IN THE MATTER OF AN ARBITRATION UNDER THE BRITISH COLUMBIA *LABOUR RELATIONS CODE*, R.S.B.C. 1996, C. 244

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
SCHOOL DISTRICT NO. 73 (KAMLOOPS-THOMPSON)

(the "Employer" or the "District")

-and-

BRITISH COLUMBIA TEACHERS FEDERATION
KAMLOOPS-THOMPSON TEACHERS' ASSOCIATION

(the "Union")

(B. Wasylik Dismissal Grievance)

APPEARANCES:	Nazeer T. Mitha Q.C. and Warren B. Woodhurst, for the Employer
	Jessica L. Burke and Johnathon Braun, for the Union
ARBITRATOR:	Ken Saunders
DATE OF HEARING:	June 29 and 30, 2020
WRITTEN SUBMISSIONS:	July 17, 31 and August 7, 2020
DATE OF AWARD:	August 20, 2020

I. INTRODUCTION

1 The Union grieves that Brett Wasylik (the "Grievor") was dismissed without just cause.

2 The Grievor was dismissed on August 23, 2019, on the ground that he was dishonest when responding to the Employer in 2016, regarding a complaint (the "Complaint") he had acted inappropriately toward a 17-year-old former female student (the "Former Student") at a restaurant. The Grievor denied key allegations when the Employer sought an explanation.

3 The Employer's 2016 investigation resulted in a November 16, 2016 letter of reprimand and suspension. The recorded grounds were that the Grievor had made "inappropriate comments to a former student and minor both privately and in public" and the Grievor "followed the former student into the parking lot, engaging in behaviour that left the individual feeling afraid."

4 On December 6, 2016, the Employer reported its description of the Grievor's misconduct to the British Columbia Commissioner for Teacher Regulation (the "Commissioner"). That report read in relevant part as follows:

> After conducting a thorough investigation, the District determined that Mr. Wasylik engaged in inappropriate communication and physical contact with the former student in her place of employment. Mr.Wasylik's behaviour was a violation of the Standards for the Education, Competence and Professional Conduct of Educators as he exploited his position of power and trust, while engaging in public behaviour that would discredit the profession.

5 The Teacher Regulation Branch ("TRB") investigated the Employer's report. That process led to a Consent Resolution Agreement ("CRA") dated June 20, 2019. The Grievor's admissions in the CRA are contrary to his denials when the Employer sought his response to the Complaint in 2016. The Employer seeks to uphold the Grievor's dismissal based on that discrepancy.

6 The central issue for determination is whether the Employer dismissed the Grievor for the same misconduct relating to his suspension in 2016.

II. BACKGROUND

7 The Grievor attended a local restaurant on November 12, 2016, with a group where the Former Student was working at the time. The Former Student's parent later

complained to the Employer about the Grievor's conduct toward the Former Student that day.

8 Associate School Superintendent - Human Resources Shayne Olsen, Superintendent of Schools, Alison Sidow and Assistant Superintendent Bill Hamblet met to discuss the Complaint and to develop a plan of action.

9 After contacting the Former Student's parent and the RCMP, the Employer appointed an internal investigator (the "Investigator") to gather evidence and issue a report (the "Report").

10 The Investigator questioned the Former Student, and her parent as well as the Grievor and the local restaurant manager. Olsen works in the same office as the Investigator. The Investigator kept Olsen apprised of her progress in formal and informal communication. The Investigator described to Olsen her analysis and conclusions in the course of the ongoing conversation.

11 On November 28, 2016, the Investigator told Olsen that she had completed all necessary interviews and provided Olsen with a draft report. The draft included findings.

12 As of November 28, 2016, Olsen understood from speaking to the Investigator that the Grievor had provided what Olsen testified was a "totally different story" than the Former Student. According to the Report, the Complaint alleged the Grievor engaged in the following behaviour:

> 1) Approached the Former Student several times while she was on shift; 2) hugged the Former Student; 3) had his hands on the Former Student's lower back and pulling her close saying "you're so hot; just like you were in grade 9"; 3) asked the Former Student to have a drink with him after her shift; 4) when the Former Student advised she was only 17 years the Grievor said "can you pretend you are 30 tonight?"; 5) followed the Former Student to her car after shift, kissing her neck and whispering, " you're so hot and "take me home with you tonight."

13 Olsen understood that the Grievor claimed: 1) he didn't notice the Former Student until he had been at the restaurant for some time, and they had minimal interaction inside the restaurant; 2) the Former Student had told him that she was getting off shift, so the Grievor told her he wanted to walk her to her car, to talk about coaching; 3) the Grievor and the Former Student were joking and laughing as they walked to her car: 4) the Grievor denied calling the Former Student hot, but recalled saying she was gorgeous, and he denied saying the Former Student should drink with him,

or that they could pretend she was older and claims he said the opposite, noting she was underage and could not join him; 5) the Grievor explicitly denied that he asked the Former Student what she was good at except being fucking hot, that he had made suggestions a relationship between them was possible, and that he grabbed the Former Student by the waist and kissed her neck.

14 Further on November 28, 2019, Olsen understood the Investigator would reach findings adverse to the Grievor and conclude that the Grievor lacked credibility, while the Former Student's account was credible.

15 Although Olsen relied on the Investigator's findings, he understood the ultimate responsibility to reach conclusions ultimately resided with the Employer. Olsen understood that regardless of the Investigator's findings, he had to consider what the Employer could prove at an arbitration based on the evidence.

16 Accordingly, Olsen questioned the Grievor about the Complaint allegations in the presence of Union representatives David Komljenovic and Amanda Jensen on November 28, 2016. At that meeting, the Grievor claimed to have limited and unremarkable innocent interaction with the Former Student. The Grievor responded to Olsen as follows: 1) that he did not touch or hug the Former Student apart from maybe hugging her when greeting her; 2) that he did not touch the Former Student at her car, and 3) that he did not ask the Former Student to serve him. In response to Olsen's questioning about the Former Student's motive to lie, the Grievor speculated that the Former Student had manufactured the allegations out of concern that her boyfriend might discover that he had walked with her to her car. Olsen testified he did not find that explanation believable at the time. Olsen told the Grievor that he would have to decide based on the conflicting reports and that he did not see any reason for the Former Student to fabricate the Complaint.

17 David Komljenovic provided his evidence in chief by statutory declaration. Komljenovic described the November 28, 2016 meeting in part as follows:

> 6. In my capacity as KTTA [Union] President, I attended a meeting with Shayne Olsen, KTTA Vice-President Amanda Jensen and Brett Wasilyk on November 28, 2016. At that meeting, Mr. Olsen referred to the allegation that Mr. Wasilyk made physical contact as alleged with the former student on the night in question. Mr. Wasilyk denied touching her at the car. Mr. Olsen said he considered this to be a situation where "someone has to believe someone." Mr. Olsen also said that the District has to determine who was telling the truth, as between the former student and Mr. Wasilyk, and Mr. Olsen said that "We believe the student." I understood Mr. Olsen to mean that the District believed the student's account of what happened on that night, and that the District did not believe Mr. Wasilyk, and

> considered his account of what occurred on that night to be untruthful. Mr. Olsen went on to say that there was no reason to believe that the former student was lying. He referenced the fact that she was no longer Mr. Wasilyk's student, and so there was no interest for her to lie about the events in question. Mr. Olsen made statements to the effect that he considered the suspension to be a serious response to serious misconduct. He said with respect to the effect of the suspension on an employee's record, one day of suspension is like 20 days.

18 Komljenovic clarified in cross-examination that his evidence "I understood Mr. Olsen to mean that the District believed the student's account of what happened on that night, and that the District did not believe Mr. Wasilyk and considered his account of what occurred on that night to be untruthful" was based on inference. Komljenovic confirmed that Olsen did not explicitly say the Grievor's account was untruthful at the November 28, 2016 meeting. Nor did Olsen explicitly spell out which of the Former Student's allegations he believed, either at that meeting or in the text of the ensuing suspension letter. Komljenovic did not request such particulars at that meeting. Further, Komljenovic testified that he found the Grievor's account to be credible based on his demeanour.

19 Olsen testified in cross-examination that he did not recall saying "we believe the student" at the November 28, 2016 meeting but that he could not deny making that statement. I accept Komljenovic's positive recollection in that regard. Olsen testified in cross- examination in part as follows:

> Q. In Ms. Jensen's notes [of the November 28, 2016 meeting] that I just read to you there is a statement "Who was telling the truth? We believe the student, no reason to believe she is lying; other pieces of information linked together." you remember her saying that?
>
> A. I don't specifically recall but we did believe her account.
>
> Q. Mr. Komljenovic recalls that you did say "we believe the student" and Ms. Jensen's notes indicate that, so I'm going to put it to you that you did say that? Do you deny saying that "we believe the student"?
>
> A. No
>
> Q. You don't deny saying that?
>
> A. No

> Q. And you said that because you did believe the student, is that correct?
>
> A. We found that it was more likely that she was telling the truth and that there was nothing that Mr. Wasylik said to convince me otherwise when I met with him. You know sometimes people will falter when you ask them again. He did not make excuses or say that he didn't recall. He just kept saying he didn't do it. So again, why would she lie was certainly in the back of my mind. Why would she lie?
>
> …

20 Olsen provided his evidence in chief concerning the November 28, 2016 meeting by statutory declaration, which reads in part as follows:

> 37. The difficulty I was confronted with is that there were two versions of events: the Complainant's [Former Student's] and Mr. Wasilyk's [the Grievor]. The Investigator believed the Complainant. I was not convinced I knew what happened; nor was I convinced that the Complainant's version could be conclusively proved. I was of the view that something inappropriate occurred that caused the Complainant concern. However, because Mr. Wasylik was a long-term teacher and had no previous disciplinary issues on record, I was prepared to extend him the benefit of the doubts I harboured about what really occurred on November 12, 2016. In other words, my view was that the actual version of what occurred or, at the least what could be proved, was somewhere between the two versions of events.
>
> 38. In light of the established findings and conclusions from the investigation contrasted with Mr. Wasylik's strong denials, I concluded that the Investigation and my meeting with Mr. Wasylik had established (1) that Mr. Wasylik had made inappropriate comments to the Complainant both privately and in public, and (2) that Mr. Wasylik followed the Complainant to her car and engaged in behaviour that made the Complainant feel afraid. On that basis, I advised that I will be suspending Mr. Wasylik for five days.
>
> …
>
> 41. In that meeting [November 28, 2016], I provided Mr. Wasylik with the [disciplinary suspension] letter, dated November 28, 2016, confirming my decision and clearly explaining to Mr. Wasylik that:

> […] An investigation was conducted regarding inappropriate contact with the minor and behaviour unbecoming of a teacher. The investigation concluded that you made inappropriate comments to a former student and minor both privately and in public. It was also determined that you followed the former student into the parking lot and engaged in behaviour that made the student feel afraid.
>
> Educators have a privileged position of power and trust and you are expected not to abuse or exploit students or minors for personal, sexual, ideological, material or other advantage. Educators are expected to act with integrity, maintaining the dignity and credibility of the profession. They understand that their individual conduct contributes to the perception of the profession as a whole. Educators are accountable for their conduct while on duty, as well as off-duty, where that conduct is in effect in the education system. …
>
> 42. Importantly, it was Mr. Wasylik's conduct during this meeting that caused me to provide Mr. Wasylik the November 28, 2016 letter as it was drafted. That letter was prepared in anticipation of Mr. Wasylik maintaining the story he had told the Investigator, namely his expressed denials of any wrongdoing. In effect, Mr. Wasylik's denials confirmed my doubts as to whether the most serious misconduct alleged in the Complaint actually occurred, and whether it could be proved. This is supported by my notes, which show that after my meeting with Mr. Wasylik, I met with Mr. Hamblett and Ms. Sidow, to explain that Mr. Wasylik did not admit to any of the alleged misconduct, and that he was polite and calm in his denials. …
>
> 43. However, had Mr. Wasylik admitted to the allegations in the Complaint, I would not have provided him the suspension letter. Instead, I would've prepared a termination letter and terminated for cause.

21 Olsen testified in cross- examination that when he issued the suspension, he (along with Sidow and Hamblet) did not believe the Grievor's account, believed the Former Student's account but concluded there was insufficient evidence to prove the most serious allegation that the Grievor kissed the Former Student. The Employer never told the Former Student her account was disbelieved. Nor did the Employer tell the Grievor that he had been exonerated of any of the Former Student's allegations. Olsen testified that had the Grievor admitted to kissing the Former Student the Grievor would have been likely dismissed. Olsen testified in cross-examination, in

part as follows (redactions are made to help preserve the Former Student's anonymity):

> Q. You have said at paragraph 34 [of Olsen's Statutory Declaration] "I found Mr. Wasilyk's response [to a question about why the Former Student would lie] troubling for a number of reasons. Mr. Wasilyk's speculation requires me to accept that the complainant felt there would be "something to explain" to her boyfriend about Mr. Wasilyk walking her to her car. Mr. Wasilyk told Ms. Marginet [the Investigator] that on the walk to the Complainant's [Former Student's] car they had joked and laughed and discussed [redacted] coaching. If that is what really occurred, it begs the question of what Mr. Wasilyk is implying the Complainant would need to "explain" to her boyfriend." The explanation that he offers does not make any sense to you is that right?
>
> A. Right, I found his response that she was maybe worried about her boyfriend to be not a good answer for lack of a better word, like 'why would she be worried', I thought this was not a good answer.
>
> Q. Those two things did not connect, he said that they had a laughing and joking conversation and he said that maybe she would not want her boyfriend knowing. That did not make any sense? Right?
>
> A. Right and sometimes people like to try to deflect and put the blame on others. I can't read his mind, but it did not sit well with me that he would try to use that as a reason that she would lie.
>
> Q. That did not make you doubt the [Former Student's] account?
>
> A. No it did not.
>
> Q. So one of the allegations was that he grabbed her by the waist and that he kissed her neck by the car, and you did not think that he she was lying about that?
>
> A. Yes. I had no reason to believe she was lying about that.
>
> Q. Whereas with him, you doubted his denial?
>
> A. I doubted him yes.
>
> …

> Q. The behaviour identified in the [suspension] letter is the behaviour identified in the [Former Student's] allegations, correct?
>
> A. It is part of it for sure, but it obviously leaves out the most serious part which is the kissing part because again I did not feel and Superintendent Sidow agreed with me, that we did not have sufficient evidence to support that and we knew that the Union would for sure grieve if we said that he kissed her. So we did not do that. We went with the language we felt we can convince the Union. Of course, they grieved us anyways but that's okay. We did not proceed with the most serious allegation.
>
> …
>
> Q. You said you did not make a finding that he kissed the Former Student but you did not tell anyone that you determined you did not believe her but that you believed him?
>
> A. It's not about who I believed or did not believe. Assistant Superintendent Hamblet and Superintendent Sidow and myself all looked at the information, what we had and what we could prove and what we could not prove and we knew that we would not be able to support the charge of kissing her in the parking lot. So we did not proceed with that particular element of the events because we knew that it was unsupported and regardless of what somebody would say, there was no way we were going to without any witnesses, videotape or something. Obviously if there was video of the parking lot it would be a different scenario but there wasn't.
>
> …

22 The Union grieved the November 28, 2016 five-day suspension the Employer imposed on the Grievor. The November 30, 2016 grievance (the "Grievance") reads in part as follows:

> We note that the District has insufficient evidence to conclude that Mr. Wasylik did conduct himself in the manner alleged. Mr. Wasylik's evidence indicated that he did have a conversation with the complainant and that he did walk the complainant to her car, but stated that at no time did he make the comments he is alleged to have made to nor did he make inappropriate contact with the complainant [Former Student]. The district bears the onus of proving the allegations and was unable to do that. It was noted by Mr. Olsen the district believes the student more than Mr. Wasylik but that statement was made without any logic or reasoning.

23 Komljenovic's statutory declaration reads in part as follows:

> 10. In the course of pursuing the grievance over the following three months (December 2016 to February 2017), I urge the district, including, in particular, Mr. Olsen, to accept that Mr. Wasylik was telling the truth. Mr. Olsen was clear that he believed the former student's account over that of Mr. Wasylik. Mr. Olsen also advised that if it had not been for the physical contact Mr. Wasylik made with the student, a reprimand and a course would have been considered a sufficient disciplinary response, but that the physical contact made the allegations more serious, and it was that which, in the District's view warranted a suspension.

24 In cross-examination, Komljenovic testified that Olsen did not elaborate on what exactly he meant by the "physical contact" referred to. In re-examination, Komljenovic clarified that the "physical contact" was that which occurred at the Former Student's car and made the Former Student feel uncomfortable. Olsen testified that he did not recall making that statement to Komljenovic but could not deny doing so. I accept Komljenovic's positive recollection in that regard.

25 That November 28, 2016 five-day suspension was later reduced to three days to settle the grievance. The Employer entered into that "without prejudice and without precedent" settlement to avoid a contentious grievance process.

26 The Grievor returned to work following his suspension until he was dismissed about two and a half years later by letter dated August 23, 2019. The Grievor was promoted to Physical Education Department Head and Athletics Director in that time.

27 On December 6, 2016, the Employer issued a report pursuant to Section 16 of the School Act, RSBC 1996 c. 412, to the Commissioner. In this report, the Employer wrote, "the District determined that Mr. Wasylik engaged in inappropriate communication and physical contact with a former student in her place of employment." (emphasis added) Olsen surmised in cross-examination that the physical contact Sidow mentioned in the report, referred to the Grievor's admission to hugging the Former Student when he first met her at the restaurant. Olsen added that the Investigator's report containing all of her findings was attached to Sidow's report. Olsen testified that the Employer found the Investigator's report acceptable albeit reflecting two different accounts.

28 On July 18, 2019, the Employer learned of the July 2, 2019 CRA, in which the Grievor admits to the much of the Complaint. Specifically, the Grievor admits: 1) that he commented on the Former Students appearance and used the words "fucking hot"; 2) that he showed the Former Student a shirtless picture of himself; 3) that he

hugged the Former Student; 4) that he called out to the Former Student more than once for her to “come here” and invited Former Student to join the celebration with him when her shift ended; 5) that he offered to walk the Former Student to her car, that she declined this offer, that he insisted despite her stated desires and walked her to her car anyway; 6) that the Former Student was uncomfortable during this situation, and tried to make that clear to others who were nearby; 7) that at the Former Student’s car he hugged her again, and told her “I’m not going to kiss you, just your neck” which he proceeded to do; and; 8) the Former Student was upset by this behaviour.

29 Olsen explained in his statutory declaration that the Grievor’s admissions in the CRA demonstrated the Grievor had lied and concealed his misconduct during the 2016 investigation and that the Grievor had engaged in additional misconduct in the form of sexual assault on the Former Student.

30 The CRA was posted publicly on July 30, 2019. It generated media attention and elicited a intense negative public reaction on social media platforms.

31 CBC News posted an article August 13, 2019 concerning the CRA, in which Superintendent Sidow is quoted as follows: “I am extremely disappointed that a professional in our school district has engaged in such professional misconduct. … The public and student safety of course is first and foremost, and when a teacher engages in any conduct or uses their position in any way to elicit inappropriate relationships, clearly when it’s unwanted, is of grave concern to us.”

32 Globalnews.ca reported the following statement from the Employer regarding the CRA:

> We are also very concerned and are in the process of addressing additional information that has come to light through this recent investigation. We do not intend to place any student in a position that compromises their safety. Thank you for your patience as we address this very unsettling report prior to the start of the school year.

33 The Employer met with the Grievor and his Union representatives on August 19, 2019. At that meeting, the Employer indicated its concern was that in the CRA, the Grievor had clearly admitted the things he denied in the its investigation and therefore the CRA appeared to show that the Grievor’s behaviour was significantly more serious than previously thought, and that the Grievor had lied to the Employer.

34 On August 21, 2019, the Employer met with the Grievor and Union representatives. The Employer asked the Grievor to respond to allegations of dishonesty and his

conduct on November 12, 2016. A Union representative responded on the Grievor's behalf, stating that pursuant to the terms of the CRA, the Grievor could not respond and claimed the Grievor had been truthful during the Employer's 2016 investigation.

35 On August 26, 2019, the Employer provided the Grievor with its dismissal letter dated August 23, 2019. The dismissal letter reads in part as follows:

> As you know, the District's present concerns have arisen as a result of the Consent Resolution Agreement executed by you on July 2, 2019 and published by the Teacher Regulation Branch. The Consent Resolution Agreement contains, among other admissions, an admission by you that you insisted on walking the former student to her car at the end of her shift, despite her decline in the offer. You then put your arm around her, hugged her; and, although you could see she was uncomfortable, proceeded to kiss her on the neck.
>
> …
>
> Your admissions in the Consent Resolution Agreement are in direct conflict with the most serious allegation which you flatly denied in the District's investigation. During that investigation, you denied most of the specific and serious allegations, including, most notably, that you grabbed the student by the waist and kissed her neck after you had insisted on walking her to the car in the parking lot at the end of her shift. Based on the evidence available at that time, including your denial, the Employer found that you made inappropriate comments to the former student both privately and in public and, given that there were no other witnesses to the events taking place at the students car, you followed her to her car and engaged in behaviour that left her feeling afraid. You received a five-day suspension, which was later reduced to a three-day suspension by agreement.
>
> The Consent Resolution Agreement provides new and incontrovertible evidence that you lied to the District during the investigation concerning a very serious allegation of sexual contact with the 17-year-old former student.
>
> …
>
> The District therefore finds that you have been dishonest either to the District, and the District's investigation, or to the Commissioner in its preliminary review of your unprofessional conduct. Either outcome is extremely troubling and provides cause for disciplinary dismissal. Further, when we met to specifically address your

> dishonesty, you did not acknowledge any wrongdoing whatsoever. We have no confidence in your and trustworthiness as a teacher. …

III. ANALYSIS AND DECISION

36 The parties seek an expedited the determination of this matter. Accordingly, I have not set out the positions of the parties under a separate heading. The parties' written submissions and briefs of authorities are part of the record of this proceeding. I have considered all that material in reaching the following conclusions.

A. Evidentiary Issues

37 The Union raised three issues concerning the admissibility of evidence. I will briefly address each in turn.

38 The first objection concerns evidence at paragraphs 10 to 13 of Olsen's statutory declaration. Those paragraphs introduce intake notes taken by a District employee of her conversation with the Former Student's parent when the Complaint was initially received. I conclude these notes are admissible as a business record. I have accorded weight to this evidence to establish the sequence of events regarding the Employer's receipt of the Complaint. However, I prefer the Investigator's description of the Complaint's allegations where it differs from the description provided in the intake notes. I have reached that conclusion given that the Investigator's Report is a considered exposition of the Complaint based on her direct questioning of the Former Student and others.

39 Second, the Union objects to the admissibility of information provided by Olsen at paragraph 84 of his statutory declaration regarding additional complaints against the Grievor. Again, the additional complaints are business records. The material is admissible as such. I find this evidence is relevant to establish the additional complaints were received. That background narrative is relevant to a determination at the third stage of the just cause analysis in *Wm. Scott & Co.,* BCLRB No. 98/76, [1977] 1 Can LRBR 1 ("*Wm. Scott*"). However, the impugned evidence is not admissible as evidence of the truth of those complaints as it is highly prejudicial. Therefore, I have confined the admissibility of that evidence to the purposes noted above. On an independent note, I do not find the truth of the additional complaints is an issue within the scope of the grievance before me.

40 Third, the Union seeks to exclude the Grievor's testimony in response to questions asked in cross-examination about the veracity of the contents of the CRA. It submits the Employer's pursuit of this line of questioning was an abuse of process as the

only benefit would be to undermine the Grievor's commitment not to contradict the CRA. I accept the Employer's submission that this line of questioning was relevant to the Grievor's state of mind when he responded to the Employer's 2016 investigation of the Complaint. That was not a topic decided under the CRA. Further, the Grievor's state of mind is relevant to the determinations under the second and third stage of the test for just cause under *Wm Scott*. Finally, I confirm that the Grievor's testimony did not impugn the contents of the CRA. Hence, it is unnecessary to address the Union's request for immunity.

41 I note one procedural matter. The Union objected to the Employer addressing the Union's evidentiary objections in reply. The Union did flag these objections at the outset of this proceeding and during the hearing. I decided to reserve judgement and invited the parties to address these issues in their written submissions. The Employer could have addressed these objections in its initial submission in a general sense. However, the Union was uniquely situated to proceed first with a complete submission in the context of the evidence adduced at the hearing. I concluded that an appropriate and efficient order of proceeding was for the Union to file its written submission on its evidentiary objections first and to consider the Employer's response in its reply submission. I do not find that the Employer's reply raised any new or unanticipated issues justifying a further submission from the Union. In sum, I am not persuaded by the submissions at hand that any material prejudice arose from this method of proceeding.

B. Double Jeopardy Objection

42 The central issue is whether the rule against double jeopardy bars the dismissal of the Grievor. This arbitral doctrine prohibits the imposition of multiple penalties for substantially the same misconduct. The authors of Brown and Beatty, *Canadian Labour Arbitration*, 5th Edition, Chapter 7 – Discipline: 7: 4240, formulate the doctrine as follows:

> It is a basic rule of arbitration law that an employer may not impose more than one penalty for the same offence. In order to promote finality and fairness in employer-employee relations, arbitrators have taken the position that when a member of management with the requisite authority chooses or agrees to a specific sanction for certain misconduct and conveys that decision to the employee, it is not proper for higher levels of management, on being apprised of the events, to substitute a more severe penalty. Such reconsiderations amount to a form of "Double Jeopardy" and inhibit disputes being settled conclusively and as expeditiously as possible.
>
> However, the rule is not offended if the initial decision taken by the employer was only an interim measure pending a final disposition of

> the matter, if an employer was removed from service for safety reasons and then disciplined, or if two penalties were assessed for two qualitatively distinct types of misconduct arising out of the same incident.

43 This doctrine is grounded in considerations of fairness and to promote finality regarding the settlement of disciplinary matters: *Torngait Services Inc. v. U.S.W. Local 648*, 2008 CarswellNfld 239, [2008] N.L.L.A.A. No. 3. at para. 28 ("*Torngait*"); *Thunder Bay Regional Health Sciences Centre v Ontario Nurse Association (Russell Grievance)* [2012] O.L.A.A. No. 474. I observe that the policy underpinnings of this doctrine dovetail with a collective agreement arbitrator's statutory duty to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes under Section 2(e) of the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244.

44 In *XYZ Co. v. U. (Z Grievance)* 2013 B.C.C.A.A.A. No. 149, 238 L.A.C. (4th) 147 Arbitrator McConchie reasoned that multiple penalties for the same misconduct are inherently unfair so that prejudice is presumed: at paras. 225-232. I agree with that conclusion. It is well settled that once an employer has decided with finality on an appropriate disciplinary response, it is inherently unfair and inimical to the above-noted policy considerations, for the employer to revisit its decision and impose a greater penalty, unless the employee has engaged in additional misconduct.

45 The real substance of the issue in dispute is whether the grounds for termination in 2019 pertain to the commission of qualitatively distinct misconduct than misconduct related to the grounds for the 2016 suspension. The doctrine against double jeopardy is not engaged if the penalties flow from different acts of misconduct that are qualitatively distinct from each other, even if those acts are connected to the same transaction of events. See *Kitchener (City) v. Kitchener Professional Firefighters Association (W. Grievance)* [2008] O.L.A.A. No. 15; 92 C.L.A.S. 222 (Luborsky) at paras. 198-199. The resolution of this issue turns on an objective assessment of the entire factual context.

46 I begin by observing that the basis for the Grievor's dismissal is his dishonesty in the Employer's investigation of the Complaint. I do not find that the Employer alleged that the Grievor committed a sexual assault as a ground for termination. Although that conclusion may be an unspoken corollary of the Grievor's dishonesty, the Employer chose not to advance that allegation. A well-established principle of arbitral jurisprudence is that an employer is held fairly strictly to the grounds set out for discipline. The purpose of this rule is to preserve the integrity of the grievance procedure: *Aerocide Dispensers Lt. (Walker Grievance),* (1965) O.L.A.A. No. 1 (Laskin). I find that the parties specifically joined issue over an allegation of dishonesty in the grievance procedure. Olsen testified in part:

> In the end we felt that we could no longer trust Mr. Wasilyk to perform the fundamental duties of his position and that his overall misconduct and dishonesty was in breach of the standards required of teachers. This was clearly communicated to Mr. Wasilyk at the August 26, 2019 meeting, and is supported by the contents of the termination letter.: para. 79 of the Olsen Statutory Declaration.

47 I find on the evidence that the misconduct alleged for dismissal is the Grievor's dishonesty in the 2016 investigation and a consequent breach of the trust relationship. In these circumstances, I do not find it appropriate to recharacterize the grounds for termination from the stated grounds.

48 I now turn to the question of whether the dishonesty alleged in the dismissal letter is qualitatively distinct from the misconduct for which the Grievor was suspended in 2016. A key challenge in making this assessment flows from the fact that an employer may consider dishonesty in the disciplinary process as an independent ground for discipline or as an aggravating circumstance connected to the stated grounds. That duality of purpose gives rise to some ambiguity as the stated grounds for the 2016 suspension do not specifically mention dishonesty. Nonetheless, I conclude that a finding of dishonesty was necessary and integral to the Employer's finding of misconduct in 2016. In addition, that finding of dishonesty was central to the Grievance and the factual foundation for the eventual settlement of the Grievance. I reach these conclusions for the following reasons.

49 I observe at the outset that that the Grievor was disciplined in 2016 for "inappropriate comments to a former student and minor both privately and in public." The only inappropriate comments made privately occurred at the parking lot. Further, the Employer alleged "it was also determined that you followed the former student into the parking lot, engaging in behaviour that left the student feeling afraid." Given the Grievor's ongoing denial of the facts supporting these conclusions, it follows that the Employer concluded the Grievor was not telling the whole truth. This is reflected in Olsen's evidence that "the actual version of what occurred or, at the least what could be proved, was somewhere between the two versions of events." It follows that the Employer did not believe the Grievor's version of events and believed the Grievor did not provide a completely honest account. In this specific context, withholding the whole truth was an act of dishonesty. Olsen's conclusion that the Grievor did not provide a completely honest account in the investigation was confirmed in his cross-examination.

50 As previously noted, Olsen understood from speaking to the Investigator that the Grievor had provided what he testified was a "totally different story" than the Former Student. The Investigator found that "based on his [the Grievor's] version of events; there really was no reason for this issue to have come forward." Neither the Investigator nor Olsen accepted the Grievor's account. In the result, the matter was

not only taken forward, but the Grievor was suspended. Thus, I find the Employer's decision to suspend was based in part on its conclusion the Grievor's account was not truthful.

51 My finding that the Employer acted on an assertion that the Grievor was dishonest is supported by Komljemovic's testimony that Olsen stated that the Employer believed the Former Student and the allegation of physical contact warranted suspension. The Grievor denied any inappropriate physical contact with the Former Student. Whether Olsen's reference to "physical contact" meant the alleged kiss, the alleged welcoming "hug", or the ambiguous reference in the suspension letter to "behaviour that made the Former Student feel afraid" I conclude the Employer disciplined the Grievor on the premise that his account was dishonest. Further, the fact Komljemovic believed the Grievor at the time does not detract from Employer's assessment of the Grievor's honesty in the 2016 investigation. In this factual context, the Grievor's dishonesty can be understood both as necessary and integral to the stated grounds for the 2016 suspension, and as an aggravating circumstance.

52 The Employer argues that the Grievor's dishonesty in the investigation related to the suspension is qualitatively different than the dishonesty related to the termination. I reject that submission. The Complaint presented serious allegations of misconduct. Despite the Employer's conclusion that it could not prove the Grievor kissed the Former Student, I find on the evidence that the Employer did not believe the Grievor's account at that time. That disbelief necessarily entailed a conclusion that the Grievor was dishonest to the Employer in its investigation of serious allegations. I also conclude the Employer's disbelief of the Grievor was a circumstance that informed its decision to impose a five-day suspension. In this context, the Grievor's dishonesty was not a trivial matter. It struck at the heart of the Grievor's position of trust as a teacher.

53 Accordingly, I conclude the dishonesty that informed the 2016 suspension is of substantially the same nature as the misconduct alleged in the 2019 termination. To that extent, and despite aspects of Olsen's evidence that suggest the contrary, I find on balance that when the Employer imposed the 2016 suspension, it proceeded on the premise that the Grievor was dishonest in its investigation of the Complaint. In these circumstances, the issue is not properly characterized as whether the Grievor is to be rewarded for dishonesty. Nor is it a question of whether the Grievor has acted with clean hands as the Employer found his hands were dirty all along. The question is whether it is appropriate to discipline the Grievor again in 2019 for essentially the same circumstance the Employer relied on to support the 2016 suspension.

54 A compelling independent consideration supporting the Union's objection is that the parties settled the 2016 suspension grievance on the premise the Grievor was

dishonest. The Grievance put the Grievor's honesty directly at issue. The Grievance reads in part as follows:

> We note that the District has insufficient evidence to conclude that Mr. Wasylik did conduct himself in the manner alleged. Mr. Wasylik's evidence indicated that he did have a conversation with the complainant and that he did walk the complainant to her car, but stated that at no time did he make the comments he is alleged to have made to nor did he make inappropriate contact with the complainant [Former Student]. The district bears the onus of proving the allegations and was unable to do that. It was noted by Mr. Olsen the district believes the student more than Mr. Wasylik but that statement was made without any logic or reasoning.

55 The Employer did not contest the Union's assertion that the Employer believed the Former Student more that than the Grievor. Komljenovic testified that he attempted to persuade the Employer the Grievor was telling the truth but to no avail:

> 10. In the course of pursuing the grievance over the following three months (December 2016 to February 2017), I urged the district, including, in particular, Mr. Olsen, to accept that Mr. Wasylik was telling the truth. Mr. Olsen was clear that he believed the former student's account over that of Mr. Wasylik. Mr. Olsen also advised that if it had not been for the physical contact Mr. Wasylik made with the student, a reprimand and a course would have been considered a sufficient disciplinary response, but that the physical contact made the allegations more serious, and it was that which, in the District's view warranted a suspension.

56 It is critical to observe that the Union ultimately relented in the pursuit of its position that the Grievor's account was entirely truthful—an assertion that inexorably supports the Grievor's exoneration. The Union compromised that claim under an agreement to substitute a three-day suspension *with no change to the underlying allegations*. For these reasons, I conclude the parties' difference concerning Grievor's honesty in the investigation of the Complaint was addressed in the grievance procedure and subsumed under the settlement of the Grievance. It would be contrary to policy considerations favouring the finality of settlements to permit the Employer to discipline the Grievor in 2019 for substantially the same conduct.

57 Finally, the Union seeks damages for a violation of Article C.15(1)(3) of the Collective Agreement because the Employer released to the media or to the public, information with respect to the discipline or dismissal of a teacher without the Union's agreement or by joint release. I accept the Employer's submission that there was no violation of this provision as the impugned releases were general comments that an

investigation was underway or that complaints had been received, not “information with respect to the discipline or dismissal of a teacher” within the meaning of that provision.

IV. CONCLUSION

58 For all these reasons, I conclude the Union has properly invoked the labour relations doctrine of double jeopardy to bar the Grievor’s dismissal on the grounds alleged. Accordingly, I conclude the Employer has not established just cause for discipline. The dismissal fails at the first stage of the test for just cause under *Wm Scott,* and there is no basis to substitute another penalty. The Grievor must be reinstated. I retain jurisdiction to address outstanding remedial issues.

Ken Saunders, Arbitrator