IN THE MATTER OF: **Two grievances arising from a decision dated August 29, 2013 to suspend a teacher without pay pending a criminal charge of Sexual Assault Causing Bodily Harm.**

BETWEEN:

ST. JAMES-ASSINIBOIA SCHOOL DIVISION,

Employer,

- and -

ST. JAMES-ASSINIBOIA TEACHERS' ASSOCIATION of the MANITOBA TEACHERS' SOCIETY,

Union.

AWARD

Appearances

Kris Gibson, Counsel for the Employer

Tony Marques, Counsel for the Association

Nature of the proceedings

The grievor is a 41-year old high school physical education teacher with 12 years of seniority at St. James-Assiniboia School Division ("the Division") and a consistently positive record of performance evaluations. He teaches grades 9 to 12 with students ranging from 13 to 19 years of age. He has never been disciplined and his workplace conduct has never been the

subject of adverse comment. On August 1, 2013, the grievor was charged with Sexual Assault Causing Bodily Harm arising from an incident on June 8, 2013. The complainant is "X" (name redacted for privacy), a 35 year old female Educational Assistant employed by the Division at a different school. After being charged, the grievor was released by police on a promise to appear in court. He pleaded not guilty and his case is pending with a preliminary hearing date of September 11, 2014. If committed for trial, the hearing would likely take place some time in 2015.

When the Division learned about the criminal charge, it suspended the grievor without pay pending resolution of the allegations in court. The issue in the present grievance arbitration is whether the suspension should stand, and if so, whether it should be a paid or unpaid suspension.

Overview of the facts

The following overview summary is based on the Division's investigation and police records, not direct evidence, since neither the grievor nor X testified at the arbitration hearing. Police interviewed X and the grievor on June 8, 2013, the day of the incident, but only X gave a statement. The grievor was legally entitled to remain silent. X and the grievor were interviewed by the Division in August 2013 after the grievor was charged. Both provided statements to Human Resources at that time. It is common ground that the grievor is legally presumed to be innocent.

The grievor and X had a prior sexual encounter at her apartment that both described as consensual. He said it occurred in March 2012. She said it was in 2009. Both indicated it was for sex only. They were never in a relationship together but at times were friendly and flirtatious.

On June 8, 2013, just after 1:00 am, the grievor arrived unannounced at X's door with the intent to have sex again. The lights were out and she was fast asleep. She awoke and let him in, still wearing her nightgown. He made clear his wish to have sex and she refused from the outset. The accounts thereafter diverge. In his prepared written statement provided to the Division, the grievor said he soon realized there would be no sex and quickly left the apartment, feeling embarrassed and ashamed. The Division said that under questioning he admitted touching X's chest and grabbing her by the wrists, pulling her towards him. By contrast, X told police and the Division that the grievor knocked her down on the couch, grabbed her wrists, held her down, reached under her night gown, kissed her thigh and tried to have oral sex. He used graphic sexual language throughout the encounter. X said to the police that when she threatened to kick him in the groin, he stood up, apologized and left. X was re-interviewed by the Division in February 2014 to follow up on information provided by the Association. Her version of events was not fully consistent across the three statements that she provided over this eight month period but she did not waver from her complaint that she was sexually touched by the grievor without her consent.

A medical examination of X three days after the incident reported right thumb and wrist hyper-extension injury, left wrist strain and lower back strain. X wore wrist splints for several weeks after the incident.

On the night of the incident, X told police she did not want to see the grievor charged criminally. She only wanted him spoken to and she wanted him to leave her alone. Two months later, after receiving a Crown opinion, police laid a charge against the grievor and urged X to inform her employer. On August 14, 2013 she contacted her union president and subsequently reported the encounter to the Division. Until that point, the Division had no knowledge of the incident or the charge.

On August 29, 2013, the Board of Trustees suspended the grievor without pay pending resolution of the charge against him (Ex. 2). In the suspension letter, the Division wrote as follows: "While the charge against you is pending the Division will consider any further information or developments material thereto." Subsequently, in response to the Association's request, the following reasons were provided (Ex. 4, dated September 11, 2013):

> [The grievor's] alleged and admitted actions are antithetical to the image the Division strives to foster and the message it strives to send to the public in order to foster confidence in the public school system. In the Division's view, [the grievor's] presence in the workplace in light of the alleged sexual assault creates a serious risk to the Division's reputation and its ability to assign and administer its workforce in a safe working environment.
>
> The Division also considers [the grievor's] ability to fulfill the duties and responsibilities of a high school teacher significantly compromised by the fact that he may have committed the sexual assault he is accused of.

The Association and the grievor each filed grievances on September 23, 2013. In his personal grievance (Ex. 5), the grievor asked that the Division rescind his suspension, with or without pay, and remove all references to it from his personnel file. He also sought full compensation. The Association grievance (Ex. 6) requested the same relief. Certain other matters raised in the grievances have since been resolved. The Board of Trustees considered and denied the grievances on October 22, 2013 without further reasons.

On November 26, 2013, I was appointed by the parties as sole arbitrator under the collective agreement. There were several pre-hearing discussions concerning disclosure of Winnipeg Police Service files to the grievor and the Division. A consent order was issued on March 10, 2014 and redacted files were released by the police. The arbitration hearing was held on

April 9-10, 2014 in Winnipeg. At the outset, the parties affirmed my appointment and jurisdiction.

General principles and precedents

The parties agreed on the governing arbitral principles as expressed in longstanding authorities including *Re Ontario Jockey Club and S.E.I.U., Local 528 (Suspension Grievances)*, [1977] O.L.A.A. No. 4, (1977) 17 L.A.C. (2d) 176 (Kennedy) and *Re Phillips Cable Ltd. and United Steelworkers of America, Local 7276 (Nicolosi Grievance)*, [1974] O.L.A.A. No. 13, (1974) 5 L.A.C. (2d) 274 (Adams).

In *Jockey Club*, the grievor was employed at the race track as a betting machine supervisor and ticket seller, often working without close supervision. He was charged with allowing his apartment to be used by a friend as a common betting house. The friend admitted his guilt but the grievor denied any knowledge that bookmaking was going on at his apartment. No workplace misconduct was alleged by the employer. The grievor was indefinitely suspended without pay pending disposition of the criminal charges against him. He challenged the suspension.

In *Phillips Cable*, a shipper was charged with others in a scheme to divert and steal wire and cable. He was suspended without pay upon being arrested by police. Seven months later he was discharged at preliminary inquiry and reinstated to his job, but not paid. He grieved to recover back pay for the period of suspension.

The grievances in *Jockey Club* and *Phillips Cable* both failed but a number of enduring general principles were endorsed by the boards. The arbitral task is to balance two legitimate but conflicting interests. The accused employee seeks to maintain his livelihood while

defending the criminal charges. The employer needs to continue its operation in an efficient and orderly way while the grievor's guilt or innocence is adjudicated. As stated in *Phillips Cable* (para. 50), both interests are worthy of protection. The employer's needs should only prevail if some substantial business reason requires suspension. The extent of the risk must be assessed and the company must show there is no other solution possible short of suspension (para. 51, 59). The company is duty bound to investigate as best it can and consider the risk of conviction along with "what can be reasonably done in the circumstances" (para. 60). *Jockey Club* adopted the same approach and noted that "it is necessary to look at the nature of the offence, the work being performed by the employee and the nature of the employer's business" (para. 5). The board in *Phillips* concluded that (para. 63):

> ... a company can only suspend an employee charged with a criminal offense if the existence of that charge and its surrounding circumstances raise a legitimate fear for the safety of other employees, or of property, or if it causes substantial adverse effects upon business. When there is no practicable means of minimizing these fears or effects short of removing the employee from the work place, a suspension should be upheld.

Jockey Club listed five principles which have been cited over the years as a guide in deciding suspension pending criminal charges (para. 6), and both parties in the present case relied on this enumeration, as follows:

> 1. The issue in a grievance of this nature is not whether the grievor is guilty or innocent, but rather whether the presence of the grievor as an employee of the Company can be considered to present a reasonably serious and immediate risk to the legitimate concerns of the employer.
>
> 2. The onus is on the Company to satisfy the Board of the existence of such a risk and the simple fact that a criminal

> charge has been laid is not sufficient to comply with that onus. The Company must also establish that the nature of the charge is such as to be potentially harmful or detrimental or adverse in effect to the Company's reputation or product or that it will render the employee unable properly to perform his duties or that it will have a harmful effect on other employees of the Company or its customers or will harm the general reputation of the Company.
>
> 3. The Company must show that it did, in fact, investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden, in this area, on the Company is significantly less in the case where the Police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the Company has initiated proceedings.
>
> 4. There is a further onus on the Company to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position.
>
> 5. There is a continued onus on the part of the Company during the period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facets or circumstances which may come to the attention of the Company during the course of the suspension. These matters, again, must be evaluated in the light of the existence of a reasonable risk to the legitimate interests of the Company.

The board in *Jockey Club* expressed apprehension about the company, or an arbitrator, becoming unduly involved in an evaluation of the evidence relating to the criminal charges, "which is the proper function of the Court hearing the charges" (para. 7).

Finally, the board addressed an issue raised by the Association in the present case. Is a

suspension pending criminal charges a disciplinary action? *Jockey Club* answered that " such a suspension is not really disciplinary in nature, but rather is protective to the interests of the Company" (para. 8). This appears to be the prevailing view today: Brown & Beatty, *Canadian Labour Arbitration*, 7:3424. Non-disciplinary suspension is legitimate if required on a balancing of employer and employee interests.

The arbitral authorities since *Phillips* and *Jockey Club* have elaborated on the above-noted principles but the basic approach has not changed. It is helpful to briefly review the cases cited by the parties to get a sense of how the issues have unfolded in a variety of circumstances. It is evident that outcomes are largely driven by the particular facts.

In *Re Corporation of Township of Langley and C.U.P.E., Local 404* (1995), 46 L.A.C. (4th) 30 (Greyell), the grievor was a maintenance worker in a family aquatic centre and was charged with a number of serious sexual offences against children aged four to seven years at the time of the alleged incidents, which occurred 15 years previously, before the grievor was hired by the township. He had contact with the public for only part of his shifts but this would have violated the no-youth-contact terms of his bail order. No alternate positions or arrangements were available.

As the arbitrator framed it, the question to ask was whether the risk of the grievor's guilt was potentially harmful to the employer's reputation or business interests (p. 41). The test was not actual harm. Here the facility was open to the public and offered a safe venue for child and family recreation. Therefore there was significant risk to the employer's reputation and interests if the charges became widely known while the grievor remained on the job (p. 45). The grievance was denied with the caveat that the township was obligated to continue looking for viable alternate assignments. Similarly in *Ramirez v. Canada Customs and*

Revenue Agency, [2004] C.P.S.S.S.R.B. No. 142 (Quigley), a case of suspension pending criminal investigation for fraud, it was held the employer's image would be damaged if there was public disclosure. Suspension was justified.

In Re School District No. 91 (Nechako Lakes) and C.U.P.E., Local 4177, [2004] B.C.C.A.A.A. No. 251, (2004), 134 L.A.C. (4th) 100 (Ready), the grievor was an office employee of the school district who was charged with murdering a school principal employed in the same district. The grievor was granted bail but the employer suspended her without pay. The grievance was denied. The arbitrator emphasized that a school system is charged with a public trust to educate children. It represents the values and aspirations of society (para. 35) and its employees are expected to set an example for the community (para. 41). The risk of guilt was harmful to the employer's reputation and justified suspension without pay (para. 44). Moreover the arbitrator was prepared to infer that co-workers would object to working with an accused murderer in these circumstances, even without "a parade of evidence to this effect" (para. 43).

On the other hand, in *Re Canada Safeway Ltd. and U.F.C.W., Local 401*, [2005] A.G.A.A. No. 77 (Ivankovich), where a pharmacy technician was charged with drug trafficking, the grievance succeeded. It was held that the criminal proceedings did present a serious and immediate risk to the employer's reputation (para. 62). However, the employer had failed to meet its onus of proving that it was unable to mitigate the risk with a transfer to a store in another community and a non-pharmacy position. The grievor had a good record and no drugs or cash ever went missing. "The principle that there should be a 'balancing of interests' suggests that each party may have to assume some degree of risk" (para. 69).

In *Re Concordia Hospital and C.U.P.E., Local 1973*, [2010] M.G.A.D. No. 1 (Wood), the

grievor was a health care aide working in the emergency room of a hospital. She was arrested and charged with nine counts of fraud as part of a widespread auto insurance scam involving odometer rollbacks, staged accidents and false stolen vehicle reports. The grievor deceived her employer about her role in the conspiracy and the fact of her charges, but ultimately it all came to light and she was suspended without pay pending disposition of the criminal allegations.

After a useful review of principles (para. 64-66), the arbitrator held that the employer had met its onus and proven a reasonably serious and immediate risk to its interests because of the necessity for a trust relationship between staff and patients (para. 72, 74). Aides work independently and without much supervision, dealing with vulnerable persons. The number of charges and the grievor's lack of honesty with her employer also gave cause for concern about trust. Finally it was found that co-workers would be adversely impacted if the grievor remained on the job (para. 78). Risk to the employer's reputation was a factor but not a major one. Notwithstanding all the foregoing, the grievance was allowed because the employer imposed suspension without any investigation of the allegations and the risk of conviction (para. 84-88). When police authorities initiate the investigation and lay the charges, the employer's duty to investigate is much reduced but in this instance virtually nothing was done by the employer.

In *Re Bell Aliant Regional Communications and CEP Atlantic Communications Council, Local 2289*, [2010] C.L.A.D. No. 419, (2010) 203 L.A.C. (4th) 407 (Archibald), the grievor was charged with internet luring of children to facilitate sexual touching, carried out on his own time but using the employer's computer and WiFi equipment. The grievor was an installer, generally working alone and having significant public contact. The arbitrator reviewed each of the five *Jockey Club* factors and concluded on the evidence that the

employer had met its onus of justifying suspension. In particular, alternate employment in a call centre or various other positions was rejected on the basis that it would jeopardize the employer's interest in demonstrating to the marketplace that it was a safe and secure internet provider (para. 33). The grievor was ultimately convicted in court and his termination was also upheld.

In *Re Edmonton Public Schools and C.U.P.E.*, [2013] A.G.A.A. No. 8 (Sims), the grievor, head custodian at a school, was charged with sexual assault on a 13 year old female student attending another school in the same division. The alleged incident occurred off site. The grievor knew the girl not from work but through family connections. The union argued that the school division could not prove reputational harm because there was a strict publication ban in place. However, the arbitrator applied a test of *potential* significant detrimental impact on the employer's business reputation or ability to operate (para. 57), following *Re Toronto District School Board and C.U.P.E., Local 4400* (2009), 181 L.A.C. (4th) 49 (Luborsky). It was held that the employer reasonably concluded "a fair minded and well informed member of the public might think that allowing a person charged with sexual intercourse with a 13 year old girl to work amongst similarly aged girls was inappropriate and contrary to the School Board's [statutory] duty ..." (para. 59). In court the grievor was acquitted but his grievances against both suspension and discharge were denied. The "fair minded and well informed" test was also adopted in *Concordia Hospital, supra*, para. 79.

By contrast, in *Re Toronto District School Board and C.U.P.E., Local 4400,* [2013] O.L.A.A. No. 215 (Gray), suspension was set aside. A school caretaker was charged with three counts of sexual assault and interference on a female complainant under 14 years of age. The charge was historical and the alleged victim was the grievor's step-daughter. His bail precluded any contact with persons under the age of 16. However there were available alternate positions

where the grievor would have no contact with students. The employer did not assert a risk to adults or to board property. The arbitrator said it was not essential for the employer to prove there was public comment about the grievor's charges linked to his employment. However, the test for reputational interest was based on what a well informed and fair minded person would think of continued employment. Here there were charges of highly reprehensible conduct. But revulsion had to be tempered by a recognition that the accusation might not be true. The arbitrator held as follows. Knowing there was no risk of contact with students, a fair minded member of the public could not reasonably lose confidence in the employer's ability to meet its obligations for the care and safety of children (para. 32-33). The employer onus had not been met.

The "fair minded and well-informed member of the public" test for potential detrimental impact requires an objective assessment by the arbitrator of the potential for harm to the employer's interests. This formulation was accepted by both parties in the present case.

The option of suspension with pay is canvassed in some of the authorities referenced by the parties. Most recently, in *Re St. Amant Centre and M.G.G.E.U.*, [2010] M.G.A.D. No. 34 (Gibson), a support worker in a facility for vulnerable adolescents was suspended without pay when the employer received notification from a child and family services agency (CFS) that the employee "may have caused a child to be in need of protection" and therefore should not be left unsupervised with children. The employer was told that there was a police investigation of a non-work abuse allegation. No criminal charges had been laid. Lacking any information about the nature of the concern, but responsive to the CFS directive, the employer put the grievor on unpaid leave. Management was concerned about the cost of continuing to pay salary and the reaction of co-workers if the grievor continued to be paid. For his part, the grievor neglected to provide the employer with pertinent information that

would have minimized the gravity of the so-called abuse issue.

The arbitrator in *St. Amant* found that the *Jockey Club* principles applied (para. 110) and that the employer had sufficiently met all its obligations, but added that *Jockey Club* did not answer the question of pay or no pay (para. 122). *Re Manitoba and M.G.G.E.U. (Thomsen)*, [2006] M.G.A.D. No. 25 (Jamieson) was cited for the statement that precautionary removal of an employee from the workplace should generally be done with pay as this is "the industrial norm today" (para. 45). Two Winnipeg police suspension cases were reviewed: *Re City of Winnipeg and Winnipeg Police Association (Eakin)*, [1998] M.G.A.D. No. 15 (Freedman) and *Re City of Winnipeg and Winnipeg Police Association (Evans and Wauer)*, [1992] M.G.A.D. No. 18 (Peltz). Both police awards held that suspension without pay may be invoked but only where necessary to protect the employer's interests and where removal or reassignment with pay would not suffice. Considerable weight was placed on the City's past practice of reassigning officers with pay pending resolution of criminal charges. In *Evans*, suspension without pay was sustained because "the allegations against this grievor are so serious, so numerous and so intimately related to his workplace duties as a police officer that, on balance, the interests of the employer must take precedence over the legitimate and competing interests of the grievor" (para. 18). In *Wauer* suspension with pay was substituted and in *Eakin* the suspension was rescinded.

The result in *St. Amant* was a suspension with pay (para. 127-129, 134), taking into account the minimal financial impact on the employer, little indication of co-worker objection, no evidence of adverse public reaction and a past practice to use paid leave or paid suspension in similar circumstances. The employer was also directed to undertake an objective review of the risk involved in reinstating the grievor based on new information provided at the arbitration hearing.

Based on the foregoing, in Manitoba at least, suspension and pay appear to be discrete issues. Even if suspension is justified, the arbitrator must continue the analysis and consider whether the employer's interests can only be protected by withholding the grievor's pay. Essentially the same *Jockey Club* principles apply. The employer's reputational interest is again a factor. The employer's capacity to bear the cost of an non-producing employee will also need attention. In *Eakin, supra*, Arbitrator Freedman summarized the considerations as follows (para. 146):

> An employer can generally accomplish most of what it seeks to accomplish in terms of protecting its legitimate interests, when an employee faces a criminal charge, by removing the employee from the workplace if circumstances require, without at the same time cutting off the employee's pay. It can certainly protect its other employees, its operations, and unless evidence demonstrates to the contrary, its financial stability, by suspension, but with pay. But suspension without pay may be justified if some factors or circumstances exist beyond those warranting the suspension itself. Possibly that would occur in the case of a public sector employer such as this Police Service, where the reputation of the Service with the public and the perception of the Service by the public, are important considerations. ...
>
> Although my view is that the power to suspend without pay exists, it can only be exercised in circumstances where some lesser sanction, including suspension with pay, would not achieve the necessary protection of the employer's interests. Circumstances may exist which require the withholding of pay, not to punish, but as a necessary element of protection of an employer's interests. Avoiding what might otherwise be serious damage to the employer's public reputation could be such a circumstance. The [*Evans*] Award is an illustration of a case where suspension without pay was determined to be appropriate. Each case will depend on its own facts.

While the arbitral principles are fairly clear, applying them to particular facts can be

challenging. As observed by Arbitrator Wood in *Concordia Hospital, supra* (para. 68):

> Various arbitrators have commented on the difficult nature of these cases. This is understandable. The arbitral stating point, emphasized by the Union, is the line drawn between employees' working and private lives (Brown and Beatty, supra, section 7:3010). As noted above, employers are said not to be the moral custodians of either the community or its employees (*Oshawa General Hospital, supra*, para.9). Yet, despite this starting point, an employer has the right to suspend on a non-disciplinary basis an employee charged with a crime in order to protect "the welfare of its enterprise". And this despite that it may ultimately resolve that the employee is acquitted or the charge is stayed.

Positions of the parties

In the present case, the Division took the position that suspension without pay was fully justified, even without accepting the full scope of X's allegations, given the inculpatory statements of the grievor himself when interviewed by Human Resources in August 2013. The Division said it acted to protect public confidence in the school system but also to ensure the safety and well being of both female staff and students. In its view, each part of the *Jockey Club* test was met - serious and immediate risk to employer concerns, harm to reputation, impact on other employees, grievor inability to perform his job, investigation to the best of the Division's ability on an ongoing basis, consideration of an alternate assignment and openness to review new circumstances as they arose. The Division asserted a uniform past practice to suspend without pay pending criminal charges.

In response, the Association denied there was any demonstrated risk to staff or students. On an informed and fair minded view, there was no risk of reputational harm to the Division.

The Association attacked X's version of the incident as inconsistent and unreliable. It maintained that the Division should have investigated as weaknesses emerged in the complainant's story over time. Even if initially justified, the suspension should have been rescinded subsequently, by February 2014 at the latest. Finally the Association said that the grievor could have been accommodated with an alternate assignment that would have met any perceived safety or reputational concerns, but the Division never gave genuine consideration to mitigating its risk in this manner. At a minimum, any suspension that might be justified should be with pay. Finally, there was no established past practice to suspend teachers without pay, said the Association.

The evidence

Witnesses

The Division presented three witnesses. **Carrol Harvey ("Harvey")** is Human Resources Manager for the Division and has been employed for 11 years. She has responsibility for the non-teaching employees' bargaining unit (Manitoba Association of Non-Teaching Employees, or MANTE) and excluded employees. She has extensive prior HR experience in other industries, a Masters of Business Administration and a CHRP designation. **Joan McEachern ("McEachern")** is a library technician at Sturgeon Heights School in the Division and for nine years has been the President of MANTE. The union has about 400 members performing a variety of job functions including Educational Assistant (EA), technical and secretarial. She appeared under subpoena. **Ron Weston ("Weston")** has been the Chief Superintendent of St. James-Assiniboia School Division for 12 years and prior to that was a Superintendent in two other Manitoba school divisions. He is the CEO for the

Division and reports directly to the Board of Trustees.

The Division operates 26 schools, including five high schools, with about 8,200 students and 600 teachers. In total there are about 1,200 employees. Of the teaching staff, 70% are female. In the MANTE unit, 90% of the staff are female. At the grievor's current school, there are 80 teachers on staff.

One other Division employee was interviewed as part of the investigation and played a role in the events of June 8, 2013, but was not called as a witness during the arbitration. "S" (name redacted for privacy) is a male physical education teacher who met the grievor about ten years ago when he was still a student teacher and the grievor was his collaborating teacher. They both coached volleyball. S also met the complainant X through their work at the same school.

Neither the grievor nor X testified during the present arbitration. Notwithstanding a suggestion by the Association that an adverse inference should be drawn from the failure of X to appear as a witness, I decline to do so. There are plausible reasons for not calling X as a witness aside from the prospect that her testimony would undermine the Division's case. Sparing a sexual assault complainant further trauma is one cogent explanation. Her evidence would be required at a preliminary hearing and trial of the criminal charge, but at arbitration, the issue is not the guilt or innocence of the grievor.

As reviewed above in *Jockey Club* and other authorities, at this stage there must be a balancing of employer and grievor interests. The core issue is whether keeping the grievor on the job would present a serious and immediate risk to the Division that cannot be

mitigated, and testimony by X is not essential to that determination. After some skirmishing about hearsay evidence of what X reported, tendered through Harvey, it was agreed that such evidence could be admitted for a non-hearsay purpose. The evidence does not go to the truth of what X told Human Resources. It establishes what the Employer knew or reasonably believed as a result of its investigation into the incident that led to a serious criminal charge against the grievor. Therefore it was available during the present arbitration to assess whether the Division met its onus under *Jockey Club* to justify suspension without pay.

As for the grievor, he has a fundamental legal right to be presumed innocent and to remain silent in the face of criminal allegations when interviewed by police or when appearing for trial. He was under no obligation to testify at arbitration and it was not suggested that any inference should be drawn from his decision not to appear as a witness. On legal advice, he did elect to provide a written statement when contacted by the Division in August 2013 during its investigation. He further agreed to answer follow-up questions posed by Harvey and Weston. The Division adduced evidence of what the grievor said took place in the June 8, 2013 incident. To the extent that the grievor made admissions during the Division's investigation, these are admissible against him in the present grievance arbitration. The admissions are not hearsay. However, there was no transcript or recording of the grievor's oral answers, only notes made by Harvey during and shortly after the meeting, so there may be room for disagreement about exactly what he said or meant to say.

With the foregoing evidentiary considerations in mind, I conclude that caution should be exercised in making factual findings about the June 8 incident. In any event, it bears repeating that the core issue is not the grievor's guilt or innocence. Ultimately the criminal justice system will adjudicate that question. The present grievance is about the grievor's employment status and pay during the lengthy period of time it will take for criminal due

process to run its course.

The grievor's employment record

The grievor began teaching physical education in a Division middle school in 2001 and "made a very good start in his first year of teaching." His performance evaluator noted "a rapport with his students through tolerance, consistency and fairness." He became heavily involved in co-curricular activities and received impressive written commendations for his contribution to students and the community. Over time, his annual performance ratings progressed from Satisfactory to Proficient, defined as "consistently exceeds position requirements for professional teaching." In 2007, his evaluator observed that students held the grievor in high regard. "Students are at ease and comfortable with him, and he creates a non-threatening/safe atmosphere in his daily lessons." The grievor was said to be assuming a leadership position on staff and in the Division. He was described as a valuable member of the school team.

When the grievor moved into a high school position, the positive assessments continued. In 2012, an atmosphere of respect and rapport was noted both in the grievor's class and outside the classroom. "He always seems to be in control of his emotions even in situations that are sometimes tense." His ratings continued as "Proficient" and in one instance "Distinguished", defined as "exceptional in the field of professional teaching" (for contributions to School/Division Activities). The grievor was described as "a great addition to our teaching staff" (Ex. 17, all references).

Under cross examination, Harvey confirmed the grievor's ratings and positive evaluations.

She agreed that he was a very good employee. In particular, it was important that he was able to create an environment of respect. Moreover, given the stresses in school life, it was "a very desirable attribute" that he maintained control of his emotions. Weston had no personal knowledge of the grievor's performance as a teacher but agreed based on the personnel record that the grievor was a good teacher. He said the Division had nothing to refute the favourable comments on record concerning respectful learning environment and control of emotions. However Weston stated several times that "sometimes good people do bad things."

Personal history of the grievor and X

The grievor and X met when they both worked at the same Division middle school around 2009. The evidence was partially conflicting with respect to their prior contacts.

In the grievor's written statement to the Division (Ex. 14; August 23, 2013), he wrote that he engaged in a consensual encounter with X about a year and a half previously. Questioned after delivering his statement in writing, the grievor clarified that this was a sexual encounter. It happened in March 2012, he said. They had met at the middle school and were just friends there. From time to time he would run into her outside work or at Division in-services. They had no relationship of any kind, he stated, just the "one night stand, it was "just no-strings-attached sex". He said there was no contact after the sexual encounter except at Division in-services but he kept his distance. He is married and did not maintain any relationship with X whatsoever.

In her initial statement to the Division (Ex.11, notes of interview; August 20, 2013), X said

there was one day about four years previously when "we were a little flirtatious" but nothing since then. It was just "Hi, how are you?" type interactions. They changed schools but stayed friends ever since, she said. Around Christmas of 2012, the grievor started coming over to her place to see if she was OK. She was having health issues at the time. Nothing inappropriate happened, said X. Then in April or May 2013, the grievor showed up at her home late at night. He had been drinking. He pushed her up against a wall and kissed her. She told him to leave and he did. They had no contact thereafter until the June 8, 2013 incident.

Contrary to X's description of these visits to her home around Christmas 2012 and into the spring of 2013, the grievor said they had no other contact until the June 2013 incident that led to a criminal charge. That night, he went over to X's place hoping to have casual sex again.

At the time the Division interviewed X in August 2013, Human Resources did not have access to the police file and were unaware of what X had told police. In fact, X was interviewed by police who attended to her home on June 8, 2013 shortly after the incident in question. She gave a statement to the officers and when asked about her relationship with the grievor, she said "It was just a one night thing. But we still remained friends." She said that encounter was four years ago. The last time she had seen the grievor was about four months previously.

The Division re-interviewed X on February 12, 2014 as part of its continuing investigation. On that occasion, she did disclose the prior sexual encounter with the grievor. They were friends at school and saw each other outside school a couple of times. One night, he came over with some home made wine and they had a one night stand. It was not pre-planned and

it was consensual, she stated. After that, the grievor was behaving awkwardly around her. She told him the more awkward he was, the more obvious it would be. "He was fine, he was my friend." She didn't see him again until she changed schools and ran into him occasionally at hockey tournaments where she volunteered and he was coaching teams. X then recounted again how the grievor showed up at her house one evening sometime after Christmas 2012 smelling of alcohol and pinned her against the wall, kissing her. He left albeit reluctantly. She was concerned about the grievor's behaviour and told a friend about it, but in the end she dismissed it as alcohol related and just bad judgment.

The events of June 8, 2013

On Friday June 7, 2013, the Division and the Association sponsored their annual golf tournament. The grievor and S both attended. Sometime after midnight the grievor drove S home. During the drive, the grievor asked S if he had slept with X before. S answered yes. The grievor dropped S at home and went over to X's apartment in order to have casual sex with her. He arrived about 1:10 am and found all the lights were off. X was asleep. He knocked on the door. She woke up.

<u>Statements provided by X</u>

The following is the description of events that X gave police about four hours after the incident itself when they took a statement from her (Ex. 8, Police Disclosure). X opened the door and the grievor walked in. She told him she had been sleeping and that he had to leave. He took his shoes off, came inside and sat on the couch. She sat on the other side of the couch. She said she had to work in the morning and he had to leave. As they spoke, he kept

repeating, “If you show me your tits, I will leave.” He asked when she last had sex and she replied it was none of his business. Then he said either “I can fuck you hard” or “You can fuck me hard.” X said it was not going to happen and again told him to leave. He asked “What changed?” She told him, “I don’t sleep with married men anymore.”

X stood up and the grievor stood up as well. She walked toward the door and he cut her off. He said, “I need to see your tits” and knocked her on the couch. She put up her hands and he grabbed her wrists. Again he said, “Just show me your tits and I’ll leave.” X slowly tried to get up but he pushed her back down. He put his left hand up her nightgown. She threatened to tell everyone if he didn’t stop. He stood up and said, “You wouldn’t do that.” Then he said, “I need to lick your pussy.” He held her down with his left hand and kissed her on her right thigh. She told him to stop. His head came up and she said, “I’ll kick it where it counts.” Then the grievor stood up, backed into the door and put his shoes on. He said, “Sorry, it won’t happen again,” and he left.

The whole incident took at most ten minutes. X said the grievor did not appear to be intoxicated. She told police she did not need medical attention. She said her wrists were a little sore but she iced them and she said would be alright. She did not want charges laid but wanted the grievor spoken to so that he would not come back or call her. She wanted him to leave her alone. She confirmed that she had not invited him and did not even have his phone number or address.

When X described the incident to Harvey and McEachern on August 20, 2013, Harvey recorded her statement as follows:

> I don't want to share a lot of detail, but it was the night of the Division golf tournament, June 7, 1:10 am. I was in bed, sound asleep, all the lights in my house were off. He, [grievor], knocked on my door, when I opened the door, he just came in. He was saying very crude things, touching me all over. He proceeded to knock me down on the couch; he held me down. In the process, he sprained both my wrists and hurt my thumb.
>
> ...
>
> ... He was touching me all over, especially my chest, he went down on me. I was just in my nightgown. I was dead asleep before he got there. I made it very clear that I was not interested. I finally managed to get a leg up and kicked him in the balls. He left at that point.
>
> ... [He was saying] very crude, inappropriate things. He said he wanted to "fuck the shit out of me," I'm not sure if that was his way of telling me he liked me.

X told the Division that her neighbour was just coming over as the grievor was leaving because her dog was barking the whole time, which the dog never does.

On February 12, 2014, in her follow up interview with the Division, X recounted the incident in similar terms. When she told the grievor he had to leave, and he asked what changed between them, she answered. "I'm making better choices in terms of the men I'm with, I'm not that person any more." The grievor mentioned that S told him to go over and "get what he wanted". X was so surprised by this remark that she asked the grievor to repeat it, but he just said it was nothing. She told the grievor a number of times that he had to leave. He got up and she thought he was leaving. She went around the coffee table but he had her by the arms, they were standing close together, he pushed her and she fell onto the love seat. By then he had kissed her a number of times. He was very crude in what he said unlike their first sexual encounter. He said he had to taste her pussy before he left.

X said now the grievor was holding her down with one hand on her wrist and one hand spreading her legs. He kissed her thigh. The dog was going crazy. She put her knee on his crotch and said, "Do I have to kick you where it counts to make you leave?" He said he was sorry and that he would never come again, then he left. She locked the door and was crying uncontrollably. Her neighbour arrived, having heard the dog, and she told him what had happened. They sat outside for a while.

After the grievor departed, at 1:38 am, X sent a text message to S. In her text (Ex. 24), X asked if S had told the grievor about their own past sexual encounter and complained she did not want to be known as "a one night stand girl". She told S that the grievor had just tried to sleep with her. S was shocked and apologized. A few minutes later, at 2:17 am, X called the police.

X said her wrists kind of hurt but not badly at the time. This was early Saturday morning. By the time she went back to work on Monday, her thumb was really bad and she couldn't do her normal routine.

Statement provided by the grievor

For his part, the grievor elected not to give a police statement the night of the incident. When contacted by Harvey to attend an investigative meeting on August 23, 2013, he readily agreed and indicated at the outset that his lawyer instructed him to be very up front with his employer. The grievor read a prepared written statement and then answered questions. He emphasized that the incident happened outside of school and so did not affect his employment.

In his written statement, the grievor said he went to X's apartment with the thought of having a second consensual sexual encounter. He knocked and she let him in, which he took as a sign that she was receptive. He acted in a romantic manner towards her but she quickly rebuffed his advances. When he realized they were not going to have sex, he quickly left. He stayed little more than five minutes. He has felt embarrassed and ashamed ever since. In his view, it was poor judgment and a terrible moral mistake.

Responding to questions, the grievor was candid that he went to X's place to have sex. His wife was out of town and he was looking for physical contact. He had a few beers on the golf course earlier that night but he was not drunk. When X came to the door in her nightgown, he took that as a sign she was interested. But she was not receptive at all. The grievor denied that X kicked him. She just pushed him and he left. He admitted trying to have sexual relations, saying sexual things to her, touching her chest and fondling her. He denied holding her down in an attempt to force her to have sex. The grievor acknowledged that X had sore wrists as a result of the encounter. The police told him. He said this probably happened when he grabbed her and pulled her towards him. She then pushed against him and fell back onto the couch. He is much bigger than X. But he was never on top of her holding her by the wrists.

The grievor summarized the incident in these terms: "She let me in. I made romantic overtures to her. She said no once. I asked a second time, she said no and I left."

Medical examination of X

X was seen by her physician on June 13, 2013 and reported a sexual assault by a co-worker.

The doctor's notes (Ex. 20) record that the assailant pushed into her home, forced X onto her couch, the dog bit him and he took off. The reference to a dog bite does not appear anywhere else in the various accounts of the incident and was never explained during the present arbitration. The physician diagnosed right thumb and wrist hyper-extension injury, left wrist strain and lower back strain. Treatment consisted of splints on both wrists with thumb support. Also cortisone was prescribed.

On July 16, 2013, her right thumb was still store and locking, but the wrists were noted as settled. The last medical note was dated August 26, 2013 and indicated her right thumb was still sore. She was advised to attend Pan Am Clinic where there is more specialized capacity for musculo-skeletal injury assessment. X was feeling anxious and was intending to contact a counselor. The medical report was provided to the Division by X.

Criminal charge is laid on August 1, 2013

Even though police officers attended to X's apartment shortly after the incident with the grievor on June 8, 2013 and took her statement, a criminal charge was not laid until August 1, 2013. X initially told the police she did not wish to proceed criminally. She only wanted the grievor spoken to. The officers noted that she was adamant in this regard. She did not want to ruin both their careers as they worked in the same school division. She knew he was married when they had their first hook up and she believed he was still married. She told police she felt she led him on as they would flirt whenever they saw each other at Safeway. The last time she saw him was at Safeway about four months previously (Ex. 8, police Disclosure, Narrative of Constable Pabuaya). However, she definitely wanted no further contact.

The police decided to request a Crown opinion on whether any charges should be laid under all the circumstances. At some point, according to X, police contacted her again and encouraged her to press charges (Ex. 11). Her consent was not necessary because there were injuries, she said, but police told her that the grievor could be a threat to others. They pointed to the fact that there were no lights on and he intruded anyway, which they said showed an intent to harm her. For that reason, X agreed to charges.

A charge of Sexual Assault Causing Bodily Harm was laid on August 1, 2013 and the grievor was contacted by phone. He came down to the police station voluntarily and was described as cooperative. He received legal advice and declined to make a statement. He was released on a Promise to Appear in court with an Undertaking. He was ordered to abstain from any communication with X and to remain 200 meters away from her residence, place of work or any other place she may be (Ex. 12).

The grievor did not notify the Division that he had been charged.

The Division's investigative process

Interview of X - August 20, 2013

Once the charge was laid, police urged X to notify her employer. She approached McEachern, the MANTE President, for advice and support. In turn, on August 14, 2013 McEachern contacted Harvey. A meeting was arranged for August 20, 2013 at which X disclosed the incident and the fact of the charge. X was urged to take care of herself and see a counselor. X stated that she had quit her other job because she worked alone at a hotel and

could not continue. She expressed apprehension about living alone. She mentioned that the grievor's parents lived nearby so she couldn't even walk her dog in the area, for fear of running into him. Also she felt she could no longer go shopping at Safeway because she always saw the grievor there.

Harvey asked X if she had any work related reason to have contact with the grievor. She said no, except potentially if her students went to the grievor's school for WorkEd. However, she had already told her supervisor that she had been hurt by someone at that school and could not go there, which was accepted. She said she used to volunteer for school hockey and the grievor was a coach, so she would stop volunteering. For the final three weeks of school, she had been wearing two wrist braces and she told everyone she fell down. People just joked that she was a klutz. Nevertheless, said X, she worried that everyone knew what really happened, so she started looking for work elsewhere. She was unable to find anything and expected to return in September. She stressed that she had done everything she could think of to avoid the grievor "but you just never know. I am scared that I might see him at work."

Following the session, McEachern and Harvey discussed how calm X seemed to be during the interview, never crying or tearing up. McEachern thought she might still be in shock. Harvey thought X was still only dealing with surface issues. Both were disturbed by what they had heard. McEachern expressed the opinion to Harvey that the grievor could be a danger to children and to female staff, and therefore he should not be in school or around her members. The Division should not put them at possible risk. Harvey testified that at that point, she agreed.

McEachern also told Harvey she would be afraid to say hello to the grievor for fear he could take it the wrong way. In McEachern's meeting notes (Ex. 29), she wrote, "He has violent

tendencies and we know what he is capable of." At arbitration, McEachern testified that her own children attended school in the Division. Speaking as a parent, she said, if the Division did nothing about an employee pending on such charges, she would be horrified and would pull her kids out of school. She admitted in cross examination that she had no information about any inappropriate conduct by the grievor, and no reason for concern, except for the incident reported by X. She acknowledged there are two sides to every story but she saw no reason to disbelieve X. She had seen the wrist braces on X. There was physical evidence. Regarding the long delay by X in coming forward to the Division, McEachern said that X was in bad shape, scared and nervous, unsure of what to do and who to contact. McEachern agreed that it is her role to support MANTE members and take a strong stand on their behalf.

Interview of the grievor - August 23, 2013

After the session with X, Harvey arranged to interview the grievor and a meeting was convened on August 23, 2013. Barb Cummine from the Manitoba Teachers' Society attended to assist the grievor. Also present was Weston and Assistant Superintendent for HR Greg Mutter. Harvey prepared for the meeting by making notes listing a series of questions to be asked (Ex. 13) as well as a script and outline, on which she made notes during the interview itself (Ex. 15). At the outset, the grievor was informed that this was a disciplinary interview in that the information obtained would be used to make decisions about his employment. The grievor read his statement (Ex. 14) and answered questions. He said he had been assured by his lawyer that the allegations did not support the charge of bodily harm and would be reduced to simple assault. He expected the matter would be resolved quickly.

The grievor said he had confessed to his wife and after many open and frank discussions, he had been forgiven. He was intending to see a counselor for help in making better personal

choices. His family was supporting him. He said two family members work in the Division and he did not want to hurt them. He reviewed his contributions and dedication to the Division, asking not to be punished for making a moral mistake that had no bearing on his role as a teacher and coach.

The Division's rationale for suspension without pay

Based on the foregoing, senior management recommended suspension without pay and the board of trustees agreed. Harvey testified that this decision was made because of the grievor's admissions. There was a sexual assault and harm was caused, albeit there were differing versions of how X's wrists were injured. Either way the grievor was culpable. He tried to force sexual relations. Harvey said parts of the grievor's story did not ring true. In particular she doubted his claim that there was no contact for a year and a half. From this she surmised that probably X's account of how she was injured was the correct one.

According to Harvey, the Division took into account the grievor's positive personnel record, the status of teachers as role models, protection of the Division's image as a place where students can learn and grow, the safety of staff and students, the unavailability of alternate assignments and finally the public outcry that would ensue if the grievor were to be suspended *with* pay. Given the nature of the charge, the grievor could not be left unsupervised in his normal position with student contact, but no other placements existed. A replacement would have to be found and paid full salary. Taxpayers would not accept retaining a teacher charged with a violent sexual offence pending his trial. Nor would they countenance paying such an employee not to work.

Harvey said she was provided with the Undertaking that barred the grievor from any contact with X and as a result, she was not worried about X as long as the grievor followed the conditions. There was nothing to suggest he would breach the Undertaking, she conceded. However, Harvey insisted that the Undertaking gave her no comfort about the safety of other Division employees if the grievor was allowed back at work. She was challenged in cross examination to say whether the grievor was a danger to any student and responded that the Division cannot take that chance. The number one concern is student welfare. But was there any specific reason to believe that the grievor would harm a student if allowed back to work? Harvey answered, "Would he? It's possible." He refused to take no for an answer with X so now there is a risk it could happen to others.

Harvey said that teachers are expected to be role models to students. The Division fosters its reputation as a place where people are safe. If it became known that a teacher was charged with a sexual offence and was still working in the school, that would be a problem. So far very few people know about the charge and there has been no media coverage. But it could happen. Harvey did not assert that she had any basis to believe that the grievor would in fact be a danger to students.

In his evidence, Weston said that suspension was required because this was a very serious incident. Student and staff safety is the Division's first concern. It is also the top concern of parents. In this case, he saw a link between the grievor's admitted misconduct and the safety of students. The incident with X originated from workplace contact and developed over time. Weston characterized this as the grooming of young women to garner sexual favours. The grievor took an opportunity. "This is not something we want to see in our schools." He emphasized the staff demographic. About 70% of employees are female. The Division also has a serious concern about its reputation as a result of a case like this, said

Weston. A clear message is needed to staff and parents. There are consequences when the line is crossed.

Weston agreed that the grievor had very good performance evaluations and these were taken into account. It came down to a bad decision by the grievor that night. After the grievor's interview, Weston was convinced that the grievor had to be removed from the workplace. After some equivocation on the point, Weston said the suspension was non-disciplinary. It was done to protect the Division's reputation. For this reason it had to be suspension without pay. Depending what happened in future, there could well be discipline. He conceded that reference was made during the grievor's interview to a disciplinary investigation as part of the opening script. That is how all such investigations are titled.

In cross examination, Weston said he had concern for X's safety if the grievor returned to work, and he maintained this position despite the fact that they worked at different schools and despite the court Undertaking. There was no indication that the grievor was breaching the Undertaking or trying to make contact with X. "Based on what he told me, he went there to have sex with her and he assaulted her." What if the grievor groomed another female staff member? This was possible. Pressed on his use of the term "grooming", Weston explained that the incident started in the workplace. There was casual chit chat at school events. He admitted that the only connection was the fact that X and the grievor met at work. They had a prior sexual encounter and it was admittedly consensual.

Under cross examination, Harvey was challenged on the neutrality of her investigation. It was suggested that as soon as she received X's version of events, she accepted it and considered the grievor guilty as charged. Harvey rejected the accusation and insisted that she maintained an open mind. She has conducted many workplace investigations. She did

however reach the conclusion that the incident probably happened as X described it. Why did she believe X and not the grievor?

Harvey conceded that X failed to reveal the one night stand when she made her first statement to the Division. Harvey attributed this to the fact that X was dealing with surface issues at the first interview. At the second meeting in February 2014, X opened up right away and volunteered the prior sexual encounter. By contrast Harvey felt that the grievor was not being forthright when he said they had only one prior encounter, whereas X described a number of visits made by the grievor to her home including once when he pinned and kissed her. Harvey also considered that the medical evidence was inconsistent with the grievor's depiction of how he pulled X. She deemed the medical report to be supportive of X but did not explain how this was the case.

Under questioning, Harvey maintained that the Division took no issue with the grievor's behaviour insofar as he wanted sex with X again and went to her apartment late at night when the lights were out. Marital infidelity was not the Employer's business, Harvey agreed. Although there were different versions of the incident, Harvey pointed out that the grievor admitted kissing and fondling X after she clearly said no. Also it was not in dispute that he injured her. X said he was holding her down whereas the grievor said he pulled her towards him, but in any case he admitted to hurting her. For these reasons, Harvey chose to believe X. She said the Division appreciated the gravity of its decision. A teacher with a family would be without work and income for an extended period of time. But the Division believed that suspension without pay was required.

Continuing efforts to investigate

The Division was aware of its legal obligation to continue investigating and to reconsider the suspension if and when new potentially relevant facts arose. Harvey testified that after the August decision was made, the Division tried repeatedly to get particulars of the criminal charge. All it had so far was a pair of statements, one from X and one from the grievor. The Division wrote to the grievor's criminal counsel in January 2014 (Ex. 21) formally seeking the Crown brief and full police particulars. From the Association's legal counsel, the Division heard that S was X's boyfriend and that X had sent text messages to S on the night in question. It was suggested that certain tweets by X over the summer were relevant to the investigation. In addition, the Division was told that X's injuries may have been pre-existing. Harvey testified that when this information came in, she took steps to interview S and to re-interview X.

Second interview of X - February 12, 2014

The session with X took place on February 12, 2014. Present were Harvey, the Division's legal counsel, McEachern and X. As reviewed above, X was more forthcoming and disclosed the previous consensual encounter with the grievor, although she placed it several years earlier than the grievor's version. Asked whether S was her boyfriend, she said no, but she and S had flirted for years. They went out a couple of times. There was one consensual sexual encounter in December 2012 after the Christmas party. But there was no relationship. She said that after the incident with the grievor on June 8, 2013, she did text S. She was upset over the grievor's comment that night that S told him to go over to her place and "get what he wanted".

Harvey was challenged under cross examination on the significance of X contacting S before she called the police. It was suggested that X was primarily concerned about her reputation rather than an alleged assault. Pressed on whether this revealed a credibility issue concerning X's story, Harvey insisted that it did not.

X denied that her wrist and thumb problems were pre-existing conditions. She said she wore braces until the end of June, felt sore all summer and was still not back to full strength. Holding a pen was difficult. Her thumb was still a problem. She was still taking medication twice a day. Harvey asked whether X had posted anything on Facebook about the incident and she said no. The Division took this at face value.

Harvey testified that the new information obtained in the second interview of X did not alter the Division's view of the unpaid suspension. Knowing that there had been a prior similar sexual encounter that was consensual, the nature of the June 8 incident was "less alarming", said Harvey. But the fact remained that the grievor had assaulted X and caused bodily harm.

Weston agreed that once he learned there had been prior consensual sexual contact between X and the grievor, the grievor's arrival late at night seeking sex took on a different hue. There was a moral issue involved but not an employment issue. However, since the grievor tried to force himself on X and admitted grabbing her, this was non-consensual. It was serious, aggressive behaviour. X was bruised. It was not just an amorous encounter. As for the text messages sent by X to S, before she called police, Weston said this made no difference in his mind. It was not surprising. X was embarrassed.

Investigation of comments in social media

Around this time the Association provided Harvey with a batch of tweets attributed to X and Harvey reviewed them. She said they did not change her view of the case. There were no direct comments related to the incident with the grievor. X referred to stress, trouble sleeping and needing to get away, "victim type statements". The Division therefore maintained its position on suspension. At arbitration, Harvey was pressed to explain how tweets by X on July 1, 2013 about "time to train hard" and "time for the seadoo" could be reconciled with her supposed wrist and thumb injuries. On July 11, 2013, X tweeted that she had just finished a wonderful swim around the island. On July 14, 2013, she posted a picture of herself cycling without any sign of wrist braces. X tweeted that she golfed on July 28, 2013 (Ex. 26, Twitter Record). Harvey responded that none of these messages were surprising or cast any doubt on her view of the suspension issue. She had the same reaction to a picture posted June 30, 2013 on Facebook showing X in summer attire and without wrist braces (Ex. 27).

Interview of S - February 18, 2014

On February 18, 2014, Harvey and Division counsel interviewed S in the presence of Manitoba Teachers' Society representatives and Assistant Superintendent Mutter. S described the golf tournament on June 7, 2013. He played pool in the bar with the grievor and then got a ride home from him. He had been drinking. He denied making the offensive comment attributed to him by the grievor about getting what he wanted. He could not recall saying it. He said he was not X's boyfriend although he admitted one sexual encounter. S said the police had interviewed him around Christmas and the grievor had called him in January with similar questions, which shocked him at the time.

Harvey testified that nothing in the S interview changed the Division's position.

Medical report from the grievor's physician

On March 23, 2014, the Division was provided with a brief letter prepared by the grievor's family physician, D. Brian Rumbolt dated March 17, 2004. The doctor stated that he had been following the grievor during his absence from work. "I feel he is doing very well emotionally and I do not feel he would be a risk either to himself or others" (Ex. 28). This information did not change the Division's view of the suspension. At arbitration, the letter was admitted in evidence subject to weight and subject to the Division's comment that it must be treated as hearsay in the absence of the doctor's appearance as a witness. Moreover since Dr. Rumbolt is a general practitioner, said the Division, his assessment of psychological status and risk inherently carries little probative value.

Alternate assignment options

The Division considered that there was undue risk in allowing the grievor to continue working in any position that involved personal contact with students. Weston testified that there is no role for a teacher that does not require some contact. The Division runs a program called "InForm Net" jointly with Pembina Trails School Division that delivers 20 on-line courses per year. Staffing is done in the late spring so this was not considered as an option when the grievor was suspended in August. Weston stated that there is a significant training component for the teachers involved. He conceded under cross examination that the 100 hours of training could have been undertaken by the grievor in 2-3 weeks.

While it is on-line education, an opportunity is also provided for students to meet in person with teachers at the home school, as arranged. Moreover teachers who participate in the program also carry regular classroom teaching assignments as part of their workload.

Potentially the Division could have pulled a current teacher out of the on-line program and substituted the grievor. Weston said this was not an option however because the grievor would still have contact with students. Pressed further under cross examination, he admitted that during the lengthy pre-trial period, arrangements could potentially have been made to bypass the direct student contact component. However, no teacher does solely on-line teaching so this would have involved hiring an extra teacher. Weston also doubted that it was practical to eliminate student contact from a teacher's job. Teaching is a solitary activity in the sense that there is no supervisor who watches over a teacher from day to day. The Division was not prepared to allow unsupervised contact with students while the grievor was still facing the criminal charge.

Weston was challenged on the Division's unwillingness to be more flexible in finding an alternate assignment. The grievor will likely be off work without pay for two years, waiting for the conclusion of the criminal proceedings. Nevertheless Weston insisted that there were no practical alternatives. The Board was given all the options including suspension with pay but there was a strong feeling that the grievor had to be removed from the workplace. It was not only the criminal charge. Weston testified that the facts, as confirmed in the grievor's own answers during the investigative interview, were serious enough that the indefinite suspension was justified. He conceded that administrative suspensions with pay have been used or considered in the right circumstances, but not here.

Division past practice

The Division initially asserted that there was a universal past practice of suspension without pay for employees facing similar criminal charges. However, it was conceded that none of the past cases involved teachers. Efforts were made during the course of the hearing to verify past practice. There were two confirmed suspensions of non-teaching employees for sexual assaults against students at the school. Neither suspension was grieved. One of these employees resigned. The other was terminated after a sentence of incarceration. In another case, an Educational Assistant was suspended pending investigation for inappropriate sexual talk with other staff. There were no criminal charges and the employee resigned.

Argument and analysis

The Division's ongoing duty to investigate

In argument, the Association criticized the investigation conducted by Harvey and other Division HR personnel as inadequate on a multitude of grounds. Based on the evidence before me, I am not prepared to say the employer's investigation was flawless, but neither am I able to find that the Division's efforts failed to meet the standard laid down under the *Jockey Club* line of authority.

It must be appreciated that in the present case, Division management were entirely unaware of the June 8 incident and the resulting August 1 criminal charge until X approached her local union president, McEachern, who in turn notified Harvey. On August 14, 2013, the Division learned that the grievor was pending on a charge of Sexual Assault Causing Bodily

Harm. There was no work connection except that X and the grievor met through their school. No alleged misconduct occurred on Division premises or at a Division function. Preceding the commencement of the Division's own investigative process, there was a police investigation and then a referral to the Department of Justice Prosecutions Branch for an opinion. The Crown authorized the charge after reviewing the available evidence.

In *Jockey Club* (para. 6), an important distinction was made between criminal allegations initiated by employers and investigations conducted by the police:

> 3. The Company must show that it did, in fact, investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden, in this area, on the Company is significantly less in the case where the Police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the Company has initiated proceedings.

The Association said that Harvey was a biased investigator. She heard one side, namely the account provided by X in her initial interview, and accepted its veracity without waiting to hear from the other side. Harvey rejected this accusation when it was leveled in cross examination. She noted that the grievor was offered an opportunity to answer the allegations and no decision was made by the Division until both protagonists had been heard. This is true. At the same time, the evidence indicates that Harvey agreed with McEachern's rush to judgment on the question of danger to female staff and students. It was perhaps understandable that McEachern, as the MANTE Local President and herself a parent of students in the Division, would feel strong empathy and concern after listening to X's account. McEachern jumped to the conclusion that the grievor has violent tendencies, could be a danger if allowed to remain in the school and must be removed from the workplace. She

said that she personally would be afraid to say hello to the grievor for fear he would take it the wrong way. These were emotional and alarmist opinions. Harvey did not endorse them. But it appears she reached at least a tentative conclusion in her own mind on a core issue in her investigation - whether a suspension was necessary to protect children and women in the school.

Ideally an investigator ought to rigorously and objectively pursue the evidence to completion before forming an opinion. Harvey's quick acceptance of the danger theory was a flaw but in my view, not a fatal one. She was still aware of her obligation to fully hear and consider both sides of the story. He preparation of questions and areas of inquiry before the grievor's interview showed a focus on relevant issues. The meeting with the grievor was held three days after the interview of X, in other words, promptly. The grievor was allowed to make a prepared statement, he was asked questions and he was allowed to give full responses. He denied holding X down and trying to force oral sex but he appeared to admit kissing, grabbing, pulling and fondling. As noted by the Division in argument, this case was unusual insofar as the criminal accused readily agreed to discuss the allegations with his employer. More commonly the defendant remains silent and the employer is left to guess about key features of the case. Here, based on its own investigation, the Division had a good sense of the expected evidence at trial.

The Association also criticized Harvey for choosing, after interviewing both X and the grievor, to believe X's version rather than that of the grievor. It was said her logic did not withstand scrutiny. She doubted the grievor because he hid the fact of his several visits to the grievor's apartment in late 2012 and early 2013. This was somewhat circular reasoning in that Harvey first had to believe X about the visits. She felt the medical evidence supported X but did not explain how this followed from the doctor's reports. I agree that these points

of criticism are arguable and repeat that the investigation was not flawless.

On the other hand, working in the shadow of a police investigation, the employer has less of a role to play. The Division's obligation was to investigate the criminal charge to the best of its ability in a genuine attempt to assess the risk of continued employment. In *Phillips Cable* (para. 60), it was stated that the employer must consider the risk of conviction and what reasonably can be done in the circumstances. Mitigation is a separate question addressed later in these reasons. But risk of conviction can only be assessed by reviewing the available information, which in this case involved a mixture of contested and uncontested facts. The Division did not have access to the police file until long after the suspension decision. Police do not typically open their files while a charge is pending and in the present case, it took an arbitrator's order to achieve redacted disclosure. Keeping in mind the practical limitations and the diminished burden as cited in *Jockey Club*, I find the Division fulfilled its duty at the initial stage of the present case.

The Association suggested that Harvey and Weston acted on a sense of moral outrage over the grievor's pursuit of late night, adulterous casual sex. Whatever their feelings in this respect, I find they managed to contain their assessment to the relevant employment considerations. More significant was their initial understanding that X and the grievor had no prior sexual history. In this context they were shocked by the grievor's unannounced visit and deemed it threatening. However, once they had the full picture of the prior contacts between the grievor and X, both Harvey and Weston conceded the incident was less alarming. But they still viewed what allegedly happened inside the apartment as aggressive sexual misconduct requiring a suspension.

The Association also argued that Harvey failed to investigate when new information came

to light casting doubt on aspects of X's complaint. I accept the Division's submission that it was alive to its obligation in this regard and did respond when new issues were raised by the Association. The evidence does not indicate precisely when the Association passed on its various new leads. However, the Division did call in X for a second interview, asked whether there was a boyfriend involved, called in S for questioning, obtained the text messages exchanged between X and S after the grievor departed the scene and reviewed a series of social media comments and pictures generated by X. None of the foregoing matters constituted compelling new evidence that could tip the balance in assessing the risk of conviction.

X did not disclose her prior sexual encounter with the grievor until the second interview but she was forthright at that time. Embarrassment was a natural reaction for a complainant under the circumstances and may explain why at first she hid her history with the grievor. Also she may have felt it had nothing to do with her complaint of assault. This is true. No means no.

The mysterious reference in the doctor's note to a dog bite was not investigated but since neither party's version made mention of it, the Division was not obligated to pursue the point. It emerged that X texted S before calling the police but it is not obvious that this undermines her credibility on the contested factual issues. Her irate reaction was understandable. And she did call police a few minutes later.

Finally the Association raised the specter of a pre-existing injury or embellishment but there was nothing to support the claim. On the face of it, wrist and thumb injuries were consistent with both versions of the June 8 incident. The fact that the X engaged in some summer recreational activities did not negate the reported injuries. She was not incapacitated, she had

a hyper-extension and a strain. Her condition improved but was not fully resolved by the end of August, according to the medical notes.

Both Harvey and Weston defended the Division's handling of the investigation on the basis that the new information did not alter the basic reality of the case. The grievor agreed to be interviewed by his employer, placed himself at the scene, admitted trying to have sex despite refusals by X and had some degree of non-consensual physical contact during the encounter. Beyond that, the contested allegations were far more serious. It is important to say that these factual matters and credibility issues may become relevant during the grievor's criminal trial where their significance will be determined by the trier of fact. All that is in the future. For now, it will suffice to say that the Division's investigation was adequate. Moreover the Division met its duty to consider reinstatement as new facts became known.

Reasonably serious and immediate risk

The Division argued that if the grievor was allowed to continue working, there was a multi-layered risk - to the safety of X herself as complainant, to students with whom the grievor comes in contact and to all female staff in the grievor's school or at other Division venues where he may be working. The Division acknowledged the grievor's favourable performance evaluations over the course of his career and conceded there was no specific evidence to suggest any danger in the workplace, up until the June 8, 2013 incident. That changed everything. The Division emphasized that the criminal allegation against the grievor goes beyond the level of sexual misconduct. The accusation is that he committed an act of violence. The Division submitted that if there was any degree of risk at all, as employer it should not be required to take the chance.

In response, the Association contended that the Division was attempting to punish the grievor before he has had a chance to defend himself in a criminal court. The Division's logic was that the accusation is heinous, X must be telling the truth and therefore the grievor is a threat to women and children. Notwithstanding the frenzied response of McEachern and others, there was no objective basis to conclude that anyone in the school system was endangered, said the Association.

I am not satisfied that the Division has met its onus of proving a safety risk. Beginning with X, and recognizing the legitimacy of her fears and concerns as a complainant, nothing in the evidence supports a finding that her safety or well-being might be endangered if the grievor returned to work pending trial. The grievor is subject to an Undertaking that prohibits him from communicating with X or coming within 200 meters of her. Division witnesses did not suggest that they doubted the grievor's compliance. He worked the last few weeks of June 2013, prior to the laying of the charge and without any court ordered restrictions, and there was no hint of a problem. On her own, X arranged to avoid any activities scheduled in the grievor's school location so she would not be at risk of running into him.

As for risk to female co-workers, again there is no objective basis in the evidence to support a finding of danger in the workplace. Everything in the grievor's past work record points to the contrary. It is true enough, as Weston said in testimony, that sometimes good people do bad things. If the grievor is ultimately convicted, then Weston will be vindicated in this respect, as a stellar teacher and citizen will have been found sexually aggressive to the point of criminality. But the context must be kept in focus. The grievor was in X's apartment, allowed inside by her opening the door voluntarily, and when she refused his advances, he allegedly assaulted her in an attempt to have sexual relations. There is no reason to believe that such behaviour might occur in a workplace setting.

Weston also worried about grooming of girls or young women. Again there is no foundation in the evidence for such a concern. X is 35 years old and the grievor is in his early forties. They met through work and had a no-strings consensual sexual encounter at some point in the past. There was no suggestion of exploitation or manipulation. On X's account, the grievor came over several more times and was still interested in sex. Once he pinned her against the wall and kissed her, she said. He had been drinking after a game that night. What happened on June 8, 2013 is yet to be fully determined but any suggestion of workplace-based grooming is misconceived on the facts before me.

Similarly there is no objective evidence to suggest a danger to students. McEachern expressed immediate and strenuous objection to the grievor's continued presence in the schools. To the extent that she was speaking as a protective parent, her reaction after listening to X was emotional and very human. In her capacity as a local union representative for a largely female membership, she was speaking as an advocate. Her duty was entirely to MANTE members and not to the grievor. By contrast the employer was duty bound to analyze the situation objectively and with a measure of balance. The facts do not support a finding that there would be danger to students.

I considered the letter from Dr. Rumbolt, the grievor's physician, cryptically commenting on the grievor as a risk to himself and others. The doctor stated he did not see a risk but I have given this opinion no weight, for the reasons put on record by the Division when the letter was tendered in evidence.

Beyond the question of safety, the Division also argued risk to its reputation as a public body dedicated to the education and protection of children attending its facilities. The authorities are clear that an employer is entitled to suspend an employee pending criminal charges if

retaining the individual would potentially cause significant detrimental impact to the employer's business, reputation or ability to operate. It is not necessary to prove that there will be harm. Often there is a publication ban and the incident has not received any publicity. Nevertheless arbitrators have held that the potential for negative publicity and consequential reputational harm can be enough to justify suspension. The test is objective - whether a fair minded and well-informed member of the public would reasonably lose confidence in the employer's ability to carry out its mandate.

The Division submitted that this case is unique because there was enough information available about the alleged offence to reach a firm conclusion that the grievor will be found guilty. He outright admitted to a sexual assault, said the Division. The remaining contested facts only go to the severity of the violence. Normally in these suspension cases the employer and the arbitrator must presume innocence and weigh potential reputational harm in light of the risk of criminal conviction. Not so here, argued the Division. In any case, even the allegation of sexual assault causing bodily harm would be enough to convince a fair minded, well informed observer that a teacher charged with this offense should not be left in the classroom pending trial. This kind of criminal charge is so antithetical to everything a school division represents that on balance, the employee's interest in his livelihood must give way to the Division's interest in offering a learning environment free from harm, and being seen as maintaining this vital standard.

The Association rejected all the foregoing lines of argument. In its haste to denounce the grievor, the Division abandoned the presumption of innocence and refused to uphold the balancing of interests called for by *Phillips Cable* and *Jockey Club*. The Association pointed to cases like *Toronto District School Board, supra*, where suspension was rescinded even in the face of reprehensible sexual misconduct on multiple occasions involving a child. The key

issue for the Association was the application of an objective test and not the kind of fearful, sensational over-reaction that sometimes shapes public opinion. A fair minded and well informed person would appreciate the seriousness of the grievor's criminal charge but would also understand that at this stage, there are only allegations and not a determination of guilt.

I do not accept the Association's position. Leaving aside for a moment the likelihood of conviction and simply considering the charge and the school context, it seems almost inevitable that an independent observer would be apprehensive about continuing to employ a teacher in these circumstances. Teachers are skilled and respected professionals. They hold a special place in our community because we entrust our children to them day in and day out. The public has very high expectations of teachers and for this reason, it is difficult to countenance a teacher continuing to work closely with students while facing a sexual assault charge. To uphold teacher standards and protect the Division's reputation, it may be necessary to suspend the grievor whereas the same considerations might not apply to other occupational groups in a school division. *Toronto District School Division*, *supra*, relied on heavily by the Association, involved a caretaker. The case was primarily decided on the mitigation issue (para. 25, 33) but I would also question its direct applicability to the present circumstances. Teachers play a pivotal role in the school system's mission. Day to day, they are the face of the Division to parents and the public, so their conduct or alleged misconduct bears most directly on the Division's reputation.

It is this demanding professional standard that persuades me, on the objective test outlined in the authorities, that there would be serious potential harm to the Division's reputation if it retained the grievor in a teaching position with regular student contact. Of course every case is different and I do not intend to declare a universal rule. The facts can be crucial in driving an outcome, as illustrated in the review of arbitral precedents. In the present case,

as emphasized by the Division, there are apparently admitted facts that suggest the grievor was guilty of a simple sexual assault if not more. Earlier in these reasons, I indicated that caution should be exercised when an arbitrator is asked to make a finding that properly belongs to the criminal court, applying the appropriate rules of evidence and standard of proof. For this reason, I do not intend to say more. But a fair minded and well informed observer would take into account all the known and apparent facts in this case.

Mitigation efforts and the potential for an alternate placement

The Division bore the onus of showing that the risk of harm to employer interests could not be mitigated through techniques such as closer supervision or assignment to another position. In the present case, closer supervision was not a practical possibility. Teachers have conduct of classes on their own. Weston testified that it is solitary work in this sense. The Division does not have excess teaching staff to follow the grievor around and supervise him pending his criminal trial.

On the other hand, there was evidence that the Division and Pembina Trails School Division deliver some classes on-line through a program called InForm Net. Teachers and students are not physically together so the risk of contact and the need for supervision does not arise. The Association argued that even if an assignment to InForm Net was precluded in August 2013 because staffing was already fixed, the Division should have taken steps during the course of the year to train the grievor and offer him an on-line teaching position at the earliest opportunity. The Division raised various objections to this notion, principally the fact that some degree of student contact is always required, or at least must be available if requested, even in on-line courses. In theory it would be possible to structure a part-time position for the grievor where someone else took the student contact role, but the Division asserted that

this was impractical and too expensive.

In turn, the Association argued that arbitral principle requires a balancing of interests and an equal sharing of the burden. In the present case, said the Association, Weston never even attempted to balance the needs of the parties. He simply rejected any form of mitigation as unacceptable because of the nature of the criminal charge against the grievor.

It is clear on the evidence that there was no existing alternate placement available for the grievor when the suspension decision was made in August 2013. In *Canada Safeway, supra,* there was undue risk to the employer's reputation if the grievor, a pharmacy technician charged with drug trafficking, continued in his position. However, the employer failed to consider whether mitigation was possible by moving the grievor to another job in a store located in a different community. Each party, said the arbitrator, may have to assume some degree of risk (para. 69). The Association relied on this reasoning in argument and it is consistent with the *Jockey Club* line of authority. However, it should be noted that in *Canada Safeway*, there were existing alternate jobs that might serve to mitigate the risk. The employer was not expected to arrange a placement for the grievor by reconfiguring existing work or creating new work. Similarly in *Toronto District School Board, supra*, it was not disputed that there were a number of locations at which the grievor could perform bargaining unit work as a caretaker without contacting minors, which would have violated his bail condition (para. 7).

How far must an employer go to find an alternative job that mitigates the risk? Based on the principles and precedents reviewed earlier in these reasons, I conclude that the Division was bound to make reasonable efforts. As held in *Phillips Cable, supra,* the test is whether there are "practical means" of minimizing the adverse effects (para. 63). In the present case, the

Association essentially argued that the Division could and should have created a unique position for the grievor doing on-line teaching but without any student contact. That element of his job would have to be picked up by another teacher. Even leaving aside the disruption and cost of such a proposal, which may or may not be reasonable under the circumstances, I find that the on-line alternative in this particular case was unreasonable because it necessitated stripping out student contact from a teacher's job. The essence of teaching is engagement, support and involvement with students.

Was suspension without pay justified?

Arbitral authorities accepted by both parties in the present case direct that, if suspension is found to be justified, a further analysis must be undertaken. Considering the *Jockey Club* principles, can the employer's interests be protected only by withholding the grievor's pay? Reputation of the employer is again a relevant concern. As held by Arbitrator Freedman in the *Eakin* award, *supra,* an employer can usually protect its legitimate interests by removal from the workplace but in some cases, such as public sector organizations like the police, public perception and the reputation of the service may demand more (para. 146). In the *Evans* award, *supra*, I held that suspension without pay was justified because the charges were numerous (20 in total), serious and closely related to the police officer's workplace duties (para. 18).

In *St. Amant, supra*, suspension was upheld but pay was ordered, taking into account factors including financial impact on the employer and past practice. The *Thomsen* award, *supra*, a Manitoba Corrections case, stated that suspension without pay or leave without pay is the industrial norm today, but no authority or empirical evidence was cited for this proposition (para. 45). *Thomsen* was a different fact scenario than the present case insofar as the

employer was aware of the grievor's criminal charge (driving with blood alcohol over .08) for three years but only suspended him once a sentence of brief incarceration was pronounced.

The Division's argument for loss of pay mirrored its position on the suspension itself although little was said about operational concerns or safety. Primarily the Division said that its reputation would be damaged if the public learned it was paying a teacher pending charges of sexual assault causing bodily harm. In fact the public would likely be outraged at the notion, said the Division, especially since a second teacher would need to be paid for doing the grievor's work. There was no argument based on inability to pay or financial hardship, although I can and do take notice that resources are scarce in the public school system. The Division stressed its obligation to be seen as a careful steward of taxpayer funds.

For its part, the Association argued that a fair minded, well informed member of the public would not object to paid suspension, recognizing the hardship to a teacher waiting an extended period of time for his trial. The Association relied on the authorities reviewed above that suggest paid leave or suspension is the norm. Nothing here dictates otherwise. The Division is a large employer with a substantial workforce. Paying is not a burden to the Division whereas unpaid suspension causes duress to the grievor. The Division tried to argue that past practice supported its position but the evidence was very limited, said the Association. There were no prior cases of teacher suspension without pay pending criminal trial. The practice in other bargaining units has no relevance.

In my view, it is unhelpful to speak of a "norm" that suspension should be paid, since this is too broad a generalization. It may be true that there is past practice on the part of particular employers or in certain industry sectors. There was nothing adduced in the present

case to show a particular practice or norm for teachers who have been charged criminally. However, drawn from those arbitral authorities that addressed the pay issue separately, there are principles which can be applied to determine appropriate outcomes, depending on the facts of each case.

Would a fair minded and well informed member of the public question the Division's reputation unless the grievor in this case was denied his pay pending suspension and eventual trial? I find the answer is no. As discussed earlier, the grievor was removed from the workplace due to the primacy of maintaining public confidence in the school system. But the corollary is that a suspension may need to be imposed with pay to avoid unfairness. This is part of the balancing process mandated by *Jockey Club*. Both employer and employee have legitimate interests. The grievor has an interest in preserving his livelihood while defending himself in the criminal justice process.

It still depends on the particular facts. As reviewed in the precedents earlier, some cases involve extremely serious allegations such as murder of a school principal or sexual assault against young children. The present case is also serious but I would not characterize the allegations as extreme. The June 8, 2013 incident was off site and not work related. No children were involved. To be sure, sexual contact or bodily harm without consent is completely unacceptable. But the grievor is a good teacher who has made a substantial commitment and contribution to his school community. If convicted, he will face the weight of the law, and even if acquitted he may be subject to discipline by the Division. In the meantime, he is presumed innocent and should not be deprived of his pay unless the Division can establish the necessity for doing so. Returning to first principles, *Jockey Club* and *Phillips Cable* establish that the employer bears the onus of proof. In close cases, that often makes the difference.

No argument was made by the Division based on financial necessity. It is a large employer and has flexibility to manage its resources if required to maintain the grievor's pay while he is suspended. I recognize this is not a desirable situation but it is part of the necessary balancing of interests.

Unlike some cases, there was no evidence from co-workers that they would object to paying the grievor or that paid suspension would disrupt effective operations. I distinguish McEachern's testimony as based largely on her desire to eliminate any and all risk through personal contact in the school. She did not speak to the separate question of pay. In *St. Amant, supra*, there was evidence from management that there could be a negative co-worker reaction if the grievor was paid while absent from work, but pay was ordered considering all the circumstances (para. 126-127).

Finally, in the present case, there was no past practice relevant to teachers in the Division. This factor is essentially neutral. The Association was unable to cite prior instances where teachers have remained on the job pending charges, as in the police awards. At the same time, as I have said, there are differences in the roles played by teachers and non-teaching staff, so the past practice evidence that was tendered is not determinative. The cited cases of suspension without pay pending criminal charges related to sexual assault of students.

Taking into account all the foregoing, while the suspension has been upheld, the grievor is entitled to pay pending disposition of the criminal charge against him.

Award and order

The grievance is allowed in part.

The grievor will remain suspended but is entitled to receive pay retroactive to the date of his suspension.

Jurisdiction is retained to settle any unresolved remedial issues.

DATED at Winnipeg on June 27, 2014.

"A. Peltz"

ARNE PELTZ, Arbitrator