

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION /
A CERTAIN SCHOOL DISTRICT

("Employer")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION /
A CERTAIN TEACHERS' ASSOCIATION

("Union")

RE:

Misconduct - Inappropriate Conduct Grievance

COUNSEL:

Keith E.W. Mitchell
Jessica L. Burke

For the Employer
For the Union

DATES OF HEARING:

April 3, 4, 5, 6, 2018
July 10, 11, 12, 2018

Colin Taylor, Q.C.
Arbitrator

I

[1] This arbitration arises from a grievance dated June 20, 2017 whereby the Union alleged the Grievor was dismissed without just and reasonable cause.

[2] After receiving information in respect of the relationship between the Grievor and a student, the Employer took the decision that the relationship violated certain boundaries and terminated the Grievor on June 16, 2017.

[3] At this arbitration, the Union conceded there were grounds for discipline but submitted that, in all the circumstances, dismissal was an excessive response. It seeks a period of suspension in place of the dismissal and reinstatement to employment.

[4] For the eleven years prior to his dismissal, the Grievor, aged 41, was a full-time music teacher at School M in the school district. He had worked in this district for a total of 15 years with an unblemished discipline record. By all accounts, he was an excellent teacher who enjoyed a sterling reputation in his field.

[5] I am satisfied on all of the evidence that the Grievor was a skilled musician and a dedicated and tireless teacher. He devoted prodigious energies to the school music program and worked exceptionally hard to integrate the program into the community by organizing jazz festivals and events

including a weekly Jazz Jam and the critically acclaimed annual Interior Jazz Festival. These events provided invaluable opportunities for students of the school music program to showcase their talent, gain live performance experience and learn from professional musicians.

II

[6] In the summer of 2014, the Grievor was an instructor at a jazz camp held in Penticton, BC, known as "Jazz Cool". This has no affiliation with the school music program. It is a one-week, small group, event for students of jazz.

[7] One of the students at the 2014 camp was Ms. A, then a 15-year old student attending a private school. Subsequent to that event, the parents of Ms. A, an only child, arranged for her to take private music lessons from the Grievor.

[8] Beginning in or about August 2014, the Grievor typically met weekly with Ms. A for private music lessons in the music room at his home where he received a small number of private students. Ms. A's father would usually drive his daughter to the lessons and wait outside the room. Through these private lessons, the Grievor and Mr. A became well acquainted and a friendly relationship developed. They discussed the student's progress and other community musical endeavors.

[9] Ms. B., mother of Ms. A, testified that when private lessons began with the Grievor, she let him know that her

daughter suffered from anxiety. Ms. B described symptoms of "critical of self, perfectionism, unfocussed, poor sleeping and eating habits" which began in Grade 7.

[10] For the Grade 10 year, Ms. A enrolled at School K. She took Band lessons at this school and continued private lessons with the Grievor as well as again attending the summer "Jazz Cool" at which the Grievor was a senior instructor.

[11] For the Grade 11 school year, Ms. A became cross-enrolled at School M in order to take two music classes with the Grievor. It was not uncommon for music students from School K and other schools to cross-enroll in the Grievor's music classes given the enviable reputation he had achieved. Ms. A's parent's drove her between the two schools.

[12] In her Grade 11 year, Ms. A, on the recommendation of the Grievor, was asked to play with the local Dreamland Band, which she described as "old white men playing jazz".

[13] Ms. A remained cross-enrolled in her Grade 12 year during which, between classes and private lessons, she typically saw the Grievor five times per week.

III

[14] The Grievor testified that in summer 2016, Ms. A was not sufficiently practicing or adequately preparing for her music

lessons. He viewed her as erratic and suffering emotional difficulties. He said that he informed her parents that continuing lessons was a waste and he intended to stop. The parents denied or could not recall any discussions involving cessation of the lessons but Ms. A agreed in cross that her parents asked the Grievor to give her one more chance to which, he said, he reluctantly agreed. She agreed that her parents saw the Grievor as an important mentor.

[15] It was at or about this time that the parents consulted the Grievor about post-high school education which Ms. A wished to pursue. They informed him she was considering acclaimed music schools for which he did not consider her qualified. The Grievor recommended other university music programs and in or about February 2017 Ms. A began an additional evening of private lessons with the Grievor in preparation for university auditions.

[16] With respect to her music program, it appears that Ms. A got off to a good start at the beginning of the Grade 12 school year but this did not last. By November, punctuality, attendance and preparation issues emerged. The Grievor said that he alerted the parents about these matters.

[17] Ms. A's parents, in their evidence, tended to downplay the scope of their relationship with the Grievor, suggesting they were acquaintances. On the whole of the evidence, including the messaging between them, I find the relationship to have been much more than that. They were Facebook friends. They socialized at concerts, festivals and weekly jam

sessions. The Grievor would often sit with them. Mr. A was an amateur photographer at these events. He spoke with the Grievor at the private music lessons. The Grievor's daughter was a close friend of Ms. A and frequented her parents' residence. Moreover, the parents began to rely heavily on the Grievor to mentor, guide and befriend Ms. A. It is apparent that the parents were very concerned about their daughter's emotional state and did not know what to do about it. Communications between parents and daughter became difficult as Ms. A asserted her independence and thought her parents were over-protective and restraining. Mr. A testified that Ms. A "became less open, more guarded and wanted to be away from us" ... "withdrawing ... didn't want to be with us." He put this down to her teen years.

[18] The Grievor found himself in the position of listening to the complaints which Ms. A had about her parents and dealing with her emotional ups and downs. In evidence, Mr. A said he thought his daughter talking to the Grievor "was better than her shutting down."

[19] Ms. A denied being tardy and unprepared for classes and lessons, but this was communicated by the Grievor to her doctor and recorded in her clinical notes with no record of disagreement by Ms. A.

[20] The Grievor did not report the attendance issues to the school office because it was his practice to deal with students directly and he was in communication with Ms. A's parents and informing them of their daughter's difficulties.

Ms. A did agree that she was struggling in November 2016 and somewhat overwhelmed by the tasks which needed to be completed and the tensions in her life. Her parents agreed Ms. A was struggling in December.

[21] On the whole of the evidence, I conclude that Ms. A confided in the Grievor that she was anxious, not sleeping well and feared she was not up to expectations. She was chafing at parental restraints which she found controlling and stifling. The Grievor urged her to see a doctor or counsellor.

[22] It is clear on the whole of the evidence that by late 2016 and on into 2017 the Grievor was in over his head. Ms. A was confiding in him, relating her emotional difficulties and problems at home. There was continuous social media messaging between them. Ms. A was leaning on him and, ironically, so were her parents. They were aware of the increasing interaction between the Grievor and Ms. A and they knew she was confiding in him and not them. It is apparent they did not know what to do about it. Mr. A observed his daughter becoming distant from her parents and was afraid of driving her further away if he interfered in the interaction between her and the Grievor. Indeed, text messages reveal that the parents encouraged the Grievor to communicate with Ms. A about her difficulties and he foolishly did so. He did though have the good sense to urge Ms. A to see a doctor or counsellor.

[23] An event in January 2017 was a blow to Ms. A's confidence and self esteem. There was a School K band concert at which Ms. A was supposed to perform a solo. Her parents were in attendance and sat with the Grievor. At the last minute, the solo performance was taken away from Ms. A and performed by another student.

[24] The Grievor continued to urge Ms. A to see a doctor or counsellor. She rejected the suggestion of school counsellors but did see her family doctor on February 2, 2017. The doctor's notes say, "only complaint is that she reports that her music teacher thinks she is depressed"; "PHQ indicates moderate depression." The medical notes also contain the following:

- not receptive to seeing a counsellor nor will she allow me to bring her mother in to discuss this
- she is planning on going to Vancouver next year and is auditioning for a music school down there. I would certainly have some concern about her mood away from home but as she is not clearly suicidal and refuses to let me discuss this with her parents I have asked her if she would feel comfortable returning here if her symptoms were to worsen and she said she would
- music teacher wonders if she has depression, this teacher has acted as a mentor, she states she has not discussed her mood with parents.
- pt has never formulated plan for self harm, she reaches out to her mentor when feeling really low.

[25] Those comments are consistent with the evidence. Ms. A was not communicating her emotional difficulties to her parents. Instead, she was reaching out to her receptive music teacher who shockingly and wrongly took on this burden.

[26] Mr. A and Ms. B are both employed in the mental health field. For confidentiality reasons, they, and Ms. A, were reluctant to consult anyone engaged in that field in the community. As well, Ms. A did not want to make her parents aware of her struggles. She wanted to leave home and was concerned about being held back.

[27] Following the doctor's appointment, Ms. A told the Grievor she had been diagnosed with depression and told him not to tell anyone. He assumed that she would begin receiving professional help but, in fact, Ms. A did not receive treatment at that time.

[28] The evidence establishes that the Grievor was in frequent contact with the parents at this time, both in person at the weekly music jams and by text. He assumed they were aware of the medical diagnosis and following whatever treatment was recommended. In the meantime, Ms. A continued frequent communication with the Grievor about her difficulties at home, with friends and what the doctor recorded as "longstanding issues with not fitting in and has had difficulty finding a peer group." Yet, this obviously troubled young woman was resistant to consulting with her parents or a counsellor. In cross, Ms. A agreed that she told the Grievor her depression was a secret and told him not to

tell anyone. He acquiesced in her request, but he did communicate to her parents that he was concerned about her. At a concert held February 8 and 9, 2017, the Grievor said he conveyed his concerns to Ms. B who he described as dismissive, suggesting that her daughter's depression was "situational" and would ebb once university auditions, festivals and concert preparations came to an end.

IV

[29] A school trip to Idaho for a jazz festival took place February 23 to 25, 2017. The Grievor attended in his capacity as a music teacher with School M. Ms. A attended with School K. Mr. A attended as a chaperone for the School K students.

[30] Ms. A continually sought out the Grievor who testified that she made comments about walking off and disappearing. Ms. A, in her evidence, did not remember making such comments but said she potentially could have. The Grievor communicated his concerns to Mr. A.

[31] On one evening on the Idaho trip, Ms. A contacted the Grievor and asked to speak with him. He messaged Mr. A at 11:47pm:

[Ms. A] is feeling overwhelmed and would like to talk to me. I'm thinking the breakfast area would work unless you're opposed. She would be leaving her room past curfew. If you'd like, I

can come and discuss, or I can just tell her no.

The reply:

No, if you are willing to go talk to her then I'm fine with that.

[32] The Grievor and Ms. A met late at night after curfew in the breakfast area of the hotel for, depending on the conflicting evidence, either one and one half or two hours. She said she spoke to the Grievor about her emotional state, being over-tired, stressed and fantasizing "hurting myself", although she emphasized she would never follow through with this. The Grievor said that Ms. A told him no one cared about her and her parents did not love her. The Grievor urged her to see her doctor and speak to her parents. On the following day, the Grievor told Mr. A that their conversation had lasted until 2 am and said he would discuss it more fully with him on their return home. The Grievor testified that he told both parents at the Jazz Jam on March 2, 2017 that he considered Ms. A's condition to be serious, that she should see a doctor. He said he repeated this at a parent-teacher meeting on March 7, 2017. The parents did not agree with that evidence. They said the parent-teacher meeting was very brief; that the Grievor made a "vague" reference to Ms. A's mental health and suggested he could provide counselling. Ms. B said she told him he was not qualified.

V

[33] The Grievor testified that he continued to be concerned about Ms. A's mental health and the impact it was having on her studies and continued to sound the alarm with her parents. For her part, Ms. A continued to seek the support of the Grievor with the knowledge and support of her parents. There was significant interaction by social media and text. At the behest of the Grievor, she made an appointment to see the doctor but asked the Grievor to go with her and, incredulously, he did just that. Equally straining credulity, Ms. A's mother encouraged him to do so. This is a text message between Ms. B and the Grievor:

G: Hopefully, you're aware that I am accompanying her to a doctor's appointment on Tuesday

B: Yes [Ms. A] had told me that you're attending her doctor appointment on Tuesday. I am thankful that she will have someone there to also hear what the doctor has to say as it can be sometimes difficult to take in all the information at once ...

G: I also have a fairly comprehensive set of notes to bring to the doctor for discussion so that nothing I've noted gets missed.

B: Awesome. If you are able to share that information that would be great

G: I'll make sure I do following the consultation with the doctor

B: Thanks

That is a conversation between a then 18-year old Grade 12 student's mother and the student's high school teacher.

[34] In its submission, the Union said this:

With the benefit of hindsight, it is clear to [the Grievor] that [Ms. A] was becoming obsessive towards him, however he did not perceive this at the time. [The Grievor] was overwhelmed with his own undertakings and personal issues. At the time, [the Grievor] was responsible for coordinating a large music festival of 1500 student performers and was working between 60-80 hours a week. That being said, he was concerned for [Ms. A], and wanted to support her until she was receiving professional help, especially as he felt that her parents had placed that responsibility onto him.

[35] The notes to which the Grievor referred in his text conversation with Ms. B (supra, para.33) are notes of his conversations with Ms. A, recorded with her consent, which he gave to the doctor. Those notes read:

Overwhelming sadness at night. Usually after 11. Thoughts of self-harm and suicide are frequent at this time of day.

More likely to experience synesthesia at this time when trying to sort thoughts. [Ms. A] claims that she can perceive sound as colour, and when she gets very emotional she thinks in colour.

No motivation to complete tasks. Very difficult to get out of bed in the morning due to hopeless/pointless feelings.

Considers herself a burden to everyone around her. Genuinely feels that people would be better off without her.

Fears sleep. Only sleeping 2-4 hours on weeknights. Frequent terrible nightmares featuring self-harm and/or or [sic] loss of control

Loss of appetite and sense of taste when feeling her lowest.

[36] As it turned out, the Grievor was unavailable for the doctor's appointment. Instead of attending the medical appointment alone or with her mother, Ms. A rescheduled the appointment for April 11, 2017 so that the Grievor could accompany her. The doctor's notes from that visit read, in part:

pt presents with older man today whom she introduces by his first name and he tells me that he is one of [Ms. A's] music teachers at school and she later tells me that he is her personal teacher and has been instrumental in her getting auditions at Vancouver school which she was recently accepted to and she tells me that her teacher later texted her to let her know that he was hearing rave reviews from the teachers there regarding her audition. This recent success has obviously increased her mood as she is not as flat as on her prior visit.

Her teacher then read a list of concerns that he had documented including her difficulty to finish tasks and tardy and absent for some classes as she was having difficulty getting out of bed

he was concerned that she had expressed self harm when I asked her teacher if [Ms. A] had been referred to a counsellor at school and he replied that it is customary to have the student link with

the teacher that had the best rapport with the pupil and in [Ms. A's] case this was himself.

[Ms. A's] teacher appeared uncomfortable

[Ms. A] on the other hand was perfectly at ease

[37] After presenting his list of concerns for [Ms. A], the doctor asked the Grievor to leave.

[38] In her evidence, Ms. A asserted she felt compelled to allow the Grievor to accompany her to the doctor and was "scared of what the Grievor would do if I didn't let him go." The doctor's notes belie that evidence. Ms. A "was perfectly at ease". Moreover, her place at university had been secured, for which Ms. A told the doctor, the Grievor had been "instrumental". The Grievor clearly wanted Ms. A to succeed, wrote a highly complementary reference letter, told her parents at one point that continuing private lessons were a waste of money and was persuaded to give her another chance.

VI

[39] A spring break band trip to San Francisco took place March 15 to 24, 2017. The Grievor was accompanied by his wife and two children. Ms. A also participated in the event. She shared a room with the Grievor's daughter.

[40] Ms. A agreed in cross that during the trip she struggled with anxiety, depression and panic attacks. She carried a blanket and once hid under it on the bus crying.

[41] Ms. A was in frequent text contact with the Grievor during the trip. She told him she dreamed of jumping off the Golden Gate bridge, adding that she would never do so.

[42] Ms. A testified that she met twice with the Grievor alone in the hotel parking lot for one to two hours. She said he put his arm around her and several hugs occurred. This, said Ms. A, was the first physical contact between them. He denied meeting privately with her in the parking lot at any time during the trip and pointed to the fact that he was with his family, 80 students and a number of parents.

[43] While in San Francisco, Ms. A reached her 18th birthday. She testified that the Grievor sent a text message on that day ("in the early morning") to the effect that he loved her "in a non student-teacher way." She could not recall the specific message or her response. There is no record of this alleged communication. Ms. A says it (and other communications) were deleted at the Grievor's request.

[44] The Grievor denies any such profession of love or physical contact whatsoever with Ms. A at any time.

[45] In the oft-quoted decision in *Faryna v. Chorney*, [1951] B.C.J. No. 152 (BCCA), the Court said:

The credibility of interested witness [sic], particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

(para.11)

[46] This was a spring break band trip to San Francisco. In attendance were some 80 students and several parents. The Grievor was accompanied by his wife and two daughters, one of whom was a close friend and shared a hotel room with Ms. A. The Grievor categorically denies the allegations made by Ms. A. It is not probable in that place and in those conditions that the Grievor would conduct himself in the manner described. Nor is it probable that a romantically and sexually inexperienced 18-year old would not remember the fine details of a text message from her high school teacher declaring his love. That she cannot remember her response is likewise improbable.

[47] I am asked to accept as probable that the Grievor would take the enormous risk of conducting himself in that fashion in the company of his wife and children, one of whom was a friend of and sharing a room with Ms. A. Think of the risk that his daughter, in the same room as Ms. A, might see the

message. Or that Ms. A, in her fragile emotional state, might show it to someone or tell someone. It is highly improbable that a first expression of love by a high school teacher, mentor and friend to his 18-year old student would not be a momentous occasion and remembered in close detail. I also observe that Ms. A did not relate this event to the Employer's Investigator nor is it mentioned in the Investigator's Report.

[48] I conclude that the San Francisco events described by Ms. A are not proven on a balance of probabilities.

VII

[49] Ms. A testified that the next physical contact with the Grievor occurred on the bus ride home from San Francisco. The Grievor sat in the front row of the bus behind and to the right of the driver. His wife and eldest daughter were in the seat behind him. The choir teacher and her husband were in the seat across the aisle from the Grievor. Ms. A moved to the front of the bus to sit with the Grievor. She testified that the Grievor put his hand on her thigh when the bus came to a sudden stop and she began to slide off the seat into the stairwell of the bus. Ms. A said he left his hand on her inner thigh for a couple of minutes before moving his hand with hers onto his lap. It is alleged he held her hand for a half hour concealed under a blanket.

[50] The Grievor recalled the bus braking suddenly and reflexively reaching over to halt Ms. A's slide off the seat. In doing so, he testified that he momentarily held her knee. When this incident occurred, Ms. A. said she was covered by her blanket. She was unable to explain how the Grievor quickly reached over to halt her slide off the seat while at the same time sliding his hand under the blanket to do so.

[51] Ms. A's evidence is inconsistent with her comments to the Investigator:

SF - One time when I moved up to the front - trying to sleep - every time closed eyes depression took over - woke up and went to sit beside him at front of bus - didn't grab hand - he did comfort me at that time.

[52] In later evidence dealing with when her relationship with the Grievor first became physical, Ms. A said it started in the Grievor's office and then revised that to his car. She told the RCMP it began in San Francisco which, she said, was a reference to the text message. She did not refer to the bus incident.

[53] The Grievor's wife and daughter sat directly behind him on the bus; the choir teacher and husband beside them; the bus driver in front of them and to the left of the Grievor; directly in front was a large mirror in which passengers on the bus would likely have been able to see the front seat. Ms. A's description of the bus incident is inconsistent with what she told the Investigator nor did she relate it in her

RCMP interview. Considering all of the circumstances, I conclude it to be improbable the Grievor would place his hand on Ms. A's inner thigh underneath a blanket, then move her hand to his lap, directly in front of his wife and daughter, other teachers and a bus load of students.

VIII

[54] Ms. A testified that after San Francisco her relationship with the Grievor became "more physical", taking place in his office and car and describing hugging and cuddling. It advanced, she said, to touching on top of and underneath her clothing and in her underwear. As to frequency, Ms. A replied about ten times and "almost every time I saw him outside of school or class." This is inconsistent with telling the RCMP there was no physical contact. It is also inconsistent with telling the Investigator it happened once or twice and later revising this to maybe five times.

[55] Ms. A testified that on the day following the return from San Francisco, March 25, 2017, she saw the Grievor at a gig and visited him afterwards at his office in the school. She said he sat on a Laz-y-boy, she on his lap and they cuddled. The Grievor vigorously denied that allegation. He said that on that day he was busy with moving a grand piano from the school to a recording studio, restocking the house after the San Francisco trip and recovering from the bus ride

and hectic week away. He did not have or attend a gig that day and said he did not see Ms. A that day.

[56] Ms. A testified she saw the Grievor "many times" between March 25 and April 7, 2017. She said the next physical contact, and first sexual intimacy, occurred on March 30, 2017, in the Grievor's school office following a jazz combo rehearsal. Ms. A described his hands underneath her shirt and inside her underwear. He then asked her to undress. Ms. A added that her parents knew she was at the school.

[57] It was put to Ms. A in cross that there was no jazz combo rehearsal on March 30, 2017 because it was Spring Break and that the next rehearsal was April 6, 2017. The witness conceded that point and agreed she was not at rehearsal or at the school on that evening. Nor is Ms. A's evidence of the first intimate encounter consistent with what she told the Investigator. In that interview, she said her first sexual encounter with the Grievor was a Sunday or Monday. She agreed that was accurate and that her evidence about the encounter at the Grievor's office on March 25, 2017 was not correct.

[58] Ms. A then testified that the first sexual encounter occurred in the Grievor's car around midday on the side of the road beside a dog park in her city of residence. Later, she said "he met me on the street off [a named Avenue] and drove to a park - there's a roundabout - dead end road." Despite living in this city her entire life, she could not identify the name or exact location of the park but thought it was close to her home and occurred on Sunday, March 26,

2017. She agreed that a dog park at midday on Sunday would not be very secluded and said people were walking by.

[59] Ms. A testified they occupied the back seat of the Grievor's car for one to two hours. He put his hand inside her pants and underneath her shirt and bra. She said she was naked on this occasion and on a second occasion when they parked near a sports stadium for which no date or details were provided except that she was unclothed.

[60] Ms. A said she wasn't concerned about being seen and neither was the Grievor. This, despite describing the park as being close to home and having a dog.

[61] A similar encounter was said to have occurred in a dirt parking lot near School M. Ms. A could not recall the date but said it took place between March 26 and April 13, 2017. She said she spent from 3:30 pm to 11 pm in the Grievor's office following which they went to the dirt parking lot because the school alarms are set at 11 pm. She testified that the Grievor suggested that location because it was secluded and there were no cameras.

[62] In an interview with Constable Lund on April 19, 2017, Ms. A was cautioned that misleading the police would be a problem and she needed to be truthful. Ms. A told the Constable that there was no sexual relationship with the Grievor and her previous description of him as her "boyfriend" was not true. After asking that the recorder be halted, Ms. A told Constable Lund that she and the Grievor had a

"romantic" relationship and "it" began after her 18th birthday on a band trip to San Francisco. Ms. A did not relate any sexual intimacy. Nor did she say what "it" was or what she meant by the word "romantic".

[63] After the interview with Constable Lund, Ms. A met with the Principal of School K. He later reported in an email to the School Superintendent that Ms. A had told him "I had a Student/Teacher relationship and a working friendship relationship." Pressed further, Ms. A is quoted as saying "... well a bit of a physical relationship as well." That evidence is, of course, double hearsay. The author of that email did not give evidence. I also observe that Ms. A did not tell Constable Lund, with whom she had just spoken, of a "physical relationship" and a "bit" of a physical relationship is meaningless.

[64] In that email, Ms. A reportedly told the Principal that the relationship began in "late March/Early April" ... "at [location X] and one time before that [at location Y]." Yet she had just told Constable Lund that it began in San Francisco at March break and after her 18th birthday.

[65] As for reportedly telling the Principal that the "bit of a physical relationship" began [at location Y], this is inconsistent with the "dog park" and sports stadium evidence. It is also inconsistent with what she told the RCMP and the Investigator. It should be pointed out that both Constable Lund and the Investigator stressed the importance of being truthful, yet she told the Investigator that intimacy

occurred about five times, later changing this to once, whereas her evidence at arbitration was about ten times.

[66] These varying accounts and failure to consistently recall what one would consider to be momentous events is troubling. There can be no doubt that the Grievor was an important figure in Ms. A's life. He was her teacher, friend, confidant, instrumental in her successful university audition. She referred to him as her "jazz father". He was a prominent and influential figure in the jazz community to which she gravitated. There is no suggestion whatsoever that she was victimized or sexually assaulted by the Grievor. She sought him out with relentless social media communication.

[67] Ms. A told the Investigator "beginning of April thought I kind of liked him"; had "romantic feelings for him" and "wanted to be touch[ed] and loved by someone that wasn't [her] parents." Ms. A had not been sexually active. Surely, then, a first sexual experience with such a prominent presence in her life, a married older man, the father of her close friend, would be a momentous occasion and remembered with detailed accuracy. Strangely, that is not the case here.

[68] Other aspects of Ms. A's evidence are likewise puzzling or implausible. She testified to being naked with the Grievor and being fondled by him on multiple occasions. Yet, she said, he never exposed himself, she never touched him and they never kissed. This, despite what she told the Investigator about her feelings for him (*supra*, para.67) and his alleged

declaration of love on her birthday. This is possible but not probable.

[69] The Grievor was an oft-publicized prominent jazz musician and educator. He was sought after for private music lessons. The Grievor was responsible for highly acclaimed concerts and jazz festivals. Moreover, he was instantly recognizable by his physical stature as well as being married with children, one of whom was a close friend of Ms. A and a frequent after-school visitor to her parents' home. Ms. A's evidence is that the Grievor took Brobdingnagian risk by engaging in sexual conduct with her in a car, in broad daylight near a dog park as well as other public locations including a bus filled with students, colleagues and his wife and daughters. The allegations include such conduct in the office at the school where he had an open-door policy and at which he was frequently visited by other students.

[70] When I weigh the evidence with respect to the allegations of sexual contact made by Ms. A against the Grievor, in light of the principles set down in *Faryna v. Chorny*, and consider the probability of those allegations, I am compelled to find that Ms. A is not a credible witness.

IX

[71] One of the grounds for discipline relied upon by the Employer arose from an incident on April 9, 2017. On that

evening, the Grievor was performing at a jazz concert. He and Ms. A exchanged texts throughout the evening. The volume of messages and who said what to whom is in dispute but the result was that the Grievor, on his way home, stopped his car in the lane behind the house where Ms. A lived with her parents. The time is in dispute. The Grievor suggests it was about midnight. Ms. A says it was later. Ms. B has the best recollection. She testified that she heard Ms. A go out to the back yard but did not hear her return. Ms. B looked at the bedside clock and was definite in recalling the time as 1:30 am. She arose and went to the back porch and observed Ms. A returning. Her daughter told her that she had been in the lane meeting with the Grievor. Ms. A told her mother that the Grievor was depressed, didn't want to go home and stopped for a chat. Ms. B said, "I was shocked - didn't know what to make of it."

[72] The Grievor testified that upon arrival in the lane at the rear of the residence, Ms. A got into his car and began crying. She said she needed a hug and that occurred, following which Ms. A returned home and the Grievor left. He estimated she was in the car for about five minutes.

[73] The Grievor agreed that whether it was midnight or 1:30 am, his conduct was wrong. He said he hoped that by complying with Ms. A's demand to stop at her home, she would calm down, cease the relentless texting and leave him alone. That he realized his conduct was wrong is evident from the exchange of text messages the next day with Ms. B:

G: Hi [Ms. B]

I wanted to apologize for disturbing your household last night so late. [Ms. A] had thought it might be okay for us to talk for a minute and I should've thought that through and said no. I'll do my best to maintain a more professional distance despite my close friendship with her.

[Ms. A] has also been pretty down this week, so I thought maybe her invitation to talk might have something to do with that, too. Anyway you look at it, in the light of day it was poor judgement, and I'm very sorry.

B: No disruption just a little startling ... I appreciate your comments. As well as your concern for [Ms. A]. I am also concerned for you and what may be happening in your life ... if there is anything that I can do to support you please let me know. You are very valued ...

Public perceptions are something to consider when we work in the public eye and as you and I do. I would not want to see someone's perception of your relationship with [Ms. A] cause negative consequences. You mean so much to [Ms. A] that I would not want to see your relationship impacted by choices made.

G: Thanks ... It's a tough time and I'm certainly pushed to my emotional limits [then follows a discussion of the Grievor's marital relationship]

I'm aware of how my closeness to [Ms. A] may be seen. It's why it's critical to me that you remain in the loop on what's going on. Hopefully you're aware that I'm accompanying her to a doctor's appointment on Tuesday

[74] That is an astonishing conversation between a high school teacher and the mother of his 18-year old student. It also underlines the closeness of the relationship between the Grievor and Ms. A and between the Grievor and her parents. The exchanges include a discussion of the Grievor's marital difficulties. Ms. B expresses concern for the outward appearances of the relationship between the Grievor and Ms. A but appears unwilling to do anything about it because she was leaning on the Grievor to be her daughter's friend, confidant and sounding board - roles which Ms. A did not want her parents to play. In cross, Ms. A agreed she was not "comfortable with her parents knowing about [her] feelings of anxiety, depression etc." The Grievor was in well over his head. He knew it but seemed powerless to extricate himself. It is clear from those messages that at some level he had come to realize the risk. Ms. A was confiding in him, relating her emotional difficulties and problems at home. Her parents knew this but had become dependent on him to fill the place they should have occupied with the professional help which the situation demanded. There was continuous social media messaging between the Grievor and Ms. A and the parents were fully aware of this interaction. They were mental health professionals but did nothing to halt this extraordinary and plainly wrong relationship between teacher and student. That, of course, does not excuse the Grievor's conduct. The Union cast the Grievor's conduct in this light:

As [the Grievor] testified, the following day, immediately recognizing his failure to exercise appropriate judgement, [the Grievor] texted Ms. B and apologized for being a disturbance, and

acknowledged in that message that he had exercised bad judgement. This exchange further reveals the extent to which [the Grievor] mistakenly believed (especially given their role as social workers) that Ms. A's parents' encouragement, and reliance on his close relationship with Ms. A, legitimized conduct which would be impermissible with another student.

[The Grievor] was extending himself well beyond his professional boundaries and should have extracted himself from the situation. His failure to do so, however wrong, was nonetheless well intended to support this student and her family. It was, in his defence, also a failure made at a time in which he was dealing with enormous personal and professional stress and was not at his best. In recognition of his failings, [the Grievor] has committed to avoiding such situations in the future.

X

[75] On April 13, 2017, the Grievor and Ms. A attended a rehearsal at the school which ended shortly before 10 pm. The Grievor testified that the students were unprepared for a pending jazz festival and the rehearsal was urgently called. He said Ms. A was woefully unprepared and she spent some time wrapped in her blanket or hiding under the blanket. She did agree to having her blanket with her but denied hiding under it.

[76] The Grievor said that following the rehearsal, he stayed to work on matters connected to the pending concert. Ms. A also stayed. She was upset and distraught. Ms. A told the Investigator:

I wanted to talk to him about depress - I had a tough rehearsal that night - didn't think it was safe for me to drive

We were in his office

he was able to help me

let me cry

[77] The Grievor told Ms. A to let her parents know her whereabouts. The evidence is that Ms. A and her mother were in communication during the course of that evening. Ms. B knew where her daughter was and who she was with.

[78] Ms. A denied being unsafe to drive home and said she lied when she told this to the Investigator.

[79] Ms. A testified that she and the Grievor engaged in sexual contact including her being fully unclothed between 10 pm and 11 pm. The Grievor denies these allegations.

[80] The school janitors left at 11:00 pm. The Grievor and Ms. A left at 11:08 pm and drove in the Grievor's car to Wendy's where they ate in the car, following which they returned to the school parking lot at 11:55 pm for Ms. A to retrieve her car and drive home.

[81] The Grievor's evidence is that Ms. A would not get out of his car. She was distraught and did not want to go home. The Grievor described her as near-hysterical. At his urging,

she sent a message to her mother to let her know where she was.

[82] The Grievor's car was parked directly in front of the school and in plain view of surveillance cameras. He and Ms. A were aware of those cameras. She said they had deliberately avoided those cameras in their alleged trysts.

[83] The Grievor testified that Ms. A was distraught, crying and inconsolable. At one point, he gave her a hug.

[84] Ms. A testified that she was sitting across the Grievor's lap in the driver's seat of his Volkswagen Passat, partially undressed when a bright light suddenly illuminated the vehicle. It was the RCMP whose observations and notes do not accord with the evidence of Ms. A. Both officers said that when they approached the vehicle, the male occupant was sitting in the driver's seat and the female occupant in the passenger seat. Moreover, the Grievor testified that the position described by Ms. A was physically impossible since there would be no room between his lap and the roof of the car. He is a man of large stature. Ms. A did acknowledge that the Grievor's car contains a solid centre console between the front seats over which she would have had to scramble in a state of partial undress without being observed in the blinding light by Constable Schwindt.

[85] The video surveillance indicates that the Grievor stepped out of the car immediately upon arrival of the police and it is improbable that he and Ms. A could have untangled

that quickly and without being observed. Their car was bathed in light.

[86] Within less than a minute of Constable Schwindt's arrival on the scene at 1:52 am, the Grievor immediately got out of the car. He said that in the blinding spotlight, he could not identify the car or its occupant. He was ordered to get back in his car and he complied. Inside the car, Ms. A, already in an emotional state without this, was terrified. According to the Grievor, she became frantic. She did agree that she was frightened because she did not know who was outside.

[87] The Grievor testified that he didn't know it was the police. There were no lights or sirens. In the blinding light, he could not see the police car or the officers. He thought it was perhaps a security guard.

[88] At 1:54 am, Constable Wilson knocked on the window. The Grievor said "he was spending time with his girlfriend", hoping that this dismissive retort would deter the inquirer. Upon learning it was the police, the Grievor immediately identified himself as a teacher at the school and offered to accompany the officer into the school to investigate the alarm.

[89] In the meantime, Constable Schwindt was interviewing Ms. A who told her the Grievor was her boyfriend. The Constable testified that Ms. A was completely dressed when she exited the vehicle. Constable Schwindt did not observe any physical

intimacy of any kind between Ms. A and the Grievor. She did report that Ms. A was straightening her clothing which she demonstrated as twitching the fabric at the knees of her pants. Ms. A's explanation for this, subsequently given to Constable Lund, is that she tends to do this when anxious and she was anxious at that time.

[90] Upon exiting the school, the Grievor found Ms. A in her own car. She told him that she had told the police he was her boyfriend and had been dating for a month. The Grievor said he was shocked by this and she should not have lied to the police.

[91] The video surveillance reveals the following relevant time line:

11:08 pm - [The Grievor] and a female student leave the [band] room, arm the school at the office, and leave the school.

11:10 pm - [The Grievor] and the student get into a dark coloured car and drive away. Dark car returns to the school at and remains beside the white car with lights on.

12:21 am - Lights go off

12:21 am - Occupants remain in car with lights off until police arrive

1:52 am - Police car arrives in parking lot and shines spot light on car

1:52 am - [The Grievor] gets out of the car and then gets back in the car (my emphasis)

1:54 am - Second police car arrives in the parking lot

1:55 am - [The Grievor] and student get out of car

[92] It will be observed that the Grievor got out of his car in less than one minute from the arrival of the police car making it improbable that Ms. A was straddling him in a state of partial undress when the car was suddenly illuminated. Moreover, had that been the case, the police officers would have made that observation. Instead, the officers observed both occupants in their respective seats.

[93] It is clear from the notes of school and Board officials that they assumed the worst. That is, that the police had interrupted a scene of sexual intimacy. That is not the evidence. Neither police officer witnessed any sexual intimacy when they arrived on the scene and surprised the Grievor and Ms. A in his car.

XI

[94] On April 18, 2017, the police notified the Employer of the alarm call to School M and the incident involving the Grievor and Ms. A. The Employer suspended the Grievor pending an investigation into his relationship with the student.

[95] On April 19, 2017, Constable Lund attended at the school and interviewed Ms. A who was cautioned of the importance of

telling the truth and that misleading the police would be a problem.

[96] Ms. A. told the Constable that the Grievor was "my friend and my colleague and my teacher. I respect him." She described a difficult rehearsal "and I was crying and he was comforting me and supporting me ... then I had basically cried myself until I was about ready to pass out and he suggested that we go get some food ... and then we came back to the school because I left my car there and then we were sitting in the car talking at that point when the police showed up."

[97] Contrary to the sexual contact she said occurred between 10 pm and 11 pm on the night of April 13, 2017 in the Grievor's school office, Ms. A told Constable Lund "we were talking. I was crying - a lot" following which they went to Wendy's. Ms. A told the Constable she was starting to feel better and they returned to the school. Constable Lund then asked:

... but you sat in the car there for a long time at the school still, like almost two hours.

Ms. A: Yeah, because then I started crying again

Cst: ... so what kinds of things were you talking about, that's all ... like, I mean at the end of the night it's four hours you spent with him

Ms. A: ... a lot has to do with some suicidal thoughts ... troubles going on at home. Even just graduation.

[98] Ms. A told Constable Lund that the Grievor was not her boyfriend and she was not his girlfriend; that she had said

that only because he had said that to the police "[so] I said that and it was not the truth and not a smart thing to do ... I said it because of what he had said."

[99] Then the following exchange occurred:

Cst: My partner ... from her observations felt that you were adjusting your clothing and that you were pretty embarrassed and sheepish and like ... she had stopped you guys in the middle of some intimacy.

Ms. A: No. Nothing had happened

Cst: There's no physical contact, sexually, kissing, hugging

Ms. A: There was a hug because I was crying and he was comforting me

Cst: ... Do you know why my partner would say that

Ms. A: No. I do get very anxious though and part of the anxiety for me is to play around with my clothing.

[100] The Employer's Investigator concluded that while in the Grievor's car the early morning of April 14, 2017, "the two hugged repeatedly, and [the Grievor] touched [Ms. A's] breasts and shoulders". This finding appears to rely on what the Investigator said was told to her by Constable Lund. At p.9 of her Report, the Investigator said:

... when [Constable Lund] asked [Ms. A] what was actually happening in the car when the RCMP showed up. [Ms. A] told him/her that [the Grievor] was touching her and it was completely "consensual".

[101] The Investigator's notes of the interview with Constable Lund do not say that. Moreover, Constable Lund testified that Ms. A did not tell her there was touching in the car. In fact, Ms. A said just the opposite (*supra*, para 99). In her evidence, Constable Lund said she would not have made that comment to the Investigator and this is supported by the Investigator's notes. Moreover, the video surveillance evidence demonstrates there was no delay getting out of the car. The Grievor got out in less than one minute after the arrival of the police. The attending police officers did not observe any sexual intimacy and said the Grievor and Ms. A occupied their respective seats in the car which were separated by a solid centre console. There is no record of the Investigator interviewing Constables Schwindt and Wilson.

[102] In an email dated May 6, 2017, Ms. A recanted a number of her previous assertions to the Investigator stating that, "[h]e never touched my thighs or under my shirt. And he didn't touch me every time he saw me. It only happened once or twice."

[103] Ms. A testified that she sent that email to the Investigator because the Grievor told her to deny ever being intimate with him so as to protect his family. The problem with this evidence is that the email does not do that. It changes the frequency of the sexual contact. Had Ms. A written that no such contact occurred, it would be consistent with what she asserts the Grievor told her to do. Moreover, the

email speaks of her romantic feelings for the Grievor. It is inconsistent with a request to deny intimacy.

[104] The Grievor categorically denied asking Ms. A to change her story. He testified that all communication ceased after April 18, 2017. It should be added that the Employer did not rely on that allegation in its reasons for dismissal.

XII

[105] In the letter of dismissal, the Employer identified the following grounds for termination:

1. Witness E was a vulnerable student suffering from both depression and anxiety;
2. The relationship between you and Witness E went well beyond any appropriate teacher-student relationship;
3. You purported to "counsel" Witness E, without any training or qualification to do so;
4. You did not refer Witness E to a properly trained counsellor;
5. You engaged in extensive texting and social media communications with Witness E, all of which have reportedly been deleted at your request;
6. You visited Witness E in the alley behind her home at 1:30 in the morning so she could speak with you "face to face". You acknowledge this was extremely poor judgment;
7. You were alone in the School with Witness E, for a period of 45 minutes, after 10pm on April 13, 2017, following which you were together in your car in the School parking lot between 11:53 pm and 1:53 am, when you were interrupted by the RCMP;

8. You told the RCMP you were with your "girlfriend";
9. You engaged in physical contact with Witness E, including hugging her and touching her breasts and shoulders;
10. You spoke with Witness E about your personal marital difficulties;
11. You did not report the events to the School District administration or your Principal.

[106] The evidence supports point 1. Ms. A did suffer depression and anxiety.

[107] As to point 2, I have concluded that the evidence of a sexual relationship is unreliable and those allegations are unproven on a balance of probabilities. Leaving that aside, the relationship between the Grievor and Ms. A went beyond the boundaries of an appropriate teacher-student relationship and the Grievor recognizes and accepts this. Moreover, in a written statement to the Chair and Trustees of the Board, and delivered in person, the Grievor said:

Regardless of my protective intentions towards Ms. A I know that I crossed professional boundaries, and for that I am extremely regretful. I have learned that I must never allow a teacher-student relationship to progress to this point again. My intent in this case was to try to look out for the best interests of my student. I would never harm a child in any way.

[108] In acknowledging this inappropriate conduct, the Union said:

Specifically, he acknowledged at the time in his June 14, 2017 Statement to the Board and acknowledges now, that the relationship crossed professional boundaries. He is fully aware that he should not have spent lengthy periods of time alone with this student, and certainly should not have done so late at night. He understands that he should, furthermore, not have engaged in messaging with this student about matters unrelated to school. The result of crossing these professional boundaries, was clearly deeply confusing to the student, who was already vulnerable. When she confided her personal problems to him, he should, in addition to telling her parents, and encouraging her to get professional help, have sought out the support of his administrator and the school guidance counsellors.

[109] As in all such difficult matters, there is always a setting in which these regrettable incidents have to be placed. When Ms. A became the Grievor's student, they had known each other for a year through the jazz camp program and through weekly private music lessons. A friendship developed between the Grievor's daughter and Ms. A. The Grievor had become friendly with Ms. A's parents. As well, Ms. A had become involved in the wider jazz community in which the Grievor was a prominent member and through which he engaged with students outside of the classroom. It is inevitable that familiarity beyond the usual teacher-student relationship would develop in these less formal and shared interests settings including addressing everyone by their first names. That is what musicians do. Jazz musicians make music. The only hierarchy is musical prowess. Jazz musicians mix freely with each other - all that matters is the music - age, outside occupations and standing are irrelevant. It is only about the

music. This is aptly demonstrated by Ms. A joining a band made up of mostly "old white men playing jazz". This community is intergenerational. Ms. A was not the only student in what she called "my jazz family". This is important context for the friendship which developed between the Grievor and Ms. A as well as that between him and her parents who attended jazz festivals, concerts and the weekly jazz jam. In fact, Mr. A was the amateur photographer at these events.

[110] The Grievor was responsible for the establishment of the weekly jazz jam. It allowed music students and professionals of all ages and abilities to interact and learn from each other. He expected the students would become members of this wider community.

[111] It should not be assumed that the Grievor bestowed favour on Ms. A. She was one of several students he recommended for inclusion in the Michael Garding Big Band. A piece in the local newspaper notes that every year the Band "slots in a couple of the best students from the area to come and join them ..."

[112] It follows that what occurred in this case must be viewed in its proper setting - a setting, I should add, known to the Employer. This is not to suggest the Employer condoned what occurred in this case. Far from it. But it is clear that the relationship which the Grievor had with Ms. A and other students did not have the usual teacher-student boundaries. The fact is that the Grievor and Ms. A and other students had a relationship with the Grievor which extended outside the

classroom in settings which, in many respects, levelled them - they were all musicians - and eroded the formal authority figure a teacher generally represents.

[113] The relationship which the Grievor had with Ms. A and other music students was open and well known. The Investigator noted this at p.6 of her Report:

The Witnesses were asked to describe the relationship between [Ms. A] and [the Grievor]. Witness F said that it was "... not a teacher/student relationship. [They have] a connection through music that is unique. [It is an] easy, natural relationship." Another Witness said, "He was her mentor. [The Grievor] is friendly with kids ... She would ask a lot of questions, he would always take the time to answer". A third Witness said, "From what I saw it never crossed the line beyond friends. They spent a lot of time together. When she was having a breakdown, she would go to him (often)..." This Witness went on to say, "When we got back from San Francisco, I saw him driving her [which was] not sensible because she had a car. [They] would come back [to School A] with ice cream". A fourth Witness said [the Grievor] and [Ms. A] were "Close. [They are] similar [people with] similar interests. [They're] both introverts, over-thinkers. [They have a] similar humour... [It was] beyond what I would expect with a teacher, but he was like that with many students." I find that [the Grievor] and [Ms. A] had a close relationship which went beyond a typical student/teacher relationship.

[114] There is a useful discussion of the special role of music teachers in *British Columbia Teachers' Federation (North Vancouver Teachers Assn) v. British Columbia Public School Employers' Ass'n (Workman Grievance)*, [2016] BCCAAA No. 30 where Band classes, similar to the

case at hand, were scheduled at times outside of the regular timetable to allow students to take more classes than required, including, as here, at 7:15 am. The arbitrator said:

In her career teaching Music at Sutherland, Ms. Workman has organized, pursued and committed to all the activities dedicated Music teachers undertake outside the classroom in their schools and communities to enrich student experience and to promote a school's Music program. These include:

- a. School and community student performances
- b. Field trips, retreats and zone concerts
- c. Student exchanges with schools in Japan
- d. Performances in elementary schools
- e. Online profiling and promotion of the program and its activities
- f. Tutoring and providing other supports for struggling students

(para.29)

[115] Similarly, the evidence is replete with examples of the Grievor's special role and dedication to his students in providing opportunities to enrich and advance their musical talents beyond the classroom. Moreover, he was immensely successful and highly regarded for these tireless endeavors.

[116] On all of the evidence, I conclude that the Grievor's relationship with Ms. A and other students was open and available for all to see. It did go beyond the norms of the typical teacher-student relationship, but it was not hidden. It was in plain view for all to see including the Employer who must not have seen the lurking risk. Moreover, it is clear that the Grievor did not grasp the extent to which his relationship with Ms. A was inappropriate. Much of this is

down to the fact that Ms. A's parents were fully aware of it and encouraged the special role which he foolishly assumed.

XIII

[117] The third ground relied upon by the Employer for dismissal is "purport[ing] to "counsel" [Ms. A] without any training or qualification to do so." While agreeing that the Grievor has no training or qualifications as a counsellor, the Union joins issue with this allegation. It submits that the Grievor listened to Ms. A, tried to calm her, cheer her up and direct her to professional help but did not "counsel" Ms. A.

[118] The word "counsel" draws its meaning from the context in which it is used. Generally speaking, it is a word used to mean advice or guidance. But in these circumstances, it has a more focussed meaning and suggests systematic guidance offered by trained school counsellors, social workers, doctors and the like where a person's problems are discussed and qualified advice is given. There is no question that the Grievor was not qualified or trained in that sense, nor is there any doubt that Ms. A required that sort of professional guidance.

[119] The clinical notes recorded by Ms. A's doctor upon the attendance of Ms. A and the Grievor contained this entry:

When I asked her teacher if [Ms. A] had been referred to a counsellor at school and he replied that it is customary to have the student link with the teacher that has the best rapport with the pupil and in [Ms. A's] case this was himself.

[120] It may be that the first point of contact for a troubled student is the teacher with whom she has "the best rapport" but that teacher's responsibility is to refer the student to trained school counsellors. It is true that the Grievor repeatedly recommended professional treatment to Ms. A and to her parents. To a limited extent, this advice was heeded. Ms. A did see her doctor who appears to have communicated to the Grievor the need for a "counsellor at school". He should have done this instead of his misguided "best rapport" response.

[121] Ms. A swore the Grievor to secrecy with respect to her depression. He should not have agreed to that. She did not want to see a counsellor because of past experience and for confidentiality reasons. He should have ignored that and reported his concerns to the school administration. Clearly, the Grievor acted irresponsibly in these matters. But there is no evidence of express direction or advice provided by the Grievor to Ms. A. He listened, tried to assure her that she was loved at home, attempted to cheer her and make things better in a supportive way but the evidence does not establish that he "purported" to counsel Ms. A by offering specific advice or direction other than to see a doctor and attend counselling, good advice which was partially heeded.

[122] On the whole of the evidence, I find that this ground for dismissal is not established.

XIV

[123] I turn next to ground number 4 - "You did not refer [Ms. A] to a properly trained counsellor."

[124] The Grievor did not report Ms. A's obvious emotional difficulties to the school administration or seek help from school counsellors. This was a failure on his part which he regrets and says he has learned from.

[125] In his defence, it must be pointed out that the Grievor did urge Ms. A to attend counselling and did successfully insist she see a doctor who, according to her clinical notes, asked the Grievor if Ms. A had been referred to a school counsellor. The Grievor reportedly replied that it was "customary to have the student link with the teacher that had the best rapport with the pupil and in [Ms. A's] case this was himself." That is a strange and irresponsible response. It is obvious the doctor's opinion was that the patient undergo counselling. His duty then was to insist that Ms. A follow that recommendation or report the matter to the school administration.

[126] Ms. A had disclosed her depression to the Grievor and sworn him to secrecy. That is no excuse. His obligation was to tell her that he could not make that commitment.

[127] Ms. A agreed in cross that the Grievor had urged her to seek counselling. She also agreed that the Grievor had prepared a list of concerns (supra, para.35) with her permission and he believed it was important these concerns be communicated to the doctor.

[128] Ms. B resisted the suggestion that the Grievor had told her Ms. A needed to see a counsellor. This assertion must, however, be viewed in the light of evidence that she had told the Grievor they had benefits to cover the cost of counselling and told him he was not qualified to be a counsellor. Mr. A agreed on cross that at a parent-teacher meeting the Grievor did tell him Ms. A should see a counsellor and his wife had responded by saying the Grievor was not qualified to counsel her. In this respect, the evidence of the Grievor that Ms. B was dismissive in replying that her daughter's difficulties were "situational" and would ebb with the end of auditions and other pending commitments is most probably correct. The evidence is clear that the parents, because of their occupations in the mental health field, were concerned about confidentiality as was Ms. A. In the result, she did not get the required professional assistance. That is not the fault of the Grievor. But, he is at fault for failing to report to the school administration or school counsellors.

XV

[129] The fifth ground relied on by the Employer for dismissal is "You engaged in extensive texting and social media communications with [Ms. A], all of which have reportedly been deleted at your request."

[130] The first part of that ground is irrefutable. The Grievor did communicate with Ms. A by text and social media. He testified to being friends with many students and teachers on Facebook and other so-called social media platforms. It appears clear that it was typical for him to communicate with students in this way and to this extent Ms. A was no exception. It is also apparent that the administration was aware of his Facebook usage and there were no policies prohibiting its use or that of similar media. Moreover, the Grievor has never received any past direction or discipline with respect to these methods of communication. This, however, does not excuse texting about non-academic matters.

[131] The Grievor denies asking Ms. A to delete text messages. He says it was Ms. A who made that request of him. She was particularly concerned for privacy following an incident where the Grievor, in a different class of students, plugged his phone into a monitor which displayed a message from Ms. A which, in reference to her parents, read "I am so fucking alone." The Grievor testified that she was upset about this and asked him to begin deleting her messages.

[132] In contrast, Ms. A testified that when the Grievor notified her of the investigation into their relationship, he told her to delete all text messages and she complied. That is not consistent with what she told the Investigator who, at p.12 of her Report, said:

Both [the Grievor] and [Ms. A] admitted that they texted each other and engaged in social media interaction on a frequent basis. I asked both of them if any of those messages were sexual in nature. [The Grievor] denied this, and when I asked him to produce the texts and messages, he said he had deleted them all. When [Ms. A] was initially asked whether the texts were sexual in nature, she said, "Some of them.. She also said she had no copies as [the Grievor] had asked her to delete the texts and messages after every conversation after their relationship moved to a sexual one". (emphasis added)

[133] Later Ms. A told the Investigator, "I've been thinking about it a lot and none of the texts that were between [the Grievor] and I were sexual". As a result, the Investigator said she could not "substantiate [Ms. A's] allegation that [the Grievor] sent her texts and messages of a sexual nature."

[134] When asked in cross to explain the inconsistency between her evidence of deleting all messages at the request of the Grievor and her statement to the Investigator that he told her to delete after every encounter, Ms. A said "That was not true. He asked me to delete everything after the investigation."

[135] Ms. A's statement to the Investigator that the Grievor asked her to delete messages on an ongoing basis, i.e., after every conversation, is inconsistent with her mother's testimony that on April 18, 2017, the day after the Grievor was notified he was under investigation, Ms. A read her a text message from the Grievor directing deletion of their communications. Ms. B did not read or see the message.

[136] Ms. B's evidence is puzzling in light of a text conversation with Ms. A on April 18, 2017. In that conversation, Ms. A tells Ms. B that the Grievor is under investigation: "I'm not to tell anyone. But you might be contacted." The following morning, Ms. A texts:

Mom. Please respond

indicating that she awaited a response to the previous day's messages. This casts doubt on Ms. B's evidence that on April 18, 2017 her daughter read the alleged text message.

[137] Mr. A testified that he and his wife observed with growing concern the interaction between the Grievor and Ms. A but decided not to take any steps until her participation in pending music events was ended. Their plan then was to report their concerns to the administration and seek restraining orders. Then, he said, on April 18, 2017, Ms. A got a text from the Grievor saying he could no longer communicate with her and directing her to delete all texts "stick to the story and we'll be fine." This message was not produced. The evidence of Mr. A and Ms. B is that they were

so concerned for their daughter's safety, they formulated a plan of action which involved reporting to the authorities and obtaining restraining orders against him. Yet, these concerns and fear of the Grievor did not galvanize them to action. They did not contact the school, the authorities or the Grievor. Add to this that both parents have careers in child protection. Yet, that crucial text evidence was not preserved. Nor does this evidence ring true when considered in the light of communication on May 6, 2017 between Mr. A and the Grievor in which Mr. A appears to seek some sort of reconciliation with the Grievor:

Mr. A: Hi ...

Obviously you are in the midst of many issues. I saw you today but did not acknowledge you as I did not want to add to your plate.

Regardless of outcomes, I would welcome an opportunity to talk to you. Reconciling events through understanding and forgiveness is healthy for one's soul.

This is a standing offer is between you and I. I have no shared it with others

I don't expect a response.

Take care

Grievor: Thank you for your offer ... I do appreciate it. I'm certainly not sure what to do or say, but I'm certainly in a great deal of distress about what has transpired, and about the future for my family. Today's meeting was certainly very painful.

Mr. A: Yes

When you are able, I would be prepared to talk with you

I think you are a good person who made a poor choice.

I wish you health ... in all aspects

[138] Is that consistent with a fear for their daughter's safety and a plan to go to the authorities and seek restraining orders against the Grievor? Is it probable in this place and in those conditions that Ms. A who, for months, was demonstrably troubled, rebellious and unwilling to confide in her parents, would suddenly share with them a text message suggesting she and the Grievor were engaged in an inappropriate relationship? I think not.

[139] Ms. A testified that efforts were made to recover text messages and other communications and that her mobile phone was provided to a forensic investigator. There is no evidence as to the results of any such investigation. In addition, Ms. B testified that her relevant communications were somehow deleted.

[140] In contrast, the Grievor voluntarily provided his mobile phone and the password to every account for investigation by a forensic investigator with the understanding that an attempt would be made to retrieve text, Facebook and Snapchat messages between him and Ms. A. He provided phone passwords and login information for Facebook, Snapchat and iCloud. The forensic investigator's report is an exhibit in these proceedings. The communications were not retrievable.

[141] In a subsequent exchange between Mr. A and the Grievor, Mr. A said this:

I told [the Investigator] and school board people that my wish was for you to receive counselling regarding boundaries and ethics. I told them of your positive influence on youth that I have observed.

The Grievor responded:

Indeed, counselling and/or training was what I requested for myself (and what my union rep asked for). I am aware of my mistakes and tried my best to own them fully in my statement to the trustees. Of course, there were aspects I denied vehemently. I tried my best to be honest and forthright in all components of my interview and my presentation to the board. Perhaps at some point we will get to talk about it. Perhaps not. I have no idea what version of events were explained to you. I doubt it would make much difference at this point to hear my side, or your side, of the story.

[142] I have previously discussed the allegation that the Grievor asked Ms. A to change her story. I do not find it necessary to deal further with that issue.

[143] On the whole of the evidence, I conclude that the allegation of deletion of texts and other communications at the request of the Grievor is not made out. The Grievor did, however, engage in texting and social media communications with Ms. A involving non-academic matters.

XVI

[144] The sixth ground relied upon by the Employer is "You visited [Ms. A] in the alley behind her home at 1:30 in the

morning so she could speak to you "face to face". You acknowledge that this was extremely poor judgement". The details of this allegation are found elsewhere in this Award. The allegation is made out.

XVII

[145] The seventh ground is "You were alone in the School with [Ms. A], for a period of 45 minutes, after 10 pm on April 13, 2017, following which you were together in your car in the School parking lot between 11:53 pm and 1:53 am when you were interrupted by the RCMP". The details of this allegation are found elsewhere in this Award. The allegation is made out.

[146] In mitigation of the Grievor's action, it should be said that he ensured that Ms. A's parents were kept advised of where and who she was with. Clearly he considered his conduct to be sanctioned by them and, indeed, it was. Incredulously, they did not protest, go and collect her or instruct that she return home. They must have had confidence in the Grievor and their daughter's safety contrary to later assertions that plans were formulated to report to the authorities and seek restraining orders. No apparent step was taken to confront the Grievor or speak to the school administration. This should not be read as excusing the Grievor's conduct. It does not. It does go to an explanation

as to why he thought his relationship with Ms. A was permissible.

[147] There is no record of the communications between Ms. A and her parents on that occasion (or any other occasion). Ms. B's evidence is that those texts had "self-deleted". Strangely, she was able to retrieve messages between herself and Ms. A from April 18 and 19, 2017 and with the Grievor from April 11, 2017.

[148] Ms. A denied telling the Grievor she did not feel safe to drive home that night but this is what she told the Investigator and said she had lied.

[149] Ms. A acknowledged that she and the Grievor were aware that their cars were parked in plain view of surveillance cameras.

XVIII

[150] The eighth ground relied upon by the Employer for dismissal is "You told the RCMP you were with your "girlfriend"". The details of this allegation are found elsewhere in this Award. The allegation is admitted by the Grievor.

[151] While making that admission, the Grievor says it was a lie. This is consistent with Ms. A's evidence that she was

not his girlfriend and she was taken aback when she heard him say that. The Grievor testified that when he said that, he thought he was talking to a security guard and it was intended as a dismissive retort. But, when he learned he was actually speaking to a police officer, he did not correct that statement. These are actions for which the Grievor has expressed remorse.

XIX

[152] The ninth ground relied upon by the Employer is "You engaged in physical contact with [Ms. A], including hugging her and touching her breasts and shoulders".

[153] The allegation of a romantic or sexual relationship has been canvassed elsewhere in this Award and I have determined that, on a balance of probabilities, the allegation is not made out. The evidence of Ms. A in this respect was inconsistent and subject to several revisions by her, both in sworn testimony she provided and during the investigation. She agreed this was so without convincing explanation. Ms. A altered her testimony during the hearing and admitted she lied on other occasions.

[154] The case for a sexually intimate relationship is wholly dependent upon the evidence of Ms. A. The Grievor categorically denies there was any romantic or sexual component to the relationship.

[155] Where the allegation rests entirely upon the evidence of one witness, it is essential that the credibility and reliability of that witness' evidence be tested in light of all the other evidence presented: *R. v. R.W.B.* (BCCA), [1993] BCJ No. 758, 24 BCAC 1. At para.29, the Court said:

While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

[156] The Supreme Court of Canada considered that decision in *F.H. v. McDougall*, 2008 SCC 53 and said this:

As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

(para.58)

[157] As discussed elsewhere in this Award, the inconsistencies in the evidence of Ms. A and, indeed, lies told under oath as well as her admissions that she lied to others during the investigation does not permit me to ascribe to her the credibility and reliability necessary to find that the serious allegations of sexual contact are proven on a balance of probabilities.

[158] The ninth allegation relied upon by the Employer includes the word "hugging" and I should deal with that since this did occur between the Grievor and Ms. A. The hug has become ubiquitous. This repellent social habit is omnipresent often accompanied by the air kiss. There are hugs of condolence - celebratory hugs - greeting and farewell hugs. Burly men on football and hockey teams exchange hugs. Even world leaders are seen leaning in for the often embarrassing hug. The list is endless. But every type of single hug is not the same and can cause confusion. What do people mean when they hug in different ways? There is the kind a friend gives you following a long absence. There are the kind that say, "I need help". The ones that say you wish them well. Those between loved ones. The really awkward hugs where the participants stand away but lean in for a brief touch. That is not a real hug. Both people are embarrassed but, for some unknown reason, feel compelled to perform this disgusting social ritual.

[159] What about the hugs which took place between the Grievor and Ms. A? Those which occurred in the Grievor's car on April

9 and 14, 2017 were occasions when Ms. A was distraught and crying. On the earlier of those two incidents, she asked for a hug and he complied. On the latter occasion, she was inconsolable and a hug took place. They were hugs of help and comfort. But hugs are not as simple as they seem. They can cause confusion and misunderstanding and should not occur between teacher and student.

XX

[160] The tenth allegation relied upon by the Employer for dismissal is "You spoke with [Ms. A] about your personal marital difficulties."

[161] While it is true the Grievor was experiencing marital discord, he denies discussing this with Ms. A except for one occasion when she and another student encountered him crying in his office. When asked what was wrong, he said he and his wife had an argument. That, he testified, was the extent of his disclosure. Ms. A's evidence is that the Grievor on other occasions told her much more than that.

[162] The Grievor pointed to the friendship between his daughter and Ms. A and speculated that could have been the source of any information, true or false, which Ms. A had. In cross, Ms. A agreed that the daughter did confide in her about her parents. In addition, it is clear from text exchanges

that Ms. B was aware of marital discord and expressed sympathies.

[163] While the evidence is in dispute, it is clear that at least on one occasion the Grievor spoke of his marital discord to Ms. A and another student. Even if that was the extent of his disclosure, it was improper. That is not a fit subject as between teacher and student.

XXI

[164] The eleventh and final ground relied upon by the Employer is "You did not report the events to the School Administration or your Principal."

[165] This allegation is made out. The Grievor failed in his duty to report the events of April 13 and 14, 2017 to the administration. As discussed elsewhere, he also failed in his duty to report Ms. A's emotional difficulties.

[166] The Grievor acknowledges these were serious mistakes which he sincerely regrets and from which he has learned.

[167] The Grievor testified that over the long weekend following the events of April 13 and 14, 2017, he resolved to contact the police and correct what he had told them. He says he encouraged Ms. A to do the same. Neither did so. By Tuesday following the long weekend, the Grievor had not heard from

the police, hoped the matter was closed and did nothing further. In the result, of course, the police contacted the school thereby removing any opportunity for the Grievor to take the high road.

[168] Obviously the Grievor was ashamed and at a loss as to how to explain all of this to the administration, all of which was a serious mistake for which the Grievor takes responsibility.

[169] The Grievor also failed to report these events to the parents of Ms. A which he acknowledges was wrong and which he sincerely regrets.

XXII

[170] In summary, I find that the following grounds for discipline are established:

- (a) Professional boundaries were crossed. The relationship between the Grievor and Ms. A went beyond the appropriate teacher-student relationship.
- (b) The Grievor failed to refer Ms. A to a properly trained counsellor.
- (c) The Grievor engaged in texting and social media communications with Ms. A on matters that were non-academic.

- (d) The Grievor visited Ms. A in the alley behind her home at 1:30 in the morning.
- (e) The Grievor was alone in the school with Ms. A for a period of 45 minutes after 10 pm on April 13, 2017, following which they were together in his car in the school parking lot between 11:53 pm and 1:53 am when they were interrupted by the RCMP.
- (f) The Grievor told the RCMP that Ms. A was his girlfriend.
- (g) The Grievor spoke to Ms. A of marital discord.
- (h) The Grievor did not report these events to the Employer.

[171] I begin by echoing the words of Arbitrator Keller in *Ottawa-Carleton Catholic School Board v. Ontario English Catholic Teachers Ass'n (Suspension Grievance)*, [1999] OLA No. 1016 (Keller):

An analysis of the arbitral authorities in this area are replete with comments about the special position of trust a teacher is in vis-à-vis a student. Constant reference is made to the expectations of the community. However valid these comments are, and I fully endorse them, one must be careful to look at the facts of each case and put each case in its proper perspective. The instant case is not one of sexual impropriety. Certainly it is not one of sexual impropriety of the nature that the employer referred me to in final argument. Additionally, there was no evidence to be refuted by the union that the grievor was or is unfit to teach. A gross error of judgement does not of itself and necessarily translate to unfitness. It translates to a need to be disciplined in the sense of bringing inappropriate behaviour to the attention of the grievor so that it can be corrected.

(para.27)

[172] Likewise, this is not a case of sexual impropriety. If it was, the outcome would be swift and beyond doubt. Indeed, this was conceded by the President of the Union local in her submission to the Board of Education of the school district:

I further concede that if there had been a sexual relationship here, there would be grounds for terminating [the Grievor] as is supported by the case-law ...

[173] The case law to which the Local President was referring is contained in the submission of the School Superintendent to the Board in which he recommended termination. The Superintendent began his submission of the case law with the oft-cited *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 in which the Supreme Court of Canada spoke of the standard of conduct expected of teachers:

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public system as a whole.

(para.43)

[174] No issue can be taken with that clear statement of principle. The Superintendent also relied on cases involving sexual impropriety and, therefore, distinguishable from the

case at hand: *R. v. Audet*, [1996] 2 SCR 171; *Shewan et al v. Board of School Trustees of School District No. 34 (Abbotsford)* (1987) 21 BCLR 92d) 93; *R. v. Forde* [1992] O.J. No. 1698 (Gen. Div.); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation (Samson Grievance)*, June 19, 2000, A-184/00 (Taylor); *Board of School Trustees of School District No. 38 (Richmond) and Richmond Teachers Association (Frank Price Grievance)*, unreported, August 25, 2000 (Korbin); *Shanahan v. Board of School Trustees of Edmonton Public School District No. 7*, unreported, May 6, 1998, Edmonton Registry, (Alta. Q.B.); *Toronto District School Board v. Ontario Secondary Teachers' Federation District 12 (Dismissal Grievance)*, [2000] OLAA No. 36, January 13, 2000 (Keller).

[175] In his submission to the Board, the Grievor said, in part:

First and foremost, it is important for me to state that I never had any form of sexual or romantic relationship with this student. There was never any sexual touching as was alleged in the report.

Regardless of my protective intentions towards [Ms. A], I know that I crossed professional boundaries, and for that I am extremely regretful. I have learned that I must never allow a teacher-student relationship to progress to this point again.

My intent in this case was to try to look out for the best interests of my student. I would never harm a child in any way.

...

My social media communication with students should be minimized to brief, professional discourse. Responding to students on social media can give the appearance of socialization especially to the students themselves. One of the larger risks is that vulnerable students may start relying on me to provide support beyond what is appropriate for a

teacher. In these cases I should discontinue responding and bring the matter to the attention of my administrator. Answers should remain appropriately professional and consistent with teacher-student relationships. Although I have always felt it is important for me to be friendly with students, it is equally important to remind them that I am not their friend; I am their teacher.

It may be that I have been overly reliant on social media platforms to communicate with students. My personal social media policy is described to students at the beginning of the year. I will accept friend requests from any student or parent who makes a request of me. I will never make a friend request of any student myself. My social media profiles are clean, and I am open to advisement on the use of social media platforms, including moving all online class communication to district systems or websites developed specifically for teachers.

A teacher should not be in a private location with a student at all. Meetings in an office should always be conducted with the door open and classroom doors unlocked. Students should never be alone with a teacher in an environment outside of a school. I understand that this represents a large error in my professional judgment in this case, and I guarantee that this behaviour will never happen again. This type of contact must be strictly avoided, and always must be reported to administration if it is to occur (eg. Late-hour contact has been a part of my job, specifically on overnight music tours with late scheduled events).

I am not trained to provide counsel to students. Some small amount of this is present in every classroom, but should only extend to minor issues relevant to class material or class events. In cases where I find that students are in need of additional support, they should be referred to the appropriate service (peer counsellors, school counsellors, administration, school mental health workers, or parents). I need to be extremely clear with students

that I am not their counsellor or their confidant. I also clearly understand that students may have a wide variety of needs (emotional, educational, professional) that I am unable to meet, and should never attempt to meet.

The discussion of my marital situation with students was an egregious error in professional judgment. Two students ... found me in a moment of personal weakness in my office and expressed concern for me. I told them about my home situation, but not in any great detail. [Ms. A] was well-aware of the situation through her connection with my daughter, who she was friends with.

...

Regarding [Ms. A], I had known for some time that she suffered from anxiety; her parents had disclosed that so I might understand her reactions to instruction in private lessons. When she initially disclosed to me that she had been diagnosed with depression by her family doctor in February, I assumed some form of treatment would be commencing immediately. As [Ms. A] continued to reach out to me with problems, it became increasingly clear that she was not receiving professional help, and that she had not been entirely honest with her doctor. In March, she disclosed long-term feelings of self-harm to me, and told me that she hadn't told her doctor. She had seen a counsellor in her past regarding her anxiety issues, and had not found the process to be helpful, so she was resistant to the idea this time. Additionally, she was very concerned about the confidentiality of the self-harm aspect of her feelings. She felt that if her parents discovered this, she would not be allowed to move away to Vancouver in the fall for post-secondary music studies. Her parents are both employed as social workers, and are in regular contact with a large number of local counsellors and psychologists, which caused [Ms. A] to worry that her treatment would not be confidential.

I told her that she needed to return to the doctor as soon as possible in order to disclose the feelings of self-harm. I began to take notes on our conversations, with the student's consent, in order to give them to her parents or to the doctor. She made an appointment with the doctor and asked if I would attend with her in lieu of her parents. I said I would if I could.

It turned out that this appointment fell in the middle of one of my recording sessions for my new album on March 28 or 29, and I told her I couldn't attend. Rather than attend with her parents, she chose to reschedule the appointment for April 11. I agreed to attend this appointment as long as it was acceptable to her parents. I asked her to inform them and then later verified that she had done so. I also told her mom about my notes on our conversations at that time.

I was very disappointed that the original doctor's appointment had to be missed. I recognized that I was in over my head and was repeatedly asking her to disclose the situation to her parents, but she refused. I felt paralyzed by her talk of self harm. I agreed to continue talking to her about these problems until she was in the care of a trained professional because I feared for her safety if I refused. My protective feelings for [Ms. A] were similar to those I hold for my own two daughters, both of whom suffer from anxiety and depression, and are close in age to [Ms. A].

Once I did manage to get the student to return to the doctor, I attended the first part of the appointment and ensured that the doctor heard what [Ms. A] had been telling me in terms of thoughts of self-harm. I also read the doctor my notes. The doctor gave her a prescription for anti-depressants and provided a list of counsellors and psychologists. The student's parents were kept informed of this process. They had already discussed with me that they understood their

daughter's concerns about confidentiality and that it was difficult to find a counsellor or psychologist that they weren't in regular contact with.

The student was set to begin treatment immediately following the BC Interior Jazz Festival. She was to begin taking anti-depressants on April 23rd, and would contact a counsellor or psychologist the following week.

Trustees, I am not telling you all of this as a way of justifying my actions. I understand that my decisions were incorrect both personally and professionally. I had a lack of knowledge about the correct procedures for reporting thoughts of self harm, and I did not understand how to deal with the fact that [Ms. A] did not want me to make the required disclosures. I would be very open to training or advisement on this in the future.

All of my after-hours communication with the student was done with the sole intent of helping. Again, I recognize that I crossed professional boundaries, and I regret that tremendously. I would never allow a counselling relationship like this to evolve again. I would report the situation immediately to parents, school counsellors, and administration.

One of the things I have been consistently lauded for in my career is how I go above and beyond for students. Parents, students, colleagues, and administrators have all praised me for this, and it has become a core part of my philosophy of education. However, it is now clear to me that students can sometimes find it confusing when you do the extra, above-and-beyond things. They could easily misread or misconstrue those actions into being something they are not, as I believe happened in this case. Instead of helping [Ms. A] as I had intended, my conduct resulted in confusion and anxiety for her, and risk to my own professional role. I must be certain in the future that my above-

and-beyond work always stays within the professional boundaries appropriate to teacher-student relationships, and I am committed to making the necessary changes to my communication and interaction with students.

[176] The Employer also relied on those case authorities dealing with dishonesty during an investigation which in and of itself may prove just cause for dismissal: *Alberta Wheat Pool v. Grain Workers' Union, Local 333 (Kramer Grievance)*, unreported, April 8, 1998 (Korbin); *Pacific Press and Communications Energy & Paper Workers Union, Local 115-M Gibbons Grievance*, [1997] BCCAAA No. 558 (Greyell); *North Okanagan-Shuswap School District 83 and CUPE, Local 523 (Anthis Grievance)*, [1998] BCCAAA No. 404 (Thorne).

[177] The evidence does not support that submission. I find that the Grievor has been honest and forthright during the investigation and the arbitration. Likewise, he was painfully honest and thorough in admitting his wrongdoing and failures to the Board of Education. Those cases have no application to the facts in this case.

[178] A case relied upon by the Employer which did not involve sexual impropriety is *School District No. 38 (Richmond) and Canadian Union of Public Employees Local 716 (Mah)*, unreported, 1994, (Korbin) in which the grievor left the school premises with a 16-year old female student. They talked for about two hours in the grievor's car following which he returned the student to the school. The student claimed the grievor kissed her. At p.41, the Arbitrator found that the grievor had not been truthful "with the Board" and, at p.44, "failed to demonstrate an

understanding of his error". In upholding the grievor's dismissal, the arbitrator said:

Central to this determination is my assessment that the grievor did not exhibit a real appreciation of the seriousness and inappropriateness of his own misconduct ... [and] I cannot be sure that the grievor understands what it is that he has done wrong. I have no way of knowing if he will engage in similar misconduct in the future.

(pp.45-46)

[179] Those findings distinguish that case from the case before me. As the Grievor's testimony and statement to the Board of Education amply demonstrate, he has carefully reflected on his actions, admitted his wrongdoing and made clear his willingness to participate in any professional training or instruction the Employer deems necessary or advisable to assist him in avoiding the errors he has made and for which he accepts full responsibility.

[180] The Grievor is an accomplished Music teacher with 15 years of unblemished service with the Employer. His skills as an educator are unquestioned. The energy he has devoted to the wider music community and the manner in which this has benefited his students is most impressive. There is no evidence suggesting the Grievor is unfit to teach.

[181] While the Grievor's only motivation was to help Ms. A - no doubt fortified by the misguided encouragement of her parents which provided a false sense that what he was doing was stamped with the imprimatur of approval - he demonstrated

appallingly bad judgement in doing so. There is no evidence to suggest there was any improper motive behind the relationship between the Grievor and Ms. A. I accept as genuine and heartfelt the Grievor's statement to the Board of Education:

All of my after-hours communication with the student was done with the sole intention of helping. Again, I recognize that I crossed professional boundaries, and I regret that tremendously. I would never allow a counselling relationship like this to evolve again. I would report the situation immediately to parents, school counsellors and administration.

[182] There is no question that the Grievor fully understands and regrets his wrongdoing and lack of good judgement. In the words of Arbitrator Keller in *Ottawa-Carleton*, "he has had hammered home to him that what he did was improper, was wrong and is not to be condoned or repeated." (para.29) Moreover, and quite apart from the personal turmoil and emotional distress, the Grievor has suffered public humiliation, reputational damage and significant financial loss.

[183] The Employer argued that even if there was no sexual impropriety, the relationship was improper and, standing alone, is just and reasonable cause for dismissal. A similar argument was made to a three-person arbitration panel in *Sooke School District No. 62 v. Sooke Teachers' Assn.*, [1995] BCCA AAA No. 260 where a teacher was dismissed in response to an allegation he had engaged in a sexual relationship with a 19 year old student. The grievor admitted a relationship with the student but

denied it was sexual in nature. At para.101, the award states that the board could not reach a consensus with respect to whether the relationship included a sexual aspect but was unanimous that the conduct of the grievor in allowing the relationship to develop was itself deserving of discipline. In reinstating the grievor, Chairman Hope said:

The chairman concluded ... that the relationship did involve a sexual aspect but was of the view that the grievor's conduct, whether or not it involved a sexual component, while it was extremely serious, did not support dismissal as the only appropriate response. In his view, dismissal was excessive when the relevant factors of mitigation are applied. In particular, he was unable to conclude on the evidence that the grievor's employment relationship could not be rehabilitated. It was his view that the grievor could be relied on to resume his teaching career with no danger of a repetition of the conduct that gave rise to these proceedings.

(para.125)

[184] In reinstating the grievor in that case, the board said:

Here the facts do not support the conclusion that the grievor will become a repeat offender. The implication is that he allowed himself to be drawn into a relationship in which he occupied roles for which he was ill-equipped either professionally or emotionally. In particular, he took it upon himself to counsel a complex young woman whom he perceived as being in need of professional assistance. Accepting that his intentions, at least in the first instance, were well-motivated, it is to be hoped that he now realizes that he acted unprofessionally and that maintaining an orthodox relationship with students is not only required, it is essential.

[185] Those comments are similar to the ones I have expressed in this case. While the Grievor exercised remarkably poor judgement in his relationship with Ms. A, his intentions were well-motivated. More important, I am persuaded that he has learned from this and there is no risk of repetition of the conduct which gave rise to these proceedings. Moreover, there is no evidence that he has impaired his ability to resume his teaching career and to perform his duties and responsibilities to the same high standards that he previously achieved. To paraphrase Wilde, "every saint has a past and every sinner has a future." I am persuaded the Grievor has a future.

[186] The dismissal is set aside. The Grievor shall be reinstated to employment effective the commencement of the 2018-2019 school year but with no compensation for his wage loss.

ANONYMIZATION OF THE AWARD

[187] I have take the exceptional step of protecting the identity of the Grievor and witnesses. This application by the Union was vigorously opposed by the Employer.

[188] One begins with the presumption that the "open court principle" is the rule and anonymity the exception. This has long been the cornerstone of the common law and applies to all judicial proceedings. It acts as a guarantee of judicial integrity: *Re: Vancouver Sun and Attorney General of Canada et al*, [2004] 2 S.C.R. 332. Notwithstanding this zealously guarded principle,

arbitrators have the discretion "to use initials of parties or witnesses, or to protect privacy interests in however they see fit." *United Food & Commercial Workers Union Local 1518 v. Sunrise Poultry Processors Ltd.*, [2015] B.C.J. No. 1713 (BCCA).

[189] In *Husband Food Ventures Ltd. (c.o.b. IGA Store No. 11) v United Food & Commercial Workers International Union, Local 1518 (Termination Grievance)*, [2013] BCAA No. 91, Arbitrator Sanderson said:

... whether a grievor's name should be redacted in this, or any other labour arbitration decision, is a matter within the discretionary authority of the arbitrator, to be decided on the facts of the specific case and a careful review of the merits of the positions of the parties ... Both [parties] accept there may be individual circumstances, for example, a need to protect the identity of a particular vulnerable person due to the existence of private information such as a medical condition, where the grievor should be anonymized in the arbitration decision. However, granting anonymity to a grievor is a matter to be determined based on the terms of the parties' agreement or the unique facts and circumstances of the specific case. For the reasons noted above, I am satisfied the decision to provide anonymity to a grievor is not a function of the application of statute law; rather it is a discretionary matter to be decided by the arbitrator if the parties cannot agree.

(paras. 7-8)

[190] Arbitrator Lanyon in *Sunrise Poultry Processors Ltd. v. United Food & Commercial Workers, Local 1518 (Renflesh Grievance)*, [2013] BCCAAA No. 142 relied on the open court principle in deciding not to anonymize the grievor. At para.41, Mr. Lanyon said:

The adoption of the open court principle creates the presumption of publication; however the privacy concerns of grievors and witnesses, especially in respect to personal identifiers, and personal information, do raise significant issues. Arbitrators must balance the sensitivity of the personal information, and the potential harm to grievors and witnesses in the event of publication of their names, in crafting their awards. Therefore, grievors and witnesses always maintain the right to raise the issue of the non-disclosure of personal information, or the right to anonymity in respect to the publication of such personal information.

[191] Thus, while there is a presumption that the parties to the collective agreement and the grievor and witnesses in an arbitration are to be identified, there are exceptions where anonymity is appropriate based upon the circumstances of the particular case. After searching consideration, I have determined this is one of those rare exceptions.

[192] The Employer submits that the Grievor "has admitted in engaging in serious misconduct [and] should not have his identity hidden" and "anonymization should not be used to assist a grievor in concealing their conduct and there is a public interest in the publication of such employment offences."

[193] There is force to that argument. It must, however, be weighed against the harm to a grievor's family and others. In this case, there is evidence that the Grievor's wife is a private school teacher and her employment could be jeopardized in the event of publication of the Grievor's name.

More concerning, in my view, is the fact that his daughter is a high school student in the district and could be exposed to difficult questions as well as invasion of privacy, embarrassment and loss of dignity should her father's name be made public. All family members have the same surname.

[194] In *Sunrise Poultry*, Arbitrator Lanyon concluded that minors and innocent third parties may have their identity anonymized. (para.128)

[195] Much of the evidence in this case is sordid and includes marital discord between the Grievor and his wife. It can reasonably be assumed this will prove embarrassing and harm the reputation of all members of the family.

[196] In *Renfrew County Catholic District School Board v. Ontario English Catholic Teachers' Assn. (A Grievance)*, [2008] O.L.A.A. No. 361, Arbitrator Swan, at para.7, said:

I have concluded that the issue of identifying participants in an arbitration award is a matter of arbitral discretion, and that it should be exercised in accordance with due concern for the privacy of participants and their families, for their continued ability to carry out their jobs, and for the ongoing relationship both between the parties to the collective agreement and among the individual employees concerned ... in the wider community, the individuals involved continue to hold positions which are more easily fulfilled if their privacy and dignity are accorded a considerable degree of respect.

[197] Arbitrator Lanyon in *Sunrise Poultry* cited the Canadian Judicial Council's Paper *Use of Personal Information in Judgements and Recommended Protocol*, March 2005, where the Council said:

... there may be exceptional cases where the presence of egregious or sensational facts justifies the omission of certain identifying information from reasons for judgement. However, such protection should only be resorted to where there may be harm to minor children or innocent third parties ...

Protection of the innocent from unnecessary harm is a valid and important policy consideration (see *A.G. of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175). In these cases, the judge must balance this consideration with the open court principle by asking how much information must be included in the judgement to ensure that the public will understand the decision that has been made.

(paras. 31-32)

[198] In exercising the discretion described, the objective should be to issue an award which provides a full report of what occurred at a public hearing while limiting, as best one can, the extent of harm to the individuals involved.

[199] Ms. A and her parents testified they did not want to be named or identified in the award. Ms. B said she wanted the Grievor and the school named but did not respond when asked if doing so would identify her daughter. Ms. A said she wanted the Grievor named even if it identified her. Given their close association in the music community, it almost certainly would result in her identification.

[200] Of particular concern with respect to Ms. A is the disclosure in the award of her medical records. In this respect, I agree with Arbitrator Lanyon in *Sunrise Poultry* that the confidentiality of medical records is a basic right to human dignity:

An important area of privacy, about which there is much consensus, is the disclosure of health records. The right to keep confidential the intimate details of a person's physical and mental health goes to the very heart of an individual's right to privacy. The right to control the dissemination of such information is vital to an "individual's identity". Justices McLachlin and Iacobucci, in the Supreme Court of Canada decision *R. v. Mill* [1999] 3 S.C.R. 668 state the following:

These private concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information 'about one's lifestyle, intimate relations or political or religious opinions': Thomson Newspapers, supra, at 517, per La Forest J., cited with approval in *Baron*, supra, pp.444-45, (para 80)

Justice Wilson in *Edmonton Journal*, supra, wrote that one of the purposes of the *Alberta Judicature Act* was to address the "personal anguish and loss of dignity" (para 67) that would result from the publication of the intimate details of a marriage. As Arbitrator Dorsey stated in *Fording Coal Ltd.*, [1996] BCCAAA No. 94, the confidentiality of medical records (from injury to recovery) raises this same "basic right to dignity") para 125-126

[201] The Union argued that for public policy reasons, the identities of Ms. A and the Grievor's daughter should be protected. I observe that during some of the events recounted

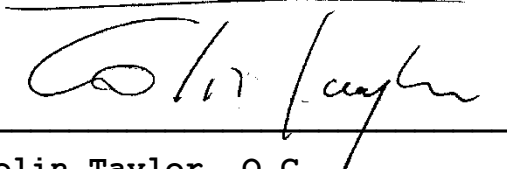
in the award, Ms. A was 17 years old and the Grievor's daughter younger. I agree with the Union that, in order for these vulnerable young persons to be protected, it is necessary to anonymize the Grievor.

[202] Likewise, the reputations of Ms. B and Mr. A will likely be adversely affected by publication of their names and it is near certain that the Grievor's reputation and future will be destroyed by publication.

[203] For all of these reasons, I have determined that the balance falls in favour of protecting the identities of the Grievor and witnesses.

[204] I remain seized to deal with any issues arising from the interpretation, application or implementation of this Award.

Dated at Vancouver, British Columbia this 5th day of September, 2018.


Colin Taylor, Q.C.