2017 CarswellNS 904
Nova Scotia Arbitration

CUPE, Local 5047 and Halifax Regional School Board (Crawford), Re

2017 CarswellNS 904, 133 C.L.A.S. 303

In the Matter of an arbitration pursuant to the Trade Union Act, RSNS 1989, as amended

Canadian Union of Public Employees, Local 5047 (The "Union") and Halifax Regional School Board (The "Employer")

Augustus M. Richardson Member

Heard: September 20, 2017; September 21, 2017; September 22, 2017
Judgment: November 20, 2017
Docket: None given.

Counsel: Karen MacKenzie, for Union
Ian C. Pickard, Leah Kutcher, for Employer

Subject: Public; Labour

Related Abridgment Classifications

Labour and employment law
I Labour law
I.10 Discipline and termination
I.10.a Grounds
I.10.a.iv Conduct incompatible with position
I.10.a.iv.B Off-duty conduct
I.10.a.iv.B.2 Threats and intimidation

Labour and employment law
I Labour law
I.10 Discipline and termination
I.10.d Kinds of discipline
I.10.d.v Discharge
I.10.d.v.B Just cause

Labour and employment law
I Labour law
I.10 Discipline and termination
I.10.g Remedies
I.10.g.i Substitution of penalty
I.10.g.i.B Miscellaneous

Headnote

Labour and employment law --- Labour law — Discipline and termination — Grounds — Conduct incompatible with position — Off-duty conduct — Threats and intimidation

Labour and employment law --- Labour law — Discipline and termination — Kinds of discipline — Discharge — Just cause

Labour and employment law --- Labour law — Discipline and termination — Remedies — Substitution of penalty — Miscellaneous

Table of Authorities

Cases considered by *Augustus M. Richardson Member*:

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Generally — referred to

***Augustus M. Richardson Member*:**

Introduction

1 Some employees of school boards wear two hats: one as an employee, and one as a parent of a child in one of the schools run by the board. The grievor, Ms Tammy Crawford, was one such employee. She was terminated on November 2nd, 2015 for advocating strongly — the Employer says too strongly — on behalf of her child. This award deals with whether the grievor's conduct as a parent justified discipline as an employee and, if so, to what degree.

2 The Union and the Employer are parties to a collective agreement with operative dates of August 1, 2011 to July 31, 2014 (the "Collective Agreement"). Pursuant to a letter dated June 29, 2016 the parties agreed to my appointment as a single arbitrator to hear and determine this grievance. The parties agreed that the Collective Agreement applied.

Background

3 The grievor was hired by the Employer to work as an Educational Program Assistant ("EPA") in 2012. She held that position as of her termination in November 2015.

4 The Employer agrees, and there would appear to be no question, that the grievor's work as an EPA was good to very good. There were no concerns about her performance as an EPA. There was no evidence of any concern from her co-workers about working with her in the schools in which she worked. Her performance reviews from March 2012 to May 2015, across three different schools, were consistently positive: see Ex. U2, Tab 13.

5 The grievor also had a son in the school system. She worked at different schools from the ones in which he was a student. It is necessary, given the events that led to the grievor's termination, to know that her son had been diagnosed with Attention Deficit Hyperactive Disorder ("ADHD") and obsessive compulsive disorder ("OCD"): Ex. U2, Tab 15.

6 Notwithstanding the grievor's good performance in the schools in which she worked as a EPA she had had some difficulty dealing with others outside of the EPA/student relationship. On June 17, 2014 the grievor was part of a field trip to Graves Island. She was with a group of grade 2/3 students, though not assigned to anyone in particular. While there she became involved in a verbal dispute with another parent over the use of a water tap, which had been shut off and denied to others because students had been fighting over the water. The parent who had shut off the water reported later that the grievor

had confronted her in front of other parents and students about

> ”not being your [the grievor’s] boss and not being able to tell your child what to do. The parent also reported feeling very uncomfortable and intimidated by the situation. She said that she moved her hand away and you fill up your [water] gun despite the fact that others had been turned away, including your family:” Ex E1, Tab 1.

7 In a letter dated July 15, 2014 Ms Paula Hadley, a Human Resources Manager for the Employer, reported the results of the Employer’s investigation into this incident. She concluded that “it is more likely than not that you made the comments as reported and finds your conduct unprofessional and disrespectful:” Ex. E1, Tab 1. She noted that as an employee the grievor was “expected to behave and communicate in the workplace in a respectful and professional manner at all times.” She added that further incidents “will result in disciplinary action up to and including termination.” The letter was to serve “as a written warning and will be placed on your employment as a matter of record:” Ex. E1, Tab 1. The grievor had had Union representation during the Board’s investigation of this incident. The written warning was not grieved.

8 In May 2015 there were two further incidents.

9 On May 5, 2015 the vice-principal of Elizabeth Sutherland school asked the grievor to call. There had apparently been an incident involving the grievor’s son and the use of what is called a “time out room.” These are rooms that the Board uses when children become unduly disruptive. The rooms are empty of furniture, desks, chairs or things on the wall. There are mats on the floor. I gather that the expectation is that a disruptive child will eventually calm down when placed in such sterile surroundings.

10 It appears that on that day the grievor’s son had been placed in the school’s time room. The grievor called the vice-principal. It was reported that she started yelling at the vice-principal, saying in part that her son should never go in the time out room; and that if the vice-principal ever did that the grievor “would come over and put her in there and see how she liked it.” When asked about this report the grievor responded by saying that she “’absolutely never said I would put her in there’:” Ex. E1, Tab 2.

11 On May 7, 2015 there was another incident involving the grievor’s son and his EPA. His behaviour was reported as having been so disruptive that the vice-principal had called the grievor to ask her to come to remove him from the school for that day. In a letter dated July 29, 2015 Ms Hadley laid out what, in the Employer’s view, had happened. The grievor had entered the vice-principal’s office, slammed the door and pointed her finger at the vice principal, yelling “that you told the school not to assign that EPA (referencing the EPA that had been involved ...).” The vice principal told the grievor that her son was suspended and handed her the suspension notice. She ripped it up and threw it at the vice principal. She then left the office and proceeded down the hall way to get her son. She ran into the EPA and said “’If you ever work with my son again, I’m pressing charges’.” When asked about this incident later the grievor denied having slammed the door or cursing, but acknowledged that it might have gotten “a little loud” and that she had ripped up the suspension notice and had thrown it on the vice principal’s desk: Ex. E1, Tab 2.

12 As a result of this incident a Protection of Property notice (”PPA”) was issued against her, restricting her from entering the school grounds at Elizabeth Sutherland for a period of six months: Ex. E1, Tab 2, p.2.

13 On May 12th the grievor emailed the vice principal, advising that she had been in contact with the Minister of Education and further accused the vice-principal of treating her and her family “a certain way because of the colour of your skin:” Ex. E1, Tab 2.

14 As a result of the incidents of May 5th and 7th the Employer concluded that the grievor had conducted herself “in an unprofessional, disrespectful and threatening manner.” Noting that she had already been given a written warning on July 15, 2014 “for similar behaviour” it imposed a one day unpaid suspension to be served during the 2015-16 school year: Ex. E1, Tab 2. She was warned that as an employee of the Board she was expected “to behave and communicate in a respectful and professional manner at all times in our schools, including when you are acting in the role of a parent,” and warned that further incidents “will result in further disciplinary action up to and including termination:” Ex. E1, Tab 2.

15 The Union grieved the discipline. However, the grievance was later withdrawn because of a failure to comply with time requirements.

Tuesday, October 27, 2015

16 The termination with which we are concerned stemmed from events at Beechville Lakeside Timberlea Senior Elementary School ("BLTSr" or, as the context may indicate, "the school") on Tuesday, October 27, 2015. At the hearing before me the Employer and the grievor offered significantly different versions and interpretations of those events. There are however certain facts that are not disputed.

17 First, while at BLTSr that day the grievor was acting as a parent. Her work as an EPA took place at an entirely different school in a different neighbourhood.

18 Second, the grievor had called in sick to her work place on October 27th.

19 Third, her son was a student at BLTSr.

20 Fourth, the grievor did drive her son to BLTSr that day.

21 Fifth, the physical layout of BLTSr and its immediate surroundings consists of a brick sided building with a large asphalted area in front of the school's entrance. This area doubles as both a parking lot and as a play ground for students while they wait for the morning bell to ring at 8:25 a.m. Access to this area is via a driveway that runs along the side of the building. The entrance to the driveway is off of a municipal street. Vehicles coming to the school enter the driveway and travel down along the side of the building and, upon entering the area, turn left to park. Children coming to the school will walk along a sidewalk between the driveway and the side of the building. If they arrive prior to the morning bell they will leave their knap sacks in front of the building and play in the asphalted area.

22 The safety concerns associated with children being and playing in and about the asphalted area led the school to institute a practice of blocking off the entrance to the driveway with a series of red pylons. While there is some dispute as to the system's effectiveness as a barrier to access, there is agreement that a line of pylons is placed across the driveway. Prior to 8:05 a.m. there is a gap in the pylons to permit some vehicular access. After 8:05 a.m. the gap is closed, the intent being to prevent or at least slow the access of vehicles down the driveway (and hence into the parking lot area) in order to safeguard the students. There is also a sign posted at the beginning of the driveway stating that there is no access to the driveway between 8:05 and 8:30 a.m., and between 1:50 and 2:40 p.m.: Ex. E1, Tab 15.

23 The parties do not agree on much else after this point.

The Employer's Version

24 Four witnesses testified as to the events that day:

a. Ms Carolyn Champagne, a teacher who was in the parking lot that morning;

b. Ms Shikeba Begun, an EPA who was coming into work;

c. Ms Lisa Banks, a Learning Centre teacher at the school who worked with the grievor's son from time to time; and

d. Ms Tracey Quinn, the school's vice-principal.

25 The Employer also had an email from the school's custodian, who had been in the parking lot with Ms Champagne that morning. The Union entered that statement into evidence: U2, Tab 7. This account had been considered by the Employer when it came to its decision to terminate the grievor.

Ms Champagne

26 She has been a teacher with the Board for 15 years. She has worked as grade 5 teacher at BLTSr for the past 12 years.

27 On October 27th, 2015 Ms Champagne was assigned to yard duty that morning. She along with other teachers had performed this duty for many years. She explained that prior to 8:05 a.m. each morning parents whose children were involved in the Excel Programme would drive them to school and drop them off in another, circular driveway that ran off the driveway to the asphalted area in front of the BLTSr entrance. Those children then walked down the driveway to the entrance to BLTSr.

28 At 8:05 a.m. the gap in the line of pylons would be closed (as already explained). School buses and parents in cars would use the circular driveway to drop off children. However, vehicular access to the driveway beside the school was now blocked by the pylons. Children would walk down the sidewalk or driveway, drop their bags in front of the school, and play in the parking area until the morning bell rang at 8:25 p.m. The children would then pick up their bags and crowd into the school.

29 During the period between 8:05 and 8:25 three teachers would be in the area, supervising the children and also ensuring that vehicles did not cross the line of pylons. Exceptions would be made for parents arriving with children who were on crutches or in wheelchairs, but on those occasions a staff member would guide the vehicle through the pylons and into the parking area.

30 She testified as follows:

> our caretaker Bob Thistle came down into the parking lot, he had put the pylons across the driveway ... we were chatting, I was greeting the kids ... we noticed a car coming through the pylons, it seemed too quickly to us. I stepped forward to stop the car, and as I approached it started to slow, but before I could say anything the driver rolled down window ... she said she was upset, that she was able to come though and said 'stop yelling at me.' I was just using hand gestures, there was no yelling except from her.

31 The grievor turned left and parked. Ms Champagne and the custodian went over to the car.

> We went over to say that cars are not allowed into the area at this time ... she got out, her son got out, and her son said they were dropping off a microwave, she [the grievor] said the same thing ... I said 'Sorry, no cars are allowed after 8:05 ... she was very upset at me, and was disrespectful and harsh with her words.

32 Ms Champagne also testified that during this exchange the grievor had said that she had had to move the pylons to gain access

33 The grievor then carried the microwave into the building. Ms Champagne, being concerned about what appeared to her to be the grievor's agitated state, asked the custodian to use his radio to alert the school office that a parent was entering the school. The school's policy at the time was to require all visitors, including parents, to sign in at the front office, which was located just inside the front entrance: Ex. E1, Tab 16.

34 Ms Champagne testified that she could not recall any parent ever treating her in such a fashion. The grievor was the only one in her experience to have driven past her without stopping. On similar occasions in the past parents had always apologized when advised that access was not permitted after 8:05 a.m. She acknowledged in cross examination that from time to time in the past parents had moved the pylons to gain access during the 8:05-8:25 time period, but that on each such occasion she had been able to stop them without them driving past her. She also agreed in cross examination that the grievor had not touched her. Nor could she recall any words of threat being used, notwithstanding her evidence that she personally

felt somewhat threatened.

35 Ms Champagne testified that she estimated that this incident occurred closer to 8:05 than to 8:25 because the custodian had been chatting with her just after placing the pylons at 8:05 a.m.; and because there were children playing in the area. She did not think it possible that it happened after 8:25 a.m., because once the bell rang the children entered the building and she had to go to her class. She also noted that she did had had no prior dealings with the grievor or her son at the time, although she was aware that the son was a special needs student at the school. The grievor did not then, or at any later point, apologize to her for the incident.

Statement of Robert Thistle (School Custodian)

36 As part of its evidence the Union introduced an email from Robert Thistle, a custodian at the school: Ex. U2, Tab 7. The statement is contained in an email dated October 28th, 2015 (that is, the day after the incident). In it Mr Thistle stated that

> ... yesterday morning Tuesday October 27/15 at 8:05 a.m., I put pylons out and went and checked on where the roofers parked their truck. On my way I stopped and talked to Caroline [Champagne] who was on duty in the parking lot, facing the front entrance. All of a sudden a vehicle came onto the parking lot at a pretty fast pace. Both Caroline and I went and tried to stop her (Mrs Crawford) but she kept on going and parked in front of the fence., facing the soccer field. We both went over to her to tell her she was not allowed to be in the parking lot at this time of day. She got out of her car and pulled out what looked like a box with a microwave in it, and turned to both of us and told us to get out of her way and not to talk to her. She said this twice and she went into the school. That's when I went to talk to Tracy Quinn and told her what had happened. Tracy went into the school to talk to Mrs Crawford.

Shakeba Begun

37 Ms Begun was an EPA working at the school. She was the EPA for the grievor's son. She started at the school in September 2015. She is still an EPA there.

38 The morning of October 27th she arrived at the school for work. She was walking down the driveway. She testified that she saw a teacher and the custodian in the parking area. She saw the grievor driving past the line of pylons. She saw the teacher try to stop the car. She saw the car then drive over to park. She thought this was in the vicinity of 8:05 or 8:10 a.m., just about the time she was entering the school to get ready for the day. She saw the grievor roll down her window, and could see that she and the teacher had a conversation. She could not hear what was said. She saw the grievor get out of the car with a box. She felt that the grievor was in an angry state of mind, based on what she had seen, and on the grievor's pace when walking towards the entrance.

39 Ms Begun testified that she held the entrance door open for the grievor. Ms Begun then went to the hall outside the Learning Centre, which is just to the left of the front entrance. She hung up her coat. This would have been before 8:25 a.m. She saw the grievor and Ms Lisa Banks, the Learning Centre teacher, talking in the room. She did not hear what was being said. She did not recall seeing Ms Quinn at the time. The grievor's son was in the Learning Centre. Ms Begun recalled taking him from the Learning Centre to his class room. Shortly thereafter the grievor came down the hall to say goodbye to her son.

Lisa Banks

40 Ms Banks has been a full time teacher since 2007. She taught French until 2010, and then became a Learning Centre teacher. She remained in that position until the end of last year, and is now a Resource Teacher.

41 Ms Banks testified that she started as the Learning Centre teacher at BLTSr in September 2014. The 2015-16 year was her second year in that capacity at BLTSr.

42 Ms Banks testified that she met the grievor for the first time just before school started in September 2015. It was a 'meet and greet' for the parents and teachers. Ms Banks explained that the grievor had had difficulties with staff who dealt with her son in the past and as a result was somewhat distrustful of staff. There had been problems in the past surrounding attempts to physically move or touch the grievor's son when he had "escalated." She and the grievor agreed that Ms Banks would be the only one allowed to deal with her son on those occasions. Because of that agreement Ms Banks felt that she and the grievor "had a good understanding ... and that we could discuss things if anything happened."

43 An individualized teaching plan ("IPP") had been developed for the grievor's son. The grievor was adamant that he not be put into a time out room. It was agreed then that there would be a classroom he could go to that had mats. It was intended to be a place where children could go when "heightened" that would give them a space in which to calm down. It was not a time out room. The grievor's son could take himself to the room if he felt the need. He was not to be taken there; it was to be voluntary on his part.

44 On October 26th the grievor's son had become agitated. He had tried to run into the office, but the door was locked. He then ran into the time out room. Ms Banks and the custodian stood at the threshold to the room. The grievor's son (who had run into the room on his own) began shouting that he was not supposed to be in the room. Ms Banks felt that he was playing a game with them because he knew that he was not supposed to be there. His EPA tried to prompt him to come back to the class room. Once he began shouting Ms Banks intervened and decided they would not go into the room to get him. They would just encourage him to calm down, leave the room on his own and come back to class. He eventually did. As Ms Banks said, "the game ended because no one went into the room to get him."

45 Ms Banks testified that the morning of October 27th the grievor and her son came into the Learning Centre room. She was standing near the doorway. She testified that the grievor looked angry. The grievor had a microwave, which she put down in the room. She stood close to Ms Banks, wanting to know what had happened the day before. Ms Banks thought that the version the grievor had "was that her son had been moved into the time out room by the EPA under my direction, when I knew he was not to be touched or moved into the time out room ... she [Ms Crawford] had been told that her son had been moved into the time out room, not that he had gone in on his own will." The grievor was angry and said "I'm feeling like I want to bust you up ... I'm feeling like I will lose it." From Ms Banks' perspective, the grievor "was angry, she was not happy ... she clearly believed that there had been an injustice on my part, that I had not followed the plan."

46 Ms Banks recalled that while this was going on the grievor's son would intervene from time to time, saying that he had been put in the time out room. The grievor was also carrying on a dialogue with her son at the same time as with Ms Banks. The grievor told her son that he was not to be in the time out room while also accusing Ms Banks of having put him there. Ms Banks agreed that the grievor was not yelling or screaming at her, but insisted that the grievor was speaking in a loud, aggressive manner. She testified in cross that the grievor was standing "close to me ... saying that she felt like she could bust me up, I had no idea what that meant but I thought that at the time it did not sound like a good thing." She also agreed that the grievor "did not lay a hand on me."

47 Ms Banks testified that shortly after this conversation began Ms Begun came to get the grievor's son. Ms Quinn then arrived. The grievor spoke to Ms Quinn about what had happened the day before. Ms Banks then turned her attention to the other children who by this time were coming into the school.

48 Ms Banks prepared an account of what had happened at emailed it to the school's principal at lunch time that day: Ex. E1, Tab 5. Of note, given the later conclusions reached by the Employer, is the following excerpt from the email:

> "She [the grievor] was very agitated and threatening. She told me that she was feeling like she wanted to 'Bust me up' as she stood very close, she spoke very angrily and said that I did not know how to do my job and that I was making her lose it. Mrs Crawford was also yelling at [her son] that he was not going to the time out room and that we were not going to be touching him. (He was standing there.):" Ex. E1, Tab 5.

49 Ms Banks testified about events after that day. This testimony related to the encounter's impact on her. In essence it came down to Ms Banks taking steps to avoid the possibility of running into the grievor in stores or at events in the

community. That possibility never materialized. I say no more about that evidence because I did not consider it material to the issue before me — the issue being the grievor's conduct that day, not Ms Banks' actions after that day in response to that conduct.

Tracey Quinn

50 Ms Quinn was a vice-principal at BLTSr during the 2015-16 school year. She did not know the grievor prior to September 2015. She testified that the grievor's son had first started to come to the school in September on the regular school bus. There had been some incidents on the bus, resulting in his being transferred to the bus for special needs children. It is smaller and carries few passengers. The hope was that that would reduce the possibility of negative interactions triggering disruptive behaviour on the son's part. The transfer did not result in the hoped for result, and by October 27th the grievor's son was being driven to school by his parents.

51 Ms Quinn on occasion supervised access to the school during the morning, and she confirmed Ms Champagne's account of how things were to work. On the day in question Ms Quinn was out in the area of the circular driveway, supervising the bus drop off. She did not see the interaction between the grievor and Ms Champagne — her vision of that area was blocked by the school building. She testified that she received a radio message that a parent had come into the school. She walked towards the school entrance. As she did she ran into the custodian (Mr Thistle). He told her that a parent had driven past them. Ms Quinn then entered the school. At that point she could see the grievor and Ms Banks standing in the doorway to the Learning Centre. She testified that she

> could hear her [the grievor], she was escalated, very loud, very heightened ... she appeared anxious and her gestures were being confrontational in front of Lisa Banks ... I was nervous because I was not sure what was going on ... I was coming onto a scene where I did not know what was going to happen ... Tammy [the grievor] was wanting to know what had happened yesterday ... I said I didn't know but that I would find out ... my job is to bring things down to an even keel ... so in talking to Tammy I was able to bring her down ... I assured her we would get answers and that her husband Randall would be contacted by the end of the day ... we had been asked to contact Randall about this situation.

52 Ms Quinn testified that this took place before the morning bell had rung. There were no students in the hallway. She did not recall the grievor asking at that point to go down to her son's classroom to say goodbye, but agreed that it was possible and had happened before. She testified in cross that she could hear the conversation taking place between the grievor and Ms Banks when she entered the building. She agreed the grievor was not screaming. She was using a loud voice, not yelling. Ms Quinn testified that after she had reassured the grievor that she would find out what had happened the day before "the tone in the room and Tammy's voice changed." She did not hear any threats being used. The grievor did not place her hands on Ms Banks, and to Ms Quinn's knowledge had never threatened anyone at the school. At the time of her discussion with the grievor Ms Quinn was not concerned that the grievor might hurt her. Ms Quinn also admitted that the grievor had had permission to deliver the microwave to the school.

53 Ms Quinn testified that school policy did require parents and visitors to sign in. She agreed in cross that she did not know at the time that the grievor had not signed in. She agreed that she had not asked her if she had. Nor did she ask her to return to the office to sign in.

54 Ms Quinn left to return to the office to supervise the school's commencement announcements, which included the singing of Oh Canada.

55 After the announcements were over Ms Quinn went back to the Learning Centre to see how Ms Banks was. Ms Banks was "very emotional, very shaken up, very taken off guard ... in a state of shock." Ms Quinn testified that it was at this point that she learned that the grievor "came into the Learning Centre and approached her in very aggressive way and said she was going to bust her up."

56 Ms Quinn offered Ms Banks the day off. It was refused. She did prepare an account of what had happened: see Ex.E1, Tab 4. Ms Quinn advised the principal of what had happened. The principal took things in hand, with the result being another

PPA notice being issued against the grievor on November 6, 2015: Ex. E1, Tab 14. The notice barred the grievor from entering the BLTSr school premises for a six month period. It expired in May 2016.

The Grievor's Version

57 The only person to testify on behalf of the Union as to the events of October 27th was the grievor herself. (Her husband did testify briefly as to events after that day, but, and for the same reasons noted above with respect to Ms Banks, I did not consider it material to the issue before me.)

58 The grievor had worked as a permanent EPA for three years as of the beginning of the school year in September 2015. She had worked on a temporary or casual basis for two years before that. She had worked at a number of schools over that period. As of the beginning of the school year in September 2015 she was working at Elizabeth Sutherland in Spryfield. As an EPA she worked with children with learning and behavioural disabilities.

59 The grievor agreed in cross examination that as an employee of the Board she was expected to conduct herself in a respectful and professional manner. She understood, in part because of her previous discipline, that her conduct as a parent could impact her employment with the Board. She agreed that her conduct could be relevant to her employment as an EPA.

60 As I have already noted, the grievor's son had been diagnosed with Attention Deficit Disorder, OCD with anxiety issues. The grievor testified that her son would act out from time to time. He would become disruptive. On occasion in the past his behaviour was such that he had to be removed from class. In the past and in some previous schools he would on occasion be placed in a "time out" room. On other occasions the school would call the grievor's husband or the grievor to come and remove him from school for a period of time.

61 The grievor testified that she did not believe in the use of time out rooms. She testified in cross that as an EPA she felt that "no child should be caged up like that." She added that it was her understanding that it was Board policy that "that kids who are aggressive should be caged up ... and I disagree with that [policy]." She added however that if she had been instructed in her capacity as an EPA to put a child in a time out room she would do so. And while she strongly disagreed with the policy she would not voice it openly in such a situation.

62 In cross the grievor acknowledged that she believed firmly that her son should not be touched or manhandled in any way; and that he should not be put in a time out room. These two principles were "near and dear" to her. She would have an emotional response if she learned that either principle had been violated. It would upset her if she found out he had been put in a time out room. If she thought that had happened she would want to speak to his school about it.

63 The grievor testified (and the Board agreed) that she had never been disciplined as an EPA. The Board had no complaint with her work as an EPA. She received good performance reviews: Ex. U2, Tab 13. Nor was there any evidence to suggest that anyone who had worked alongside her had any complaint or concern about her work as an EPA. She had only been disciplined "for advocating for my son." When asked how often she acted as an advocate for her son she said "pretty much every day."

64 The grievor called in sick on October 27th. She testified that she herself had been diagnosed with OCD. On that day her anxiety levels had been heightened, and she called in sick for that reason.

65 The grievor decided to drive her son to BLTSr that morning. When asked "why" on direct, given that she was sick, she said it was because he had missed his bus. By way of backdrop, she explained that her son had initially been on the regular bus but had been taken off it because the large number of children on the bus led to his becoming agitated and acting out. He was switched to the special needs bus, which only much fewer children. He was on that bus "for quite a while till he started to act up on that, and then we started driving him ... mostly my husband did because I had to be at work." The grievor also testified that they had decided it was best "he not play with kids in the morning because he gets too ramped up ... so we decided not take him to school until the bell rang, which I thought it was 8:30," adding that she had only found out at the hearing that the bell rang at 8:25 a.m.

66 The grievor also testified that she decided to take a microwave in to the school at the same time. Her son became

agitated when he had to wait or stand in line for his lunch. She and her husband thought that it would be a good thing for him to be able to heat his own lunch in a microwave. He would not have to wait to eat, and he would also gain a measure of self-determination. She testified that at the time she understood that her husband had broached the idea with the school, and had received permission to bring a microwave in. No date had been set or agreed upon for them to deliver it.

67 The grievor lives in Spryfield. BLTSr is in Timberlea. It is about a 25 minute drive to the school, depending on traffic. The grievor testified that she and her son left their home 8:00 and 8:10 a.m. She got to the school around 8:30 or 8:35. There was a gap in the line of pylons on the driveway. A white van with a ladder on top was driving through the gap just ahead of her. She assumed that the person in the van had moved the pylons to create the gap. She herself did not move the pylons. She followed it through the gap. As her car entered the asphalted area in front of the entrance she saw Ms Begun walking around the building. She saw no children in the area, just a few "stragglers" running to the front entrance. She testified that she assumed then that the bell had already rung.

68 She was driving "very slow" at this time. When asked 'why' in direct she explained that two people had been approaching her. They were yelling as they did so. She did not know who they were or what they were yelling. In cross examination she explained that because of a childhood experience she refused to stop for strangers. She acknowledged that the person she now knew to have been Ms Champagne might have wanted her to stop, but she hadn't heard what they were saying. She pointed out that teachers were not the only adults found on school property, and that "if I don't know who they are I won't stop, unless I know exactly who there are."

69 The grievor denied rolling down her window. She said that Ms Begun was mistaken in her testimony on that point. She also denied saying anything to the two people. She did gesture to them that she would be pulling over to park in the parking area. The only person she spoke to was her son, who was yelling and cursing in an agitated fashion in the back seat. She testified that she thought he was yelling because he had been "ampted up" by the two strangers yelling at them. She asked him who the people were, and told him to "cut it out." She spent her time, and focussed her energies, on dealing with him. She got out of the car with him, and picked up the microwave and his back pack. She testified that she spoke to her son using her "mother voice, which is louder than normal ... he listens better if I speak over him ... he is loud as it is." She and he walked to the school entrance. She saw Ms Begun and asked her to hold the front door for her. She walked in. She passed the office. There was a woman with brown hair standing there. The grievor did not know who she was, but asked if she could deliver the microwave. She was told it was OK to do so.

70 The grievor, her son and Ms Begun walked to the Learning Centre. Ms Banks was there, as were two boys. The grievor said 'good morning.' Ms Banks asked for a minute, and shooed the two boys to their regular class. The bell had rung. It was at this point closer to 8:40 a.m. The grievor put the microwave down. At this point the people in the room were Ms Banks, the grievor, her son and Ms Begun. She denied being agitated or that the subsequent conversation between her and Ms Banks became "escalated." She denied yelling at Ms Banks. However, at this time her son was yelling. In cross she explained that he was shouting that "they" had put him in the time out room the day before. She agreed that that would have upset her. She denied knowing anything about this incident before October 27th.

71 The grievor testified that she alternated between speaking to Ms Banks in a normal tone and crouching down to admonish her son who was "screaming in my ear ... I told him to be quiet, that he was not to be in that time out room, it was not a game, not a play room, no one will put you in there." She acknowledged that the term "bust up" was mentioned, but testified that it was just a comment about "kids in general in my experience," adding that "I talk really fast sometimes." She denied saying anything about her son's behavior. She said she would never do so in front of him because "it just escalates him." She denied asking Ms Banks whether she was accusing her son of lying — again, because he would never say that in front of him. She explained in cross examination that to speak that way in front of her son would lead him to disrespect Ms Banks.

72 At some point Ms Quinn entered the picture. The grievor testified that she did apologize for having driven down the driveway into the parking lot. She had not understood it was wrong when she drove in, but once she had got her son calmed down she had realised that she should not have been there. The greivor said that nothing was said to her about her voice or its tone. She allowed that she was a "boisterous, Type A personality" and that people "could hear me before they could see me." She testified in cross examination that she asked Ms Quinn to find out why they had put her son in the time out room the day before. She also asked her to find out about people "putting their hands on him." She denied being upset or agitated when

asking these questions, saying that she was just "loud and boisterous." The discussion eventually ended. The grievor testified that she asked to be able to say good bye to her son (who had been taken about this time to his classroom by Ms Begun), and Ms Quinn gave her permission.

73 The grievor was asked in cross whether she had any explanation for why the testimony of the Employer's witnesses would diverge in places so much from her own. She denied thinking that there was any conspiracy, or that they were lying. She said their testimony, where it was different from hers, was simply mistaken — that it was "their version, whether right or wrong." She did think, however, that their testimony had been influenced by their knowledge of rumors about, or past experience with, her son.

The Employer's Investigation — the Meeting on Thursday, October 29th, 2015

74 Ms Charelle Maillet, the Employer's Co-ordinator, Human Resources, testified regarding its decision to terminate the grievor on November 2, 2015. She did not sign the letter of termination which had been signed by Ms Hadley. However, she wrote much of it and certainly would have advised Ms Hadley as to its contents and reasoning.

75 Ms Maillet testified as to the Employer's organization. It operates 136 schools. There are roughly 3,500 permanent teachers. If casuals are included the Board's total complement of employees approaches 10,000.

76 Ms Maillet's first encounter with the grievor was with respect to the incidents in May 2015, which had resulted in the grievor's one-day unpaid suspension. She and Ms Hadley had met with the grievor to interview her about the incidents. She also recommended the one-day suspension to Ms Hadley.

77 Ms Maillet testified that when she heard about events of October 27th from Ms Hadley she was surprised — as she said, "border line shocked." The previous discipline had been intended to bring home to the grievor the importance of conducting herself in a respectful and professional manner. She and Ms Hadley decided to investigate. They relied on the principal at BLTSr to collect statements (actually, email accounts) from the custodian, Ms Champagne and Ms Banks: see Ex. E1, Tabs 4 and 5; Ex. U2, Tab 7. They also prepared a formal series of interview questions to pose to the grievor for a meeting to take place at 3:00 p.m. on October 29th: see Ex. E1, Tab 7. The questions followed along the lines of the statements that had been provided to them by the Employer's witnesses.

78 I pause here to note that Ms Maillet and Ms Hadley prepared their questions based on their interpretation or understanding of the email statements they had received. They did not speak directly to any of the witnesses. For the most part their interpretation followed along the lines of what was contained in the emails. However, there was one important error in their understanding of what had happened. This error surrounded the use of the term "bust up" or "bust you up."

79 Ms Banks in her email statement of October 27th had written that the grievor "told me that she was feeling like she wanted to 'bust me up' as she stood very close, she spoke very angrily and said that I did not know how to do my job and that I was making her lose it:" Ex. E1, Tab 5.

80 However, in the questions formulated by Ms Maillet and Ms Hadley the statement was formulated in a different way, as follows:

> "3(c) Do you recall saying to the LC Teacher that you felt like you wanted to 'bust her up' as you stood very close to her?

81 I note too that in response to a question from me at the hearing Ms Maillet testified that she had understood the grievor to have said to Ms Banks "I am going to bust you up," *not* that "she felt like busting her up." This understanding is to be contrasted with what Ms Banks said in her email statement on October 27th, and what she testified to at the hearing — that is, that the grievor had said "she felt like" she wanted to bust her up, not that she intended to. I take that to mean that Ms Banks understood that the grievor was expressing a feeling, not a present intention to act upon that feeling.

82 Ms Maillet and Ms Hadley met with the grievor on October 29th. Ms Maillet took notes of the responses of the grievor to the questions being posed to her: see Ex. E1, Tab 8. The answers recorded in Ms Maillet's notes followed form with the grievor's testimony at the hearing. After the meeting Ms Maillet formed the view that the grievor had not been honest or forthcoming in her answers; and that on balance, the version of events provided by the other witnesses was more likely than not the accurate one. The grievor had not apologized for her conduct, other than for driving into the parking area without knowing that she was not supposed to. She felt that the grievor's conduct had been aggressive and confrontational. Such conduct was not in accord with the Provincial School Code of Conduct (the "Code"): see Ex. E1, Tab 9.

83 The Code applies to "school members," who are defined as

> "students and all adults whose roles or jobs place them in contact with students in school settings and school activities. School members include students, principals, teachers, parents, staff employed by the school board, other staff engaged to provide services at the school, volunteers, visitors, and any persons who have contact with students and staff:" Ex. E1, Tab 9, Definitions.

84 The Code requires all school members to, amongst a long list of things, "show respect for the rights, property, and safety of themselves and others;" "show respect for the roles and responsibilities of students, principals, teachers, parents, volunteers, and the school board;" and to "demonstrate respect for the learning environment of the school and the classroom and school activities and events:" Ex. E1, Tab 9, Acceptable Standards of Behaviour.

85 Ms Maillet testified that parents as well as employees, and employees who were also parents of children attending schools of the Board, were expected at all times to treat other employees, parents and children with respect and in a professional manner. The fact that an employee was acting in a parental capacity did not relieve him or her of that responsibility. Ms Maillet was also concerned, based on the grievor's past disciplinary conduct as well as that on October 27th, that she could not be trusted in the future to deal with other employees or parents in the school system in an appropriate way.

86 In cross examination Ms Maillet agreed that she had not taken the *Human Rights Act* into account when evaluating what she believed to be the grievor's conduct. Nor did she consider the fact that the grievor was acting in her capacity as a parent on October 27th, not as an EPA. She expressed the view that the Board had grounds for concern about an employee's personal life when it had an impact on the employment relationship. She agreed that the grievor had not physically touched anyone; and that there were no complaints as far as she was aware of the grievor's work or conduct as an EPA. She agreed that she had not seen fit to interview Ms Begun. She did not think her evidence was relevant at that point.

87 Ms Maillet further explained that

> our obligation is to ensure that when kids arrive at school we have staff mindful of their safety and needs ... this also includes comportment in front of staff and students ... I believe that as a Board we have an obligation to ensure our employees act as role models, demonstrate good conflict resolution methods, and not be aggressive or confrontational ... because such conduct does impact the reputation of the Board.

88 Following the meeting Ms Maillet asked Ms Quinn for her recollection of what happened. That was provided: Ex. U2, Tab 7. Ms Quinn also responded to some follow up questions from Ms Hadley on October 30th: Ex. U2, Tab 8.

89 The grievor had also prepared a written statement concerning the events on October 27th: Ex. U2, Tab 9. The grievor acknowledged in it that she had started to discuss with Ms Banks her son's "behaviour in school the day before" but that they had not gotten very far before Ms Quinn arrived. She also mentioned the two people she did not know yelling at her in the parking lot, and not saying anything to them. She wrote that she had apologized for being in the parking lot; and that she had then explained that any student could come into the learning centre "and bust the place up and unfortunately there is nothing we can do about it:" Ex. U2, Tab 9.

90 Ms Maillet decided — or recommended strongly — that the grievor be terminated. As a result the termination letter of November 2nd was drafted for Ms Hadley's signature. The letter noted that the grievor had submitted a doctor's note on November 2nd, which note had stated that the grievor was off work until November 16th. The termination letter continued:

> "In the meeting on October 29, 2015 you did not indicate that any of your actions or behaviours were as a result of a medical condition. In fact, you denied all of the allegations. If you have thorough and complete medical explanation to explain why you denied all of the allegations and why you acted as you did on Ocober 27, 2015 the Board is willing to review that information if received by 4 p.m. Friday, November 6, 2015:" Ex. E1, Tab 3.

91 On November 6th the grievor's family physician wrote to Ms Hadley

> "to indicate that Tammy [Crawford] is receiving ongoing active treatment for ADHD and OCD along with generalized anxiety disorder and has been over the past few years. For this she requires medication and regular follow up. Recently due to an exacerbation of issues she has been put off work from November 2nd to November 16th to allow some of her symptomology to settle:" Ex. U2, Tab 25.

92 Ms Maillet reviewed the medical note. In an email dated November 17th and copied to Ms Hadley Ms Maillet stated that the note was "not sufficient medical information, as stipulated in thee letter of termination, nor does it provide explanation to support Ms Crawford's actions nor her explanations in the investigation meeting:" Ex. U2, Tab 10.

93 In cross examination Ms Maillet explained that in her view the note had not responded to the question posed in the termination letter. She agreed that the grievor had been terminated for off-duty conduct, but insisted that it was not fair to say that the grievor's role as a parent had played a large role in the decision to terminate — the grievor was terminated "because of her behaviour as it relates to the work place and her employment relationship with us."

Submissions on Behalf of the Employer

94 Counsel for the Employer commenced by noting the grievor's own admission that the Employer was entitled to expect its employees to act in a respectful manner, whether in their capacity as parents or as employees. Notwithstanding that acknowledgement, the grievor had in the past acted in — and been disciplined for — conduct that fell below that standard. He also noted that credibility was an issue. There were two versions of what had happened on October 27th: the Employer's, and the grievor's. The Employer's version was based on the evidence of at least four, if not five, witnesses. None of those witnesses had a motive to misrepresent what had happened that day. The grievor's version, on the other hand, was based on her testimony alone. The grievor had agreed during cross examination that her conduct could be grounds for discipline, giving her a motive to minimize or misrepresent her conduct.

95 Counsel submitted that the Employer's version was the more credible, and the more logical, than that of the grievor's. And a finding that the Employer's version was more accurate could lead to a further conclusion — that the grievor was not being truthful, not just to the Employer, but to me as arbitrator. These were factors that I ought to take into account.

96 In assessing the grievor's version of what had happened counsel submitted that I should consider the similarity between the grievor's conduct on previous occasions for which she had been disciplined with that on October 27th as recounted by the Employer's witnesses. They were all occasions in which the grievor had spoken loudly and aggressively to other parents or staff in front of students; they were all occasions in which she was advocating for her son; and they were all occasions in which the grievor had downplayed or denied what had happened.

97 Counsel for the Employer went through the testimony of the witnesses called on its behalf. He noted that the testimony of these witnesses was consistent, not only with each other but with common sense. So, for example, it made sense that the incident in the driveway would have taken place before rather than after 8:25 a.m. because the teachers and the staff would have entered the school with the children at that time. There would be no reason for Ms Champagne or Mr Thistle to be in

area after 8:25 a.m.

98 Counsel then referenced the arbitral jurisprudence. The off-duty conduct of an employee could ground discipline. This was especially true in the case of school boards, where there was a heightened expectation on staff to conduct themselves as role models for students and the community at large: Brown & Beatty, *Canadian Labour Arbitration*, para.7:3010 (Off-Duty Behaviour); *Toronto District School Board and CUPE, Local 4400 (Hatzantonis), Re* [2015 CarswellOnt 6561 (Ont. Arb.)], 2015 CanLII 24478 (Wacyk); *Kingston (City) v. C.U.P.E., Local 109*, 2011 CarswellOnt 9046 (Ont. Arb.) (Newman); *Limestone District School Board v. C.U.P.E., Local 1480*, 2007 CarswellOnt 8470 (Ont. Arb.) (Newman); *Ottawa-Carleton District School Board v. O.S.S.T.F., District 25*, 2006 CarswellOnt 8752 (Ont. Arb.) (Goodfellow); *Parkinson v. Kemh Holdings Ltd.*, 2013 SKQB 172 (Sask. Q.B.); *Peel (County) Board of Education v. O.S.S.T.F.*, 2002 CarswellOnt 2430 (Ont. Arb.); *Attis v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (S.C.C.).

99 Counsel also relied upon the doctrine of culminating incident. The grievor had been disciplined twice before for similar conduct. On each occasion she had been warned that further such conduct could attract discipline up to and including termination. Indeed, the last such discipline and warning had occurred only a few months prior to October 27th. The grievor's repeated refusal to heed such warnings supported a conclusion that the employment relationship was broken. The Employer could no longer trust the grievor to act appropriately or to improve her behaviour: Brown & Beatty, *Canadian Labour Arbitration*, para.7:4310 (The Doctrine of Culminating Incident) and para.7:4312 (The Final Incident); *Canadian Lukens Ltd. v. U.S.W.A.*, 1976 CarswellOnt 1463 (Ont. Arb.) (Schiff).

100 Counsel accordingly submitted that the Employer had just cause to terminate the grievor, and that the grievance should be dismissed

Submissions on Behalf of the Union/Grievor

101 The Union's representative's submissions focussed on the fact that the grievor's actions had been as a concerned parent rather than as an employee. Her work and performance as an EPA was not challenged by the Employer. The Union's representative also placed particular emphasis on the criteria with respect to discipline for off-duty conduct set out in *Millhaven Fibres Ltd. and OCAW, Local 9-670, Re*, [1967] O.L.A.A. No. 4 (Ont. Arb.) (Anderson). In that award the Board of Arbitration noted that "if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that

> a. the conduct of the grievor harms the Company's reputation or product
>
> b. the grievor's behaviour renders the employee unable to perform his duties satisfactorily
>
> c. the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him
>
> d. the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees, and
>
> e. places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces:" para.20.

102 The Union's representative submitted that the Employer had to meet these factors in order to justify discipline for conduct outside of the workplace: *C.U.P.E., Local 5050 and Cape Breton - Victoria Regional School Board (Delaney), Re*, [2009] N.S.L.A.A. No. 8 (N.S. L.R.B.) (Ashley); *Ontario (Ministry of Transportation) and OPSEU (Richard), Re*, 2013 CarswellOnt 976 (Ont. Grievance S.B.) (Mikus). She submitted that the Employer had failed to satisfy these conditions. There was no direct evidence that the grievor's conduct had harmed the Board's reputation in any way. There was nothing to suggest that the grievor's conduct had impaired her ability to work as an EPA — and indeed the evidence in her performance appraisals supported a conclusion not only that she worked effectively in that capacity, but that her fellow EPAs and staff at her school had no difficulty working with her. The greivor conduct on October 27th had not constituted a Criminal Code offence. And there was no evidence that the Employer had been impeded in its ability to manage efficiently its operations and

its work force.

103 The Union's representative also submitted that the Employer had not taken into account the grievor's own medical condition — her OCD and anxiety disorder — and accordingly had breached Articles 3 (Management Rights) and in particular Article 3.02 (no exercise of management rights inconsistent with the Collective Agreement or in an arbitrary manner); and Article 7 (Human Rights). Terminating an employee who had advocated for her child constituted discrimination on the basis of family status.

104 The Union's representative urged the grievor's version of the events on October 27th. She noted that none of the Employer's witnesses saw the grievor touch Ms Banks — or anyone else for that matter. Ms Banks did not go home after the incident. She continued to work that day. She did not lose any work time as a result of the incident. Nor was there any evidence that any child had been in any actual danger by reason of the grievor's driving into the asphalted area.

105 The Union's representative also emphasized the impact of the PPA notice that had been issued against the grievor. She had not been able to attend her son's school, or even his Holiday Concert that December.

106 Turning to mitigating factors, the Union's representative submitted that the grievor's conduct on October 27th had to be assessed solely in her capacity as a concerned parent. She was not working at the time. The incident happened in a different school from the one in which she worked. If I was satisfied that the Employer's version of the events of October 27th was more accurate, then it was apparent that the grievor's conduct had been impulsive and motivated by concern for her son. It was an isolated incident. She was a three-year employee with a good work record. The impact of the termination was severe, since the grievor lost employment in a unionized environment with all of the attendant benefits.

107 The Union's representative concluded by submitting that there was no just cause for the grievor's dismissal, and that she should be returned to work as an EPA and made whole for all her losses. In the alternative, if I was satisfied that some discipline was warranted, I should impose a substitute and lesser penalty.

Reply on Behalf of the Employer

108 Counsel for the Employer emphasized that neither the grievor nor the Union's representative had been prepared to acknowledge that the grievor had done anything wrong. The grievor's continued denial of any misconduct on her part flew in the face of the totality of the evidence.

109 Counsel denied that the Employer had failed to consider the grievor's medical condition. He pointed out that the Employer had asked the grievor to supply any medical information that might have explained or justified her behaviour on October 27th — and noted that the grievor had failed to do so. The fact that the grievor had OCD or an anxiety disorder was a diagnosis — it did not explain what had happened. For such evidence (had it been available) to be relevant there had first to be an acknowledgement of misconduct; and then medical evidence to explain how the condition would have caused that conduct. Neither had been provided by the grievor.

Analysis and Award

110 This is a discipline grievance. I must make the following determinations:

a. what happened as a matter of fact on October 27th, 2015;

b. did that conduct warrant discipline of some kind;

c. if it did, was the discipline reasonable in all the circumstances;

d. if not, would it be appropriate to supplement that discipline with something else.

A: What Happened on October 27th?

111 Having considered the testimony of all of the witnesses (including the grievor), as well as the written statements, I am inclined to the view that the Employer's version of events is closer than that of the grievor to what happened that day. I am satisfied that the following facts were established on a balance of probability:

a. on the morning of October 27th the grievor was operating under the mistaken belief that her son had been placed in a time out room the day before, contrary to her instructions and the prior agreement with the school;

b. she called in sick to the school at which she worked as an EPA;

c. she then drove her son in to school, arriving at the school shortly after 8:05 a.m. in an agitated state of mind, intent on confronting her son's teacher (Ms Banks) about what she thought had been a breach of that agreement;

d. she drove into the school parking lot at a speed high enough to have alarmed Ms Champagne and Mr Thistle, and to have sparked concern on their part for the safety of children in the parking lot;

e. she ignored and then refused to respond to the concerns being expressed by Ms Champagne and Mr Thistle;

f. she marched into the school to confront Ms Banks, still in an agitated state;

g. she went to the classroom and told Ms Banks in a loud and aggressive voice in no uncertain terms that she was upset with her; that she did not think highly of her abilities as a teacher, and that she "felt like busting her up;"

h. the grievor did not say to Ms Banks that she *would* "bust her up," nor that she *intended* to assault her in any way — but she did say that she felt "like she would loose it;" and

i. after the intervention of Ms Quinn, and after being assured that the school would investigate the events concerning her son on the day before, the grievor calmed down and then left the school.

112 I have come to this conclusion for a number of reasons.

113 First, there is the question of motive and consistency. This is not a case where the determination of what happened depends upon pitting one of only two witnesses against the other. We rather have four witnesses — Ms Champagne, Mr Thistle, Ms Begun and Ms Quinn — who gave overlapping accounts of the events that day. Where their testimony overlapped (as in the case, for example, of Ms Champagne, Mr Thistle and Ms Begun) it was consistent and reinforcing. Their testimony was consistent with statements they reduced to writing on the day or shortly thereafter. No motive for exaggeration or dissembling on their part was suggested.

114 Second, there were aspects of the grievor's testimony that did not make a great deal of sense and which I was unable to credit. For example, her testimony that she arrived at the school at or after 8:30 a.m. cannot be reconciled with the evidence of any of the other witnesses. Neither Ms Champagne nor Mr Thistle would have been where they were — or in particular waving her to stop — at that time. Their duty to ensure that cars did not enter the parking lot ended when the bell rang at 8:25 a.m. and the children entered the school. It is also directly contradicted by Ms Begun. Her work day started at 8:25 a.m., and she was in the school yard before that time when she saw the grievor's car come into the parking lot.

115 To take another example, the grievor's testimony as to the events in the parking lot struck me as odd. Her explanation for her refusal to roll down her window or to respond to Ms Champagne and Mr Thistle — that they were strangers — did not ring true. One would expect that in ordinary course a person in the grievor's position would want to know why two people were, in her words, yelling at her. Indeed, the fact that the grievor later acknowledged to Ms Quinn that she was wrong to have driven into the school yard suggests that she did in fact hear and understand what Ms Champagne and Mr Thistle were shouting at her at the time. The weakness of the grievor's testimony with respect to what happened in the school yard then casts doubt on her version of what happened with Ms Banks a few minutes later.

116 Third, the essence of the evidence relied upon by the Employer — a protective parent responding aggressively and angrily to what she thought was ill-treatment of her son the previous day — is consistent with both common sense and the grievor's own testimony. She admitted that she could be loud and boisterous. She admitted that she adamantly disagreed with the use of time out rooms. She agreed (as indeed any mother would) that she was an advocate for her son. She agreed in cross that she would react emotionally on learning that her son had been "caged up" in a time out room, and that she would want to speak to the school if she thought that had happened. All of this is consistent with the picture painted by the Employer's witnesses. She arrived at the school in an agitated state. That was certainly the impression left with Ms Begun and Mr Thistle. She was upset that, as she believed, her son had been placed in the time out room. She rushed into the school intent on advocating for her son against such treatment, and marched to the classroom — and Ms Banks — with the intent of advocating for her son against such treatment.

117 Fourth, and although not determinative, I note that the conduct described by the Employer's witnesses was virtually identical to the two earlier incidents for which the grievor had been cautioned or disciplined. Her advocacy and her response to being challenged had in the past had been loud, aggressive and assertive. It had not been measured and calm. Given that the events on October 27th involved by all accounts — including that of the grievor — her son's treatment there is reason to think that she would have responded in the same way.

118 I turn next to the question of whether this conduct warranted discipline.

B: Did the Conduct Warrant Discipline?

119 The question here is whether the Employer has established that it had just cause for discipline an employee for actions away from the workplace and, in this case, for actions not as an employee, but rather as a parent.

120 There is a body of arbitral jurisprudence dealing with whether or when an employer has just cause to discipline an employee for conduct as a private citizen away from the workplace. As I have already noted, the Union placed particular weight on what it called the "*Millhaven Fibres* factors," arguing that the Employer here had failed to satisfy them. Pointing to those factors, the Union's representative noted that there was no evidence that the teachers or EPAs at her school would refuse or be reluctant to work with her; or that the grievor's behaviour as a parent interfered with her ability to work as an EPA; or that her conduct interfered in any serious way with the Employer's ability to manage its operations; or that her conduct had harmed the Employer's reputation in any way. Nor, of course, had there been any breach of the Criminal Code.

121 I agree that the *Millhaven Fibres* factors are useful considerations when assessing whether an employer is entitled to discipline an employee for off-duty conduct. And I accept that as a general rule an employer, whether a school board or not, cannot discipline an employee for off-duty conduct unless it has a real and material impact on its public reputation or its ability to successfully carry out its operations, or both: *Ottawa-Carleton District School Board v. O.S.S.T.F., District 25*, 2006 CarswellOnt 8752 (Ont. Arb.) (Goodfellow) at paras.16-17.

122 However, there are a number of reasons why *Millhaven Fibres* factors have to be applied with some caution, at least insofar as they might apply to the case before me. The award dates from 1967, when the issues of respectful behaviour and violence, both in and out of the workplace, was not as well developed as concerns in the employment context. (Though not relevant here, I note too that it was decided long before the advent of social media — a development which in many ways has eroded if not entirely eliminated the social distance that used to exist between an employee's workplace and his or her private life outside that workplace.)

123 Another reason for caution stems from the fact that *Millhaven Fibres* was decided in the context of an industrial workplace, where the focus was on the operations of a physical plant. That context may be distinguished from an operation like a school board, where the operations of the employer are based on social relations rather than machines and assembly lines; and where there is a heightened emphasis on the responsibility of its employees, particularly its teachers (including EPAs), to act as role models for students.

124 A factory operation does not need to be concerned about the relations between its employees and its product (other than to ensure the product is made properly and efficiently). By way of contrast, the "production system" of a school board is

an intangible social construct — the "learning environment." In order to maintain this construct — one necessary to the teaching and learning of its students — a school board has to manage complex social relations between professional and non-professional staff; between the staff and its students; between and amongst students; and between its staff and their student's parents. It must do that while protecting the students entrusted to it and ensuring that they have a safe and productive learning environment. If, to stretch a dated analogy, a construction site is not a tea party, then a school system is — or at least is one in which respectful behaviour is common currency, one necessary to foster a safe learning environment: *Toronto District School Board v. C.U.P.E., Local 4400*, 2009 CarswellOnt 4210 (Ont. Arb.) (Luborsky) at para.62. Failure to promote or maintain safe learning environments can lead to schools or school boards developing bad reputations, reputations which can further their decline.

125 This need to foster and maintain the reputation of a school or school board as having a safe and effective learning environment means that school boards have to be concerned about off-duty conduct of its employees that may damage that reputation. So, for example, in *Limestone District School Board v. C.U.P.E., Local 1480*, 2007 CarswellOnt 8470 (Ont. Arb.) (Newman), discipline was found to be warranted for conduct that involved physically confronting a student — or indeed any young person — near but not at a school. As Arbitrator Newman noted at para.84 of that award, the employer school board was entitled "to expect its employees to demonstrate a non-confrontational verbal and physical conduct when in immediate view of its students — even if not on school property, and even if not during one's shift," adding that it was "consistent with the business of operating a school board that its employees model non-violent conduct, even when provoked by a rude teenager;" see also *Ottawa-Carleton District School Board*, *supra* at para.16 to the same effect.

126 The other important distinction is that the conduct here in question did not in fact happen away from the employer's work site. It happened in a school; it involved other employees of the Employer; and happened in front of at least one student (the grievor's son). The fact that it did not involve the *grievor's* workplace (that is, the school at which she worked) does not mean that, as in *Millhaven Fibres*, it happened away from the *Employer's* workplace operations. That being the case the situation is more like that in *Parkinson v. Kemh Holdings Ltd.*, 2013 SKQB 172 (Sask. Q.B.), where an employee who was frequently rude to fellow workers, yelling at them, sometimes in the presence of customers, was held to have been terminated with just cause; or that in *Kingston (City) v. C.U.P.E., Local 109*, 2011 CarswellOnt 9046 (Ont. Arb.) (Newman), where the grievor was terminated for having uttered a death threat against her union president at the work place.

127 Turning then to the facts as I have found them, the grievor is a parent. Her child has difficulty at school. Her role as an advocate on his behalf is admirable. No one doubts her right to inquire of the teachers and staff in her son's school as to what had happened the day before. No one doubts or questions her right to insist that other employees of the Board provide their version of what had happened, or to question whether they had adhered to the earlier agreement reached between them regarding her son's treatment. The issue, however, is the way she chose to express that advocacy. She allowed her emotion to get the better of her. In doing so she ended up ignoring signs prohibiting entry onto the school parking lot between 8:05 and 8:25 a.m.; ignored Board employees who warned her to stop; and angrily and loudly confronted her son's teacher, in front of her son, in a manner that called into question the teacher's competence as well as causing her to feel personally stressed. None of this was a necessary part of her role as a parent. It exhibited a lack of respect for the work of a fellow employee. Moreover, by exhibiting that disrespect in front of her son it made the work of Ms Banks all the more difficult — a possibility the grievor herself acknowledged in her testimony (albeit as a reason why she would not have done it).

128 Added to that is the fact that this conduct was virtually identical to the incidents in June 2014 and May 2015, both of which had resulted in warnings and discipline from the Employer. The grievor knew — or certainly should have none — that the behaviour she exhibited on October 27th, 2015 was conduct the Employer did not accept as appropriate.

129 Taking all of this into account I am satisfied that there were grounds for discipline, and that the Employer's decision to impose discipline was justified. The question then becomes whether the Employer established that the discipline it chose to impose — termination — was reasonable, warranted and just.

C: Was Termination Appropriate?

130 Article 14.01 of the Collective Agreement provides that an employee can only be disciplined for just cause. Article 13.17 grants an arbitrator "the power to modify or set aside any unjust penalty of discharge, suspension, or discipline imposed by the Employer on an Employee."

131 Cases such as *U.S.W.A., Local 3257 v. Steel Equipment Co.* (1964), 14 L.A.C. 356 (Ont. Arb.) (Reville), *William Scott & Co. v. C.F.A.W., Local P-162*, 1976 CarswellBC 518 (B.C. L.R.B.) (Weiler) at paar.12 and *Canadian Broadcasting Corp. v. C.U.P.E.* (1979), 23 L.A.C. (2d) 227 (Can. Arb.) (Arthurs) have suggested that in assessing whether the misconduct was serious enough to warrant the discipline imposed by an employer an arbitrator ought to consider such factors as

a. The seriousness of the offence which precipitated discharge;

b. Whether the conduct was premeditated or repetitive, or was instead a momentary, perhaps provoked, emotional aberration;

c. The reason or intent that motivated the misconduct;

d. The seriousness of any harm caused by the misconduct;

e. Whether the employee had a record of long service with a relatively free disciplinary history;

f. Whether progressive discipline had been employed and appeared not to have been effective in solving the conduct;

g. Was the discharge consistent with consistent policies of the employer in its treatment of similar cases; and

h. Whether the employee acknowledged and apologized for his or her misconduct.

132 These factors were suggested in the context of misconduct at the workplace. When the misconduct in question instead happens away from the workplace there is an additional burden on the employer, that set out in *Toronto District School Board v. C.U.P.E., Local 4400*, 2009 CarswellOnt 4210 (Ont. Arb.) (Luborsky) at para.66: "The task of the arbitrator is to assess, considering all of the evidence and the nature of the employment, what 'a fair-minded and well-informed member of the public or relevant constituency may think about [the off-duty misconduct].'"

133 In my view any fair-minded and well-informed member of the public would take into consideration the following points.

134 First, at the material time the grievor was acting solely as a parent. She was a parent of a child who had disabilities that affected his behaviour at school and required specialized handling. No one would doubt her right to inquire of the teachers and staff in her son's school as to what had happened the day before.

135 Second, and flowing from the first, at the material time the grievor was operating under the belief that her son's teacher had breached or ignored the agreement concerning her son's handling and the use of time out rooms. She thought the teacher had agreed that her son would not be put in a time out room. She disagreed strongly with its use as a treatment for disruptive behaviour. She believed the agreement had been ignored. It was this belief (albeit mistaken) that led the grievor across the line from acceptable to unacceptable behaviour. It was not motivated by ill-will or dislike of the teacher.

136 Third, the grievor's performance *as an employee* had been consistently viewed by the Employer as "very good." So, for example, on May 29, 2015 the grievor's supervisor had this to say about her work as an EPA:

"Tammy has demonstrated flexibility in her assignment with students in the area of upper elementary. She is firm, yet fair in her interactions with all students. Tammy encourages and supports students to make good choices in their learning and in interactions with each other, and with adults. She goes above and beyond her job description to provide students with additional nutritional foods, fun experiences and a cheerful environment. She donates her time beyond school hours to support extra-curricular activities such as track and field.

"Tammy displays a cooperative and respectful demeanor with students and staff. She is always ready to support students and staff in whatever capacity that she can. Tammy has been an asset to the Rockingstone team in the 2014-2015 school

year, with her ready smile and positive attitude:" Ex. U2, Tab 13.

137 This evaluation coincides in time with the discipline imposed on the grievor for the May 5th and 7th, 2015 incidents (wherein she was acting as a parent). The difference between the two would make clear that the grievor's misconduct *as a parent* did not carry over to — or affect — her conduct *as an employee*. Further support for this conclusion may be found in the fact that the Board did subsequently agree to permit the grievor to continue with her work as a volunteer in various after-school activities (so long as they did not take place at BLTSr), which gave her son the chance to attend those same activities: Ex. U1, Tab 5.

138 Fourth, there is the fact that Ms Maillet misapprehended what the grievor had said to Ms Banks. Ms Banks' written statement made a few hours after the incident was that the grievor "told me that she was feeling like she wanted to 'bust me up':" Ex. U1, Tab 5. That is not quite the same as — nor as bad as — what Ms Maillet thought had been said, which was "I'm going to bust you up." The difference is subtle but important, since it converts a statement of feeling into a statement of intent. The latter is obviously more serious than the former.

139 Fifth, the grievor's misconduct as a parent was in effect punished twice by the Employer. The PPA notice, which barred her from entering the BLTSr, meant that she could not drop off or pick up her son at school, nor could she attend parent-teacher meetings at the school. Perhaps even more painful to a parent, it meant that she was unable to attend her son's Holiday Concert, even after she asked for a one-day lifting of the PPA notice to allow her to attend: see Ex. U2, Tab 5. Some would say that such punishment was punishment enough, particularly since its focus was on the conduct — that of a parent — which had attracted the penalty in the first place. To then add to that punishment by terminating her employment — even though her conduct as an employee had been considered very good — could easily be seen as unfairly doubling the punishment to which she was subject.

140 Sixth, there is the issue of whether a progression from a one day unpaid suspension (for the May 2015 incident) to outright termination for similar conduct in October 2015 is in accord with the principles of progressive discipline. Article 14.01 of the Collective Agreement also provides that discipline "shall include the following:

i. A written reprimand

ii. A written warning

iii. An unpaid suspension

iv. Discharge.

141 The progression laid out in Article 14.01 mirrors the principle of progressive discipline, which the Employer in its "Progressive Discipline for Board Employees Policy" describes in section 1.5 as "discipline ... based on the concept that disciplinary action is to be progressive based on the seriousness and/or repetition of unacceptable conduct or performance:" Ex. E1, Tab 10.

142 While it is apparent that the grievor needed a reminder of her duty to act in an appropriate manner that was sharper than a one day unpaid suspension, a leap to termination strikes me as an unnecessarily harsh progression in discipline. This is especially so given that the grievor's conduct in October 2015 was not markedly different from that in May 2015 — and given that in both cases the misconduct arose out of her actions as a parent rather than as an employee.

143 Taking these factors into account I was not in the end persuaded that a fair-minded and well-informed member of the public would have thought that the grievor's misconduct on October 27th warranted termination. The grievor was at the time acting as an advocate for her child. She was acting on the belief that an agreement between herself and her son's teachers as to how he was to be treated had been ignored if not breached. Had it been true her emotional response would have been fully explained (if not totally justified). The grievor's questioning (though not its tone or manner) of her son's teacher was fully explained and justified by her role as a parent and her understanding as to what had happened the day before. Once she spoke

to Ms Quinn and received assurance that the incident would be investigated she calmed down. The grievor's intent and motivation was not criminal, nor was it selfish, self-interested or morally reprehensible.

144 All of this leads me to the conclusion that on the facts of this case, and accepting the Employer's evidence as to what happened that day, the discipline imposed was too severe a penalty. Discipline was warranted; termination was not.

D: What Discipline Should Be Imposed?

145 I have found that there was just cause for discipline, but not for termination. The question then becomes what discipline ought to be imposed.

146 In considering this question I took into account two factors in addition to those listed above. First, there is the fact that the grievor had been warned twice that her role as an advocate for her son did not justify aggressive or disrespectful behaviour. The seriousness of those warnings had been underlined with discipline. Yet she continued to let her emotions get the better of her.

147 Second, I was also concerned about the grievor's inability to acknowledge fully and openly her misconduct. My findings as to what happened on October 27th should make clear that I was not satisfied that she was completely candid in her description of the events of that day. It is true that she did stop short of accusing the Employer's witnesses of lying (saying only that their versions or memories were different from her own). However, I am satisfied that she modelled her own evidence to present a more positive and less negative presentation of her actions that day. Such lack of candour has often stayed the hand of an arbitrator when deciding whether to replace a termination with a lesser penalty: see, for example, *Cariboo-Chilcotin School District No. 27 v. I.U.O.E., Local 859*, [2004] B.C.C.A.A.A. No. 317 (B.C. Arb.) (Hope).

148 On the other hand, as was recognized by Arbitrator Veniot in *Farmers Co-operative Dairy Ltd. and CEP, Local 40N (Strang), Re*, [2003] N.S.L.A.A. No. 24 (N.S. Arb.) (Veniot), a case involving termination for theft, at paras. 155, the parties "have agreed to arbitration as the means for settling their disputes, and no grievor should ever feel that he or she should admit to an act which he or she says was not committed, to seek mitigation, and avoid a possible condemnation that might come with adverse findings of fact in the adversarial process." In other words, lack of remorse or candour cannot change the nature of the underlying misconduct, save in the clearest of cases: *Canada Safeway Co. and UFCW, Local 401 (Champagne), Re*, [2007] A.G.A.A. No. 27 (Alta. Arb.) (Hornung) at para.67. It is the misconduct, not the lack of candour about that conduct, which justifies discipline: *Calgary (City) and IAFF, Local 255 (Loveland), Re*, [2005] A.G.A.A. No. 116 (Alta. Arb.) (Hornung) at paras.55, 58-60. This is particularly true in a case like this, where strong emotions coupled with a confusing cross-current of voices and interests could result in distorted memories. (I am thinking here of the evidence that the confrontation between Ms Banks and the grievor took place when the grievor was dividing her attention between Ms Banks and her son, and where the fear of serious discipline may have coloured the grievor's recollection of what happened.)

149 In my view then the appropriate discipline to be imposed in place of the termination is a period of unpaid suspension. At the end of that suspension the grievor should be returned to her employment as an EPA, subject to the condition that she not be assigned to any school in which Ms Banks is a teacher. The grievor should not lose any seniority accumulated as of the date of her termination, but should not accumulate any during the period of her suspension. The question then becomes this: how long should the suspension be?

150 In answering this question I place major emphasis on the fact that the grievor has proved resistant to the idea that her role as a parent does not give her a free pass as an employee. She had been reminded twice before that her conduct as a parent could affect her continued status as an employee. She agreed that it was appropriate that the Employer take her conduct as a parent into account when evaluating the employment relationship. She had already been disciplined twice for her conduct as a parent within the educational context. Indeed, the most recent discipline and warning had been only a few months prior to the October incident. Yet she persisted in thinking that when acting as a parent on school property or within an educational context she did not need to model herself as an employee subject to the Employer's Code of Conduct Policy. Twice before, and on October 27th, she allowed her emotions to get the better of her. There is too the grievor's inability to face up to the errors of her conduct, and of its need to be remedied.

151 The only way then to make crystal clear to the grievor that her role as an employee imposes on her a duty to act in

accord with the Employer's Code of Conduct Policy — and that her role as a parent does not justify acting in a disrespectful fashion — is to make her period of suspension coterminous with the date of this award. Her return to employment, and to which school, is to be governed by the terms of the Collective Agreement and any relevant polices or procedures that may be in place. In view of the impact of the grievor's conduct on Ms Banks, I also make it a condition of the grievor's return to work that she not work at any school at which Ms Banks is a teacher. I will remain seized for 30 days from the date of the award to deal with any issues or questions arising from this award.

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