or two.

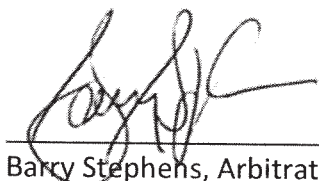
[66] I agree with the employer's submission that, in order to be considered for reinstatement, the grievor would have to demonstrate that he could be trusted as an employee and a teacher in the future, that he understood his behaviour was wrong, that he was committed to changing his behaviour, and that he expressed genuine remorse. In

my view, the evidence was not sufficient to establish these conclusions. I agree with the employer's characterization of the grievor's apology in his evidence in that I found it lacked authenticity. More importantly, when asked about the process of how he came to accept that his behaviour was not appropriate, he stated it was a "gradual process" of talking to others and gathering information. He referred to his confusion with respect to boundaries between teachers and students, but stated that over time he had gained insight about these issues. I found this notable given that, as outlined above, I do not see how a reasonable adult could have been confused, for example, about whether he should have given X money to take a bus trip away from her family in a distant city. This is not so much a boundary issue, but a more fundamental issue of a breach of the commitment to the safety and well-being of a student under his care. I have concluded that the evidence does not establish that the grievor appreciated the wrongful nature of his actions, and there is not a reasonable basis upon which the employer could trust his actions and decisions in the future.

[67] The evidence leads me to the conclusion that the grievor provided unacceptable or vague rationales for his behaviour. He was evasive when questioned and provided explanations that were untruthful. He has not accepted responsibility in a manner that would lead one to have confidence that he would behave differently in the future. He established improper relationships with two students, and violated the trust placed in him as a teacher of young and at-risk students. He failed to take reasonable steps to protect his students from harm, and instead states that he supported at least one decision that

placed a student at serious risk of harm. He engaged in inappropriate intimate private conversations with two students, even though he demonstrated his understanding of the inappropriateness of such discussions in a classroom setting. He admitted to being in text contact with student over subjects not related to school. (I note that the allegation in the letter of termination with respect to the use of code words for body parts was not proven.). The grievor was a short-term employee, having been with the Board for less than four years. I must also take into consideration that he was a successful teacher who was well liked by students and staff, he revitalized the automotive technology program at the school, and a finding against him in this case will mean it will be unlikely he will be able to carry on with his teaching career.

[68] Weighing all of the mitigating factors, however, I have concluded that the reasons for termination outweigh other considerations. Given the evidence, the submissions of the parties, and the authorities, it is my conclusion that the employer had just cause to terminate the employment relationship, and the grievance is dismissed.



Barry Stephens, Arbitrator
March 6, 2019