

IN THE MATTER OF: An Arbitration

BETWEEN:

FRONTIER SCHOOL DIVISION

and

United Steel, Paper and Forestry,  
Rubber, Manufacturing, Energy,  
Allied Industrial and Service Workers International Union  
(United Steelworkers)  
on behalf of USW Local 7106

Grievance F-04-11-Suspension – Mike Dubois  
Grievance F-05-11-Termination – Mike Dubois

Robert A. Simpson, on behalf of the School Division

Roy Leslie, on behalf of the Union

Diane E. Jones, Sole Arbitrator

November 5 and 6, 2012, Flin Flon, Manitoba

These matters came before me as Sole Arbitrator pursuant to the terms and conditions of the Collective Agreement (Exhibit 1) between the parties. At the outset of the hearing the parties confirmed I had been properly appointed and had the jurisdiction to determine the grievance before me. The parties also waived the applicability of any time limits with respect to the issuance of this Award, to the extent necessary.

There are two grievances that have been filed by the grievor.

Grievance F-04-11 (the “suspension grievance”) states the nature of the grievance to be:

Unjust discipline in response to letter forwarded to Mike Dubois dated October 26, 2011. (Exhibit 3)

Grievance F-05-11 (the “termination grievance”) states:

In response to letter dated November 28, 2011 from Mr. Ray Derksen  
Unjust termination (Exhibit 4)

It was the position of the School Division that the grievor, a Residence Counselor at Frontier Collegiate Institute, who had been on permanent staff since November 2009, had a verbal warning in January 2011, a 5 day suspension in June 2011, neither of which were grieved, a further 5 day suspension in October 2011 and further misconduct culminating in his termination in November, 2011. The Division said the 5 day suspension and termination were for just cause and the grievor should be dismissed.

The Union’s position was that the discipline imposed was not justified and was without cause and the grievances should be allowed and the grievor reinstated with full redress.

The Division called as its witnesses Dale Cowan, the Residence Administrator and Cathy Fidlerchuk, Area Superintendent. The Union called Tony Poirier and Mike Dubois. It is not my intention to recite all of the evidence and argument which I have heard and considered but to comment on the most salient points when necessary.

Mr. Cowan has been with the Division for 35 years on the Frontier College Campus in Cranberry Portage and has done all residence jobs including Residence Counselor, Shift Head, Head Counselor and has been Residence Administrator for the last 10 years. Mr. Cowan described Frontier Collegiate and the unique role it has in providing secondary education, for grades 9-12 for young people in the North, including serving 22-23 First Nations' communities. He said young people come out from their communities to go to school and approximately 240 out of 300 students live in residence which is located on the same campus as the school. Mr. Cowan said the majority of students are 15, 16 and 17 years of age although some are as young as 13 and some may be up to 21 years of age if their education has been delayed or disrupted. He noted that school hours were from 9:00 a.m. to 3:40 p.m. and when the students were not in school those who lived in residence attended in the residence or the community for activities. He said the residence provided a structured environment with supervision on a 24/7 basis through the school year, with a layered system of staff. Mr. Cowan said the students have a summer break of approximately 2 months, a 2 week break at Christmas, and a one week break at Thanksgiving and in the spring.

Mr. Cowan described his role as Residence Administrator as similar to a principal except that he was responsible for employees who provided medical care (2), cafeteria services (7), laundry (2), student support services (1) as well as Residence Counselors (22-24) who are the main caregivers of the student residents. Mr. Cowan said his overall role for 18 hours a day and on weekends was to ensure the care, safety and well being of the students in residence while they attend Frontier Collegiate Institute.

Mr. Cowan described generally the role of Residence Counselors, Area Counselors, Night Staff and Head Counselor. In particular, Mr. Cowan noted that Residence Counselors have the closest contact with the students in residence, are involved on a day to day basis and are expected to form positive relationships. He said Residence Counselors have the responsibility of ensuring the care, safety and well being of these students, and are to be like a parent. He said the grievor applied for the position of Residence Counselor in response to a job posting (Exhibit 6), submitted his Resume (Exhibit 7) and was appointed as Residence Counselor, step 1 on November 30, 2009 (Exhibit 9).

In December 2010, just prior to the Christmas break, Mr. Cowan testified he received information about the grievor that caused him concern. He said concern was raised about a potential inappropriate relationship between the grievor and a couple of girls. After the Christmas break on January 12, 2011, Mr. Cowan said he spoke to the grievor and confronted him with the information he had received that an inappropriate relationship was developing. Mr. Cowan said the grievor acknowledged he had a connection with the two girls and the girls were taking it too seriously and he knew he had to “reset” it. Mr. Cowan

said he warned the grievor that he had to stop associating personally with the girls and that he expected the grievor to have only professional, job related communication. Mr. Cowan said he emphasized to the grievor that his communication had to be professional and that he informed the grievor that his admitted use of Facebook (Exhibit 10) and texting with these students was not professional contact.

Mr. Cowan explained that he expected his staff to respect boundaries and limits with students and that if a relationship was too personal or too close you are crossing a boundary. He said he expected staff to replicate a parental relationship, to develop positive relationships and gain trust so that they would be able to “be there” when the teenagers needed advice, encouragement or ran into trouble.

Mr. Cowan said the grievor admitted to him that he had no intention of his relationship with the girls going this far and that he would speak to them and tell them there would be no further non work related communication. Mr. Cowan said no grievance was filed with respect to the verbal warning.

Mr. Cowan testified in June 2011 he received a call from the Division’s Winnipeg office that they had received a complaint about inappropriate Facebook communication involving the grievor. Mr. Cowan had one of his Head Counselors, Lisa Stevens, help with this investigation and located the grievor’s Facebook page (Exhibit 12) and found that one of the girls involved in the January matter was involved in the Facebook matter. Mr. Cowan reviewed the Facebook page and determined that the grievor was engaged in talking with

and about another student and was right in the centre of a derogatory teenage conversation. Mr. Cowan thought the conversation might constitute cyber bullying.

Mr. Cowan said when he had spoken to the grievor in January he thought there had been a professional discussion and that the grievor knew where the parameters were, but that the Facebook page did not reflect this.

Mr. Cowan met with the grievor, his Union representative and Mrs. Fidierchuk to hear the grievor's explanation. Mr. Cowan said at this meeting he found the grievor to be aggressive and uncooperative. A 5 day suspension was imposed on the grievor by way of letter dated June 16, 2011 (Exhibit 13), where details of the grievor's misconduct and pattern of concerning behaviour were set out. The letter provided to the grievor written policies to be followed – the Residence Counselor Job Description, Respectful Workplace and the Use of Information and Communication Technology. The letter also warned the grievor that "...any future misconduct will result in further disciplinary action, up to and including termination." Mr. Cowan was of the view that the grievor had breached the Respectful Workplace Policy and the Information and Technology Policy.

The June 16, 2011 five day suspension was not grieved.

Mr. Cowan testified on October 17, 2011, approximately 6 weeks into the new school year he received a call from the local RCMP constable that the grievor had been stopped for a vehicle equipment failure by a Natural Resources officer but that the RCMP had been

called in because there was a concern alcohol and drugs were in the vehicle. Mr. Cowan said the RCMP constable called him because in searching the car he found marijuana, open liquor and drug paraphernalia and the grievor had told him that the drug paraphernalia found in the car had come from residents at Frontier Collegiate where he worked.

Mr. Cowan said it was the Division's policy that any drugs or paraphernalia found or seized by staff from students was to be turned over to administration for disposal or police and decisions are made what to do with the students in such a situation. Mr. Cowan said he was very concerned that the Division's policy was not followed by the grievor and that the entire incident did not reflect well on the Division, or the school and "gave us a black eye". Mr. Cowan set out the detail of this matter in an Incident Report he provided to Ms. Fidierchuk (Exhibit 14).

Mr. Cowan and Ms. Fidierchuk met with the grievor and his Union representative. Mr. Cowan said the grievor provided conflicting information and described the grievor as aggressive and defensive during the meeting. After consideration of the matter Mr. Cowan said he supported a decision to issue a 5 day suspension because he wanted the grievor to change his behaviour and he hoped the grievor would understand that he needed to make changes. Mr. Cowan said a letter of suspension was issued to the grievor stating in part he had violated policies and guidelines relating to seizure of property and that his actions had put the reputation of the Division and school in question (Exhibit 2). Mr. Cowan said the letter attached the policies and guidelines and told the grievor he had been placed on Step 3

of the Progressive Discipline Model and that any future misconduct will result in further discipline up to termination. Mr. Cowan said this suspension was grieved.

Mr. Cowan testified that in November, 2011, a month later, he received information by email from his Head Counselor Scott Hamblin (Exhibit 15) that a school van had been driven down Old Indian Trail which was not passable and was meant to be used by quads and skidoos. Mr. Cowan said he did not know initially that the grievor had been driving because Mr. Poirier had claimed he was driving.

Mr. Cowan said staff specifically had been instructed not to take vehicles off roadways because another vehicle had been damaged earlier.

Mr. Cowan said Mr. Hamblin advised that the grievor and Mr. Poirier were out looking for students who had missed curfew. He said Mr. Hamblin became aware through comments on the radio that the van was stuck and continued his own search for the students in a different area until he got the impression that the van situation was "serious". Mr. Cowan further said Mr. Hamblin went to the stuck van, saw a gathering of staff who had come to help, knew from his experience that a tow truck was needed and sent staff back to the residence since it was time for students to be getting to bed.

Mr. Cowan said when he became aware of this the next morning (November 17<sup>th</sup>), Mr. Poirier told him he had been driving the van. Mr. Cowan said he asked Mr. Poirier to write a statement about this (Exhibit 16) and contact MPI. Mr. Cowan said the next day



Mr. Poirier came back to see him and said he had time to think about the ramifications, the seriousness of the incident, the information from MPI and that he was not being honest. Mr. Cowan said Mr. Poirier told him the grievor had been driving the van and he was trying to cover for him and “take the heat” for him. Mr. Cowan asked Mr. Poirier to write a further statement to confirm this. (Exhibit 17).

Mr. Cowan said the grievor never came forward between November 16-18<sup>th</sup> to say he had been driving the van. Mr. Cowan further said he advised Ms. Fidirchuk of what had taken place (Exhibits 18, 19) and she became involved.

Mr. Cowan described his concerns about this latest situation as a continuation of situations that showed the grievor had very few limits on what he would do, and he disregarded the limitations of campus, did not take direction and had an immature attitude. He said it was reminiscent of other matters that had “got him on our radar” earlier. Mr. Cowan said he was also concerned because Mr. Poirier had told him he had difficulty making the grievor understand why he could not take the responsibility for driving the van and had changed his mind about assuming responsibility.

Mr. Cowan said a meeting was held with the grievor and his Union representative on November 24<sup>th</sup>. He described the grievor’s demeanor as showing anger and a little bit of arrogance. Mr. Cowan said he participated in the decision to terminate the grievor and supported it. He said he felt the grievor had been given every opportunity to prove himself, gain better understanding and learn from his errors but there was no evidence to

show he would be able to move on. Mr. Cowan said he expected a level of professionalism from the grievor and he had concluded that there was not going to be a change of behaviour.

In cross examination Mr. Cowan reiterated that he told the grievor at the end of the January 12<sup>th</sup> meeting that he told the grievor there was not to be any further unprofessional, non work related activities with the two girls. Mr. Cowan noted that the grievor had told him one of the girls was getting “too serious” which Mr. Cowan interpreted as “getting romantic or falling for him or being infatuated” and said he emphasized the importance of observing boundaries.

Mr. Cowan said he did not know if the grievor was nervous in the meeting in June but said his demeanor and body language was aggressive at times. He said he thought the meeting was a time to clear the air, speak calmly and gain a greater understanding. He agreed the grievor did respond to questions but said that a person could be responsive without being cooperative and he did not think the grievor was cooperative.

Turning to the incident involving the van that became stuck Mr. Cowan said staff had been told vehicles were not to be used off road. He said there was a campaign to tell staff this and they were told in meetings. Mr. Cowan said the grievor’s supervisor, Lisa Stevens had specifically spoken to the grievor about this rule. Mr. Cowan went on to explain that during the time the van was stuck, staff should have been in the dorms getting students settled for the night and instead left dorms unattended when they went out to help.

Mr. Cowan was asked if he knew that the grievor had told the shift head he was driving the van. Mr. Cowan said he became aware first that Mr. Poirier was driving the van and the next day from Mr. Poirier that he in fact had not driven the van and that the grievor had.

Cathy Fidierchuk is Area 4 Superintendent and has been with the Division for 34 years having served throughout that time as a classroom teacher, English Language Arts Consultant, Principal and Superintendent. As Area Superintendent Ms. Fidierchuk said she was responsible for 7 schools in her area and worked closely with principals, vice-principals and staff, travelling weekly. She said the campus of Frontier Collegiate Institute was her responsibility which included approximately 100 employees. She also described the Mission Statement of Frontier Collegiate Institute (Exhibit 21) as sharing the responsibility for the education and care of students on campus and to provide “a home away from home that is safe, caring and structured.”

Ms. Fidierchuk said she and Mr. Cowan meet every day for approximately 15 minutes to touch base. As a result she said that she was aware and informed of the issues that arose with the grievor. Ms. Fidierchuk said she thought it was appropriate for Mr. Cowan to meet and verbally warn the grievor in January, 2011. She said she became aware of the incident involving the grievor in June, 2011 when she was told that the Division’s Winnipeg office had received a complaint that one of Frontier Collegiate’s staff was posting lewd, derogatory and negative comments on Facebook. Ms. Fidierchuk was directed by her superior to conduct an investigation. She said she discovered that there were derogatory and defamatory postings on Facebook made by the grievor about a student

in conversation with another student (Exhibit 12). Ms. Fidlerchuk said she was shocked by what she discovered and that no one entrusted with the care of students should talk in such a familiar, loose way and would not attack the character of a student or say a student should go home. She said this was not acceptable in any way by any staff who deals with students. She also said she was very concerned that a student would feel that they could talk to an adult, the grievor, in such a familiar way and it was obvious to her from reading the postings that such a conversation was acceptable or had become acceptable. Ms. Fidlerchuk made notes of her investigation (Exhibit 22).

After meeting with the grievor, his Union representative and Mr. Cowan on June 10<sup>th</sup>, Ms. Fidlerchuk made the decision to suspend the grievor for 5 days (Exhibit 13). She said she considered the grievor had been warned previously and it was necessary to increase the severity of the discipline. Ms. Fidlerchuk described the grievor as unprofessional, aggressive and confrontational in the meeting. She said no grievance was filed about this discipline.

Ms. Fidlerchuk said Mr. Cowan advised her of the call he had received from the RCMP in October 2011. She said she directed Mr. Cowan to get the details from the RCMP and thought she could rely on those details which included that open liquor, marijuana and drug paraphernalia had been found in the grievor's truck.

At the meeting held with the grievor and his Union representative, Ms. Fidlerchuk said she did not think that the grievor was forthcoming and that he thought it was not the Division's

place to be asking about this situation. Ms. Fidlerchuk explained that teachers and residence counselors are in positions of trust and authority and are held to a higher standard, as they are role modeling behaviour. She said at Frontier Collegiate Institute the Division and staff feel that they are at war with drugs and alcohol and that they are vigilant about drugs and alcohol and they try to keep unsavoury people away.

Ms. Fidlerchuk said the RCMP advised that when questioned by them the grievor said the drug paraphernalia was from Frontier Collegiate students. She said she did not believe this was the case since there is a procedure and protocol to be followed when drugs are confiscated from students which included giving seized items to the Residence Administrator or Head Counselor who is to lock them up and notify the RCMP who come and collect it. Ms. Fidlerchuk said the grievor knew this and what he ought to have done and that was not done if the drugs and paraphernalia were in his possession.

Ms. Fidlerchuk referred to a summary of the meeting with the grievor (Exhibit 24) that she prepared at the time. She noted confusing and inconsistent statements made by the grievor and also that when the grievor was stopped it was over a student break when the grievor had not been in contact with students over 7 days and anything he had confiscated should have been given to the Residence Administrator before the beginning of the break.

Ms. Fidlerchuk concluded that, given the facts of this incident, including his failure to follow the policy and protocol regarding confiscation, and, his earlier 5 day suspension, at the very least the further 5 day suspension was appropriate along with a further step under

the Division's Progressive Discipline Policy (Exhibit 25). She said it seemed to her that the grievor's behaviour was following a pattern and that it did not seem the grievor was getting the message to correct his behaviour.

Turning to the stuck van incident, Ms. Fidierchuk said she was informed of the details by Mr. Cowan and eventually a meeting with the grievor was held on November 24<sup>th</sup>. She said the grievor was aggressive and confrontational, tried to thwart the purpose of the meeting by making loud comments, verbally attacked Mr. Cowan and when asked why he went down Old Indian Trail, pointed his finger at her and loudly said he was "looking after your kids." Ms. Fidierchuk also described the grievor as not forthcoming when asked why he had not taken responsibility for driving the van and instead sarcastically answered, "ask Tony".

Ms. Fidierchuk said the termination letter (Exhibit 4) given to the grievor was based on her recommendation. She said she concluded termination was appropriate because:

We had exhausted all of our abilities to try to work with Michael and see a change in attitude, growth in responsibility for his actions, his care of students and the reputation of our school and staff. I felt we had invested a huge amount of time to have him grow to be a good employee but those supports and things did not seem to make a difference in attitude and responsibility. We have too much to risk and we cannot have employees who are so cavalier with students and their responsibility. We need employees to care, look after and provide for the safety and well being of our kids.

Ms. Fidierchuk was not cross examined.

The Division closed its case.

Having reserved the Union's opening argument Mr. Leslie reiterated the Union's position that the discipline imposed was unjustified and without cause and the Union would lead evidence with respect to the events leading up to the termination.

In reply to this Mr. Simpson said that Ms. Fidlerchuk was not challenged on any of her evidence and that Mr. Cowan was not challenged or asked any questions about the RCMP stop in October 2011. He said that the suspension grievance evidence is unchallenged with respect to either witness and the Division's evidence is accepted. Mr. Simpson argued that it was inappropriate for the Union to lead evidence inconsistent with evidence presented by Mr. Cowan or Ms. Fidlerchuk that was not challenged through cross examination and the Union ought not to lead evidence that would impeach evidence that the Division's witnesses did not have the opportunity to respond to.

The grievor Michael Dubois said he was hired in September 2007 to work as a casual employee and worked weekends 6:00 p.m. to 3:00 a.m. and picked up other shifts. He said there was a posting in 2009 float security that came under the pay structure Residence Counselor that he got.

Mr. Dubois said his duties as Residence Counselor included the general care and well being of students in residence, being in charge of all door checks on campus, off campus patrols to look for students out after curfew and any duties the Shift Crew Head would assign him. He said he worked 6:00 p.m. to 3:00 a.m. and usually worked Sunday to Thursday, had Friday and Saturday off and came in on Sunday night. Mr. Dubois said he

was not given any training when he was hired and on his own he created a door check, sports inventory check and started a floor hockey league.

The grievor said he accepted full responsibility for the Facebook incident and did not grieve it.

With respect to the RCMP stop the grievor said he was stopped by Conservation who found in his truck open liquor and little box of drug paraphernalia. Mr. Simpson objected to this evidence on the basis that it was inconsistent with earlier unchallenged evidence that open liquor, drug and drug paraphernalia were found. Mr. Dubois said marijuana was found on another person in the car. He said Conservation called the RCMP and he was questioned by Constable Butts who asked him if he was going to find anything. Mr. Dubois said he told the Constable that there may be a pipe or paraphernalia because of his job as Residence Counselor. Mr. Dubois said after the Constable searched the vehicle he didn't find anything and allowed him to drive away after he passed field sobriety tests.

With respect to the November van incident Mr. Dubois testified his shift head Carolyn Brignells called him shortly before 11:00 p.m. to patrol for students who had missed curfew and gave Mr. Poirier permission to extend his shift and look for students. Mr. Dubois said they saw evidence indicating students on Old Indian Trail and that they had been down the trail a number of times with Division and personal vehicles. Mr. Simpson objected and said nothing had been put to the Division's witnesses about the usage of trails by vehicles, let alone Division vehicles. Mr. Dubois continued his



testimony and said the van became stuck 20-30 yards in. He said there was radio chatter so he used his cell phone to ask Carolyn to come and get him with her truck but she had no gas so volunteered to contact Kenny. Mr. Poirier then phoned Kenny to tell him where to find a rope or chain. Mr. Dubois said Kenny was the only employee requested to come and give them a hand. He said Scott, the Head Counselor, then came and told them to leave the van and told everyone to go back to work.

Mr. Dubois said he was walking back to campus when Mr. Poirier and Kenny pulled up beside him and they talked for a while. Mr. Dubois said "Tony said he would take care of things and not to phone it in". Mr. Dubois said he finished his shift and then went home.

Mr. Dubois said a couple of days went by and he received a call from Mr. Poirier who told him he had told Mr. Cowan he was driving and was taking responsibility for the van getting stuck since he was frightened that Mr. Dubois was going to be terminated. Mr. Dubois said he told Mr. Poirier this was not the right thing to do and he should go and tell the truth and that he didn't think he was going to be fired for getting a van stuck.

Mr. Dubois said when he reported for work on his shift on Sunday he was sent home with pay and told to report to Ms. Fidierchuk on Monday morning. He said he did this and was told to come back the next day with a shop steward and Ms. Fidierchuk slammed the door in this face. Mr. Simpson objected again, noting this was not put to Ms. Fidierchuk and that although he wanted to "keep moving" it was unfair to call this evidence when the Division had closed its case.

Mr. Dubois said a meeting was eventually held with the Division and his Union representative and he explained the situation. He said a few days after he got a call that he was terminated and then received the termination letter. Mr. Dubois said he felt “this big” and went to see a doctor a month later who diagnosed him with depression and said the termination was the cause of that. Mr. Simpson objected to this as hearsay and there were no medical reports or medical evidence to substantiate.

Mr. Dubois testified that he felt he was a good employee – he had found/rescued/brought out hundreds of students from the bush or off campus, had put out a fire on the third floor, had rescued two students with hypothermia, had saved numerous students from suicide, had very good rapport with students, had used his own vehicle for patrols, had produced door checks and organized floor hockey. Mr. Dubois said he did not hold a grudge against Frontier Collegiate Institute. When asked if he would like to go back to work as a Residence Counselor, Mr. Dubois said “Sure.”

In cross examination Mr. Dubois confirmed that his seniority date under the Collective Agreement, after 3 months probation was November 20, 2009. He also confirmed that his regular hours of work for Wednesdays or Thursdays were 6:30 p.m. to 3:00 a.m. and that the van issue began on late Wednesday evening into Thursday morning. He said he was not at work on Thursday 6:30 p.m. to 3:00 a.m. after the van was stuck because he was sick and had phoned in to Mr. Cowan’s office. Mr. Dubois also confirmed that his Shift Head, Carolyn, was his sister.

Mr. Dubois reiterated that he took full responsibility for the June 2011 Facebook incident and had not grieved the 5 day suspension imposed. Mr. Dubois said his relationships with all students were close, as a parent would be.

Mr. Dubois was challenged as to whether he was behaving as a parent would in October 2011 when he was driving with open liquor, drugs and drug paraphernalia. He said he was “not my brother’s keeper” and these were not being consumed by him but his vehicle was involved. Mr. Dubois denied implicating students at Frontier Collegiate and said he only said if the vehicle was searched the RCMP may find drug paraphernalia from his job as Residence Counselor.

Mr. Dubois said staff was told to get rid of any items confiscated from students and that the policy and protocol of turning it in was not in place until after this incident. Mr. Dubois denied the paraphernalia was his.

Turning to the van incident Mr. Dubois said he never received a memo about not taking Division vehicles off road, nor was he told that. He said he disagreed with Mr. Cowan’s testimony and had taken vehicles down the trail before.

Mr. Dubois said in reporting the van was stuck he used his cell phone because the radio was not free and did not switch to texting to exclude Mr. Hamblin’s involvement. He said there were a lot of people who came to help when the van became stuck but he had only

asked his sister, who sent Kenny, and others came on their own because they were devoted employees who wanted to help out.

Mr. Dubois said when he was told to go back to work he put the van in park and got out to walk back to campus. He said he did not know Mr. Poirier was going to say he was driving the van and told him when he later phoned to tell the truth. He denied that a conversation took place between Tony and himself that Mr. Cowan referred to where Mr. Poirier said it was hard to make him understand why he was changing his story. Mr. Dubois maintained that he told Mr. Poirier he should tell the truth and that Carolyn knew who was driving. Mr. Dubois was asked why on November 24<sup>th</sup> at the meeting when he was asked who was driving, he replied "Ask Tony". Mr. Dubois replied to this question that Ms. Fidlerchuk's methods and demeanor were not professional and she was very aggressive and kept trying to tell him the logical thing was and that was what she believed.

Mr. Dubois reiterated that he thought he was a great employee and that in his two years he had saved students from suicide, hypothermia, taken hundreds out of the bush, had confiscated alcohol and drugs and had made the environment a safer place.

Tony Poirier is the Recreation Coordinator at Frontier Collegiate and has worked there for a total of 9 years. He said he was with the grievor when the van became stuck in November 2011. He said they were searching for kids after curfew and they noticed tracks in fresh snow and pulled onto Old Indian Trail. Mr. Poirier said he had been on this road hundreds of times looking for students. Mr. Simpson objected to the leading of this

evidence that was not challenged in the Division's case or put to the Division's witnesses. Mr. Poirier continued and said the van became stuck in a pothole and they were unsuccessful in getting the van out, so he texted the shift head to let her know they were stuck. He said others arrived to help and then Scott Hamblin, the Head Counselor came and said to leave the van and go back to work. Mr. Poirier said Mr. Hamblin was upset about this situation, raised his voice and wanted them back at work.

Mr. Poirier said the grievor left on foot and he stopped him as he walked and asked him if he wanted a ride. He said the grievor was "pretty upset" and said here was "another thing to use against him" and he would "lose his job." Mr. Poirier said he told the grievor not to worry about it, he would "take care of it" and then he went back to the residence, turned in the radio and went home. Mr. Poirier said he had worked with the grievor a long time and they were friends and he could see the grievor was worried and not his normal, jovial self and he portrayed the feeling he would be in trouble. Mr. Poirier said by saying he would "take care of it" meant he would say he was driving the van but he did not say that.

Mr. Poirier said when he went in to work Mr. Cowan asked him what happened and he told him he was driving the van and Mr. Cowan asked him to write a report (Exhibit 16) and he then subsequently contacted MPI. When Mr. Poirier spoke to the MPI adjuster he said he found out that he would be held responsible for the repairs, would lose his safe driver's record and that he had just bought a Harley and realized he would be paying a lot in insurance. He said he called the grievor and told him he had said he had been driving the van but that it was going to be a financial hit. Mr. Poirier said the grievor told him to tell

MPI that the grievor was driving. Mr. Poirier said he then spoke to Mr. Cowan and he explained to Mr. Cowan he had lied and that he had spoken with the grievor about the MPI cost and the grievor had said to tell the truth and not to take the blame. Mr. Cowan told him to write a proper report about the truth that he was not driving. Mr. Poirier said he certainly did not remember the exact conversation since it was quite some time ago.

In cross examination Mr. Poirier was asked if he was prepared to lie on the grievor's behalf. He said he was not prepared to lie but had done so before.

Mr. Poirier acknowledged he went to work the next day in the afternoon of November 17<sup>th</sup> after the van was stuck and lied to Mr. Cowan and that he was prepared to lie for his friend, the grievor, when he wrote his first report. He also acknowledged that he would only go so far since when he found out it was going to cost him money he wasn't prepared to lie. Mr. Poirier said when he called MPI he was not concerned about lying about driving because he did not think the van was damaged. When asked by Mr. Simpson if he had any problem with filing a false report with MPI, Mr. Poirier said he didn't know about the process and thought they wanted to know about what had happened to the van.

Mr. Poirier said he knew right from wrong and that he had learned it was better to tell the truth. He said when he learned this was going to cost him money he thought he maybe shouldn't lie to MPI or his employer. Mr. Simpson asked him if whether he told the truth depended on the consequences to him and Mr. Poirier replied "In that situation, yes."

Mr. Poirier said people were upset when Mr. Hamblin yelled at them and was very stern and that the grievor said he was afraid for his job. Mr. Poirier said he went in and said he was driving without knowing if the grievor had gone in and said he was driving. He further said he was not prepared to lie further once he found out it would cost him money and he was not willing to lie because he can't afford it.

Mr. Poirier denied having told Mr. Cowan that he had a difficult time making the grievor understand why he could not take responsibility and that the grievor was immature and didn't think things through (Exhibit 19). Mr. Poirier said he had taken an oath at the hearing and was not lying now, although he acknowledged he had been prepared to lie to MPI and his employer to aid a friend.

The Union closed its case.

Mr. Simpson began the Division's argument by noting this was a fact based case which required findings of credibility. He said the Division's witnesses were forthright, careful and candid in their evidence and any challenge of their evidence was minimal or non-existent. Mr. Simpson said the statements and incident reports were covered in the examinations in chief and support the discipline letters of June, October and November, 2011.

Mr. Simpson said the grievor was a two year employee, who had casual experience, with a seniority date of November 20, 2009. He said the first issue with the grievor arose in

December, 2010/January 2011 where the grievor was spoken to and warned about his relationship with certain students, his involvement with Facebook and the need to understand and respect boundaries. Mr. Simpson noted that the Division's school, Frontier Collegiate Institute has children from isolated communities who have been sent by their parents who have elected to have them at Frontier Collegiate and have placed their faith and trust that their children will be well cared for. He contrasted the grievor's admitted behaviour in January 2011 to hardly the work of a trusted Residence Counselor in charge of children entrusted to him.

After Mr. Cowan spoke to the grievor in January 2011, Mr. Cowan thought the grievor had listened and learned as he outwardly appeared to heed the warning he had received. However, Mr. Simpson argued that six months later in June 2011, a complaint was made, investigated and substantiated that the grievor was communicating on Facebook with a student and commenting in lewd and inappropriate language about another student (Exhibit 12). Mr. Simpson said Mrs. Fidierchuk described this conduct as wholly unacceptable. The Division issued the grievor a 5 day suspension and its June 16, 2011 letter describes in specific detail the Division's concerns about the grievor's behaviour and reminded him of his responsibilities as a Residence Counselor and that any further misconduct would be dealt with up to and including termination. Mr. Simpson noted Mr. Cowan and Ms. Fidierchuk testified about how seriously they viewed the grievor's conduct and were not challenged in their evidence in that at all and the grievor did not grieve the June 16<sup>th</sup> suspension.



Mr. Simpson argued that while the grievor said he took full responsibility for his January and June conduct that should be assessed carefully because ultimately the grievor took only responsibility for posting on Facebook, which is like saying “I’m sorry I got caught.” He noted that there was no expression of remorse for his wrongdoing or his behaviour and misconduct in terms of his relationship with students and the boundaries did not appear to apply to him.

Turning to the October 2011 traffic stop, Mr. Simpson said the search revealed open alcohol, marijuana and drug paraphernalia in the grievor’s car which caused the Division great concern because the grievor had said the drug paraphernalia was from Frontier Collegiate students and it obviously had not been properly disposed of in accordance with the Division’s policies. Mr. Simpson argued that the Division had concluded the information it had received from the RCMP was accurate and preferred it to the grievor’s information. He said the “best” interpretation of the information was that if this was student drug paraphernalia it had been in the grievor’s possession for some time given that it was the weekend following the week long Thanksgiving break and it had not been turned over, on confiscation, contrary to protocol.

Mr. Simpson also noted that the grievor had open liquor and marijuana in the car, in addition to the paraphernalia. He said this was not acceptable personal off duty conduct and that Residence Counselors, like teachers do not leave their hat at the doorway on the way out and their conduct reflects on the institution. Mr. Simpson asked how one can expect the Residence Counselor to come to work and maintain the respect and control of

students when they have been “busted” for open alcohol or marijuana on the weekend, whether charged or not? He said Cranberry Portage is small, 850 people and there are not many secrets.

Mr. Simpson referred to the October 26, 2011 suspension letter which refers to the grievor’s inconsistent comment at the October 24<sup>th</sup> meeting about whether or not items were found in his vehicle, whether or not items were confiscated and whether or not the items were the grievor’s. He said these inconsistencies were repeated in the grievor’s testimony at this hearing as to who and when the search was done and who found what. Mr. Simpson argued the bottom line was this Residence Counselor had received a short time earlier in June 2011, a 5 day suspension for conduct and behaviour that was seen to be damaging to the reputation of the school and now is operating his vehicle where open liquor and drugs and drug paraphernalia are found.

With respect to the grievor’s suggestion that there was no policy for confiscated items, other than to just throw them away, Mr. Simpson said this was not the evidence of Mr. Cowan or Ms. Fidierchuk, nor was that suggestion put to them. Further he said the Division’s policy was in place as of September 2009 (attached to Exhibit 2) and not something that was devised in October 2011.

Mr. Simpson said all of the information set out in the October 26<sup>th</sup> suspension letter was established in the testimony of Mr. Cowan and Ms. Fidierchuk and was not challenged.

Ms. Fidlerchuk was not questioned at all and Mr. Cowan was not questioned about the October issue.

Mr. Simpson noted that the grievor did not take any responsibility, make any acknowledgment or express any remorse for his October 2011 behaviour. He said there was some attempt to minimize his involvement but there was no evident awareness of the adverse effect of such conduct on the public institution where he was employed. Mr. Simpson commented that one would have thought at the very least the grievor would have recognized that driving around with open liquor and drugs was not a good idea. Mr. Simpson said a 5 day suspension following the June 5 day suspension was lenient but that the October 26 letter made clear to the grievor he was at Step 3 of a 4 step discipline model, along with a clear warning about what the future could hold in the event of other misconduct.

Mr. Simpson said that less than a month later, contrary to specific instructions given to all and to the grievor personally, the grievor took a Division vehicle and drove it off road. He said the evidence of Mr. Cowan and Ms. Fidlerchuk confirmed the Old Indian Trail was basically for ATV's and snowmobiles (Exhibit 26 photos) and they were not challenged about that, nor was there any suggestion to the contrary.

Mr. Simpson commented on Mr. Poirier's testimony that the van slipped into a pothole which he thought was a miniscule and meaningless thing and yet shortly thereafter was prepared to lie for the grievor. He said this does not jibe with what had occurred.

Mr. Simpson said Mr. Hamblin's email (Exhibit 15) sets out the immediate concerns about the stuck van situation, including his concern that he was deliberately being excluded from the developments when texting was used rather than the radio, the number of employees at the van who should have been at the residence, the damage done by trying to remove the van and the repeated warnings that vehicles were not to leave the road at any time.

Mr. Simpson argued that the grievor, contrary to specific direction, having been advised that he particularly has to conform to all guidelines and is at Step 3 of a 4 step discipline process, takes a Division van and deliberately drives it where he is not supposed to; the grievor contacts his sister, has Kenny come out with a chain and yet advises Mr. Hamblin he is stuck but it is no big deal. When Mr. Hamblin arrives he is justifiably upset because the van and many employees are where they are not supposed to be and sends them back to campus. Mr. Simpson said that Mr. Poirier saw the grievor was very upset and offered to assume responsibility. He said the Arbitrator was being asked to believe that without discussion with one another the grievor went back to work and Mr. Poirier went in the next day and told an outright lie with the clear intention of protecting his friend. Mr. Simpson said we are being asked to accept that when Mr. Poirier did this he didn't know if the grievor had been at work in the meantime and reported he was the driver. He said Mr. Poirier, as an employee of the Division, lies to Mr. Cowan, to MPI and then contacts the grievor when money is involved. Mr. Simpson argued that Mr. Poirier would still have the Arbitrator believe the grievor still doesn't know he has claimed to be the driver and that is incredible. He asked if this was so why hasn't the grievor come in to report the damage and that he was driving.

In light of all of the above Mr. Simpson urged the Arbitrator to conclude that Mr. Poirier was not a credible witness and that in particular Mr. Cowan's recollection of the conversation he had with Mr. Poirier where Mr. Poirier said he had difficulty making the grievor understand why he could not take responsibility for driving the van (Exhibit 19) should be accepted.

Mr. Simpson argued that the grievor was not fired because a van slid into a pothole; rather, he took a vehicle off road, down a trail, got the van stuck, was privy to an attempt to tow the van without involving his supervisor, and other employees were at the van site, leaving the residences, and then he was party to a cover up as to who the driver of the van was.

Mr. Simpson referred to Ms. Fidlerchuk's assessment of the grievor's demeanor, conduct and behaviour during the meeting of November 24<sup>th</sup> as sarcastic, insolent and insubordinate. He said she was not challenged on any of that and yet the grievor comes forth at the hearing and purports to take issue with Ms. Fidlerchuk's behaviour in the meeting.

It was argued by Mr. Simpson that there was no recognition by the grievor as to what had happened and there was no acknowledgment or remorse and in essence the grievor's position was that he had done nothing wrong and in fact was a great employee. Mr. Simpson said the termination letter (Exhibit 4) set out the facts on which the termination was based and these facts were established in evidence, and the vast majority

of the evidence not challenged at all, and if challenged not done successfully or with credible evidence.

In summary, Mr. Simpson concluded that cause for termination had been established. He said whether cause for termination was established by virtue of the November 2011 van incident alone may be debatable, but that there was cause to have regard to earlier events was not debatable. Mr. Simpson said there is no doubt discipline was warranted for November 2011 and it was appropriate to take into consideration the grievor's record. He said the only appropriate conclusion was termination as Ms. Fidlerchuk concluded when she determined that she was not prepared to have the grievor who behaved in this way and conducted himself in this way continue in the employ of the Division.

In support of the Division's position that the suspension and termination should be upheld

Mr. Simpson filed and reviewed:

Brown & Beatty

7:4422 Rehabilitative potential

- great weight is put on whether the grievor has tendered a sincere apology or expressed real remorse;
- where grievor refuses to admit a true statement, to fully acknowledge wrongful conduct, to identify an accomplice, to remedy the cause of his unsatisfactory performance, to comply with the employer's rules then arbitrators are less likely to rate future employment prospects highly;
- Mr. Simpson said both Mr. Cowan and Ms. Fidlerchuk said they did not see the grievor as being able to continue successfully in the employment relationship.

7:4300 The Reasonableness of the Penalty

- long and exemplary employment histories count in favour of higher penalties while a record of poor performance has the reverse effect.

7:4310 The Doctrine of Culminating Incident

- where an employee has engaged in some final culminating act of misconduct or behaviour for which he can be disciplined then it is proper for the employer to consider the prior blameworthy record.
- Mr. Simpson said this doctrine should be applied in these circumstances.

7:4424 Mitigating Factors

- Mr. Simpson said none of the factors reviewed are applicable to these facts and that neither economic hardship or compassion could be invoked even for consideration;
- he also noted the grievor is employed as a foreman at a construction company.

7:3330 Unethical Conduct

- employees who misuse the Internet may be liable to discipline and use of the Internet to post contemptuous and unflattering comments about coworkers and management has been considered to be sufficiently serious to cause irreparable severance of the employment relationship;
- Mr. Simpson said the grievor's Internet conduct is worse because it involved students.

7:3660 Insolent and Defiant Behaviour

- conduct that is insolent or defiant of management may be found to be insubordinate even if there is no refusal to comply with a directive;
- Mr. Simpson said the grievor's demeanor, behaviour and aggressive and uncooperative manner throughout the meetings was insubordinate.

7:3310 Off Duty Behaviour

- employees in government and public employers may face special restrictions on what they can do as private citizens.

Ross v. New Brunswick School District [1996] 15 C.R. 825

Mr. Simpson said this case included a review of off duty conduct and held in part:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. (p. 858)

Mr. Simpson said there was an analogy in this case to the position of Residence Counselors and the uniqueness of Frontier Collegiate Institute campus. He said there is trust and

confidence required in the Residence Counselors who act in a parental capacity and while the grievor was off duty in October he brought his conduct home to his place of employment when he told the RCMP that he might find something that was seized while in his position as Residence Counselor at Frontier Collegiate.

Mr. Leslie began the Union's argument by saying the grievor and Mr. Poirier were truthful in their evidence. He noted the grievor did not deny saying he told the RCMP they might find something he had confiscated from students. With respect to the van incident Mr. Leslie said there was no contradiction as to how this occurred since the grievor told Carolyn the van was stuck and he was behind the wheel when Mr. Hamblin arrived; the grievor was driving. Mr. Leslie argued that the grievor did not text to intentionally keep Mr. Hamblin "out of the loop" but texted because there was radio chatter.

Mr. Leslie said it was not the grievor who asked Mr. Poirier to say he was driving but rather Mr. Poirier did his on his own because he wanted to and he thought the van being stuck was a minor incident. Mr. Leslie reiterated Mr. Poirier was telling the truth about his conversation with Mr. Cowan and he did not say what Mr. Cowan testified he said about the grievor.

Mr. Leslie said that the grievor had accepted full responsibility for the Facebook incident in June and that is why no grievance was filed.



Mr. Leslie said the grievor wanted his job back and asked that the grievances be allowed and that if returned to his job there would be no issue of compensation.

In support of the Union's position Mr. Leslie filed and reviewed:

Re: CNR and Teamsters 110 C.L.A.S. 265

- culminating incident but suspension substituted to give the grievor a last chance

Re: Johnson Packers and UFCW 89 C.L.A.S. 18

- culminating incident did not justify discharge and the relationship was not irreparable

Re: Agropur and Teamsters 111 C.L.A.S. 287

- culminating incident but Board found the grievor to be negligent but not intentional in damage caused and suspension imposed rather than termination

Re: Snow Lake School Division and USW 66 C.L.A.S. 273

- grievor as a maintenance supervisor publicly criticized employer and received written warning
- found not no cause for discipline

In conclusion Mr. Leslie said the grievor should be reinstated.

I have carefully reviewed and considered the material filed, evidence and argument presented. The first issue to be determined is whether there is just cause for discipline of the grievor. Turning first to the suspension grievance, I am satisfied there is just cause for discipline for the following reasons:

- a) When the grievor's vehicle was stopped on the weekend of October 15, 2011, according to the RCMP report, open alcohol, marijuana and drug paraphernalia were seized. Although the grievor in his testimony denied the marijuana was his he said he told the RCMP if the vehicle was searched drug paraphernalia that was from Frontier Collegiate Institute where he was a Residence Counselor might be found. The grievor conceded in his direct evidence, contrary to what he said on October 24<sup>th</sup>, that drug paraphernalia was found in his vehicle. The grievor said it was not his;

- b) The Division has a clear policy that prohibited items that are seized from students are to be turned over to Residence Administration and determination about what further action is to be taken is made. (Exhibit 2) Mr. Cowan's evidence and Ms. Fidierchuk's evidence confirms that this is the policy that is enforced at Frontier Collegiate and they articulated the rationale behind the policy, including involving the RCMP and deciding how the students who had the prohibited items will be treated. Such a policy is clearly reasonable and necessary;
- c) The grievor's assertion that staff had been instructed to "get rid" of or throw out what is confiscated rather than turn it in to Residence Administration is not believable, nor is his assertion that the turning over of confiscated items policy only came into force after the October 2011 incident. The written policy from the Frontier Collegiate Residence Procedures Manual produced in evidence sets out what Mr. Cowan and Ms. Fidierchuk said were the long standing practice guidelines and further I note the Division's Search of Students and Search and Seizure of Student Property Policy G.1.G. was adopted September 1, 2009 in its present form; (Exhibit 2)
- d) It is disturbing to note that even though the grievor claims that prohibited items that are confiscated are to be gotten rid of or thrown out he still had in his possession, on the weekend of October 15<sup>th</sup>, the drug paraphernalia that he said was confiscated from students, when school had been on Thanksgiving break since October 7<sup>th</sup>;
- e) I am satisfied that the grievor violated the clear practice guidelines and policy of the Division and Frontier Collegiate that prohibited items that were confiscated must be turned over to Residence Administration;
- f) Having determined that the grievor violated the Division's policy, and in the circumstances as described, it is understandable the Division would conclude that the grievor had engaged in inappropriate and unacceptable behaviour that also was potentially harmful to the reputation of Frontier Collegiate and the Division.

Having found that there is just cause for discipline the issue to be determined is whether the 5 day suspension imposed was a reasonable response. The grievor had been warned in January 2011 about his inappropriate behaviour and conduct and had received a 5 day suspension on June 16, 2011 (Exhibit 13) for inappropriate conduct and behaviour with

respect to students and his use of Facebook. Neither of these had been grieved. I also note the grievor on June 16, 2011 had been warned in writing about future misconduct, as follows:

Please be advised that your actions in the future will be monitored closely to ensure you do not jeopardize the trust of students, the reputation of F.C.I. Residence and Frontier School Division. This letter will be placed in your personnel file and future misconduct will result in further disciplinary action, up to and including termination.

The Division in its letter of suspension of October 26, 2011, specifically cited the grievor's continued pattern of inappropriate and unacceptable behaviour. I note that Mr. Cowan in his evidence expressed the hope that this further 5 day suspension would create a change in the grievor's behaviour.

The grievor did not express any apology or remorse for his actions.

Given the January, 2011 warning, the June 16, 2011 five day suspension, the serious breach of Division policies and the grievor's apparent continuing pattern of inappropriate and unacceptable conduct on the weekend of October 15, 2011, I find a further 5 day suspension imposed on October 26, 2011 to be more than reasonable and do not find any grounds on which to interfere with the discipline imposed. The suspension grievance is therefore dismissed.

Turning to the incident of the stuck van on November 16, 2011, and the ensuing events, I am satisfied there is just cause to discipline the grievor for the following reasons:

- a) The evidence of Mr. Cowan was that the staff had been instructed not to take vehicles off road and that the grievor specifically had been told by Lisa Stevens not to take vehicles off road. Mr. Cowan was not challenged on this aspect of his evidence;
- b) Although the grievor said he was not aware of this policy, I am not persuaded by his assertion. In particular the grievor certainly seemed to know that he had done something that was going to get him in trouble and voiced his concern at the time to Mr. Poirier when he said this was “something else” to use against him;
- c) Mr. Poirier certainly knew this was the policy when he wrote his first note and said he was “driving on Old Indian Trail which is not a road I should have travelled.” (Exhibit 16);
- d) If there was no policy about taking vehicles off road then there would be no reason for Mr. Poirier to assure the grievor that he would “take care of things” and proceed to tell his employer and MPI he was driving the van;
- e) I find based on the evidence as described above that there was a policy and specific instruction to staff, as well as to the grievor individually not to take vehicles off road and that the grievor knew of this policy and instruction and breached it when he took the van down the Old Indian Trail on November 16, 2011. Further such a policy was reasonable and necessary given past damage to vehicles and the terrain (Exhibit 26);
- f) I find it difficult to believe that the grievor did not know that Mr. Poirier was going to accept responsibility for driving the van. What else could “I’ll take care of it” mean in these circumstances, particularly when Mr. Poirier made this undertaking to his friend the grievor when the grievor told him he was afraid of losing his job. On the balance of probabilities I find that the grievor knew Mr. Poirier was going to accept responsibility for driving and was prepared to allow this to happen. Further, by November 18<sup>th</sup> the grievor knew Mr. Poirier had accepted responsibility but had changed his mind about doing so. The grievor still did not come forward to report he had been driving nor did he make a report to MPI. This lack of disclosure by the grievor about the whole situation, coupled with his breach of the policy not to take vehicles off road and insubordinate conduct at the meeting on November 24<sup>th</sup> caused Ms. Fidierchuk understandably grave concern;
- g) The grievor did not apologize or express any remorse for this incident at any time.

Having found there to be just cause for discipline for the van incident the issue to be determined is whether the response of termination is reasonable. In so doing, I find that it is proper to consider the grievor's record.

In a relatively short time with the Division the grievor received a warning and two 5 day suspensions prior to the van incident which I consider to be proper progressive discipline, and that the grievor had been warned and knew from his letter of suspension on October 26, 2011, the following:

You have been placed at Step 3 of the Progressive Discipline Model...

Please be advised that your actions in the future will be monitored closely to ensure you abide by Division policies and do not further jeopardize the reputation of F.C.I. Residence and Frontier School Division. This letter will be placed in your personnel file and any future misconduct will result in further disciplinary action up to and including termination.

The grievor's actions caused the Division to conclude in its letter of termination that:

...through your actions you have established an ongoing pattern of untrustworthiness, a refusal to follow established protocols and procedures within the Division, as well as repeated display of abuse of your power and authority as Residence Counselor. This continued behaviour is unacceptable to the Division.

You were informed in writing, on two separate occasions, that any future misconduct will result in further disciplinary action, up to and including termination. Therefore, be advised in light of your lack of regard for your employment relationship with the Division your continued refusal to amend your conduct, based on the above and all the circumstances surrounding your employment history to date, I am terminating your employment effective immediately. (Exhibit 4)

The evidence of Ms. Fidlerchuk demonstrates that the Division had "reached the end of its rope" in trying to salvage the employment relationship it had with the grievor. The matters

for which he had been disciplined were not trifling but were significant, particularly given the position of trust he held as a Residence Counselor for students in residence at Frontier Collegiate. There is no doubt that Residence Counselors in this setting have an onerous responsibility for the care, safety and well being of the students in residence and that the Division as employer must be able to rely on the Residence Counselors to fulfill their duties and responsibilities at all times. Unfortunately the grievor failed to do so in the circumstances of the incidents as described above, despite being disciplined in a progressive manner that the Division had hoped would result in a change of attitude and behaviour. It is the Division who bears the ultimate responsibility for the care, safety and well being of its students and as Ms. Fidlerchuk testified, the conclusion was reached that to continue to employ the grievor was “too much to risk.” I find myself in agreement with this conclusion.

I have considered whether there are mitigating factors that would convince me to exercise my discretion and substitute a lesser penalty and have concluded there are not. I recognize that the grievor during the course of his employment did find many students who were missing after curfew and did establish a floor hockey league and implement a system for door checks. Those things however are not enough to mitigate the conduct and behaviour for which he has been rightly disciplined. I also note, and find as significant that the grievor has not apologized or expressed any remorse for any of his actions for which he was suspended October 26, 2011 and terminated on November 28, 2011.

For the above reasons, I find that the employment relationship between the grievor and the Division has been irreparably severed and the Division's decision to terminate the grievor properly took into account all relevant factors and was reasonable in all of these particular circumstances. I therefore dismiss the termination grievance.

Dated this 4<sup>th</sup> day of December, 2012.



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Diane E. Jones  
Sole Arbitrator