

IN THE MATTER OF AN ARBITRATION  
AND IN THE MATTER OF A GRIEVANCE FILED  
ON BEHALF OF THE GRIEVOR

BETWEEN:

WESTERN TEACHERS' ASSOCIATION,

“Association”

-and-

WESTERN SCHOOL DIVISION,

“Division”

ARBITRATION AWARD

Board Chairperson  
Nominee of Association  
Nominee of Division

Colin S. Robinson  
David Shrom  
Adrian Frost

Appearances

Garth Smorang, K.C.  
Jeff Smorang

Counsel for the Association

David A. Simpson

Counsel for the Division

Date of Award

October 3, 2023

## I. Overview

1. The Grievor has been employed by the Division as a middle school teacher since 2007. He was arrested on December 15, 2021 and later charged with sexual interference and sexual assault upon a minor. The allegations relate to when the complainant was a student in the Division. While the Division initially placed the Grievor on administrative leave with pay, it subsequently concluded that a material change in circumstances occurred justifying that the leave be converted to unpaid.
2. The alleged offences for which the Grievor has been charged are alleged to have occurred between 2010 and 2018. During that time, the complainant was a student in the Division and the Grievor was acquainted with her and her family. The Grievor has pleaded not guilty and has retained experienced criminal counsel to contest the charges. A trial has been scheduled for the summer of 2024. He is presumed not guilty of the charges in the eyes of the law and by this Arbitration Board (the "Board"). Moreover, it is not the task of this Board to determine whether the Grievor is guilty of the charges or not. That issue will be resolved through the criminal justice system, not this arbitration hearing.
3. The Division became aware of the allegations in late November of 2021 when two students made disclosures to a teacher in the Division (however, the criminal charges against the Grievor relate to one student only). The disclosures included allegations that the Grievor engaged in sexual abuse, supplied the students with marijuana and cigarettes at school, and sent inappropriate text messages. The disclosure was conveyed to the Superintendent of the Division. As a result of the allegations, the Division immediately removed the Grievor from active teaching duties by placing him on paid administrative leave effective November 30, 2021, pending further investigation. Further, the Division promptly informed the Morden Police Service ("MPS") of the disclosure and provided a report to Manitoba Education.

4. The Association did not file a grievance in response to the Division removing him from the classroom and placing him on paid administrative leave.
5. However, in July of 2022, the Division became aware that the Grievor had surrendered his teaching certificate in response to a request by the Minister of Education and Early Childhood Learning. By letter dated July 14, 2022, the Division advised the Grievor that it had conducted an assessment and, considering the surrender of his teaching certificate, determined that his administrative leave would be concerted to without pay effective the first day of the 2022/23 school year. The Association and Grievor filed grievances challenging that decision on August 25, 2022 (Tabs 36 and 37 of Book of Documents). The grievances were denied by the Division on September 14, 2022 (Tab 39 of Book of Documents).
6. The issue in this case is whether the Division's decision to place the Grievor on administrative leave without pay was justified. While an employee charged with a criminal offence may be placed on a leave of absence without pay (or suspended without pay) to safeguard an employer's legitimate reputational and other interests, such action is reserved for exceptional circumstances. Even if a suspension is justified, arbitration decisions in Manitoba suggest that arbitrators must continue their analysis by considering whether the employer's interests can only be protected by withholding the employee's pay rather than some lesser sanction. The Grievor confirmed that he is not asking to be returned to work with the Division at this time. Rather, he requests that the Division return his employment status to administrative leave with pay and that he receive full compensation for all lost salary and benefits, less his earnings from having obtained alternate employment.
7. The assessment of a decision to suspend an employee without pay pending the outcome of criminal charges involves weighing two legitimate but competing interests. An employer is entitled to operate in an efficient and orderly manner, without undue operational disruption or reputational harm. In contrast, the employee is presumed not guilty of the criminal charges and has a legitimate interest in preserving their livelihood and income. Accordingly, it is necessary that the Board

assess the impact that continuing to pay the grievor will have on the Division's operations and reputation against the interest of the Grievor in maintaining his income while he faces criminal charges of which he is presumed to be not guilty. Both interests are worthy of protection.

8. The Division bears the onus to satisfy the Board that its decision to withhold the Grievor's pay was justified. The fundamental question that the Board must determine is whether a fair minded and well-informed member of the public would question the Division's reputation unless the Grievor was denied his pay during his leave of absence effective the start of the 2022-23 school year pending his criminal trial.
9. These reasons for decision have been authored having regard to the sensitivity of the matter and considering the pending prosecution. Neither the Grievor's name nor the names of the students appear in these reasons. We are cognizant that the criminal court has pronounced confidentiality orders relating to the charges pursuant to the *Criminal Code*, R.S.C., 1985, c. C-46.
10. In addition, prior to the start of this hearing, the Division sought an order from the Court of King's Bench pursuant to *The Manitoba Evidence Act*, C.C.S.M. c. E150, with respect to the production of documents which it contended were arguably relevant. A Consent Order was issued by Kroft J. which ordered the MPS to produce a redacted form of a document referred to as the Prosecutor Information Sheet (the "PIS"). The redacted PIS, which was provided to the Board and referred to by the parties during the hearing, is a document prepared by the MPS for the purposes of the prosecution. It sets forth certain particulars including, but not limited to, the years between which the offences are alleged to have occurred, summaries of statements provided to the MPS, and the date of the Grievor's arrest. In the Consent Order issued by the Court, the parties were required to: request that the Board receive the document as a sealed exhibit and not disclose it without further order authorizing its disclosure; notify the Board regarding the scope and extent of any confidentiality instruments that are applicable in the criminal case; and remind the Board that a

prosecution is pending and that “any written reasons be authored with that in mind”. The parties have complied with those requirements.

11. Before this hearing into the merits of the Grievance commenced, the Division advanced a preliminary motion seeking disclosure of certain documents contained in what has been described as the “Crown Brief”. The Division was unable to obtain production of those documents which it asserted were arguably relevant to the issues in this grievance arbitration and, as a result, requested that the hearing be scheduled to proceed only after it obtained disclosure (or following the Grievor’s criminal trial). The Association responded, amongst other things, that the Division had sufficient information to proceed and its request to delay was prejudicial to the Grievor’s interests.
12. The preliminary motion was heard on January 16, 2023. In reasons for decision dated February 22, 2023, the Board unanimously denied the motion having balanced the interests of the Division in securing additional information against the Grievor’s interest in having the arbitration hearing proceed expeditiously.
13. The hearing on the merits was conducted on June 26 to 28, 2023. The parties agreed that the Board was properly appointed and had jurisdiction to hear the grievance which arose under the collective agreement in effect between the parties (Exhibit 1). The Board advised the parties that we had taken our Oath of Office. The Association agreed to proceed first notwithstanding its position that the Division bore the onus.
14. The parties provided the Board with a Book of Documents and Supplementary Book of Documents. They agreed at the outset that all the documents contained therein were arguably relevant with only the weight attributed to each to be determined if necessary. In addition to the documentation provided by the parties, the Board heard testimony from two witnesses. The Association called the Grievor. The Division called Stephen Ross, the Superintendent of Schools/CEO. Most of the salient facts are not contested.

## II. The Evidence

### *Background of the Grievor*

15. The Grievor is 50 years old. He holds Bachelor of Arts and Bachelor of Education degrees. He has one adult child who lives with him. He raised the child for many years as a single parent. Having commenced employment with the Division in 2007 on a term, he was converted the following year to a permanent contract. Throughout his career with the Division he has taught in the Division's lone Middle School.
16. In addition to his teaching duties, the Grievor participated in several extra-curricular activities and events. He testified about coaching school teams, participating in school clubs, taking students on field trips, leading religious exercises prior to the start of the school day, and involving students in other educational activities outside of the classroom (Tabs 1 and 3 Supplemental Book of Documents). He has also completed a significant number of continuing professional development activities (Tab 2 Supplemental Book of Documents). He noted that the collective agreement provides teachers with one day of leave for achieving 50 hours of extracurricular activity.
17. In cross-examination, the Grievor acknowledged that some of the activities which he characterized as "extracurricular" were part of his regular teaching duties. With respect to the training which the Grievor highlighted, he accepted that some of it was taken prior to his employment with the Division. He further agreed that some of the training was mandatory, some was completed on Professional Development days (PD Days), and some had been paid for by the Division.
18. As shall be discussed further below, the Grievor obtained alternate employment with a food processing and production company in July of 2022, prior to the Division's decision to change his administrative leave to being without pay. In that position, he earns approximately half of what he earned as a teacher.

### ***The Division***

19. Mr. Ross testified about the Division's structure, size, and finances. He is the Division's Superintendent of Schools, a position he has held for approximately 17 years. He commenced his career as an educator in 1990 and, prior to becoming Superintendent, was a classroom teacher and school Principal in Manitoba and Saskatchewan.
  
20. As Superintendent, Mr. Ross is responsible for Divisional programming and operations. Members of the management team report to him including, but not limited to, the Secretary-Treasurer, Assistant Superintendent, and the Human Resources Manager.
  
21. The Division encompasses the smallest geographic area of any school division in the Province of Manitoba; however, its student population is larger than several others. It includes just 4 schools and an Adult Learning Centre. The Middle School (at which the Grievor was employed) and Senior School are physically connected. Approximately 2,100 students were enrolled in the Division from Kindergarten to Grade 12 in 2022, which was an increase over the prior school year. Approximately 160 teachers work for the Division.
  
22. The Division operates using taxpayer funds. Mr. Ross testified that the Division is currently restricted in its ability to tax and is reliant upon allocations from the Provincial government. He indicated that the Division's spending per student is amongst the least in the Province given the amount of funding that it receives. In carrying out its activities, the Division incurs expenses of over \$15 million annually. Most of its operating expenses pay for front line instruction of students. The 2022/23 Division budget indicated a deficit of approximately \$70K. Deficits are made up by not offering certain programming or by vacancy management. Mr. Ross added that the Provincial government occasionally provides extra money, but this funding is intermittent, of indeterminate amount, and cannot be counted upon. The Division's

budget prepared in March of 2023 for the 2023/24 school year indicates a projected budget deficit of \$80K.

23. Tab 12 of Supplemental Documents is a fiscal statement for the end of 2022 which indicates that the Division had a healthy surplus. Mr. Ross said the government unexpectedly provided some additional funding for “salary settlements based on arbitration”. He was unable to explain the Division’s significant accumulated surplus; however, he noted that school divisions are legislatively restricted in the amount of surplus they may amass.

### ***Grievor’s Prior Disciplinary Record***

24. The Grievor’s prior work record includes two disciplinary suspensions. He received a one-day suspension on June 22, 2012 for making inappropriate comments to a Grade 5 Family Life class. That discipline was not grieved. The discipline letter (Tab 1 Book of Documents), signed by Mr. Ross, indicates that the Division received several complaints and concerns from parents related to the Grievor making graphic sexual comments to students during the class (Tab 2 Book of Documents). Based upon its investigation, the Division determined that the Grievor’s comments were “very graphic in nature, outside of the curriculum, and very inappropriate for this age group”. As a further consequence, the Grievor was not given a teaching assignment that included the Family Life class the following school year. He confirmed that he did not teach that course again.
25. Mr. Ross testified that the Division was concerned by the graphic sexual comments made by the Grievor to a group of Grade 5s, and the “deflection” evident in the Grievor’s response to the allegations. In addition, Mr. Ross testified that when the Grievor returned to class following being presented with the concerns, he told the students that he got in trouble because one of their mothers phoned and complained. Apparently, the Grievor also told the class that the Division did not want students to be told the truth (Tab 2 Book of Documents). Mr. Ross testified



that the Grievor's comments made some students feel guilty and they wondered if it was one of their parents who had complained.

26. The Division imposed a five-day suspension on the Grievor on December 18, 2012 (Tab 3 Book of Documents). The discipline letter, once again signed by Mr. Ross, indicates that the Grievor took a student "off school premises for lunch, and then to your home, without the permission of the student's parents and without advising the school". An aggravating factor was that the student's parent earlier told the Grievor that the student (who had special needs) was not allowed to go to the Grievor's house. According to the discipline letter, the student's parent met with the Grievor that very morning to express concerns about his support of the student in the classroom, but "in spite of this you took the student out without permission and then to your house". That context increased the severity and inappropriateness of the Grievor's actions according to the Division. The discipline letter further records the Division's concern that the Grievor's version of events contained "discrepancies" which cast doubt on his "credibility and trustworthiness". The Division was clearly concerned that the Grievor manipulated the student and failed to take personal responsibility for his actions. The discipline was grieved; however, that grievance was withdrawn prior to the matter proceeding to arbitration.
27. The Grievor testified about the circumstances of taking the student for lunch. He explained that his son was also present. He explained that he took the student to his home because he needed to retrieve something for his class. He testified that he elected to withdraw the grievance because he believed that the Division was working with him, and he did not want to alienate his colleagues. He added that the Division seemed to "move on" after the discipline, and that he "felt grateful to still have a job". In cross-examination, the Grievor accepted that he took the student off campus without the consent to the child's parents. He says that he now understands the problem with having done so and he regrets having caused a problem.
28. As Superintendent, Mr. Ross signed both letters and he was familiar with the circumstances of both disciplinary suspensions imposed upon the Grievor. He

testified that when he heard about the allegations which led to the Grievor's arrest in 2021, he "had a pit in his stomach". He noted that there was correlation between the timing of the discipline meted out in 2012 and the complaints which led to the Grievor's criminal charges. Mr. Ross testified that some of the criminal allegations related to "the same window of time" as the events which led to the disciplinary suspensions.

29. The Grievor has not been disciplined since 2012.

***Students' Disclosure and Division's Response***

30. On November 30, 2021, two students met with a teacher employed by the Division. The students disclosed alleged inappropriate conduct towards them by the Grievor. The students are sisters and are known to the Grievor. He lived near them and was acquainted with their mother. Although they were both students in the Division, they were never students in the Grievor's class. The teacher to whom the disclosure was made prepared typed notes of the discussions (Tab 6 Book of Documents). The notes reflect that:

- a) One of the students claimed that the Grievor "sexually abused" her "from the age of 3-10";
- b) When the students were in Middle School, the Grievor would bring them "weed and cigarettes" at recess on school grounds; and
- c) During their time in Middle School, the Grievor started sending "creepy texts". With respect to the texts, it was further alleged that he asked one of the students "repeatedly if she had showed anyone and if she had deleted them or not" and was "concerned about her telling".

31. The notes prepared by the teacher also refer to the students indicating that "they used to all have sleepovers in the same bed" and "something about when they were in the back seat of his car".

32. The teacher reported the disclosure to the Division's Assistant Superintendent. Together they met with Mr. Ross on November 30, 2021 to advise him of the disclosure.
33. Immediately following the meeting with the teacher and the Assistant Superintendent, Mr. Ross informed the MPS of the disclosures. Arrangements were made for the students and the teacher to whom the disclosure had been made, to meet with the police. Mr. Ross acknowledged that he did not speak directly with the students who made the disclosure or their mother.
34. Very shortly thereafter, Mr. Ross prepared a letter to the Grievor advising that the Division received a complaint containing serious allegations and, as a result, he was being placed on "administrative leave effective immediately" (Tab 7 Book of Documents). Although the letter does not specifically indicate that the administrative leave was with pay, in a December 1, 2021 email to Ms. Andrea Zaroda, a representative of the Association, Mr. Ross clarified that: "At the present time the administrative leave is on a paid basis; however the Division will re-evaluate the basis for the leave as the investigation progresses" (Tab 10 Book of Documents). That email also advised of the Division's intention to investigate the matter and its expectation that the Grievor would fully cooperate with the Division in its investigation.
35. After preparing the letter, Mr. Ross attended the Middle School and talked to the Principal, directing him to find someone to cover the Grievor's class. They then met with the Grievor to advise that serious allegations about him had been made as a result of which he was being placed on administrative leave. Mr. Ross handed the Grievor the letter which reads as follows:

I am writing to notify you that Western School Division (the "Division") has received a complaint containing serious allegations that require investigation related to your work with the Division (the "Complaint"). We will provide more information regarding the Complaint in due course.

Given the serious nature of the Complaint, the Division is hereby placing you on administrative leave effective immediately, pending further investigation.

Unless and until you receive indication otherwise from the Division, during your period of administrative leave:

- you must not attend at Division premises or perform work for the Division pending the investigation; and
- you are directed to treat this matter as confidential and must not contact parents, students of the Division. Further, communication with Division staff must be limited to the Superintendent and your school administrator.

As noted above, the Division will provide more information regarding the next steps in due course. In the meantime, if you have any uncertainties regarding this letter, please contact Superintendent Stephen Ross. Finally, we encourage you to treat this matter with seriousness and to consult with your Western Teachers' Association representative.

36. Asked to describe the Grievor's reaction to this news, Mr. Ross testified that he found the Grievor's response to be "unusual". Rather than reacting emotionally, Mr. Ross stated that the Grievor was calm. This reaction was atypical to what Mr. Ross had previously experienced when he advised teachers of complaints or allegations. He recalled that the Grievor asked him if he could share more about the allegations, but he responded that he was unable to do so at that time. The Grievor asked if they wanted his keys and requested that he be allowed to return to his classroom to retrieve some personal effects.
37. The Grievor testified that he was shocked to hear that serious allegations about his conduct had been made. He subsequently consulted a doctor and provided a Certificate of Illness to the Division dated December 2, 2021. His request for sick leave was denied by the Division. The Grievor was continuing to receive his pay at that point in time in any event and the denial of sick leave was not grieved.
38. The Division did not have any discussion with the Grievor about returning to teaching duties since the decision to place him on administrative leave on November 30, 2021. Asked if he considered putting the Grievor back in the classroom, Mr. Ross

testified that “it was not front of mind because of the allegations” given that the Grievor had been charged with sexual offenses involving a young student in the Division. However, Mr. Ross testified that it was not fair to say that he never turned his mind to the possibility of the Grievor being returned to the classroom depending on the outcome of the Division’s investigation.

39. In accordance with provincial requirements, the Division also informed Manitoba Education and Training of the students’ allegations. Mr. Ross completed a Serious Incident Report and submitted it online on December 1, 2021 (Tab 8 Book of Documents). The incident was described as an “Serious Assault” and “Allegation of historical sexual misconduct”. The Grievor’s name does not appear on the form. An official in the Provincial Department acknowledged receipt of the report and copied the Coordinator of the Professional Certification Unit on his response (Tab 8 Book of Documents). That email states that Mr. Ross should contact the Coordinator to “discuss further details about the incident and determine actions to be taken”. Mr. Ross testified that he did not have much contact with the Coordinator; however, on or about April 14, 2022 he communicated with her and provided additional details, which included the Grievor’s name, the fact that the police had been immediately informed, and that the Grievor was arrested on December 15, 2021.
40. Mr. Ross testified that following the removal the Grievor from the classroom, the Division intended to conduct a thorough investigation while allowing the MPS to “determine if there was anything to proceed on”. He said it was his intent to “find out the truth”. However, the Division’s investigation did not begin immediately because of a direction from an officer with the MPS that the Division not interfere in its criminal investigation. As a result, the Division deferred its investigation. Mr. Ross testified that the Division’s investigation was placed on hold until such time as “we had clear runway and would not interfere with the police”. In the meantime, the Division’s expectation was that the Grievor would keep it apprised of any relevant information. The Division regularly sought updates from the Grievor and Association regarding the charges.

41. The Division did not contact Child and Family Services. Mr. Ross understood that the MPS is responsible to notify the agency of such circumstances (and vice versa).

***Grievor's Arrest, Undertaking, and Criminal Charges***

42. On or about December 15, 2021, the MPS attended at the Grievor's home and arrested him. He testified that he was "shocked" by the allegations. While two students made disclosures and were both interviewed separately by the MPS, the charges that were ultimately brought relate to just one student. As noted above, the complainant in the criminal charge is known to the Grievor. She and her family lived near the Grievor from 2008 to 2013. She and her sister were educated in the Division. The Grievor testified that he knows their mother. At the time of the disclosure and the Grievor's arrest, the complainants were not in the Grievor's school and they are no longer students in the Division. At no time was the complainant a student in the Grievor's class or involved in the extracurricular activities in which he participated. During cross-examination, the Grievor agreed that the complainants were friends with his child and they had been in his home. He further acknowledged that he looked after them "rarely, but on occasion" when their mother was not present.
43. The Grievor was released pursuant to an Undertaking dated December 15, 2021 (Tab 15 Book of Documents). The Undertaking indicates that the Grievor is alleged to have committed the offences of Sexual Assault and Sexual Interference and that the alleged crimes occurred between the years of 2010 and 2018. It required that the Grievor attend at court on February 24, 2022, and thereafter as directed. He was subject to additional conditions including that he not to communicate with the students who made the disclosure or attend at their residence or place of work, residence, or worship. The Undertaking also provided that the Grievor not be in contact with anyone under the age of 16 "with the exception of a family member or while in the execution of your duties as a teacher while under the direction of your employer".

44. The Grievor was subsequently charged. The Information, dated February 14, 2022, sets out two charges, namely Sexual Assault and Sexual Interference contrary to sections 272 and 151 of the *Criminal Code of Canada* (Tab 8 Supplemental Book of Documents) for acts alleged to have occurred between 2010 and 2018. The Division did not receive the Information until November of 2022 when it was produced for arbitration. The Board heard that the Division was surprised to see the formal charge dated February 14, 2022 given that it sought updates and was told by the Association on March 7, 2022 that there had been no change in the status of the matter.
45. Particulars of the offences are included in the PIS which was provided in accordance with the terms of the Consent Order issued by the Court of King's Bench (Tab 8 of Supplemental Book of Documents). Considering the Court's Order and the request contained therein that our written reasons be authored having regard to the fact that the PIS is a sealed exhibit and concerns a pending prosecution, limited details of the offences shall be described herein, and the students' names do not appear.
46. As summarized in the PIS, the complainant alleged that the Grievor would take her into his bedroom alone and lock the door. While there, it is alleged that he massaged her over her clothes including intimate areas of her body. The particulars indicate that the complainant described herself as a child of perhaps 6 or 7 years old when those acts are alleged to have occurred. There are references to the Grievor allegedly having conversations with the complainant which were inappropriate for her age, outings alone, and her receiving text messages from the Grievor when she was 13 or 14 in which he allegedly told her that she was beautiful and loved everything about her. The PIS also refers to the accusation that the Grievor provided the complainant and her sister with marijuana and alcohol both at school and their residence.

47. According to the particulars set out in the PIS, the complainant's mother provided a statement to MPS. She recollected that her daughters spent time at the Grievor's home and that he would buy them toys and give them candy. The PIS further indicates that the mother told police that, several years ago, one of her daughters disclosed to her that the Grievor allegedly touched her and her sister but had refused to elaborate. The mother's statement also claimed that the Grievor allegedly sent text messages to her daughter about how beautiful her hair was and that she was becoming a young woman.
48. Mr. Ross testified that the criminal charges are very concerning to the Division. He noted that the PIS referred to concerning activity alleged to have taken place on school property during the school day. He viewed the pattern of allegations made by the students to be behaviour consistent with "when an adult is trying to gain the trust of a child". Counsel for the Association noted that Mr. Ross was offering his "opinion on grooming" and that it was not relevant. However, counsel for the Division replied that Mr. Ross' testimony on this point went to the issue of reputational harm and how the circumstances would be perceived by a fair-minded member of the public.
49. In cross-examination, Mr. Ross acknowledged that no one from the Division has attended any of the Grievor's court dates of which it had notice.
50. The Grievor pleaded not guilty. The criminal trial was scheduled for June of 2023, but has been rescheduled to July of 2024. In his testimony before this Board, the Grievor denied all the allegations contained in the PIS.

***Divisional Policy Respecting Criminal Charges and Division's Requests for Updates***

51. In accordance with Policy AP 5-411, employees of the Division have an obligation to report to their immediate supervisor in the event they are the subject of a criminal investigation or are charged with a criminal offence (Tab 5 Book of Documents). The policy states the following:



## AP 5-411 – EMPLOYEE CRIMINAL AND CHILD ABUSE CHARGES

Employees being investigated or charged with a criminal offence must report to their immediate supervisor in writing within ten (10) working days of becoming aware of the investigation or charge. The supervisor reports details to the Superintendent.

Should the offence being investigated be of a nature that would make the employee unable to perform their duties, they may be suspended without pay.

In the event that the criminal or child abuse charges indicate that the individual may pose a threat to the safety of children and adults, the Division reserves the right to terminate the employment of the individual with the Division.

52. Introduced in 2015, the policy was unilaterally created by the school board. Mr. Ross testified that he administers the policy for the Division. It is the only policy applicable to a Divisional employee facing criminal charges. Mr. Ross accepted that the policy states that an employee must report within 10 days and that period excludes weekends.
53. By letter dated December 21, 2021 (Tab 12 of Bood of Documents), the Division requested information from the Grievor regarding the criminal investigation and his arrest. The Division indicated that he had not informed it about the investigation as required by the Division's policy AP 5-411 respecting Employee Criminal and Child Abuse Charges. In the letter the Division advised the Grievor that it was requiring him to "immediately contact the division to provide full details of current or pending charges, the circumstances giving rise to the current or pending charges, and any conditions to which you may be subject" no later than December 23, 2021.
54. The Grievor testified that he shared information relating to his arrest, the alleged offences, and his criminal charges with the Association (Ms. Zaroda and Mr. Rejean LaRoche, Staff Officer). It was his understanding that the Association would communicate the required information to the Division on his behalf.

55. In response to the Division's letter to the Grievor, on December 22, 2021, Mr. Laroche wrote to Mr. Ross and provided the Undertaking which sets out the alleged offences and the conditions of the Grievor's release. That letter indicated the Association's position that the Grievor should "remain on paid leave as he is presumed innocent until proven guilty" (Tab 14 Book of Documents).
56. As the Association provided the Division with a copy of the Undertaking within 10 days of the Grievor's arrest, Mr. Ross agreed, in cross-examination, that the Grievor complied with Policy AP 5-411.
57. Mr. Ross expressed some frustration with what he believed was a limited amount of information provided by the Grievor and Association. While the Division was aware of the alleged offences, it did not receive confirmation that the Crown had authorized criminal charges against the Grievor until he acknowledged the charges during a meeting with the Division on April 20, 2022. Indeed, Mr. Ross testified that he had reached out to the MPS in early January of 2022 to obtain an update on the status of the investigation and charges. He testified to being advised by the MPS at that time that the Crown was considering whether it would proceed with charges. In cross-examination, Mr. Ross conceded that it did not occur to him to go to Court or to speak with the Crown attorney handling the case to obtain the information he wanted. He said that he did not believe that the Division could write to the Crown to obtain information and it did not seek the advice of a criminal lawyer. With respect to the Information, Mr. Ross admitted that there was no reason the Division could not have written to Crown in February of 2022 to attempt to obtain it.
58. On several occasions, the Division requested updates from the Grievor and the Association, examples of which include emails to the Association sent on March 2, 7 and 25, 2022 (Tabs 16 and 17 Book of Documents). In the March 7, 2022 email, the Division's HR Manager stated, in part, that: "Based upon the most current information provided to the Division, it is our understanding that [the Grievor] is currently subject to police investigation but has not been criminally charged...We reiterate the Division's expectation that [the Grievor] will immediately update the

Division to any change in circumstances, including changes to charges, undertakings, or applicable conditions, or any other change relevant to this very serious matter”. By that date, the Grievor had been charged with criminal offences, but neither he nor the Association corrected the Division’s apparent misapprehension.

59. The Grievor maintained that he complied with the Division’s direction that updates be immediately provided. Although he believed that there may have been some misunderstanding about when he was charged having regard to the Division’s correspondence in March of 2022. the Grievor noted that the Division was provided with the Undertaking (which refers to the alleged offences) soon after his arrest. Furthermore, in cross-examination, the Grievor testified that he too remained confused in April of 2022 about whether he had been charged. He also acknowledged that he had no direct communication with the Division between November 30, 2021 (when he was told that he was placed on administrative leave) and April 20, 2022 (when he submitted to an investigative interview conducted by the Division).
60. Mr. Ross testified that he was aware that the Division had a responsibility to investigate. He grew frustrated with what he perceived as a lack of information being provided to the Division by the MPS, the Grievor, and the Association. By the middle of April of 2022, Mr. Ross reached out to the provincial Coordinator of the Professional Certification Unit to try to obtain information. In an email dated April 12, 2022, the Division’s HR Manager wrote to the Coordinator requesting information about the Grievor’s “teacher certificate status”.
61. Mr. Ross testified that until the Division confirmed that charges were laid, it did not want to interfere with the MPS investigation. He was aware, based upon a previous situation, that the Crown needed to decide whether to proceed with charges. By mid-April of 2022, Mr. Ross was confident that the Division could proceed with its investigation without fear of interfering with the criminal investigation, particularly give that the Coordinator of the Professional Certification Unit advised that the

Grievor had been charged. In an email to Ms. Zaroda dated April 14, 2022, the Division required the Grievor “to attend an investigatory meeting...to discuss the circumstances giving rise to his current administrative leave from his teaching position” and the status of “his criminal investigation / charges and his obligations under the Division’s policy AP 5-411”. The meeting, characterized by the Division as disciplinary, was scheduled for April 20, 2022.

62. Notwithstanding the Division’s apparent frustration with obtaining updates from the Grievor and Association, Mr. Ross agreed in cross-examination the Grievor complied with Divisional policy. Moreover, he agreed that some of the information sought by the Division following the Grievor’s arrest is not referenced in the policy. He accepted that the policy requires the employee to report the charge but nothing else. To the extent that the Division received additional information, Mr. Ross agreed that it was over and above what was required by the policy. He further acknowledged that the policy contemplates that an employee facing criminal or child abuse charges may be suspended without pay, not that they will be in all cases. He agreed that the Division has discretion to make that determination based upon the circumstances.

#### ***April 20, 2022 Investigation Meeting***

63. The Grievor attended the investigation meeting and answered the Division’s questions. In advance of the meeting, the Division prepared questions to be asked of the Grievor, however it did not provide them to him or the Association ahead of time. Mr. Ross testified that although the Grievor should have understood that the Division wanted to discuss the allegations and investigation, he was not provided with much other information about the meeting. Notably, Mr. Ross confirmed that the Division did not provide the Grievor with the notes of the students’ disclosure at any point prior to them being disclosed for this arbitration. Mr. Ross testified that he assumed the MPS had provided that information, but he acknowledged that it was possible that the Grievor was going into the meeting without knowledge of the allegations.

64. Conducted via videoconference, the investigation meeting was approximately 30 to 45 minutes long. Mr. Ross and the Division's HR Manager attended on behalf of the Division. Ms. Zaroda and Mr. LaRoche represented the Grievor.
65. During his direct examination the Grievor briefly testified regarding the investigation meeting. He agreed that the various notes of the meeting included in the Books of Documents generally and accurately reflected what occurred (Tab 21 Book of Documents is the Division notes, Tab 4 of Supplemental Documents is Zaroda's notes, and Tab 5 of Supplemental Documents is LaRoche's notes).
66. During the interview, the Division asked the Grievor why he had failed to provide updates. Mr. Ross testified that when this question was put to the Grievor he "looked confused and said he felt it was all going through the Association".
67. The Grievor told the Division that the police came to his house between December 6 and 15, 2021. When asked in cross-examination why he provided a date range, he explained that he was "overwhelmed and struggling" at the time. He was unclear at the time if the police investigation was continuing, and he indicated that there were ongoing court dates.
68. The Division also asked a series of questions during the interview based upon the students' allegations which emerged during their disclosures to the teacher on November 30, 2021.
69. The Grievor acknowledged during the interview that he was friends with the students' mother. He also indicated that the students played with his son. But he noted that he had not talked to them for a number of years.
70. In response to questions during the interview, the Grievor told the Division that he never invited the complainants for sleepovers and that they never slept over at his home. However, at the hearing, he acknowledged that they and their mother spent the night at his home on one occasion, albeit at her request. He agreed in cross-

examination that he did not mention that during the investigation meeting, on the basis that that he had not “invited” them, and their parent was present.

71. At the interview, the Grievor denied ever being alone with the students or that they ever slept in his bed. However, during his testimony, the Grievor acknowledged that there were times that the complainants were at his home without their parent present. In cross-examination, the Grievor also admitted to having been alone with the complainant. In response to counsel for the Association’s suggestion that the answer given by the Grievor to the Division during the interview was wrong, the Grievor responded, “you could say that”. In addition, although he denied taking the complainant to the beach alone, he acknowledged that the complainants had been in his house and at the beach when he was the only adult present. When asked at the hearing how frequently the complainants were in his house under his care, he estimated that it was about 10 times, but he could not specify the exact number.
72. During the investigation meeting the Grievor denied that he ever provided drugs, alcohol or cigarettes to the complainants at all or on school property as alleged. While testifying at the hearing, he maintained that denial. The PIS reflects an allegation of one of the complainants that when she was in Grade 9, the Grievor would bring her “joints” to school. The specific allegation is that the complainants would meet the Grievor at his Grade 6 classroom known as “the hut” and he would hide the joints in a plastic bag filled with chocolate. He agreed that his classroom was in “the hut”, and that the Middle School and Senior School are connected, but he denied the allegations of providing drugs to the students. It should be noted that the Grievor has not been charged with providing drugs or alcohol to minors, despite the reference to that allegation in the PIS.
73. Both during the investigation meeting and while testifying at the hearing the Grievor denied touching the complainant inappropriately as alleged.
74. He was also asked questions during the investigation and in cross-examination about texting with the complainants. He denied having done so when asked during

the investigation meeting. However, the notes reflect that he told the Division that the students' mother gave them his number to text him for a ride home or if they forgot their lunch. He testified that this was in his role as a family friend, not as a teacher. That said, he agreed that he was at the school because he was a teacher employed by the Division. The Grievor also acknowledged that had driven the complainants home along with his own child.

75. With respect to the allegation that he sent "creepy" text messages to the students, the Grievor responded during the interview that he did not do anything illegal and that he did not know what was meant by the term "creepy". He told the Division that he could not recall if he ever asked the complainants to delete any text messages from him. During the hearing he reiterated that he was not able to recall if he ever asked them to delete any text messages. Pressed by counsel for the Division as to whether he had made such a request, he responded "hypothetically".
76. The Grievor was further questioned about a statement made by the complainant's mother that he bought the students toys and gave them candy. He testified that it "might have happened once or twice".
77. Mr. Ross testified that some of the Grievor's answers during the interview seemed odd or inconsistent. He also noted that the Grievor's testimony was "surprising" with respect to texting with the students, and some other responses during the interview appeared to be inaccurate in light of the Grievor's evidence. Indeed, Mr. Ross felt that the Grievor had failed to inform the Division regarding some of the facts about which he testified at the hearing.
78. Notwithstanding any concerns that the Division may have had regarding the Grievor's responses during the investigation meeting, it did not change his status at that time and he remained on administrative leave with pay.
79. Following the investigation meeting, the Division wrote to the Association requesting clarification from the Grievor about whether he had been charged, the date of those charges, and it sought confirmation that the conditions set forth in the Undertaking

remained the only ones to which the Grievor was subject (Tab 22 Book of Documents). At this point, Mr. Garth Smorang, K.C., counsel for the Association, responded directly to the Division having been authorized to do so by its counsel, Mr. Simpson. In his letter to the Division, counsel for the Association wrote that he consulted with the Grievor's criminal lawyer and confirmed that the Grievor had been charged, that the conditions in the Undertaking provided earlier to the Division were the only ones in effect, and that there were recurring remand dates that the Grievor was not obligated to personally attend. Counsel added that "the next communication you will receive regarding the status of the criminal matters will be once we know when the trial will occur" (Tab 23 Book of Documents).

80. On May 5, 2022, the Division responded to Mr. Smorang, in part, by repeating its expectation that the Grievor "will immediately advise the Division of any changes to his status, including the laying of new charges or changes to the existing charges, changes to the conditions to which is subject, or any other change material to this very serious matter" (Tab 23 Book of Documents).
81. Mr. Ross stated that at no time did the Division attempt to interview the students as part of its investigation. That decision, he said, was motivated by the Division's desire not to retraumatize students. He also testified that the Division did not interview their mother because they were, by that time, over 18 and, as such, the Division would require their consent to speak with their parent.

### ***Surrender of Teaching Certificate***

82. On May 6, 2022, the Province's Minister of Education and Training wrote to the Grievor (Tab 24 Book of Documents). In that letter, the Minister cites the Grievor's pending criminal charges, stating that they "raise significant concerns about your continued possession of" a teaching certificate. The Minister added that he was "considering an interim suspension" of the teaching certificate until such time as the criminal charges were concluded, but offered the Grievor an opportunity to provide



a submission as to why such a suspension was not appropriate. The Grievor testified that he sought advice from the Association.

83. In response to the Minister's correspondence, Mr. Smorang wrote to the Minister, attempting to persuade him that the teaching certificate did not need to be suspended. Counsel contended that it was neither appropriate nor in the public interest to suspend the certification (Tab 25 Book of Documents). Noting that the trial was not likely to be concluded for a significant period, counsel stated:

As such, his financial well-being is extremely dependent on the Division continuing to pay him while he is on administrative leave. [The Grievor] is concerned, as am I, that if he was to voluntarily surrender his teaching certificate, the Division might use that as an excuse to change his status to unpaid leave, which would have catastrophic effects on him.

[The Grievor] has no intention of seeking employment as a teacher elsewhere while he is on paid administrative leave. He is focused on defending himself against these allegations and is confident that he will, in due course, be acquitted of all charges. (emphasis added)

84. Mr. Smorang's correspondence to the Minister contains some limited inaccuracies which were seized upon by the Division at the hearing. The Grievor testified that he reviewed counsel's correspondence to the Minister prior to it being sent. However, counsel for the Association subsequently advised the Board that the Grievor was mistaken in this regard and the letter had not been provided to him prior to it being sent to the Minister. That said, the Grievor did receive a copy of the letter after it was sent. He agreed that the letter was not entirely accurate and further acknowledged that he did not take any steps to correct the information with the Minister. Given, in particular, that the Grievor did not have an opportunity to review counsel's letter prior to it being sent to the Minister, and further given that he ultimately surrendered his teaching certificate, the Board does not believe that the inaccuracies contained in the letter are at all relevant to our determination.
85. By letter dated June 6, 2022, the Minister replied to Mr. Smorang to advise that he intended to suspend the Grievor's teaching certificate and refer the matter to the

provincial Certificate Review Committee (“CRC”) for investigation and report (Tab 26 Book of Documents). In the alternative, the Minister offered that the Grievor could voluntarily surrender his teaching certificate and provide a written undertaking that he would not use his status as a certified teacher in any way until a hearing of the CRC was scheduled following the outcome of the criminal charges against him. The Grievor was given 14 days to make his election. In cross-examination, the Grievor accepted that the Minister’s letter dated June 6, 2022 was brought to his attention and that it was clear at that point that he would not have a teaching certificate.

86. Neither the Minister’s letter to the Grievor, Mr. Smorang’s response on his behalf, nor the Minister’s reply were provided to the Division. The Grievor acknowledged that this would have been relevant information to the Division. Indeed, the day prior to the Minister’s first letter regarding the Grievor’s teacher certification, the Division had written to counsel for the Association repeating its expectation that the Grievor immediately advise of “any changes to his status” and “any other change material to this very serious matter”. The Grievor testified that he assumed the Association would pass the information on to the Division and he was surprised to find out that the Minister’s letter was not provided.
87. By letter dated June 24, 2022, the Grievor voluntarily surrendered his Teaching Certificate “until the outcome of the court matters”. He further agreed not to use his status as a teacher in any way in the meantime (Tab 28 Book of Documents). The Coordinator of the Professional Certification Unit acknowledged receipt of the Grievor’s letter and the surrender of his teaching certificate on June 29, 2022 (Tab 30 Book of Documents).
88. Also on June 24, 2022, Ms. Zaroda responded to an email sent by the Division inquiring as to whether “there has been any change in status regarding this matter” since the last update on May 5, 2022 (Tabs 27 and 29 Book of Documents). Ms. Zaroda’s reply indicated that there was no change in status at that time. It was not until July 7, 2022 that Ms. Zaroda sent an email to the Division advising that the

Grievor complied with a request by the Minister and surrendered his teaching certificate pending the final disposition of his criminal charges and a subsequent hearing of the CRC (Tab 31 Book of Documents).

89. Despite acknowledging that the Division had communications with the Coordinator of the Professional Certification Unit, Mr. Ross claimed that the Division was “completely unaware that the Minister was looking into” the Grievor’s certification. He noted that the Division did not receive Tabs 24 or 25 of the Book of Documents until after this arbitration was convened. Mr. Ross said that the status of the Grievor’s certification was incredibly relevant, but the Division was “not aware that this was ongoing”. He testified that the Division was “very surprised” upon discovering the Minister’s involvement and the Grievor’s surrender of his teaching certificate. He claimed that this information was “out of the blue” and the Division had no previous awareness of these developments. It was acknowledged by Mr. Ross in cross-examination that the Grievor and Association were not specifically instructed by the Division to inform it about changes to his teaching certification; however, he added that the Grievor was repeatedly told to update the Division respecting any changes in his status.
90. The Grievor acknowledged that having surrendered his teaching certificate, he is unable to teach. He admitted to being concerned that it might negatively affect his status of being on administrative leave with pay. He conceded that his goal in having the Association’s counsel write to the Minister on his behalf was to retain his teaching certificate so that he could continue receiving his pay. Indeed, as noted, Mr. Smorang’s letter refers to the Grievor’s concern that if he was to “voluntarily surrender his teaching certificate”, it could be used by the Division as a pretext to change his status to unpaid leave.

***Child and Family Services Contacts the Division and the Grievor***

91. Mr. Ross testified that on June 30, 2022, Child and Family Services of Central Manitoba (“CFS”) spoke to him about the Grievor. He recalled that an Intake Worker

from CFS inquired about whether the Grievor had been removed from teaching duties. Mr. Ross testified that the Intake Worker told him that even if the charges against the Grievor were dropped, the agency believed he “should not be in class” and that she would seek to add his name to the child abuse registry. Apparently, the Intake Worker told Mr. Ross that she would follow up with a letter shortly. However, the promised letter did not arrive in the days or weeks that followed, and Mr. Ross eventually followed up with CFS.

92. On November 7, 2022, CFS sent a letter (signed by the Intake Worker who met with Mr. Ross in June and an Intake Supervisor) regarding the Grievor (Tab 43 Book of Documents). That letter states, in part, that:

In the event that [the Grievor’s] criminal charges are dropped our agency still believes him to be at risk and will be presenting him to the child abuse committee for a hearing on whether or not he will be placed on the child abuse registry. The agency’s position at this time is that [the Grievor] should not be allowed any unsupervised access to anyone under the age of 18 years old until otherwise directed by CFS.

93. Mr. Ross confirmed that the letter is consistent with his conversation with the Intake Worker which occurred on June 30, 2022.
94. Citing concern for his child and the pending criminal charges, CFS also contacted the Grievor on or about June 30, 2022. CFS completed a Household Safety Plan and Family Mapping document which set forth conditions respecting contact with his own child to which the Grievor agreed (Tab 7 Supplemental Book of Documents).
95. The Grievor testified that his child did not disclose concerns to CFS and continued to reside in his home.
96. By letter dated January 24, 2023, CFS advised the Grievor that it closed his protection file effective November 30, 2022 (Tab 7 Supplemental Book of Documents). That said, the letter also cautioned the Grievor about “being alone with any children under 18 due to the sexual abuse allegations and charges”. As of the date of the letter, the Grievor’s son was over the age of 18. The Grievor said that

he was not aware of CFS's letter to the Division dated November 7, 2022 until it was disclosed in advance of this arbitration hearing.

97. The Grievor did not advise the Division about the contact with CFS. He also testified that CFS did not tell him that they were going to contact the Division and he was not aware if CFS did in fact contact the Division on June 30, 2022. The Association ultimately informed the Division of the CFS investigation in an email dated August 16, 2022 (Tab 34 Book of Documents).

***Decision to change Grievor's status to Administrative Leave without pay***

98. After being advised that the Grievor had surrendered his teaching certificate in response to communication from the Minister, and the communication with CFS, the Division determined that it had to evaluate the Grievor's status. Mr. Ross testified that all of the available information was reviewed. He noted that the Grievor could no longer fulfill his role as a teacher having surrendered his certificate.
99. Having regard to its past practice in relation to Divisional teachers who were restricted from teaching, the current climate in the Province regarding sexual misconduct by teachers, and the reputation of the Division, a determination was made to place the Grievor on unpaid leave.
100. By letter dated July 14, 2022, the Division advised the Grievor that it had conducted an assessment and, in light of the surrender of his teaching certificate, determined that his administrative leave would be without pay effective the first day of the 2022/23 school year. The letter states, in part, the following:

The surrender of your teaching certificate and your undertaking to the Minister amounts to material changes in circumstance, as you are not entirely precluded from working as a teacher in the Province of Manitoba. Accordingly the Division has conducted an assessment as to the circumstances of your leave and, in light of this new information, the Division has determined that your Administrative Leave with pay will be converted to Administrative Leave without pay. As a courtesy, by this

letter, we are providing notice that the change will be effective on the first day of the 2022/23 school year.

101. The Association and Grievor filed grievances challenging that decision (Tabs 35, 36, and 37 Book of Documents). The grievances were denied by the Division on September 14, 2022 for reasons including, but not limited to, the fact that the Grievor had surrendered his teaching certificate and was therefore no longer permitted to teach in the Division (Tab 39 Book of Authorities).
  
102. According to Mr. Ross, by July 14, 2022, the Division was aware of several significant changes in circumstances that caused a re-evaluation of the Grievor's status. He cited the Grievor's surrender of his teaching certificate which prohibited him from teaching, the information provided by CFS which warned of that agency's concerns with the Grievor having unsupervised access to minors and its intent to present him to the child abuse committee for a hearing, and a heightened awareness of teacher sexual misconduct in the Province in response to media reports in the spring and early summer of 2022 concerning sexual misconduct by teachers involving students. That said, the Division's letter advising the Grievor of the change in his status only referred to the surrender of his teaching certificate and the associated undertaking to the Minister as the "material changes in circumstance".
  
103. Regarding the heightened awareness in the Province of sexual misconduct by teachers, Mr. Ross testified that the issue was "blowing up" and there were calls from the Province regarding mandatory training and potential legislation respecting teacher misconduct. He referred to media coverage of similar charges brought against teachers recently (Tab 11 of Supplementary Docs). Mr. Ross said he is responsible for the care and trust of children and that "all Divisions are under the spotlight" given the current climate. He claimed that as each successive case of misconduct was publicized, the spotlight on school divisions became increasingly intense.

104. The Grievor, during cross-examination, accepted that there is heightened public awareness of sexual assault allegations involving staff in schools. He said that he was aware of some recent cases reported by the news media. He said he was aware that of proposed legislation which addressed teacher discipline in part through public access to the disciplinary records of teachers.
105. Mr. Ross testified that, as a result of these circumstances, the Division considered the impact upon its reputation. Asked in his direct examination how continuing to pay the Grievor would affect the reputation of the Division, Mr. Ross testified that the school is located in a small community and someone could inadvertently become aware of the serious charges against the Grievor. He added that the provincial climate was placing intense pressure on Divisions and teachers. Mr. Ross testified as to his belief that the Grievor's current charges of sexual assault combined with his relevant disciplinary history, imperilled the Division's reputation. He expressed the view that its reputational interest would have been "significantly damaged" by continuing to pay the Grievor who no longer possessed a teaching certificate.
106. Mr. Ross spoke about the public trust and the Division's responsibility to students. He said that educators are *in loco parentis* and are responsible to look after children during the day. He maintained that it is essential that the Division maintain the trust of the public. In his view, if that trust is broken, then all of the Division's critical relationships are compromised.
107. In cross-examination, the Grievor agreed that it is the obligation of the Division and its staff to ensure the safety and wellbeing of its students. He further agreed that parents need to have the utmost confidence in their children's wellbeing. The Grievor acknowledged that the obligation of staff to protect students extends to all students and is not limited to those in his classroom. Teachers supervise students that are not in their classrooms. In response to the suggestion that any conduct by a teacher that caused harm to a student would be detrimental to the Division, the Grievor agreed that would be the case particularly if the information became public.

108. During cross-examination, Mr. Ross agreed that the Division's July 14, 2022 only mentioned the Grievor's surrender of his teaching certificate when suggesting that a material change of circumstances occurred. He acknowledged that the surrender was significant to the Division. He also agreed that the letter makes no mention of communications with CFS, but he added that the Division had not received the letter that CFS had promised. However, Mr. Ross reiterated that a number of circumstances led to the decision to change the Grievor's status including the surrender of his teaching certificate, the communication with CFS, the need to protect the reputation of Division, and the "fire storm" in the Province at that time relating to allegations of sexual misconduct by teachers.

### ***Charges not made Public***

109. The criminal charges against the Grievor have not been made public. Confidentiality orders relating to the charges have been imposed by the criminal courts pursuant to the *Criminal Code*.

110. However, Mr. Ross testified that he was personally aware that the news media was intensely seeking out stories regarding teacher misconduct. He testified to receiving numerous calls and Freedom of Information requests from the media. Because of the recent intense media coverage of teacher misconduct cases, Mr. Ross also expressed the view that "this event is on the radar of our staff".

111. With respect to the Grievor's case, Mr. Ross said that he had discussions with the media during which the Grievor's name was raised. He refused to discuss the circumstances on the basis that it is a personnel matter. Mr. Ross agreed that nothing about the Grievor's criminal charges has been published to date. However, he testified that he continues to scan media reports because he was told by a reporter that a story would be published.

112. Asked why the Division has not itself disclosed the information about the Grievor, Mr. Ross said that the Division remains concerned about protecting the students



who made the complaints. They reside in a small community where most people know each other. In addition, Mr. Ross acknowledged that he did not want to further damage the reputation of the Division and it wanted to protect all those involved.

***Consideration of Alternate Duties for the Grievor***

113. The Grievor testified that the Division did not have any discussion with him about returning to teaching duties or placing him in an alternate assignment since placing him on administrative leave on November 30, 2021. However, the Grievor confirmed in cross-examination that he is not seeking to return to work at this time. He also accepted that he never asked the Division to explore alternate duties that he could perform and further, that he is not aware of any suitable position in the Division that does not involve contact with children. As such, the Grievor could not contest the Division's position that it has no suitable alternate assignment for him that does not involve contact with children.
114. Asked if he considered other positions that the Grievor might perform for the Division, Mr. Ross testified that he had a discussion with his Assistant Superintendent about other positions for the Grievor. They concluded that there was no other job in the Division that the Grievor could perform that did not require special qualifications or did not interact with students. He added that the Division's clerical staff are paid less than the Grievor is earning in his current job. He also pointed out that the Division is very small and does not have anyone off independently working on projects.
115. Mr. Ross accepted that he did not reach out to the Grievor or the Association about alternate duties, and added that "we did not see anything". However, he also noted that neither the Grievor nor his representatives initiated any such discussion.

### ***Past Practice of Division***

116. The Division has limited experience with its staff facing criminal charges. In 2009, a teacher was arrested for historical abuse allegations. That individual was placed on administrative leave without pay “as a result of conditions of release stemming from charges which currently prevent you from working” (Tab 45 Book of Documents). However, the Division afforded the employee an “opportunity prior to the Administrative Leave of Absence to seek a variance of the conditions of release” for a short period “with deduction at the sub-rate”. The grievance states that during that period, the grievor was permitted to “work at home on paid administrative leave” but was paid at the rate the Division pays substitute teachers and was not paid at all for one day. Ultimately, the Crown did not authorize charges against the employee, and he was allowed to return to work. The Association grieved the Division’s action. Mr. Ross confirmed that the grievance did not ask for pay for period he was prohibited from teaching. A settlement was subsequently concluded which provided compensation to the grievor effective the date crown determined that charges would not be authorized (Tab 9 Supplemental Book of Authorities).
117. According to Mr. Ross, another example of past practice arose from a teacher being charged in 2015. The conditions of her release prevented her from fulfilling her employment obligations as a teacher and, as a result, the Division placed her on administrative leave without pay. A grievance was filed but was later withdrawn by the Association as they were unable to contact the grievor. Her teacher certification was permanently suspended, and she never returned to teach in the Division.
118. Mr. Ross testified that in both of these prior cases, where the teacher was subject to conditions that precluded them from working, the Division suspended them (placed them on administrative leave) without pay. However, he acknowledged that this is the first case in which a teaching certificate of a teacher in the Division has been surrendered or revoked.

119. The Grievor said he was not aware of the specifics of any Divisional past practice other than the two cases which are set out in the documentation provided at this arbitration hearing. He accepted that Policy AP 5-411 contemplates a suspension without pay if the offence being investigated is of a nature that would make the employee unable to perform their duties.

***Financial Impact on Grievor and Financial Circumstances of Division***

120. The Grievor obtained alternate employment on July 11 or 12, 2022 (prior to the Division's decision to change his leave to without pay). His starting wage was just under \$20.00 per hour, but it was increased in January of 2023 when he was offered a team leadership position. His annual income is approximately \$48,000 which is roughly half of what he earned as a teacher (\$98,000).

121. He described the financial impact of the Division's decision to suspend his pay as "very difficult" and has resulted in the depletion of his savings. That said, the Grievor did not testify that he has been unable to meet his financial obligations. He also stated that, if the Arbitration Board allowed the grievance and reinstated his pay, he nevertheless intended to continue working at his new job while contesting the criminal charges. Accordingly, he is seeking pay from the Division less his mitigation efforts.

122. The Grievor accepted that he commenced working in his new job prior to the Division altering the status of his pay. He did not normally seek alternative employment in the summer. He agreed that he sought employment at that time because he thought the Division might convert his administrative leave to without pay.

123. The Division operates with taxpayer funds. Its 2022 expenses were over \$15 million. The Division has recently had some surpluses. In cross-examination, it was suggested to Mr. Ross that if the Board allowed the grievance, the total amount of compensation being sought by the Grievor consisted of back pay of approximately \$50,000 and a further payment of approximately \$50,000 until the trial is completed.

It was suggested that this was a very minor amount in the context the Division's overall budgeted expenses, but Mr. Ross maintained that there would be a cost to the Division and given its increased student population, the Division needed to hire more employees.

124. The Grievor agreed that the Division is small. He also accepted that if the Division must maintain his pay despite his inability to teach, it must also hire and pay someone else for the work that he is unable to do. That would mean, if the trial proceeds next year, the Division would have to pay him for 2 ½ years while being on administrative leave if the grievance is allowed. That amounts to the Division paying him roughly \$200,000 for which the Division would not receive his services.

### **III. Positions of the Parties**

#### ***Association Submission***

125. Counsel for the Association referred to the well-established principles that apply when an employee charged with a criminal offence is suspended or placed on administrative leave by their employer. Rather than focusing exclusively on the employer's desire to protect its operations, integrity and reputation, the arbitral jurisprudence now firmly establishes that the employee's legitimate interests in preserving their employment and income must be given equal consideration. In balancing these two legitimate but competing interests, such cases require arbitrators to consider whether the presence of the grievor as an employee can be considered to present a reasonably serious and immediate risk to the legitimate interests of the employer.
126. The potential impacts of an employee's criminal charges on their employer's legitimate interests, including its reputation, must be considered from the perspective of "fair minded and well-informed member of the public" and requires an objective assessment. The nature of the offence, the work performed by the employee, and the nature of the employer's business are relevant considerations.

127. The Association points out that arbitrators in Manitoba have clearly stated that suspension and pay are discreet issues requiring independent analysis. Furthermore, the presumption is that a suspension with pay is the appropriate response and that the removal of an employee's pay is only permissible in extraordinary circumstances. As a result, in Manitoba, it has been held that even where an employer is justified in suspending an employee facing criminal charges, arbitrators must continue their analysis and consider whether the employer's interests can only be protected by withholding the employee's pay. Recognizing that the employee is presumed innocent, arbitrators have stressed that they should not be deprived of their pay unless the employer can establish the necessity of doing so.
128. Highlighting this principle, counsel referred the Board to several cases in which arbitrators determined that although the suspension and removal of the employee from the workplace was reasonable, the employer's decision to withhold their pay was not.
129. The Association submitted that arbitrators insist that employers bear an onus to show that they investigated the criminal charges to the best of their ability. Although the burden on employers is significantly reduced where police have investigated the matter, employers remain obligated to investigate to the best of their ability in a genuine attempt to assess its legitimate risks.
130. Counsel argued that just because the Grievor faces criminal charges is not enough to justify placing him on administrative leave without pay. The fact that an employee faces even reprehensible charges must be tempered by the reality that they might not be true. That presumption of innocence required the Division investigate and closely examine the allegations with a view to determining the risk of conviction. The charges faced by the Grievor are "historic", dating from as far back as 2010. Counsel characterized the particulars as being vague given that the conduct is alleged to have occurred between 2010 and 2018. In addition, counsel noted that

the complainant and her sister were never the Grievor's students, they are no longer students in the Division, and the charges relate to allegations which took place outside of the school while he was not performing his duties. Faced with these historic and vague allegations, the Grievor has maintained his innocence. He pleaded not guilty and will defend himself at his criminal trial.

131. Commenting upon the Division's investigation, counsel contended that the Division entirely relied upon the Grievor to do the investigation for it. The Grievor provided the Division with all of the information required pursuant to the applicable policy and submitted to an investigative interview during which he answered all of the questions put to him. He did not remain silent. Any minor inconsistencies or vagueness in his responses must be considered in light of the fact that he was given no advance warning of the nature of the questions that the Division planned on asking. In addition, counsel pointed out that the Division did not attend any of the Grievor's court dates, it did not file an application in court to obtain additional information until after this Board was convened, it failed to contact the Crown or seek the advice of a criminal lawyer, and it elected not to seek additional information from the students or their mother. Only after it made the decision to withhold the Grievor's pay, did the Division seek out additional information in an attempt to buttress its case.
132. The Association further submitted that arbitrators require employers to take reasonable steps to determine whether the risks to its interests could be sufficiently mitigated through closer supervision or assigning the employee to alternate duties. The Association claimed that the Division made no real effort to search for alternate assignments or to meaningfully consider whether its risk could be mitigated.
133. Counsel also asked the Board to consider the minimal financial cost to the Division of paying the Grievor while he awaits trial. Paying the Grievor in these circumstances would not adversely affect the Division's financial stability. The Division employs approximately 160 teachers and has salary expenses of over \$15 million. In that context, the requirement to pay the Grievor the difference between his teacher salary and his current earnings is approximately .3% of the Division's

salary budget. Furthermore, there is no evidence that any of the Grievor's co-workers would object to him being paid.

134. The Association also rejected the notion that the Division established a clear past practice. Counsel asserted that there is no past practice as this is the first occasion where a teacher has surrendered their certification or had it revoked. Moreover, it claimed that the previous cases relied upon the Division are not applicable. Counsel submitted that the 2009 case predates critical developments in the arbitral jurisprudence and the grievance was settled. He added that the 2015 case was grieved but not pursued as that grievor subsequently failed to respond to the Association and disappeared. As such, neither of those cases establishes a past practice upon which the Board can rely. The Association contends that this is a case of first instance.
135. The Association called the Division's concerns about when it became aware of the exact nature of the criminal charges a red herring. Counsel submitted that the Division was aware of the specific allegations on November 30, 2021 and it immediately placed the Grievor on administrative leave with pay on that date. Following the Grievor's arrest, the Division was provided with a copy of the Undertaking promptly and in accordance with Divisional policy. From the Undertaking, the Division was aware of the arrest, the conditions of the Grievor's release, and the offences alleged.
136. Furthermore, despite the fact that the conditions of the Grievor's release expressly permitted him to continue teaching for the Division, no meaningful consideration was given to keeping the Grievor in the classroom. Counsel for the Association referred to Mr. Ross's testimony in which he stated that returning the Grievor to work was "not top of mind". In addition, the Association submitted that the Division failed to engage with the Grievor about alternate work that he could perform.
137. The Association contends that when the Division interviewed the Grievor in April of 2022, it had information about the students' allegations, the Grievor's arrest, the

criminal charges he faced, and the time frame of the allegations. Following that meeting, during which the Grievor answered all the Division's questions, all of the reputational risk to the Division of continuing to pay the Grievor was known. In addition, the Division possessed the information regarding the Grievor's disciplinary record, the potential for media involvement, and the potential reaction of the local community. Counsel for the Association argued that despite having all of that information, the Division continued to pay the Grievor. In the Association's view, it is particularly significant that the Division possessed information upon which to assess its reputational risk, however it did not seek to change the status of his pay until July of 2022. Furthermore, although the Division referred to media reports of other cases involving alleged teacher misconduct, the allegations faced by the Grievor have not been made public in the media.

138. By removing the Grievor from the classroom in November of 2021, the Division took steps to safeguard its operations, reputation, and the safety of its students. That response was not grieved because the Division also continued to pay the Grievor. Although the Division says that the surrender of the Grievor's teaching certificate constituted a material change of circumstance, the Association says that the Minister's action was really no different from what the Division did in November of 2021. By ensuring that the Grievor would not be able to teach anywhere in Manitoba, the Minister took the same precautions as the Division had done. The Association submits that the actions of the Minister and the surrender of the Grievor's teaching certificate do no amount to a material change with respect to the potential risk to the Division's reputation. It is not disputed that the Division had absolutely no intent of returning the Grievor to the classroom prior to the resolution of his criminal charges. As such, the Association says that the surrender of the teaching certificate would not cause a reasonable and well-informed member of the public to conclude that protection of the Division's reputation required the withholding of the pay from the Grievor.



139. Despite the nature of the criminal charges faced by the Grievor, counsel for the Association states that there is no case which sets an inflexible rule that an employee of a school division charged with such crimes must be suspended (or placed on administrative leave) without pay. The Association maintained that the Division failed to meet its onus in this matter and as is pointed out in a leading case, in close cases, the onus often makes the difference.
140. The Association requested that the grievance be allowed and the Grievor receive retroactive pay from September of 2022 and that his status be returned to administrative leave with pay. The Association added that the amount of compensation owing to the Grievor would be reduced by his mitigation efforts.
141. In support of its position, the Association relied upon the following authorities:
- a) *St. James-Assiniboia School Division and St. James-Assiniboia Teachers Association (MTS)* (2014) 244 L.A.C. (4<sup>th</sup>) 361;
  - b) *Ontario Jockey Club v. Mutual Employees' Association, S.E.I.U., Local 528* (1974) 5 L.A.C. (2d) 176;
  - c) *Phillips Cables Ltd. v. U.S.W.A., Local 7276* (1974) 5 L.A.C. (2d) 274;
  - d) *T.E.A.M. and Bell MTS Inc.* 2023 CarswellMan 28;
  - e) *Bell MTS Inc. and T.E.A.M.*, Arbitrator D. Jones, dated June 15, 2020;
  - f) *St. Amant Inc. and MGEU*, 2010 CarswellMan 873;
  - g) *Cabiakman c. Industrielle Alliance, cie d'assurance sur la vie*, [2004] 3 S.C.R. 195 ;
  - h) *Concordia Hospital and CUPE, Local 1973*, 2010 CarswellMan 864;
  - i) *Toronto District School Board and CUPE, Local 4400*, 3013 CarswellOnt 8216;
  - j) *Bell Canada and C.W.C.*, (1991) 24 L.A.C. (4<sup>th</sup>) 116;
  - k) *Basra v. Canada (Deputy Head – Correctional Service)*, 2012 CarswellNat 1638;  
and

- l) Brown & Beatty, *Canadian Labour Arbitration* (5<sup>th</sup> ed.) at 7:31 – Criminal Conduct – Criminal Charges.

***Division Submission***

142. There is no significant dispute between the parties regarding the applicable principles that govern cases of this type. All of the cases are dependent upon their own facts and the Division's counsel acknowledged that his authorities tend to support suspension without pay, while the Association's cases go the other way.
143. The Division was critical of the Association's position that the Division did not make the decision to place the Grievor on administrative leave without pay sooner than it did. Counsel referred to the well-established arbitral principle which places an onus on employers to investigate and a continuing onus to consider new circumstances which may come to its attention during the course of an employee's suspension. In light of those principles, counsel cautioned the Board against deciding this case in a manner which would thereafter obligate employers to make snap judgements about employees facing criminal charges. Penalizing employers for investigating thoroughly and then thoughtfully reflecting on the matter prior to deciding to withhold the pay of an employee who is facing criminal charges is inconsistent with the caselaw and unreasonable.
144. The Division submitted that the grievance should be dismissed and the Grievor's administrative leave should continue to be without pay. The Division's reputational interest in these circumstances was significantly impacted by the serious nature of the charges against the Grievor, the surrounding circumstances and details leading to those charges, the nature of the Division's operations, the communications initiated by CFS, and the surrender of the Grievor's teaching certificate which prohibits him from teaching. Although the Division agrees that exceptional circumstances must be present to warrant the imposition of a suspension (or administrative leave) without pay, it maintained that this case is exceptional. The

test to be considered by the Board is an objective one – what a well-informed, reasonable person would conclude based upon all the available information.

145. Considering the offences faced by the Grievor in the context of his position as a teacher, along with the nature of a school division, the Division maintains that the facts of this case differ markedly from the cases upon which the Association relied. While accepting that there is no blanket rule that a teacher facing sexual assault allegations should be suspended without pay, counsel noted that there is similarly no rule that an individual in that circumstance should continue to be paid pending the outcome of the charges. However, counsel for the Division bluntly stated that if this Board concludes that this Grievor should continue to receive his pay in light of all of the information available, that is effectively what we would be saying. Criminal charges alleging that a teacher committed sexual offences against a child who is a student in the Division are the most egregious circumstances imaginable and strike at the heart of the Division's mandate. Counsel for the Division maintained that if the Board allowed the grievance, such a decision would "move the goalpost" too far. The Division maintains that this case falls within the category of "exceptional circumstances" in which it is appropriate that pay be withheld from an employee in order to properly safeguard the reputation of the employer.
146. The Division submitted that the surrender of the Grievor's teaching certificate was a critical factor. It maintains that the surrender speaks to the reputational risk issue and also creates a separate and additional ground for withholding the Grievor's pay. Voluntarily surrendering his certificate meant that the Grievor was legally ineligible to perform the duties for which he was hired. That alone, according to the Division, constitutes grounds to deny the Grievor his pay.
147. Past practice was also relied upon by the Division. Counsel stated that the Division has a clear past practice of not paying employees who lose the ability to perform their duties. In those cases, the Division states that its practice has been to place the employee on leave without pay. Indeed, despite the Association's attempts to suggest that this is a case of first instance, counsel submitted that there is no

evidence of the Division following any other past practice. He argued that when teachers have been rendered ineligible to teach in the past, the Division has a consistent practice of not paying them during the period of their ineligibility.

148. The seriousness of the charges and their relation to the Grievor's work as a teacher was underscored by the Division. Here, the students disclosed to another teacher in the Division allegations of sexual assault over a period of time. In addition, they alleged that the Grievor furnished them with drugs on school property and sent "creepy" text messages. The Division treated the matter seriously and expeditiously by removing the Grievor from the school. Counsel said that the Division's action is indicative of its prime interest being the well-being of students.
149. While the Grievor was initially placed on administrative leave with pay, counsel noted that it was always the Division's intent to investigate as was specifically indicated to the Grievor in its November 30, 2021 letter. Counsel said that the Division's investigation could not commence immediately given the direction from the MPS not to interfere. Moreover, counsel criticized the alleged failure of the Grievor and Association to provide updates to the Division as it directed and as they promised. The failure to provide relevant information was particularly apparent with respect to when the Grievor was formally charged. Despite its numerous attempts to obtain information about the formal charge, the Division states that it never received a copy of the Information and charges were not confirmed until early May of 2022. While acknowledging that the Division perhaps could have contacted the Crown or engaged criminal counsel, counsel noted that it was promised updates and, in any event, the Board should find that an employee is obligated in these circumstances to keep the employer apprised owing to the common law duty of fidelity and loyalty to the employer.
150. Once the Division was satisfied that it would not be interfering with the criminal investigation, it promptly commenced its own investigation. Counsel was critical of the Grievor's responses during the April 20, 2022 investigation meeting, which he characterized as "cute but misleading". He said the Grievor's answers should cause

the Board concern. Particularly in light of the Grievor's testimony at the hearing, counsel for the Division suggested that during the investigation meeting the Grievor attempted to convince it that he had virtually no interaction with the students. The picture which emerged at the hearing, however, was far different according to counsel for the Division. He pointed to several inconsistencies between what the Grievor said to the Division and his testimony before this Board.

151. Counsel for the Division also criticized the Grievor for failing to provide timely updates to the Division about the Minister's involvement leading to the surrender of his teaching certificate. The Division was never advised of the correspondence relating to the teaching certificate which was exchanged in May and June of 2022. Although the Grievor agreed at the hearing that the information regarding his certification was relevant, and he that he knew on June 6, 2022 that he would soon lose his certification, the Division was not advised that the teaching certificate was surrendered until July 7, 2022. Counsel for the Division suggested that the failure of the Grievor to inform the Division of this critical information was because he was concerned that the loss of his certification would impact his pay.
152. The Division also asked the Board to consider the Grievor's disciplinary history. Counsel submitted that it is appropriate to consider prior discipline where it is linked to the reputational issue. The circumstances of the previous discipline involve suspensions imposed on the Grievor in 2012 for making inappropriate, sexually graphic remarks to a group of Grade 5 students during class, and by removing a student with special needs from school property without the permission of the parents and after being told not to do so. Considering the Grievor's discipline record in the context of the disclosures made by the students and the criminal charges it is clearly relevant. Counsel noted that the discipline was imposed in 2012 which is when some of the allegations of criminal conduct are alleged to have occurred. Counsel for the Division contends that the combined effect of the disclosure leading to criminal charges and the Grievor's past discipline has a significant impact on the Division's reputational interest. He added that the objective test to be applied

involves consideration of what a reasonable and well-informed person would conclude.

153. In response to the Association's submission that the Division failed to consider alternate duties for the Grievor, counsel for the Division pointed out that the Grievor did not ask the Division to explore other jobs that he could do. Furthermore, neither the Grievor nor Mr. Ross could identify any alternate position which did not involve interaction with children or require specialized training or qualifications. Clerical positions do not pay as much as the Grievor currently earns. Rejecting the notion that the Division gave no consideration to whether suitable alternate positions were available, counsel highlighted Mr. Ross's recollection of discussing the matter with the Assistant Superintendent and arriving at the conclusion that no such work was available. The Division further noted that the Grievor obtained other employment prior to the decision to withhold his pay. Counsel added that this was another relevant fact which the Grievor failed to disclose.
154. The Division also referred to the communication with CFS in late June of 2022. At that time the agency indicated that it planned to seek the Grievor's inclusion on the child abuse registry. The agency also advised the Division that the Grievor should not be left unsupervised with children. While CFS met with the Grievor the same day, during which time it raised concerns and set up a home plan, the Division was not notified of that contact by the Association until August of 2022. Counsel for the Division noted that the letter advising the Grievor of the change in his pay makes express reference to proceedings by or on behalf of CFS.
155. A heightened public awareness of teacher misconduct was cited by the Division as also being relevant to the consideration of its reputational interests. Counsel for the Division referred to the evidence of multiple high profile cases involving teachers which came to light at the material time. He submitted that the heightened awareness and the increasing pressure and scrutiny from the Province is relevant to the Board's consideration of what a reasonable, well-informed individual would think about continuing to pay a teacher who is facing charges of sexual assault and

sexual interference as a result of allegations from a student in the Division. Counsel added that it is not relevant that the Grievor's criminal charges have not become public.

156. The Division summarized the timeline of events. In late November of 2021, the students made a disclosure of serious misconduct by the Grievor and he was immediately removed from the classroom and placed on administrative leave with pay by the Division pending an investigation. In December of 2021, the Division was directed by the MPS not to interfere with its criminal investigation. The Division failed to receive promised updates from the Grievor or Association particularly in relation to when the Grievor was formally charged. By April of 2022, the Division was satisfied that it could proceed to conduct its own investigation without fear of interfering with the MPS and, as such, it interviewed the Grievor on April 20, 2022. Because the Division remained unclear about whether a police investigation was ongoing, following the meeting it asked for clarification relating to the charges. The clarification was provided in May of 2022. In June of 2022, the Division was contacted by CFS. In July of 2022, the Division was advised that the Grievor had surrendered his teaching certificate following intervention by the Minister. At that point, the Division says that it concluded its investigation and, based upon a material change in circumstances, determined that the Grievor's status would be converted to administrative leave without pay.

157. Counsel for the Division submitted that the Division investigated the matter to the best of its ability, considered new information as it became available, and properly evaluated its risk. The Division referred to leading authorities which indicate that some circumstances will require an employer to withdraw the pay of an employee facing serious criminal charges in order to protect the employer's legitimate interest. Indeed, as noted by Arbitrator Peltz in *St. James-Assiniboia School Division, supra*, allegations related to the sexual assault of young children are particularly serious and distinguish the present case from the authorities relied upon by the Association.

158. Having regard to the nature and circumstances of the criminal charges, the vital role played by teachers in society, and the business of the Division, counsel asked the Board to consider what a reasonable, well-informed member of the public would think if the Division had continued to pay the Grievor following the surrender of his teaching certificate. In light of the serious charges faced by the Grievor, the allegation that he furnished students with drugs on school property, his disciplinary history, the concerns raised by CFS, and the fact that he was ineligible to perform the duties for which he was hired, the Division contends that it would have harmed its reputation and eroded the trust of the public if the Grievor's pay was maintained in the circumstances. Furthermore, the Division submitted that there is no evidence of substantial hardship to the Grievor. He obtained alternate employment. In any event, the Division contends that the financial impact on the Grievor is not nearly significant enough to outweigh the reputational harm to the Division.
159. The Division contended that this case presents the type of exceptional circumstance discussed in the caselaw justifying the imposition of administrative leave without pay. The only logical outcome, it maintains, is for the grievance to be dismissed.
160. In support of its position, the Division relied upon the following authorities:
- a) *Ontario Jockey Club, supra*;
  - b) *St. James-Assiniboia, supra*;
  - c) *Nechako Lakes School District No. 91 and CUPE, Local 4177*, 2004 CarswellBC 3356;
  - d) *Langley (Township) and CUPE, Local 404*, 1995 CarswellBC 3154;
  - e) *Vancouver Coastal Health Authority and HAS*, 2018 CarswellBC 1320;
  - f) *Winnipeg (City) and Winnipeg Police Association*, 1992 CarswellMan 570;
  - g) *Edmonton Public Schools and CUPE (S.J.)*, 2013 CarswellAlta 390;
  - h) *Winnipeg Regional Health Authority and MNU (Ahmed)*, 2016 CarswellMan 90;
  - i) *Canadian Freightways Ltd v. Western Canada Council of Teamsters, Local 31*, 2000 CarswellNat 3910.



### ***Association Reply***

161. Counsel for the Association reiterated that, in Manitoba, the norm is for employees to be paid during the period of their suspension or leave pending the outcome of criminal charges. It was suggested that the authorities upon which the Division relied pre-dated changes in the arbitral jurisprudence requiring a separate analysis to determine whether the withholding of pay is necessary to protect an employer's legitimate interests and they are therefore distinguishable from this case.
162. The Association repeated its contention that the Division conducted no search for alternate positions for the Grievor.
163. It is the position of the Association that the Grievor was not the author of his own misfortune by surrendering his teaching certificate. Counsel said it was not fair to suggest that the Grievor made that decision knowing that it would justify the Division withholding his pay.
164. With respect to the role of CFS, counsel for the Association said that there is no evidence that CFS had the authority to keep the Grievor out of the workplace, the agency merely advanced a position.
165. Counsel also rejected the suggestion that the Division's investigation was hampered by the Grievor and the Association. While the Division expressed frustration that it did not receive the PIS or the Information, counsel for the Association noted that there is no evidence that the Grievor had either of those documents. Indeed, counsel referred to the fact that the PIS had to be obtained by the Division through an order of the Court. Counsel asked the Board to consider what additional information the Grievor could possibly have provided. He submitted there was no evidentiary basis to conclude that the Grievor impeded the Division's investigation.
166. In response to the Division's assertion that the Grievor and Association failed to inform it about the communications with the Minister, counsel submitted that when

there was a change in the Grievor's status, the Division was notified. Furthermore, the Association argued that the short delay in providing the notification was of no consequence as the Grievor had already been paid for that period of time and the Division ultimately determined that the change to his status and pay would be effective the first day of the 2022/23 school year.

167. Finally, the Association rejected the notion that the Board should rely on *obiter dicta* set out in the *St. James-Assiniboia case, supra* to find that allegations of sexual assault upon children is where the goal post for denying pay currently sits. Counsel argued that the Division maintained the Grievor's pay until it seized upon the surrender of his teaching certificate and reversed course in July of 2022. The Grievor was not teaching at that time and, therefore, the Association maintained that the surrender of his teaching certificate was not sufficient reason to withhold pay pending the outcome of the criminal charges that he denies and is contesting in court.

#### IV. Analysis

##### *The Law*

168. There is no substantial disagreement between the parties about the fundamental principles applicable in determining whether an employer is justified in suspending an employee without pay pending the outcome of criminal charges. The determination requires a balancing of interests. Employers have an interest in protecting their business and reputation. Employees, who are presumed not guilty of the charges, have an interest in maintaining their livelihood. These conflicting interests are both worthy of protection (see for example, Arbitrator Adams in *Phillips Cables, supra* at paragraphs 37 – 41). As a result, cases of this type can be particularly challenging for arbitrators.
169. The cases relied upon by the parties are fact specific. Although the Board carefully reviewed all of the authorities provided by the parties, given the clarity of the law

and the fact that each of the cases is dependent on the unique facts, it is not our intention to discuss each case in these reasons. This decision shall focus on the foundational principles to be applied. Suffice to say that some of the decisions provided to us upheld the suspension and/or the denial of pay to employees facing serious charges, and in others the opposite conclusion was reached. It should be noted that the cases do not distinguish between a leave of absence or a suspension. As Arbitrator Gibson noted in *St. Amant, supra* at paragraph 110, the characterization does not make a significant practical difference.

170. The decision in *Ontario Jockey Club, supra* is the seminal case setting out the principles which apply when determining whether a suspension of an employee pending the resolution of criminal charges is justified. Paragraph 6 of the decision states:

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 (sic) 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.

171. Clearly, the employer bears the onus of showing that the risk of harm to its interests justifies the imposition of a suspension and, if the suspension is without pay, that no lesser measure could adequately protect those legitimate interests. The onus extends to showing that the risk of harm to the employer's interests could not have been satisfactorily mitigated through techniques such as closer supervision of the employee or assignment to another position.

172. It is important to recall the facts and determination in the *Jockey Club* case. There, the grievor worked on machines and sold tickets for the employer. He was suspended following being charged with keeping a common betting house. He pleaded not guilty to the charge but admitted that he granted a person, whom he knew to be a heavy gambler, unrestricted use and access to his premises without questioning the purpose of such use. In the result, the suspension was upheld. The arbitration board concluded at paragraph 13 that, due to the nature of the charge: "it was a reasonable step in the interests of the Company that the grievor be suspended". Suspensions in these circumstances are "protective to the interests of the Company". As such, to justify a suspension "it must be found that the mere existence of the charge will substantially undermine the effectiveness of the employee in the work environment".

173. Another foundational case referred to by the parties is *Phillips Cables, supra*. In that case, the grievor was charged with theft of the company's product. The employer suspended him indefinitely pending review. Following a preliminary court hearing,

the charges against the grievor were “discharged”. He was reinstated by the employer shortly thereafter. He grieved on the basis on his assertion that the company promised him backpay if he was acquitted and, further, that the suspension was without just cause.

174. Writing for the majority in *Phillips Cables*, Arbitrator Adams established several early principles that continue to guide arbitrators. He accepted that an employer, depending upon the circumstances, has the power to suspend an employee charged with a criminal offence pending the outcome in the courts. Indeed, he envisaged many circumstances: “where a work-related criminal charge against an employee will substantially undermine his effectiveness in the work environment” adding that, “in these same circumstances it may not be fair to impose any financial obligation upon an employer where the employee eventually escapes the charges or does not”. However, he cautioned that arbitrators must remain “conscious of the competing interests of the innocent employee”. In order to justify a suspension, Arbitrator Adams commented that the competing interests must be considered. While an employer is entitled to protect its legitimate interests and reputation, the suspension of an employee in these circumstances is “a last resort” and may only occur where there is no practicable alternate means of minimizing the employer’s risks.
175. In *T.E.A.M and Bell MTS*, *supra*, Greenberg J., in the course of determining an application seeking judicial review of an arbitrator’s decision, summarized the applicable principles. Citing the Supreme Court of Canada’s decision in *Cabiakman*, *supra*, she commented that when an employee is charged with a criminal offence, a suspension without pay is reserved for exceptional circumstances. In allowing the application for judicial review, Justice Greenberg concluded that the arbitrator misapprehended the effect of a bail order applicable to the grievor. She further determined that the arbitrator failed to conduct a separate analysis of the decision to suspend without pay. The matter was remitted back to the arbitrator to be decided with the benefit of the Court’s reasons.

176. As Justice Greenberg correctly observed, arbitrators in Manitoba have determined that while employers have the power to suspend an employee without pay pending the outcome of criminal charges, evaluating the use of this power requires a distinct analysis from whether the suspension is justified. Additionally, arbitrators have concluded that a suspension (or leave of absence) without pay is only permissible where some lesser response, including a suspension with pay, would not achieve the necessary protection of the employer's interests.

177. This approach is evident in Arbitrator Peltz's decision in *St. James-Assiniboia School Division, supra*, a case upon which both parties relied. In that case, which Justice Greenberg quoted with approval in *T.E.A.M. and Bell MTS, supra*, the arbitrator considered a grievance filed on behalf of a teacher who was suspended without pay after having been charged with sexual assault. The alleged victim was an Educational Assistant employed at a different school in the same division. Arbitrator Peltz reviewed the facts of the alleged assault in considerable detail and comprehensively reviewed the case law. At paragraph 28, he observed that threats to the reputational interests of the employer should be considered from the perspective of a "fair minded and well-informed member of the public" and further that the "test for potential detrimental impact requires an objective assessment by the arbitrator of the potential for harm to the employer's interests".

178. At paragraph 32, Arbitrator Peltz commented on the requirement for a separate analysis of an employer's decision to suspend and the decision to suspend without pay:

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 a non-producing employee will also need attention.

In the result, the arbitrator upheld the suspension, holding that the employer established a potential risk to its reputation. However, he concluded that the

employer's decision to deny the grievor pay during the suspension was not justified and allowed the grievance. He did so on the basis that the grievor was removed from the workplace due to the primacy of maintaining confidence in the public school system, but the "corollary is that a suspension may need to be imposed with pay to avoid unfairness".

179. Arbitrator Peltz's analysis included consideration of the school division's position regarding the risk to its reputation as a public body dedicated to the education and protection of its students. At paragraph 126, he noted that an employer is entitled to suspend an employee facing criminal charges if retaining the individual would "potentially cause significant detrimental impact to the employer's business, reputation or ability to operate" adding that it is "not necessary to prove that there will be harm". Even in circumstances where the criminal allegations and charges have not been publicized and a publication ban has been pronounced, Arbitrator Peltz noted that "the potential for negative publicity and consequential reputational harm can be enough to justify suspension" if a fair minded and well-informed member of the public would reasonably lose confidence in the employer's ability to carry out its mandate.

180. The *St. James School Division* case includes a helpful discussion of the role of teachers in society and the inherent risk to a school division in continuing to employ a teacher facing sexual assault charges (see also in this regard, *Nechako Lakes School District No. 91, supra* in relation to the role of a school system at paragraphs 39, 42, and 45 ). In support of his conclusion that the school division was justified in suspending the grievor in that case, Arbitrator Peltz commented as follows at paragraph 129:

Leaving aside for the 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 expectation 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... 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.

Although the arbitrator concluded that the suspension in that case was justified, he specifically indicated that he did not intend to declare any universal rule. In addition, he noted that the admitted facts suggested that the grievor was guilty of a crime and that a well-informed person would "take into account all the known and apparent facts in this case" (paragraph 130).

181. As noted above, Arbitrator Peltz conducted a separate analysis respecting whether the grievor's suspension without pay was justified. Notwithstanding the finding that the grievor was appropriately suspended, the arbitrator concluded that a fair minded and well-informed member of the public would not question the employer's reputation if the teacher continued to be paid pending the outcome of his criminal trial. Referring to the grievor's interest in preserving his livelihood while defending himself in the criminal proceeding, and the presumption of innocence, Arbitrator Peltz concluded that the employer failed to meet the onus to prove that it was necessary to deprive him of his pay in order to protect its reputational interest.

182. However, the arbitrator proceeded to make comments which the Division here argues are of particular significance. Specifically, at paragraph 142, the arbitrator stated that the sexual assault charges against that grievor were not appropriately characterized as "extreme". He reserved the label of "extremely serious allegations" for cases involving such issues as the "murder of a school principal or sexual assault against young children". The arbitrator's decision that withholding the grievor's pay was unjustified was animated by his conclusion that the "incident was off site and not work related" and that "No children were involved". Although the Association



labelled these remarks *obiter dicta*, the Board is satisfied that they provide important context for the arbitrator's finding, and they are instructive.

183. The nature of the criminal charges faced by an employee and the fact that the charges are closely related to their duties may justify a decision to suspend the employee without pay in order that the employer's legitimate interests be protected. In *Winnipeg Police Association*, supra, Arbitrator Peltz considered grievances filed by two police officers who were suspended without pay upon being charged with serious offences involving a criminal conspiracy. The allegations concerned on-duty and work-related activities. One of the grievors was charged with 20 criminal offences. The other grievor had a lesser role in the alleged conspiracy and was charged with 2 offences. Significant evidence respecting the employer's past practice of continuing to pay officers charged with offences was considered by the arbitrator and found to be particularly germane. However, he nevertheless held that the suspension without pay of the officer charged with 20 criminal offences was justified. He expressed that conclusion as follows:

18. In summary, I accept that 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. I make this decision with some regret, in light of [the grievor's] outstanding service record and the hardship which has undoubtedly been caused by this suspension without pay.

19....I wish to add that the presumption of innocence, a principle argued forcefully..., is in no way undermined. I have not considered in any way the question of the guilt or innocence of the [grievor], since he is at this stage presumed to be innocent under our legal system. The criminal court will adjudicate the charges against him.

184. With respect to the other grievor in that case, Arbitrator Peltz concluded that the charges were "far less numerous and serious" and that grievor "was not alleged to be a central figure in the so-called break and enter ring, and there is no allegation of personal gain on his part". In consideration of those facts and the substantial evidence of the employer's past practice in dealing with officers facing criminal

charges, the arbitrator concluded that while the suspension of the officer was justified, that a suspension with pay was appropriate and he allowed that grievance.

185. In *St. Amant Inc.*, [2010] M.G.A.D. No. 34 (QL), the grievor was placed on a leave of absence without pay from his position as a support worker in a residence for disabled adolescents. The grievor was the subject of a police investigation concerning alleged abuse of an international student who was living at his estranged in-law's residence. At the time of the arbitration hearing, the grievor had not been interviewed by police, let alone charged with a criminal offence. Arbitrator Gibson concluded that the suspension of the grievor was justified; however, she was not persuaded that protection of the employer's reputation required the withholding of the grievor's pay. In so holding, the arbitrator noted that the employer had an established past practice of paying employees who were suspended, which buttressed her view that the public would not be outraged by payment to the grievor in this case.

186. Upon review of the arbitral jurisprudence in that case, Arbitrator Gibson concluded that there is a presumption that an employee's suspension pending the outcome of criminal charges should be with pay. She adopted the comments of Arbitrator Freedman in *Re Winnipeg (City) and Winnipeg Police Association (Eakin)*, 1998 CarswellMan 1392. The circumstances of that case involved a police officer who was suspended without pay after being charged with assault causing bodily harm upon a citizen while the officer was on duty. While acknowledging that there may be circumstances in which an employee may be suspended without pay if necessary to protect the employer's legitimate interests, Arbitrator Freedman commented that employers may only do so if some lesser sanction, including a suspension with pay, would not provide sufficient protection. In the course of determining that the grievor should not have been suspended without pay, Arbitrator Freedman commented:

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. Perhaps it is correct that the public would be incensed or outraged if an officer in Constable Eakin's position was suspended, but with his pay maintained. Perhaps the legitimate interests of the Service can only be protected by suspension accompanied by the removal of pay. Evidence would be required to support such a conclusion.

147 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 reputation could be such a circumstance. [*Winnipeg Police Association, supra*] is an illustration of a case where suspension without pay was determined to be appropriate. Each case will depend on its own facts.

187. Determining the risk of harm to an employer's legitimate interests involves an objective assessment by arbitrators. An arbitrator must reflect on 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 unless, as is the issue in this case, the employee is suspended without pay. As Arbitrator Gray noted in *Toronto District School Board, supra* at paragraph 32, this test is not "the imagined reaction of someone who learns of the charges but does not know or care what work the grievor is performing". The arbitrator added that a person who does not know the nature of the work cannot be considered well-informed and someone who does not care cannot be considered fair minded. A fair minded and well-informed person must be taken to understand that accused persons are considered to be not guilty until proven otherwise and further that a contested criminal charge is only an allegation.
188. Where an employer has elected to suspend an employee with or without pay, the onus is on it to justify that decision based upon the potential harm to the employer's

legitimate interests. Arbitrators must determine whether the presence of the grievor as an employee can be considered to present a reasonably serious and immediate risk to the legitimate concerns of the employer. The mere fact that a criminal charge has been laid is not sufficient to discharge the employer's onus. As indicated above, in cases involving suspensions without pay, a separate analysis must be completed which must consider whether a fair minded and well-informed member of the public would question the employer's reputation unless the grievor is denied pay pending trial. The relevant circumstances to consider include:

- a) the nature of the offences including whether the offences are work-related,
- b) the work performed by the employee,
- c) the employer's ability to absorb the financial loss,
- d) whether there is a past practice of paying employees suspended pending the outcome of criminal charges,
- e) the employee's discipline record if the discipline is relevant to the assessment of the risk to the employer's operations or reputation, and
- f) the nature of the employer's business.

### ***Sufficiency of the Division's Investigation***

189. It is well established that the employer bears the onus to demonstrate that it investigated the criminal charges to the best of its abilities in a genuine attempt to assess the risk of continued employment. The nature and extent of such an investigation depends on the circumstances. Notably, this burden is "significantly less in the case where the Police have investigated the matter" (Jockey Club, *supra* at paragraph 6.)

190. As noted by Arbitrator Wood in *Concordia Hospital, supra* at paragraph 97, "The investigation process to assess risk of conviction, as set out in *Ontario Jockey* and *Phillips Cable*, has been consistently required by arbitrators". At paragraph 102, he added that "even in circumstances of charges being laid by the police without the employer being involved in the lead up to those charges, there must be some

investigation”. In that case, the arbitrator concluded that the hospital failed to conduct any investigation prior to placing the grievor on an unpaid leave of absence. Although the hospital sought information in the weeks prior to the arbitration hearing, the arbitrator concluded that the hospital’s request for disclosure long after the imposition of the unpaid suspension did not change his opinion that “there was no investigation as required”.

191. As Arbitrator Peltz noted in *St. James-Assiniboia, supra*, at paragraph 112, an employer’s obligation to investigate may be affected by practical limitations particularly in cases in which the police have investigated the matter:

112 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.

192. In *St. Amant, supra*, at paragraph 113, Arbitrator Gibson suggested there is “very often tension between the amount of information an employer needs, the specifics of which will be not provided directly by police or other involved agencies, and the amount of detail an employee will volunteer when criminal charges or other allegations are pending”. That tension was certainly evident in this case. Mr. Ross testified about his frustration in obtaining information from both the MPS and the Grievor.

193. The Association criticized the Division’s investigation, saying that it relied almost entirely on the Grievor to provide it with information. It advanced additional criticisms

including the failure of the Division to attend any of the Grievor's court dates, the delay in seeking to obtain additional information until after this Board was convened, the failure to contact the Crown or seek the advice of a criminal lawyer, and its decision not to seek additional information from the students or their mother.

194. The Board does not agree that the Division's investigation failed to meet the required standard. Given that it was working in the shadow of the police investigation, there was a diminished burden on the Division to investigate the criminal charges against the Grievor. The Division was obligated to investigate the charges to the best of its ability in a genuine attempt to assess its risks. The Board agrees that the Division has satisfied its onus to prove that it do so.
195. Although the Division necessarily delayed commencing its investigation, its decision to do so was prudent, reasonable, and in accordance with the request of the MPS that it not interfere with the criminal investigation. It should be noted that when it made the initial decision to remove the Grievor from the classroom and place him on administrative leave with pay, the Division was aware of the students' disclosure. The Division repeatedly followed up with Grievor and the Association and pressed for updates related to the criminal investigation and charges. Once it was satisfied that the criminal charges had been authorized by the Crown and it could investigate without fear of interfering with the MPS criminal investigation, the Division interviewed the Grievor to obtain his response to the allegations and followed up on information about which it remained unclear. The fact that the Division did not attempt to interview the students again following their disclosures or speak to their parent about the allegations, does not persuade the Board that the Division somehow failed to investigate to the best of its ability. The Division possessed information about the allegations and the Division's choice not to re-interview the students for fear of retraumatizing them was a sufficient explanation for that decision.

### ***Relevance of Grievor's Discipline Record***

196. The parties presented evidence regarding the Grievor's disciplinary record. That record consists of two disciplinary suspensions. Details of the discipline are set out above, but it may be summarized as follows. In 2012, the Grievor was issued a one-day suspension for making inappropriate, sexually graphic remarks to a group of Grade 5 students during class. The one-day suspension was not grieved. Later that same year, the Grievor received a five-day suspension for removing a student with special needs from school property without the permission of the parents and after being told not to do so. The discipline letter indicates that the Grievor took the student to lunch and later to his premises contrary to the express wishes of the student's parent. A grievance was filed with respect to the five-day suspension, however the Grievor elected to withdraw the grievance prior to it proceeding the arbitration.

197. The Division argued that it is appropriate for the Board to consider prior discipline where it is linked to the reputational issue. In *Toronto District School Board, supra*, Arbitrator Gray commented on the relevance of an employee's prior discipline record in the context of a suspension without pay as a result of criminal charges. At paragraph 29, the arbitrator stated:

29. When the mere existence of criminal charges is cause for suspension without pay, the suspension is considered non-disciplinary. It follows that the employee's prior disciplinary record cannot play a role in assessing whether there is cause for such a suspension, unless perhaps the established factual basis for the discipline is logically relevant to an assessment of the risk to the employer's operations or reputation of employing him in the work which the union says he should have been assigned while the charges were pending. (emphasis added)

198. Can the Board consider the Grievor's past discipline record in this case? We are satisfied that it appropriate to do so. The established factual basis for the Grievor's previous discipline is relevant to the assessment of the risk to the Division's reputational interest. In arriving at this conclusion, the Board notes the temporal

overlap between the Grievor's discipline in 2012 and the criminal charges which allege that the offences occurred between 2010 and 2018. Furthermore, fact that the discipline related to inappropriately graphic and sexualized comments to young children and removing a student from the school and taking them to his home, is clearly relevant to assessing the potential harm to the Division's reputation. When applying the objective test required in cases of this type arbitrators must consider the issues from the perspective of a reasonable and well-informed person. A well-informed person in this case would consider the Grievor's disciplinary record in these circumstances.

***Division's decision to place Grievor on Administrative Leave with Pay***

199. It was clearly appropriate for the Division to move expeditiously to remove the Grievor from the classroom and place him on administrative leave with pay pending further investigation. Despite the fact that the Undertaking allowed for Grievor to have contact with persons under the age of 16 while in the execution of his duties as a teacher while under the direction of the employer, we agree that the Division acted reasonably and in accordance with the applicable arbitral authorities by immediately suspending him and placing him on administrative leave with pay. The Division is responsible for the education and protection of its students. Teachers play a pivotal role in the lives of their students and they stand *in loco parentis* in relation to those children. As skilled and respected professionals and they hold a special place in our community as parents entrust their children to them each school day. Swift action by the Division was obviously required considering the circumstances.

200. 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 operations or reputation. The Grievor has been charged with sexual



assault and sexual interference on a child. The charges span a period of several years. There is a clear link to the work of the Grievor. The complainant was a student in the Division at the time when the offences are alleged to have occurred. Moreover, it has been alleged that the Grievor provided drugs to the students while they were on school grounds.

201. It is difficult to imagine more serious criminal charges for a teacher to face than sexual assault and sexual interference on a young child. While the Board is cognizant of the fact that the criminal charges are unproven and the Grievor is entitled to the presumption of innocence, we agree with, and adopt, Arbitrator Peltz's assessment at paragraph 129 of the *St. James-Assiniboia School Division, supra* case where he stated:

Leaving aside for the 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 expectation 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...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. (emphasis added)

202. Applying the objective test established in the authorities referred to herein, the Board agrees that a fair minded and well-informed person would consider retaining the Grievor in a teaching position following becoming aware of the allegations made by students and his subsequent criminal investigation, arrest, and charges of sexual assault and sexual interference would result in serious potential harm to the Division's reputation. The Board notes that the Division's decision to place the Grievor on administrative leave with pay on November 30, 2021 was not grieved.

***Mitigation through enhanced supervision or alternate assignment***

203. One of the principles set out in *Jockey Club, supra* is that the onus is on the employer 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 assignment to another position. The Association contends that the Division failed to discharge its onus as it failed to put forward any meaningful effort to identify ways to mitigate its risk. The Division responded that it met its onus by considering ways to mitigate its risk but that there were no viable options available to do so in the circumstances.
204. A term of the Grievor's release set out in the Undertaking is that he not be in contact with anyone under the age of 16 with the exception of a family member or while performing his duties as a teacher under the direction of the Division. In addition, in late June of 2022, CFS took the position that the Grievor should not have unsupervised access to anyone under the age of 18.
205. Notably, the Grievor never asked that an alternate assignment be explored, and he has not requested to return to the classroom. Furthermore, neither of the witnesses who testified at the hearing could identify any alternate position which did not involve interaction with children and did not involve specialized training or qualifications. Furthermore, the Division maintained that it considered whether suitable alternate positions were available. Mr. Ross testified to having had a discussion with the Assistant Superintendent about the matter. However, the Division is one of the smaller school divisions in the Province and it does not have anyone who works independently on projects. The Division was unable to identify any appropriate alternate assignments that the Grievor could perform that did not require special qualifications or did not interact with students. Indeed, the Grievor could not contest the Division's position that it has no suitable alternate duties that he could perform that do not involve contact with children.

206. The issue of mitigating the risk to an employer presented by an employee charged with criminal offences was considered in *Toronto District School Board, supra*. That case concerned a school caretaker who was arrested for sexual assault and sexual interference on a minor. A term of the employee's release was that he not be in contact with any person under the age of 16. The arbitrator noted that there was no debate that the grievor could not continue to work in a position where he might have contact with students. Indeed, at paragraph 24, the arbitrator expressed his view that if there had been no work the employee could perform without breaching the conditions of his release "that alone would have been cause for suspension without pay". However, the arbitrator went on to consider whether the potential impact of the criminal charges on the employer's interests could have been adequately addressed by assigning the employee to work that involved no potential student contact. It was undisputed that such assignments existed and could have been given to the employee in a manner consistent with the collective agreement. In concluding that the employer did not have cause for suspension without pay and allowing the grievance, at paragraph 33, the arbitrator stated:

33. It is not enough that the grievor was charged with highly reprehensible conduct toward a child. The revulsion engendered by the formal charges, and by the alleged victim's later testimony, had to be tempered by recognition that they might not be true. Establishing that a concern for the Board's reputation was cause to withhold the grievor from the work that the union says he should have been assigned requires, at least, a finding that if it had assigned him such work a fair-minded and well-informed member of the public made aware of the nature of the work as well as the nature of the pending charges would reasonably lose confidence in the ability of the Board to discharge its responsibilities for the care and safety of children, or perhaps for the safety of staff and other adults, in or around the premises where the grievor was working. I do not know how such a conclusion could have been reached, either before me or after the preliminary hearing, if the work being performed involved no prospect of contact with students and the Board itself does not suggest that the grievor might have been a serious risk to adults or property at the work location.

207. However, the facts in this case differ significantly. The evidence in this case is that while the Division gave consideration to alternate assignments that the Grievor was able to perform, it was unable to identify any position for which the Grievor possessed the appropriate qualifications and which did not involve contact with students.

208. The Board has concluded that the Division has discharged the onus 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 assignment to another position. We accept the Division's evidence that it made a meaningful attempt to consider ways to mitigate its risk but that it was unable to identify any suitable options.

***Was leave of absence without pay justified?***

209. The arbitral jurisprudence in this province holds that whether a suspension without pay is justified requires a distinct analysis from whether the suspension is justified (see, for example, Justice Greenberg's remarks in *T.E.A.M. and Bell MTS, supra* at paragraph 29). Even if, as is the case here, suspension is justified, arbitrators must continue the analysis and consider whether the employer's legitimate operational and reputational interests can only be protected by withholding the employee's pay. Indeed, the caselaw establishes that a suspension without pay is reserved for exceptional circumstances. The Division bears the onus to justify not paying the Grievor.

210. In considering this issue, the *Jockey Club* principles apply. The issue is not whether the Grievor is guilty or innocent, but rather whether the risks to the Division's legitimate interests can only be addressed through a suspension without pay. Fundamentally, resolution of this issue requires arbitrators to balance the interest of the employer to protect its business and reputation against the interest of the

employee to maintain his livelihood. It is critically important to recall that the Grievor is presumed not guilty of the charges.

211. Leading arbitrators have insisted that the power to suspend an employee without pay pending the resolution of criminal charges can only be wielded where some lesser sanction would not achieve the necessary protection of the employer's interests. It has been held that an employer can generally protect its interests adequately by removing the employee facing the criminal charges from the workplace if required but continuing to pay them.
212. However, there are circumstances in which arbitrators have concluded that an employer's interests can only be adequately protected by suspending an employee faced with criminal charges and denying them their pay. Examples of such cases in this province's arbitral jurisprudence are extremely rare. But examples do exist. Arbitrator Peltz made that determination in *Winnipeg Police Association, supra*. He concluded that the allegations against police officer accused of participating in a criminal conspiracy while on duty were "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".
213. As Arbitrator Freedman acknowledged in *Winnipeg Police Association (Eakin), supra*, the suspension without pay of an employee facing criminal charges may be justified if some factors or circumstances exist beyond those warranting the suspension itself. The question to be considered is whether a fair minded and well-informed member of the public would question the Division's reputation unless the Grievor is denied his pay pending the outcome of his criminal charges. The majority of the Board has concluded that the answer is yes. The Grievor's interest in maintaining his livelihood must give way to the Division's interest in maintaining public confidence and its reputation. The arbitral jurisprudence recognizes that in exceptional cases, a suspension without pay is necessary to protect an employer's

legitimate interests. By majority, the Board believes that this is clearly one of those exceptional cases and the Division has discharged the onus placed upon it.

214. The following factors were considered by the Board in arriving at this conclusion.

215. The criminal charges faced by the Grievor are extremely serious. He stands accused of the offences of sexual assault and sexual interference upon a child who was a student in the Division when the offences are alleged to have occurred. There is a clear link between the between the criminal offences and the Grievor's work as a teacher. In addition to the fact that the complainant was being educated in the Division when the offences are alleged to have occurred, the particulars set forth in the PIS include allegations that he supplied marijuana to the complainant on school property. The Board understands that at this stage the Grievor is presumed not guilty. The charges will be addressed in the criminal court.

216. The fact that the Grievor is a teacher also a critical factor. As previously discussed, teachers occupy a special place in our community. They are role models for their students. The public has very high expectations of them. Teachers have largely unsupervised access to students, work closely with them, and they stand in *loco parentis* in relation to children they are responsible for educating. As Arbitrator Peltz noted in *St. James-Assiniboia, supra*, at paragraph 129, "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".

217. The Division is not like other employers. It is critically important that public confidence in the school system be maintained in order for the Division to effectively carry out its critical mandate of educating and protecting students. As Arbitrator Ready noted in *Nechako Lakes School District, supra*, at paragraph 36, "a school system charged with public trust and the education of the public's children, is far different than a business".

218. There is history of past practice followed by the Division in similar circumstances. On two previous occasions, teachers of the Division have faced allegations of

criminal conduct which resulted in them being placed on leave without pay when they were unable to perform their teaching duties due to conditions imposed upon them. In both of those prior cases, when conditions precluded the teachers from working, the Division suspended them (placed them on administrative leave) without pay. This is the first case in which a teaching certificate has been surrendered or revoked. However, the past practice involving two of the Division's teachers being suspended without pay when they were rendered ineligible to work due to restrictions placed upon them as a result of criminal charges is nevertheless relevant and supportive of the Division's position in this case.

219. The Grievor's prior disciplinary history is also relevant to the assessment of the risk to the Division's reputational interest. That record of being disciplined for making graphic sexualized comments to a class of Grade 5 students and taking a student with special needs off school premises, going for lunch with the student, and briefly bringing the student to his home, would properly be considered by a fair minded and well-informed individual to be an aggravating circumstance which supports the position of the Division that suspension without pay is required in this case to protect its reputational interests.
220. We have also considered the Grievor's responses to the Division's questions during the investigation meeting on April 20, 2022. The Board is satisfied that his responses contained some inherent contradictions. Additionally, in light of his testimony before this Board, some of the Grievor's responses during the investigative interview were inaccurate or incomplete. A fair-minded and well-informed member of the public would undoubtedly find those inherent contradictions to be concerning and supportive of the Division's position that an unpaid suspension was required to adequately safeguard its reputation.
221. The Grievor surrendered his teaching certificate. The fact that the Minister of Education expressed concerns about the Grievor possessing a teaching certificate and that the Grievor ultimately surrendered certification is significant. First, the surrender eliminated any potential of the Grievor to perform the work for which he

was hired. Second, the fact that the Province initiated correspondence challenging his right to hold a teaching certificate and being able to teach anywhere in the Province speaks to the reputational interest of the Division.

222. In addition, the Board is satisfied that the concerns expressed by CFS to the Division in late June of 2022 are also relevant. The fact that an agency responsible for protecting children was so concerned about the Grievor that it approached the Division and asserted its position that he should not be alone with anyone under the age of 18 and, further, that even if the charges against him were dropped, and that it intended to present him to the Child Abuse Registry for review, speaks to the reputational interests of the Division.
223. In addition, we note that the Division was concerned that recently publicized reports about sexual misconduct by teachers towards students created additional public awareness. The heightened awareness has resulted in increased scrutiny by the Provincial government on the Division in relation to the conduct of teachers. It is appropriate for the Division and this Board to consider how that heightened awareness resulting from published reports of teacher misconduct towards students would affect the fair-minded and well-informed public perception of the Division's reputation if the Grievor, charged with sexual offences upon a minor student, continues to receive his pay while suspended and not legally eligible to teach having regard to the surrender of his teaching certificate. This factor also supports the position of the Division that a suspension without pay is justified and that no lesser sanction would achieve the necessary protection of its interests.
224. The Board has also considered that the Grievor participated in a significant number of extracurricular activities and that he has not received any discipline since the two suspensions in 2012. There was also no evidence from his co-workers that they would object to him receiving his pay while suspended and defending himself on the criminal charges or that a paid suspension would disrupt the Division's operations.



225. The financial circumstances of the Division were also considered. The Division is a public sector employer reliant upon public funds to operate. Reviewing the financial reports provided, the Division appears to operate at or near budget. However, the Board accepts that the amount of compensation being sought by the Grievor is, considering the operating expenses of Division, a relatively negligible sum. Although it is a smaller school division than St. James-Assiniboia, the evidence does not persuade the Board that the Division lacks sufficient flexibility to manage its resources if it was required to compensate him and maintain his pay as requested in the grievance. No financial loss to an organization is welcome, but the evidence indicates that the Division would have the ability to absorb a loss of this size. We have also considered the evidence respecting the financial impact upon the Grievor. The financial impact is clearly challenging for him. He is now making roughly half of what he earned as a teacher with the Division. That said, he testified that he is managing his finances by drawing on his savings and he did not disclose any dire impacts resulting from the withdrawal of his pay by the Division.

226. Having considered all of these factors the majority of the Board is satisfied that a fair-minded and well-informed member of the public would question the Division's reputation unless the Grievor was denied his pay and that no lesser response would achieve the necessary protection of the Division's legitimate interests. The Division has satisfied the onus placed upon it. Having balanced the legitimate interests of the Grievor and the Division, the Board is satisfied that the Division's interest must prevail.

227. In arriving at this conclusion, the Board has carefully considered the Association's position that in November of 2021, the Division took steps to safeguard its operations, reputation, and the safety of its students by removing the Grievor from the classroom. That response was not grieved because the Division also continued to pay the Grievor. The Association argued that the Minister's action in challenging the Grievor's ability to hold a teaching certificate was really no different from what the Division did in November of 2021. It was simply a precautionary decision.

Moreover, the Association contended that the actions of the Minister and the surrender of the Grievor's teaching certificate did not amount to a material change with respect to the potential risk to the Division's reputation. This is because the Division was not going to return the Grievor to the classroom prior to the resolution of his criminal charges. As such, the Association maintained that the surrender of the teaching certificate would not cause a reasonable and well-informed member of the public to conclude that protection of the Division's reputation required the withholding of the pay from the Grievor. It takes a similar position with respect to the involvement of CFS and that agency's communication with the Division at the end of June 2022.

228. However, the majority of the Board agrees with the position of the Division that it bore a continued onus to investigate and objectively consider and evaluate the risk to its reputation. The fact that the Grievor surrendered his teaching certificate bears upon both the Division's reputational interest and his eligibility to perform his work as a teacher. In addition, the communication initiated by CFS regarding its concerns with the Grievor, and the heightened awareness of teacher misconduct arising out of media coverage around that time, was appropriately considered by the Division when in finalized its investigation, re-evaluated the Grievor's status, and decided to convert his status and stopped paying him.
229. The Board agrees with the position of the Division that employers are not required to make snap judgements about the status of employees facing criminal charges. Penalizing employers for investigating thoroughly and then thoughtfully reflecting on the matter prior to making a such a difficult decision, as the Division did in this case, is inconsistent with the central principles set out in the caselaw and would be unreasonable.
230. While the majority of the Board accepts that the surrender of the Grievor's teaching certificate did not change the fact that the Division had no desire to return him to his teaching position prior to the resolution of the criminal charges, that does not mean that the surrender was not relevant to the evaluation of the risks to the Division's

reputational interest. The fact that Minister was sufficiently concerned about the Grievor possessing a teaching certificate in light of the criminal charges that he initiated communications leading to the surrender is significant. A fair minded and well-informed individual would obviously question the Division's reputation if it continued to pay the Grievor while he was ineligible to perform the duties for which he was hired. Furthermore, once he became ineligible to perform his duties, the Division's past practice was consistently applied. We further accept that the Division appropriately turned its mind to how its reputation would be affected in the context of the concerning communication from CFS and recently publicized instances of sexual misconduct relating to students.

231. The majority of the Board is satisfied that the surrender of the teaching certificate constitutes a particularly relevant change of circumstance which the Division properly considered as impacting its reputational interest. What would a fair-minded and well-informed person in the community think of the Division if it continued to pay the Grievor while he was suspended pending charges involving sexual assault and sexual interference on a child while she was a student in the Division now that he is precluded from teaching due to the surrender of his teaching certificate? The majority is of the view that, having regard to all the circumstances, a fair-minded and well-informed person would be outraged if the Division continued to pay the Grievor pending the resolution of his criminal charges and that doing so would be devastating to the Division's reputation. The majority has determined that, in the circumstances prevailing, the withholding of pay was necessary to protect the Division's interest and no lesser approach would have been sufficient.
232. While the Division's initial decision to maintain the grievor's pay pending its investigation was prudent and reasonable, so too was its decision to re-evaluate that decision and convert his status to unpaid leave following that investigation. The cumulative effect of all the relevant information, which built up over a period of months culminating with the surrender of the teaching certificate, ultimately tipped the scales in this case. The Board is satisfied that the Division reasonably considered the totality of circumstances in July of 2022 and properly concluded that

its reputational interests could only be protected by placing him on a leave of absence without pay.

233. As a result, the grievance is dismissed.

Dated this 3<sup>rd</sup> day of October, 2023 in Winnipeg, Manitoba.



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Colin S. Robinson  
Chairperson



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Adrian Frost  
Nominee of the Division

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David Shrom (dissenting reasons attached)  
Nominee of the Association

## **Dissenting comments - D.M. Shrom**

I disagree with the majority decision to dismiss this grievance.

I would have allowed the grievance on the basis that the Division did not provide a sufficient justification to satisfy the onus on it to change the administrative leave with pay to one without pay.

As the majority decision notes (p. 57 para. 169) each case is to be determined on its own facts, and this case certainly had unique facts.

On November 30th, 2021, when the Division first learned of allegations against the grievor, the Division imposed an administrative leave with pay. This was not a disciplinary measure, but rather an administrative move to protect the interests of the Division.

The Division was aware of the nature of the allegations and was aware of the grievor's previous disciplinary record. Despite that however the Division determined that an administrative leave (or suspension) with pay was appropriate - balancing the conflicting interests that it was required to consider being the safety of students and the Division's reputational interests versus the employee's interest to maintain his livelihood.

If the Division was to explain its decision to a fair minded member of the public it would have said - we have removed this teacher from the

classroom to protect the safety and well-being of students and the Division's reputational interests, but because the teacher is to be presumed innocent until proven guilty and because there's a presumption in Manitoba jurisprudence that such an administrative leave should be with pay (unless there are exceptional circumstances requiring the withholding of pay) we're maintaining his pay.

Clearly the Division took into account the relevant tests in the jurisprudence and decided it was appropriate that the suspension be with pay. No grievance was filed by the Association challenging this suspension.

Subsequently the Division learned and confirmed that the grievor was charged with two criminal offences. Although there could be a debate whether the Division knew in December 2021 or not until April/May 2022, it is undisputed that once it knew, the Division did not exercise any discretion to change the suspension (with pay) to a suspension without pay.

The Division continued to be satisfied that it was able to protect its reputational interests and the safety of students by a suspension with pay. There were no exceptional circumstances requiring a withholding of the teacher's pay.

In the month of May 2022 for example the Division was fully aware of the nature of the allegations against the teacher, the teacher's past disciplinary record, the existence of criminal charges and any heightened public awareness or sensitivity to alleged teacher misconduct of this nature. Despite all this information, this Division was content to maintain the

suspension with pay on the basis that the Division's interests and the safety of students was sufficiently protected just by removing the teacher from the classroom. A withholding of pay was not required.

It was only in July 2022 when the Division learned of the voluntary surrender of the teacher's teaching certificate that the Division wrote to the grievor on July 14th and asserted a "material change" warranting a change in the suspension to one without pay.

The Division was very specific in that letter and set out their sole basis for changing the suspension to one without pay, ie. the voluntary surrender of the teaching certificate.

The evidence regarding how the voluntary surrender of the teacher's certificate occurred was clear. The Minister of Education advised the teacher that he was contemplating suspending the teacher's certificate and referring the matter to the Certificate Review Committee (the "CRC") and offered the teacher the opportunity to voluntarily hand in his certificate pending a resolution of the criminal charges against him. The action of the Minister did not involve any findings of misconduct on the part of the teacher by the Minister or the CRC, but rather was an administrative move designed to protect the safety of students throughout the Province.

Just as the Division had taken an administrative step to protect students in Western SD, the Minister was taking steps to protect the safety of students in the Province.

Faced with the options outlined by the Minister, the grievor chose to voluntarily surrender his teaching certificate.

The ultimate issue in this case was whether the voluntary surrender of the teaching certificate provided a basis or justification for the Division to cease paying the teacher on this administrative leave.

In my mind, it is illogical and therefore unreasonable to find that in May the Division's interests were protected by a suspension with pay, but that in July just because the teacher voluntarily surrendered his certificate that somehow the Division's interests could only be protected by withholding the teacher's pay.

The teacher was removed from the Division's classrooms and all the surrender of the certificate did was ensure the teacher was removed from all classrooms in the Province.

The evidence from the superintendent confirmed that there was no contemplation that the teacher would be returned to the classroom until the criminal charges were dealt with. The lack of a teaching certificate therefore was really of no effect in terms of whether the teacher would be returned to work in Western SD. Hence, it was not a material change inter se the relationship of this Division and this teacher.

Although the Division tried to buttress its case in testimony at the hearing as to the reasons for the change to a suspension without pay, the record was clear as to what the Division purported to be acting upon.



The superintendent in his testimony referred to two additional matters - a call from CFS expressing concerns about the grievor and a “heightened media awareness” related to teacher misconduct of this nature.

The supposed “heightened media awareness” was nothing new. If it existed at all, it existed in the months before the change to the suspension when the Division was perfectly content to have the teacher on a suspension with pay.

The reference to the call from CFS was properly objected to by the Association as being hearsay evidence and therefore not able to be accepted as proof of the truth.

The real basis for the change to a suspension without pay was spelled out in the Division’s letter of July 14th - “The surrender of your teaching certificate and your undertaking to the Minister amounts to a material change in circumstances...” and “....in light of this new information, the Division has determined that your administrative leave with pay will be converted to an administrative leave without pay.”

If the Division’s interests were adequately protected by a suspension with pay (with all the knowledge the Division had as to the allegations against the teacher and the confirmation of the existence of criminal charges), then how could it be said that the Division’s interests could only now be protected by withholding the grievor’s pay simply because the Minister in

effect did the same administrative thing the Division did in terms of removing the teacher from classrooms.

A fair-minded well-informed taxpayer in this Division - understanding that the safety of students was protected in June 2022 (by a suspension from the classroom with pay) would hardly question the Division's decision to continue paying the teacher in July 2022, just because the Minister in effect did the same thing the Division did - that is, ensured the teacher wasn't in any classroom in Manitoba until the criminal allegations were dealt with.

Quite apart from not finding the voluntary surrender of the certificate to be a "material" change, I don't find it to even be a change. In my view, it was consistent with and confirmatory of the administrative move the Division took.

In my respectful opinion, the majority has erred in two respects. First, in finding that the voluntary surrender of the teaching certificate somehow constituted a "material change" in the circumstances that existed and secondly in considering other reasons beyond the record as a possible basis for the change to the suspension.

In *TEAMS vs. Bell MTS Inc.* [2023 CarswellMan 28] the Court found that an arbitrator erred in not appreciating the real reason an employee was not at work and hence on suspension without pay. In this case, this teacher was not at work because of the Division's decision to suspend the teacher. It had nothing to do with the fact that the teacher did not have a teaching certificate.

In St. James [(2014) 244 L.A.C. (4th) 361] the arbitrator found that in order to justify a suspension without pay in these circumstances two separate analyses are required. The first analysis is to decide whether a suspension is justified and then a separate analysis is required to determine whether it should be with or without pay. In this case the Division determined that it should be a suspension with pay, and then did not provide any rational basis for why it subsequently was required to be without pay.

While I acknowledge that the facts were close in terms of whether the suspension should be with or without pay in general applying the tests in the jurisprudence, given the Division's initial and ongoing determinations through November 2021 to June 2022 (that a suspension with pay was sufficient to protect the Division's interests) and with a proper understanding as to what the voluntary surrender of the teaching certificate meant (ie. no finding of misconduct by the teacher, but just an administrative move to ensure the teacher was not in any classroom pending the disposition of the criminal charges) it is not reasonable in my mind to find any basis for withholding the grievor's pay in the unique circumstances of this case.

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\_\_\_\_\_David M Shrom - nominee of the Western Teachers' Association