

IN THE MATTER OF:

An arbitration under the Labour Relations Act, 1995, and

An agreement dated November 3, 2014

re: EXPEDITED ARBITRATION, and

**GRIEVANCES C-4591 and C-5049, 5054 – CRYSTAL TAYLOR (the
“Grievor”)**

BETWEEN:

CUPE LOCAL 4400

(the “Union”)

- and -

TORONTO DISTRICT SCHOOL BOARD

(the “Employer”)

Before: Brian McLean, sole arbitrator

Hearing Date: January 21, 2016

Date of Award: February 18, 2016

Appearances:

For the Union: Megan Reid et al

For the Employer: Deloris Barbini et al

The Grievor was a school based safety monitor employed by the Toronto District School Board. The Union represented the Grievor in her employment relations with the Employer.

On January 7, 2014, the Employer suspended the Grievor's employment for three days for various performance issues, including frequent absences and lateness and having inappropriate relationships with students by, among other things, giving them rides in her car.

On October 14, 2014, the Employer terminated the Grievor's employment for bringing a small knife into the school where she worked. The Employer also alleged that she had acted inappropriately in a meeting which was held to advise her that she was suspended with pay pending further investigation of the knife issue.

The Union filed these grievances with respect to the three-day suspension, the suspension without pay pending investigation and the discharge. I was appointed to hear and determine the grievances pursuant to the parties' expedited arbitration procedure. In accordance with that procedure the parties filed detailed written briefs, including will say statements signed by their respective witnesses and detailed submissions regarding the factual and legal issues raised by the grievances. In addition, the Employer exercised its right to cross examine

the Grievor and following that, the parties made oral submissions to supplement the written materials.

The Facts:

The Employer hired the Grievor as a temporary full-time school based safety monitor at Northern Secondary School on March 10, 2006. As a school based safety monitor the Grievor was responsible for assisting school administrators and staff to establish a positive school environment by implementing a safe school plan and providing an intervention role to address school related safety matters on a daily basis. Her duties included monitoring non classroom common areas of the school including hallways and entrances/exits, and resolving minor disputes between students by encouraging positive communication and working to minimize conflicts.

When the Grievor became a permanent full-time safety monitor in September 2013 at Runnymede Collegiate Institute the school had almost immediate concerns about the Grievor's performance. In or about December 2013 the administration made a decision to formalize their concerns through discipline.

The Three Day suspension

On January 7, 2014 the school's administration met with the Grievor and her union representative to discuss their concerns and to identify corrective action. Following the meeting the school issued a letter to the Grievor, suspending her for three days, which states in part:

When we met with you and your union representative on January 7, 2014, to discuss the incidents that occurred during the period from September 3, 2013 to November 29, 2013, you explained that lates were due to car issues, absences were due to personal illness and that the inappropriate relationships that you had with some students were not an issue.

However, based on the results of our investigation of these incidents, we have concluded that your actions resulted in significant inconsistency in the safety and security of the staff and students. Furthermore, it was found that you engaged in inappropriate behaviour when you had students in your car.

As a result of your actions, this letter which will be placed in your personnel file, is to inform you that you have been suspended from work for three days without pay from Wednesday, January 8, 2014 to Friday, January 10, 2014 and your attendance will be monitored on a daily basis beginning on Monday January 13, 2014. As of Monday, January 13, 2014, you are also required to submit a medical note for each absence due to illness.

As can be seen, the three-day suspension was issued for various attendance and tardiness issues and the Grievor's socializing with students in ways that are discussed below. There was also concern that the Grievor was wearing sunglasses in school while on duty. However, the sunglass issue appears to have been dealt with, seems to have not been part of the cause of the three-day suspension and I do not deal with it in this award.

Attendance Issues

There is no dispute that the Grievor's attendance record was poor in the Fall of 2013. Between September 3 and November 29, 2013 the Grievor was absent from work approximately 50% of the time. The Grievor also regularly and frequently arrived late.

The Grievor's regular hours of work were from 8:30 am to 4:30 pm, Monday to Friday. However, on a quite frequent basis, the Grievor was either late arriving to her scheduled shift, or absent without having provided adequate notice. Her late attendance reporting and punctuality were poor right from the start of the school year and continued to decline over the course of the semester.

The Employer uses an automated system called Smartfind Express for staff to advise the school when they will be absent. It is an electronic system that can be accessed from anywhere. The staff member is required to call-in and provide their details (such as name, position and school) and dates of absence (full or partial), and the system automatically notifies the school and tries to find a replacement.

The system calls other staff on a supply list and requests confirmation of whether they can fill in on the date of absence. If the individual indicates that they cannot,

then the system automatically proceeds to the next staff member on the list until a replacement is found. The more advance notice that staff provide of their absences, the better the chances are that a replacement will be found. The office administrator checks the system every morning to see who has called in absent, and which positions were successfully filled and which were not.

The Grievor called-in her absences directly through the Smartfind Express system, and often did so overnight or shortly before the start of her shift, thus making it difficult for the system to find a replacement before the shift began at 8:30 am. The attendance log shows the times at which she logged her absences on Smartfind Express. Sometimes this occurred after midnight for absences the next day.

During the month of September, the Grievor was absent from work on September 10, 2013 and September 19, 2013. On September 10, 2013, she called at 8:14 am, for a start time of 8:30 am, and on September 19, 2013, she called at 7:23 am.

The Grievor was also beginning to show a pattern of tardiness. She was late generally 2-3 times per week by 10-15 minutes. Ms. Ardell spoke to the Grievor about her tardiness on September 17, 2013, and advised her that punctuality was very important because an important part of her job was to be present at a door when the students were arriving to school at the start of the day, and that she

had to ensure she arrived at work on time to pick up her walkie-talkie from the main office, so that she could begin her shift promptly at 8:30am. Ms. Ardell asked the Grievor to check in the office with a secretary and then get the walkie-talkie from the charging station in the office. Ms. Ardell sent an email to Mr. Edwards confirming this.

Despite Ms. Ardell's discussion with the Grievor, her late notifications of absence and tardiness continued and she gave little, if any, notice of her absences another 8 times in October. The following were her absences and call in times:

- (i) Thursday 3rd, called in at 11:31 pm on Wednesday
- (ii) Friday 4th, called in at 8:11 am on Friday
- (iii) Wednesday 9th, called in at 2:55 pm on Tuesday
- (iv) Tuesday 15th (half shift), called in at 9:54 am on Tuesday of the 8:30 am shift
- (v) Wednesday 16th, called in at 9:33 pm on Tuesday
- (vi) Wednesday 23rd, called in at 7:33 am on Wednesday
- (vii) Thursday 24th (half shift), called in at 7:51 am on Thursday
- (viii) Thursday 31st, called in at 2:26 am on Thursday

On October 15, 2013, after the Grievor had called in at 9:45 am to report her absence for the morning of her shift starting at 8:30 am on October 15, 2013, Ms. Ardell had another discussion with the Grievor. She came in for the afternoon

portion of her shift and Ms. Ardell called the Grievor down to her office. Ms. Ardell discussed the Grievor's late notification of absences, precluding the school from finding a fill-in for her. Ms. Ardell also reiterated the requirement that she arrive at her shift on time. The Grievor denies that to the extent this discussion took place, it was at anything other than an informal discussion.

Out of 22 working days in October 2013, the Grievor gave little notice of her absence for 6 full shifts, and 2 half-shifts, making it difficult for the School to make proper arrangements for a substitute. The Grievor also continued to arrive late for her shifts, approximately twice each week. In November the Grievor also had a large number of absences, including instances where the Grievor called in late the night before or well after her shift was supposed to start.

The school was concerned because by being late, the Grievor was absent at one of the busiest times of the school day, and thus failed to monitor an entrance to the school prior to the start of the school day.

The Grievor stated as follows with respect to her lateness and attendance issues:

In July 2013, shortly before I started working at Runnymede, I had knee surgery to replace some surgical screws in my knee. I have chronic knee pain and my doctor hoped that the surgery would ease the pain.

I was on crutches after the surgery in July and August 2013. By the time school started in September, I had just stopped using my crutches. I had also weaned myself off pain medication, but I was still taking Tylenol 3 one to four times per day, depending on the level of pain. Although my knee constantly hurt, there were days where the pain flared up and was particularly intense.

I was unable to sleep through the night due to my knee pain. As a result, I found it difficult to wake up in the morning, so I would sometimes arrive late for my shift.

At the time, I was not aware that I could ask for accommodation for my knee pain or the problems associated with it.

In October 2013, I was involved in a car accident and I did not have access to a car for a few days. While I waited for my car to be repaired, I took a bus. Since I was unfamiliar with the bus system, I was late for work on some of those days.

When I knew I would be more than 5-10 minutes late, I would email the secretary, Lina to let her know.

During the fall of 2013, I was absent from work due to illness for an unusual number of days. Most of my absences were due to knee pain.

Sometimes, my knee pain would flare up at night. If I did not think the pain would decrease before the next morning, I would notify the school board that night.

On other days, my knee pain would flare up in the morning when I woke up. On those days, I would try to get ready for work and if it did not subside by the end of my morning routine I would notify the school board.

I told the principal, Paul Edwards, and the vice-principal, Julie Ardell, on several occasions that I had recently had a knee surgery and that I was still recovering from it.

At no time before the January disciplinary meeting (discussed below) did Mr. Edwards or Ms. Ardell ask me for medical certificates when I was absent.

Under cross examination the Grievor deviated from the evidence given in her will say. In cross examination she testified that she had advised Mr. Edwards at the start of the school year that she had recently had knee surgery, but never raised the issue again with either him or Ms. Ardell. She acknowledged that she never justified her lateness and attendance issues with reference to the pain she was experiencing in her knee. This is difficult to understand. Her pain also does not really excuse or explain occasions when she would call into work to advise that she would be absent after she was supposed to be at work.

It is difficult to understand why the Grievor did not mention the surgery in any of her conversations with the administration. One would have expected that any employee faced with even the most informal admonishment (“Please get to work on time”) would, if accurate, respond with an explanation (“I am sorry but I just had surgery and my knee is keeping me up at night and making it difficult for me to come to work at all, let alone be on time”). Had the Grievor done so, that would have presented the parties with an opportunity to assist her, through accommodation or otherwise, to deal with the issues she was facing.

The fact that she did not do so casts doubt on her whole explanation. As will be seen below, the Grievor worked nights at a nightclub. This seems to me both equally possible as an explanation for her attendance issues and the fact that her knee was acting up. It seems possible that her failure to raise her knee as an explanation for her issues was designed to avoid difficult conversations about

whether it was appropriate for her to be working two jobs on a chronically sore leg.

However, this is where the Grievor's failings and the failing of the administration to engage in progressive discipline intersect. Had the administration formally met with or disciplined the Grievor prior to January, perhaps with a written warning, or a shorter suspension, or simply a clearly formal discussion, these issues would have surely come to light. The Grievor would have been required to formally justify her absences and lates, the school would likely have sought a medical note and the parties could have addressed the problems and worked out an acceptable solution. More will be said about this below.

Inappropriate Student Interactions

There appears to be no dispute that the Grievor interacted with students in an inappropriate way. The Grievor explained that she was attempting to develop a relationship with the students at the new school. This led her to engage in activities where proper boundaries were not observed. This included allowing students in her personal vehicle and driving them to get lunch and giving them drinks and snacks from her car. The Grievor explains about one incident:

In or around October 2013, I was about to get in my car to go to McDonald's for lunch. Four to five students asked if I could give them a ride because they also wanted to buy their lunch at McDonald's. I did not know that I was not permitted to drive students to McDonald's. I agreed to do so.

My car can seat seven people safely: two in the front, three in the middle and two more in the back. The middle seats have to be folded down for someone to access the back row. One of the students decided to climb through the trunk to sit in the back row rather than fold down the middle row.

Shortly thereafter, Ms. Ardell told me for the first time that I was not permitted to transport students in my car during my shift. I stopped giving students rides immediately. From that point forward, I told students I could not take them anywhere for lunch when they asked.

The students continued to hang out near my car. I always have candies and drinks such as bottled water and pop in my car. I would give them candies and drinks if they asked for one.

In or around November 2013, Ms. Ardell told me for the first time that I was not allowed to permit students near my car. I thereafter told the students repeatedly that they were not allowed to hang around my car.

In or around November 2013, I was mediating a conflict between two students with Ms. Ardell. After the students left the room, I told Ms. Ardell that I did not think it was wrong for me to give students rides if I was off-duty. I sometimes run into students in the neighbourhood or at various basketball tournaments that I organize while I am off-duty. There are occasions where students ask me for a ride in those situations and I usually agree to help them out.

Vice Principal Ardell's evidence is that she spoke with the Grievor on October 30, 2014 and told her that she was no longer to have students in her car and was not

to give students food and drinks. In that same conversation she told the Grievor that she was to station herself near the library. There is a dispute about this conversation, but I find it more likely than not that V.P. Ardell had that conversation with the Grievor on that date. She took a note of the conversation which was put into evidence. She also confirmed the conversation in an email to principal Edwards.

Despite the Grievor's statement, confirmed in her oral testimony, that she stopped driving students after being spoken to, a witness for the Employer provides evidence that she saw the Grievor drive students after the date on which she was told to stop. The Grievor denies this assertion.

The Employer has rules about the circumstances under which staff may take students in their personal vehicles. Suffice it to say that appropriate school related circumstances must exist and paperwork need be completed, none of which was present here. That being said, there was evidence of circumstances where students were driven in staff cars even though the paperwork was not completed. Those instances did not involve trips to McDonalds though.

The union implicitly acknowledges that the Grievor's behaviour was warranting of discipline. It asserts, however, that the discipline imposed was too harsh. It notes that any discussions the Employer had with the Grievor did not form part of her disciplinary record. It asserts that a written warning or, at most, a one-day suspension, would have been appropriate for the Grievor's inappropriate actions with students.

I have no hesitation in concluding that the Grievor engaged in conduct for which discipline was warranted. Interacting with students in a way which overstepped proper boundaries, by driving students to a restaurant for lunch, permitting them to be in her personal vehicle, handing out drinks and snacks, is clearly behavior that jeopardizes the Grievor's effectiveness in her role and which the Employer is entitled to correct through discipline. Even accepting, as I think is likely, that the Grievor engaged in these activities in order to establish a rapport with the students under her supervision, I am satisfied that she crossed boundaries of appropriate interaction and, to her credit, does not now suggest otherwise.

Similarly, the Grievor's handling of her attendance issues was not acceptable. Leaving aside the issue of why the Grievor was absent from work and late so often (which is not really before me), it was not acceptable for the Grievor to notify the Employer so late, so often, that she would be absent. More importantly, there can hardly be an acceptable excuse for the Grievor to have

contacted the Employer after her shift had started to advise that for health reasons she would not be at work. Finally, the Grievor's explanation for being late when her car broke down may have made sense on the first day, since it is understandable that she was not familiar with the transit schedule. On subsequent days that excuse for lateness is not acceptable or believable.

The difficulty for the Employer in sustaining a three-day suspension in this case is the manner in which it imposed the discipline. The first issue is that it gave one penalty (a three-day suspension) for two sets of completely unrelated conduct. A second and related problem is that it did not engage in progressive discipline in dealing with the Grievor's misconduct. Progressive discipline is important because it permits the employee chances to correct her behavior and provides an opportunity to explain why she has engaged in the misconduct so as to allow for accommodation if possible. As Arbitrator White stated in *Canada Safeway Ltd. And UFCW, LOc.441* (1993) 34 LAC (4th) 401:

...most arbitrators take the view that an important purpose of discipline (short of discharge) is to ensure compliance with established norms of behaviour and this typically requires "progressive" discipline, or a "corrective approach" to employee misbehavior. This means that discipline is a tool to achieve an objective, not an end in itself. By increasing the severity of the discipline imposed for persistent misconduct, it is expected that an employee will be given an inducement to mend his ways; moreover, he will clearly be put on notice that if he does not do so, he will risk increasing sanctions.

Here, had the Employer engaged in progressive discipline prior to the January meeting (and the Grievor's behavior not improved as a result) I have little doubt that a three-day suspension may have been warranted. However, the decision to deal with matters all at once means that it is not. In my view a written warning was an appropriate first response for the Grievor's attendance and tardiness issues. That means, following the principles of progressive discipline, that it was appropriate for the Employer to have imposed a one-day suspension for the Grievor's interactions with the students. I note that this is in line with the discipline suggested to the school by the Employer's human resources department and, in my view, it will bring home the importance to the Grievor of coming to work on time and, where possible, to report an absence early enough so that a replacement can be found. It should also make the Grievor consider if it is possible to reconcile her night job with her day job or whether appropriate choices need be made. It should also bring home to the Grievor, as all parties agree, the role she must play in dealing with students and the boundaries that must be maintained if she wishes to remain a school based safety monitor.

Accordingly, a one day unpaid suspension is to be substituted for the three day suspension that was imposed. The Grievor is to be made whole for the two days of suspension that are no longer part of her record.

The Discharge

While there are some differences in relatively minor areas, the facts which caused the Employer to discharge are not in dispute. Essentially, the Grievor brought a knife to school which she showed to fellow employees in an area where students could be. The Employer viewed the Grievor's actions as a violation of its weapons prohibition policy and serious misconduct, which, with her record (and perhaps by itself) justified the termination of her employment. The Union, while acknowledging that the Grievor brought a knife into the school, takes issue with whether the knife constituted a weapon under the Board policy and argues that even if it does, that under the circumstances that the discharge of the Grievor was a grossly disproportionate disciplinary response.

In her oral and written evidence, the Grievor described the circumstances of how she brought a knife to school. As she explained it, she kept a knife in her make-up bag. The make-up bag was frequently, but not always, in the knapsack which she brought to school to hold her personal belongings. While at school she kept the knapsack in a locked room off of the library where she and library staff frequently ate their lunch. There is no dispute that, while the Grievor did not bring her knife to school every day because she did not always put her make-up bag in her knapsack, the knife was at school on numerous occasions. It is also agreed that students could, with permission, access the locked library ante room.

The knife in question is a small folding knife (less than three inches long when the blade is folded into the body and about five inches long when the blade is extended). The blade itself is approximately two inches long, but shaped and partially serrated in a way that, when closely examined, gives it a somewhat menacing appearance when open. It is more “weapon like” in appearance than a Swiss army knife or a jack knife. On the other hand, it would not be out of place in someone’s fishing tackle box.

The Grievor’s evidence is that the knife served two purposes. Its primary purpose seemed to be for personal defence at night which was necessary (in the Grievor’s view) because, in addition to her job with the Employer, she worked after school hours at nightclubs. This meant that she was walking alone at night both around the club and in her neighbourhood where she felt at risk. It is unclear why the Grievor needed to bring the knife to school for that purpose. The secondary purpose for the knife was so that the Grievor could cut her lunch sandwich on those occasions when she bought a sandwich at a nearby bakery and forgot to ask that her sandwich be cut.

The knife came to the attention of the school in the following circumstances (I note that there are disagreements about the precise sequence of events, but these disputes need not be resolved- for the purposes of this award I accept the Grievor’s version of events). The Grievor was sitting alone in the room

where she stores her knapsack. She was using the knife to cut her sandwich. She heard someone coming to the room and “immediately closed the knife and put it in the pocket of [her] pants”.

Two teachers came into the room and the three employees ate lunch together. At one point there was a discussion about a stabbing incident at another school. One of the others wondered whether the library’s book security system would detect a knife. The Grievor responded that she carried a knife with her every day and the library security system did not activate when she entered the library. The Grievor then took the knife out of her pants pocket and showed it, unopened, to the other two. One of the others asked if she could hold the knife and the Grievor handed it to her.

One of the others asked the Grievor why she carried a knife. The other employee responded that the Grievor worked at night clubs and it was dangerous. Neither of the two employees suggested that there was anything inappropriate about the Grievor having a knife. However, one of them went home, felt troubled by it, had a discussion with her spouse and reported the knife the next day.

The relevant Employer safety policies state:

Operational Procedure PR585

BOARD CODE OF CONDUCT

Safety

Under the Provincial Code of Conduct, all members of the school community

must not:

be in possession of any weapon, including firearms;

Operational Procedure PR697

Title: PROMOTING A POSITIVE SCHOOL CLIMATE

Possession of a Weapon – means anything used, designed to be used or intended for use in causing death or injury to any person, or to threaten or intimidate any person. It can include objects which can be used as weapons. Objects such as a pen, or a screwdriver, if displayed to threaten or intimidate, become weapons under this definition. Weapon includes a firearm and any device that is designed or intended to exactly resemble or to resemble with near precision, a firearm.

Weapon- Any article designed as a weapon or used or intended to be used for the purpose of threatening, intimidating or injuring a person. All firearms, including replica firearms or imitation firearms, are always considered weapons.

The Employer has a clear and compelling interest in preventing weapons from coming into schools. That being said, aside from obvious examples of weapons, such as guns, defining what constitutes a weapon is a somewhat vexing problem. As the policy establishes, virtually any physical object can be used as a weapon,

including obvious examples of items regularly found in schools such as scissors, baseball bats, and cutlery. Accordingly, and quite reasonably, the Employer's definition of possession of weapons, with the exception of guns (which, with replicas, are explicitly characterized as weapons regardless), focusses on the intent and motivation of the carrier of the object. A "weapon" is anything used, designed to be used (like a gun) or intended to be used to kill or injure a person. Which is not to say that it is only guns that are prima facie weapons under the policy. There are a whole range of items which are clearly weapons under the policy's definition, even if not carried with malicious intent, because, like guns, their design and purpose is to injure people. However, it is equally clear that many kinds of knives are not designed to harm people.

The definition of "weapon" and "possession of a weapon" is difficult to apply to the circumstances before me. Obviously, there was no death, injury, threatening or intimidation caused by the Grievor with her knife. The knife was kept in her back pack, hidden and well away from the vast majority of students except when she was coming to and from work when it was in the vicinity of students but, even then, it was contained in her backpack. There is also no evidence that the knife had a student related purpose-the Grievor did not carry it against the possibility that she might have to defend herself against an assault by a student or staff member. Indeed, it was ill suited for that purpose since it was kept in a locked room. Instead, the only reason the Grievor brought the knife to school was to use for her lunch and because she routinely kept the knife in her back pack for later self protective uses.

That being said, this was a case in which the Grievor was reckless in her decision to carry what she acknowledges was intended to be a weapon, at least at night, onto school property. Although, the fact that the Grievor showed the knife to her co-workers suggests that she was not aware she was doing anything wrong, her evidence about what occurred immediately prior to that suggests the opposite. Her evidence is that she heard someone coming to the library room and “immediately closed the knife and put it in the pocket of [her] pants”. Why did she “immediately” close the knife and put it in her pants? The most obvious conclusion is that she did not want whoever was coming into the room to see that she had a knife. She must have had some concern that it was not proper for her to have that knife in the school; she obviously would not have hidden away a kitchen knife had she been using that to cut her sandwich.

I conclude therefore that the Grievor engaged in behaviour for which discipline is warranted. The Grievor clearly had some concern about whether she should have the knife in the school. She also acknowledged that had she seen a knife like hers in the possession of a student she would have taken appropriate actions. Whether or not school safety monitors have a special responsibility and should be held to a higher standard, I am satisfied the Grievor ought to have taken more care to ensure that the school was comfortable with her decision to have a knife she uses for self-defence on school premises.

In assessing what level of discipline is warranted I am mindful of the fact that the Employer's policy regarding weapons in schools is, except with respect to guns and ammunition, difficult to apply in a practical sense, especially with respect to knives. As discussed, the policy focuses mainly on the intent of the person carrying the object. This can naturally lead to confusion. Paragraph 65 of the Employer's submissions states: "The Grievor did not appear to understand that it was improper for her to bring a knife into the school." However, it was not improper for the Grievor to bring a knife into the school- there are lots of knives in the school and had she brought a paring knife or butter knife it seems to me very unlikely that her employment would have been terminated or that she even would have been disciplined at all. Since it was not prima facie improper for her to bring a knife into the school and since the Grievor did not intend to use the knife as a weapon and, indeed, kept it hidden away in her backpack, a finding that it was a weapon under the policy must be based on the design or intended use of the knife. On the one hand, the knife is very small (barely longer, when open, than a blackberry). On the other hand, whatever its size, the Grievor carried it as a weapon when she was traveling at night; it was enough of a weapon that she carried it for defensive purposes. Although the knife does not necessarily violate the Board's weapons policy, as noted, I am satisfied she was somewhat reckless about the application of the policy to the knife.

However, I am equally satisfied that the penalty which ought to have been imposed was far less severe than that which the Employer argues should apply. While somewhat reckless, the Grievor did not deliberately break the Employer's

policy and did not generally carry it on her person while working. I also note that there was no serious threat that a student might have obtained possession of the knife or that, even so, that the knife was any more of a threat than any of the knives which are normally found in a school.

Critically, the Employer's practice of dealing with knives carried by employees does not support the penalty imposed in this case. I note that in another case where a school based safety monitor was found carrying a knife the employee received a written warning. Even if the employee in question had much longer and exemplary service than the Grievor before me, the conduct of the other employee was worse in that the knife was carried on his person in the school and was carried as a weapon for the purpose of self-defence against students. While the knife in that case was a Swiss army knife, which might be seen as less menacing than the knife in this case, both knives were very small knives.

If the Employer wished to ban employees from bringing knives onto school property under the threat of significant disciplinary consequences, it needed to be much clearer about that in its policy. On the whole, the type of discipline levied by the Employer in the other case, a written warning designed to let the employee know in the clearest terms that he/she is not in compliance with the Board's rules, would have been appropriate here had the Grievor's record been discipline free.

As for the September 25 meeting, it is clear that the Grievor acted in an improper manner. Regardless, of what an Employer is telling an employee, it is inappropriate for an employee to drop or throw school property on her supervisor's desk, lift up her chair as if to throw it and lose control. That being said, under the circumstances the fact that the Grievor was angry and frustrated is understandable and was explicitly expected by the Board. It is emotionally problematic to remove an employee from the workplace without giving a hint as to why such action is being taken. It is understandable that an employee would become frustrated by not being told why action was being taken against her. While the administration employees may have been afraid of the Grievor during the meeting, ultimately nothing actually occurred to those employees.

The Union argues that the Employer is not permitted to rely on anything that occurred during that meeting because the collective agreement mandated that a union steward be present as follows:

Any Employee covered by this Agreement, called before Management to be interviewed concerning any matter that might reasonably be anticipated to result in disciplinary action to the Employee, shall have the right to two (2) representatives designated by the Union present. Where feasible, forty-eight (48) hours notice is to be given a Union representation must be present.

I have doubt about whether the collective agreement requires union representation in the case before me. The Employer was not interviewing the

Grievor. Instead it was meeting with her to advise her that she was being sent home with pay pending the results of an investigation. Management advised her of this fact and suggested to her that she immediately call her union. That being said, I do note that the Grievor alleges that she was asked whether she had a knife on her person. Had this presence of the knife been a disputed issue the mere asking of the question could have attracted the requirement for union representation. The case relied on by the union has no application since there, the clause at issue, provided for union representation when the employee was issued discipline, which did not occur here since a union representative was present at the time of discipline and, in any event, is not a right which is, on its face, in the collective agreement before me. In the result, I find that the conduct of the Grievor in the meeting, in the circumstances, merited only at most a warning and it has no real impact on the final disposition of the case.

The Employer also relies on the Grievor's attitude during the investigation of the knife as a ground to not interfere with the penalty imposed. It says that she showed no remorse and that this ought to operate against reducing the penalty imposed. I disagree. In her will say the Grievor did express remorse for acting up in the meeting with the administration. In my view, given the expedited process which requires will say statements largely in lieu of oral evidence, this expression of remorse carries the same weight as if she expressed remorse in oral testimony. Moreover, while the Grievor was somewhat reckless in bringing the knife into the school, I am satisfied that, as she states, she was of the view that there was no concern with the knife given the way that she stored it. Finally, there is certainly

a significant issue about either the knife violates the weapons policy at all, although the Board is certainly within its rights to prohibit employees from carrying a particular knife to school whether or not it violates the policy. In these circumstances it is not surprising that the Grievor does not express “remorse” and I take nothing from her failure to do so. What is important is that I have no reason to believe that she would take the knife into the school again.

In the result, I allow the grievance respecting the discharge in part. Applying the principles of progressive discipline, a three day unpaid suspension is substituted for the discharge. The Grievor is to be reinstated to employment without loss of seniority, wages or benefits. I remain seized if there are any difficulties calculating damages or otherwise implementing my award. Finally, in my view, the Grievor would benefit from a change of schools and I encourage the parties to facilitate that, although I make no award in that regard.

I remain seized should there be any dispute as to the implementation of this award.



Brian McLean

Toronto

February 18, 2016