

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

**WINNIPEG SCHOOL DIVISION**

(hereinafter referred to as "the Division" or "the Employer")

- and -

**WINNIPEG TEACHERS' ASSOCIATION AND  
THE MANITOBA TEACHERS' SOCIETY**

(hereinafter referred to as "the Association" or "the Union")

- and -

**GEORGE HESHKA**

(hereinafter referred to as "Mr. Heshka" or "the Grievor")

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**ARBITRATION AWARD**

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BOARD OF ARBITRATION:	Gavin Wood
DATE OF HEARING:	February 15, 22, 23 and 24, 2021
LOCATION OF HEARING:	Winnipeg, Manitoba
APPEARANCES:	Kristin Gibson and Bret Lercher, Counsel for the Employer Garth Smorang, Q.C., Counsel for the Union

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**A. INTRODUCTION**

This arbitration hearing proceeded on February 15, 22, 23 and 24, 2021. At the outset, my appointment and jurisdiction to hear the matter was confirmed.

There was a preliminary motion for disclosure that was heard on February 15, 2021, with an Order for Disclosure issuing on February 16, 2021.

The grievance involves a claim of violation of the Collective Agreement between the Division and the Association arising from Mr. Heshka, Principal of Sisler High School, being placed on administrative leave and suspended with pay on November 16, 2020.

## **B. EVIDENCE**

At the outset of the hearing, the parties jointly filed an extensive set of documents, including the Collective Agreement (hereinafter referred to as “the Collective Agreement” between the Division and the Association, dated for the period July 1, 2014 to June 30, 2018, but which presently remains in effect).

The Division called as its sole witness, Mr. Eric Barnaby, Chief Human Resources Officer. The Association called the Grievor, Mr. George Heshka.

## **C. FACTUAL CIRCUMSTANCES**

### **(i) Background**

Much of the background to the adjudication is uncontroversial. Any area of factual dispute is set out in the following outline of the factual circumstances, with reference to the testimony on the dispute.

### **(ii) The Division**

The Winnipeg School Division administers the public schools for the City of Winnipeg, with its head offices located at 1577 Wall Street East, Winnipeg. Its Human Resources Department consists of five units, with Mr. Barnaby as its Chief Officer. The Department provides human resources services for 38 schools and a number of non-school sites making up the Winnipeg public school system.

Mr. Barnaby reports to Ms. Pauline Clarke, Chief Superintendent/CEO of the

Division. There are several human resources officers who report, in turn, to him.

There are several superintendents, each responsible for a group of schools.

The superintendents also report directly to Ms. Clarke.

The Collective Agreement provides the following with respect to discipline and complaints:

30. Discipline

The imposition of discipline with just cause by the Division or any agent thereof in the form of written warning(s) and/or suspension(s) with or without pay shall be subject to the following provisions:

- (a) Where the Division or person(s) acting on behalf of the Division so disciplines any person covered by this Collective Agreement and where the affected person is not satisfied that the discipline is for just cause, the Division's action shall be deemed to be a difference between the parties to or persons bound by this Collective Agreement under Article 8 – Provisions for Settlement of Disputes During Currency of Agreement.
- (b) When such a difference is referred to a Board of Arbitration under Article 8, the Board of Arbitration shall have the power to:
  - (i) uphold the discipline
  - (ii) rescind the discipline
  - (iii) vary or modify the discipline
  - (iv) order the board to pay all or part of any loss of pay and/or benefits in respect of the discipline
  - (v) do one or more of the things set out in subclause (i), (ii), (iii) and (iv) above.
- (c) The written warning(s) shall not include Performance Assessment and Development done pursuant to Policy GCN and/or any regulations and amendments thereto (hereafter referred to as the policy), except where the implementation of said policy against a person covered by this Collective Agreement is for the purpose of disciplining said person.
- (d) The Association agrees that the Division has the right to suspend an employee with or without pay for just cause.

### 30.1 Complaints

Should the Division receive a serious complaint, in writing, regarding a member of the Association, the Division shall communicate, in writing, the complaint received to the member concerned. Prior to making any judgment regarding the complaint, the Division shall afford the member an opportunity to appear and answer to that complaint, either personally or by representative.

#### (iii) Human Resources Practice

Mr. Barnaby was appointed Chief Human Resources Officer in August, 2012. There is a daily briefing meeting conducted by Mr. Barnaby, with the human resources officers. Staffing concerns generally first arise at that daily briefing.

If a concern arises involving the removal of an employee from their position, the practice is to have that potential removal considered by the superintendent for the school at which that employee works and Mr. Barnaby. A recommendation for removal is made to Ms. Clarke, the Chief Superintendent, and a decision for removal is then made. After removal, an investigation is conducted. That investigation may either be conducted internally by personnel of the Human Resources Department or externally by appointment by the Division.

Generally, the practice of the Division is to place the employee under investigation on a leave of absence with pay, pending the conclusion of the investigation. There are circumstances whereby an employee may remain in their position while the investigation is ongoing.

The practice is to advise the employee at a meeting that he/she is being placed on a leave of absence. The practice has not been to provide a formal letter of notice of the leave of absence at that meeting.

However, as an exception, a letter was provided, dated October 10, 2019, in which an employee was advised of an investigation, the name of the complainant, the nature of the complaint, and advising of an external person who had been appointed to carry out the investigation. In that letter of notice, the following caution was included:

As confidentiality is crucial to a fair and effective investigation, I urge you to refrain from discussing the investigation or the allegations with anyone other than your representative. It is especially important that you not have any communication with the Complainant or with any potential witnesses related to this matter while the investigation is underway. Please preserve intact any physical documents such as email and text messages, letters and audio recordings, as evidence in this investigation. Ms. Clarke will want to review such evidence when you meet with her.

In cross-examination of Mr. Barnaby, he described this letter of notification as unique. He acknowledged, though, that there was nothing in the Collective Agreement to prevent Mr. Heshka from having been provided with such a letter of notification.

(iv) The Office of Principal

The position of principal of a school was described by the witnesses. The principal's general authority is set in Section 28 of the Education Administration Miscellaneous Provisions Regulation (No. 468-88 R) of *The Education Administration Act* (C.C.S.M. c. E10), which provides:



**Principal's general authority**

**28 (1)** Subject to *The Public Schools Act* and the instructions of the school board, the principal is in charge of the school in respect of all matters of organization, management, instruction and discipline.

**28(2)** The principal is responsible for the supervision of staff, pupils, buildings, and grounds during school hours.

**28(3)** The principal is responsible for placing pupils in classes and issuing statements of their standing, subject to the approval of the superintendent where one has been appointed.

The principal's role is defined by various Division and Provincial policies and directives. With regards to hiring, assignment and evaluation of teachers, a principal is given authority to participate as set in Section 30 of the Regulations, which provides:

**Hiring, assignment and evaluation of teachers**

**30** A principal is to participate in the hiring, assignment and evaluation of teachers, and may have regard to parental and community views when making recommendations about those matters to the school board.

During his testimony, Mr. Heshka defined the principal's authority as involving all aspects of the running of the School on a day-to-day basis, including care for the health of all of the School's occupants, the School plant itself, and the students' education.

(v) Sisler High School

Sisler High School is located in the north end of the City of Winnipeg. It covers grades 9 to 12. It is described as servicing an "immigrant catchment area", with approximately 85 percent of the students being from the Filipino community.

It is one of the largest high schools in Winnipeg, with approximately 1,800 students, 103 teachers and 50 other support staff. There are three vice-principals and various department heads.

Mr. Heshka described Sisler High School's accomplishments in glowing terms, speaking highly of the student body and its teachers as striving and community-oriented. He emphasized the strong connection of the staff-to-students as a "cohesive whole".

(vi) George Heshka

Mr. Heshka is presently 87 years of age. He began teaching in 1960 and has been employed at Sisler High School since 1973, becoming its principal in 1980.

He acknowledged that most educators in the Division retire in their late 50's or early 60's. However, he explained that with his passion for the education process and for Sisler High School, he had no interest in such "early retirement". At present he has no plans to retire, explaining that "quite frankly there remains a lot to be done at Sisler".

Mr. Heshka's work ethic is strong. During his career as an educator, he has until recently worked seven days a week. In the last five years he has reduced his work week to six days, including Saturdays. He has always maintained long work hours, arriving early at the School and staying well-past the end of the school day.

Mr. Heshka's accomplishments as an educator and, in particular, as the principal of Sisler High School, have been recognized. He has received numerous awards for those accomplishments, examples of which were filed. These include formal recognitions by ethnic communities, the naming of Sisler High School, by Maclean's magazine in 2004 as one of the leading high schools in Canada, being named to the Order of Manitoba, and receiving an Honorary Doctor of Letters by the University of Winnipeg.

The practice of the Division is to evaluate the principals of its schools every five years. The evaluations of Mr. Heshka have been done in the past by superintendents (and most recently (in 2011) by the Director of School Services for the Division).

Three evaluations of Mr. Heshka were filed. The last of those was carried out in June, 2011. (The earlier evaluations were consistent in terms of comments to this last evaluation.)

The evaluation of June, 2011, conducted by Mr. Dushant Persaud, Superintendent of Schools-North, was reviewed in detail during Mr. Heshka's testimony. It includes the following comments under the various performance areas which were assessed:

Leadership/Management

Over the years, Mr. Heshka has provided the leadership at Sisler where exemplary programs in performing arts, athletics, academics, and technology have been developed. Program in all these areas have been

provincially acclaimed and some recognized as the standard for high schools. Sisler consistently ranks among the top of grade 12 provincial assessment results. His staff observed that “no one works harder than Mr. Heshka and we all see this. This makes us all want to work harder.”

### Personnel

Mr. Heshka demonstrates excellent understanding and application of the Winnipeg School Division’s policy and processes for staff performance assessments. Assessments are conducted in a timely manner and his assessment provides teachers with excellent feedback. When applicable, areas needing improvement are identified and supports are provided for growth in the identified areas.

### Communication

Mr. Heshka has excellent oral and written skills. All reports and communication are concise, clear, and submitted in a timely manner.

### Program

Mr. Heshka’s leadership to implement strong, industry-standard programs in Technology deserves special recognition. The school offers a Game Development and Design Certificate Program with courses that are similar to those offered at University of Winnipeg and the Red River Community College. To further enrich student experiences, Mr. Heshka has established working collaboration with both institutions. With the University of Winnipeg, students will spend one week every month at the University state of the art technology facilities to advance with skills. The Red River Community College provides instructors to lead lunch hour enrichment at Sisler. Students from this program learn enough skills and credits for their first year of post-secondary education. This represents a huge financial savings for families and a self-image boosts for students. Sisler joined with Daniel McIntyre, Tec-Voc to facilitate program articulation so that graduating students could take courses at Tec-Voc which would be granted credit at Red River College, thereby saving students money.

The overall performance summary provides:

Mr. Heshka has excellent skills in all areas of his performance assessment. He is a principal with vision, works hard, loves students, and is a great team builder. He models excellent work ethics.

He has developed Sisler High School as a nationally acclaimed school for its excellent programs and achievement. The Winnipeg School Division, and in particular, Sisler High School, are fortunate to have Mr. Heshka as a principal. He has provided us with exemplary leadership.

We are glad that he chose to remain at Sisler and turned down a very attractive offer from Dr. Axworthy to be Dean of the University of Winnipeg Collegiate, an offer which would have paid him more money for less work. And he did it so he could remain close to his students.

Thank you, Mr. Heshka

Mr. Heshka acknowledged during his direct-examination that possibly not all of the personnel at the School have the high regard for him set forth in this evaluation.

(vii) Background to the Grievance

Mr. Heshka attended the School during the period March to June, 2020, in the initial months of the pandemic. One of the vice-principals was present at the School full-time as well. The other two vice-principals, because of personal circumstances, physically attended with Mr. Heshka's permission on a partial-basis during these months.

In the summer of 2020, Mr. Heshka was in regular physical attendance at the School.

He became ill, however, in August, 2020. As a result, he presented the following medical report, dated September 1, 2020:

Mr. Heshka presented to this clinic on August 12, 2020 with severe mid and low back and neck pain. This was accompanied by vertigo. A cane was used to help with the altered balance. Symptoms appear to have occurred following over exertion in the form of an exercise routine one month prior.

Treatment has been provided on 4 separate occasions to date with neck and back pain improving. Vertigo is still present and continues to affect ambulation and concentration. Mr. Heshka is also being treated by his family doctor. Treatment will continue over the next month with a gradual improvement anticipated.

Mr. Heshka has been unable to work for the last half of July, August and will be unable to work for the month of September. Persistent vertigo does not allow a safe return to work. His condition will be re-evaluated and updated at the end of September.

A replacement acting principal was sought for Sisler High School. Initially, it was anticipated that person would be acting in that role for the month of September, 2021. Several retired educators, generally former principals and vice-principals, were approached for that temporary position. Ultimately, Ms. Susan Schmidt, who was a retired principal of Pembina Trails School Division (and who had never been employed in the Winnipeg School Division) accepted.

Her contract of appointment for the term position was filed.

Subsequently, Mr. Heshka's medical leave was extended initially to the end of October and then to November 16<sup>th</sup>. Mr. Barnaby received a medical report indicating that Mr. Heshka was in a position to return to work as of November 16, 2020. As a result, he wrote to Ms. Caetano-Gomes on October 26, 2020, as follows:

Afternoon Celia,

We received a new medical note from George today. It indicates that he will be able to return to full activity on November 16, 2020.

Regards,  
Eric

Ms. Caetano-Gomes wrote in response to Mr. Barnaby the following:

Hello Eric,

Thank you for letting us know about George. We would like to meet with him on the first day to support his transition back.

Thanks again,  
Celia

Ms. Schmidt had had her limited-term contract extended to November 17, 2020. On November 12, 2020, Ms. Celia Caetano-Gomes, Superintendent of Education Services for the Division, in an email wrote to Ms. Schmidt concerning her completion of the acting principal role in the following terms:

I have approved two days for Susan to support George's transition back to the school. This will provide the team with an opportunity to review the school's Covid plan, recovery learning, confirmed case protocols and lessons learned, committee priorities, school calendar and PD plans.

Her last day as Acting Principal will be Tuesday, November 17<sup>th</sup>, 2020. This will provide George with time to familiarize himself with the resources, guidelines, division policies and provincial curricula.

Susan will coordinate the transition meetings for the school teams over a two day period and invite Julie for the most essential meetings. She will send a draft plan for our review.

Mr. Heshka testified that he was medically able to return to his position as principal of Sisler High School as of November 16, 2020.

(viii) Communications in Fall, 2020

The Division provided its schools with various materials concerning the pandemic, including policies and directions, during the spring, summer and fall of 2020. Part of those materials were filed as exhibits.

Mr. Barnaby indicated that during his daily briefings during the month of September, 2020 with his human resources officers, he began noting indications of certain human resources concerns at the Sisler High School. On September 25, 2020, he received, together with Ms. Caetano-Gomes, an email from Ms. Keri-Lee Zaharia, the Human Resources Officer for Sisler High School, as to specific concerns. She began the email by indicating:

Just wanted to document some of our communication that has been ongoing in regard to Sisler.

Later in the email, she indicated the following concern:

**Brian Paradis work hours:**

Currently Brian is working a modified/split shift Monday through every second Saturday. Brian has a secondary job at one of the hospitals in Winnipeg so he has been working unusual shifts that can be aligned with his other position. Accordingly to Brian, this split shift has been going on for at least 10 years.

Monday: 14:30-21:30 pm  
 Tuesday: 14:30-21:30 pm  
 Wednesday: 6:00-9:00 am and 18:00-21:30 pm  
 Thursday: 6:00-9:00 am and 18:00-21:30 pm  
 Friday: 6:00-9:00 am and 18:00-21:30 pm  
 Every second Saturday: 9:00 am-14:30 pm

He would like to change the above hours to now be Monday to Friday 14:30 to 21:45 pm

I have sent an email to Brian (included Susan) advising that for his Saturday shift for tomorrow he will have to work from home as I do not feel it appropriate to short the employee on that day. I discussed this scenario with Eric and he suggested the work from home for this day only. Further to that I advised that as of September 28<sup>th</sup> his working hours will be Monday through Friday 8:30 am-4:30 pm. I am not suggesting in any way he quit his other job – he can work out an alternate shift with the secondary employer. We need him around during the regular work day.

And, she raised the following additional concerns:



**Dogs in the school:**

I had received an email inquiring about dogs in the school. On further follow up on what was being asked, we became aware that there were 5 dogs in the school where apparently staff were given permission to bring the dogs in. These are NOT service animals – just regular dogs.

I further obtained the names of the staff to do a double check in their files if there was any correspondence identifying that somehow permission was given to staff on this matter. I have not sourced anything in any of the employee files in our office.

We do have a policy for service animals only.

I further understand that this poses a huge liability for us should the dog bite a staff or student within the school or should anyone in the school be allergic to dogs.

Mr. Heshka testified that Mr. Paradis, the computer technician at Sisler, approximately 10 years earlier had taken a second job. Thereafter, for a number of years, his workdays had been scheduled to allow Sisler High School to “hold onto him” as Senior Computer Technician. Mr. Heshka explained that Mr. Paradis was an excellent employee and that he did not want to lose him.

With regards to the issue involving dogs in the School, Mr. Heshka had determined the appropriateness of the teachers’ and students’ requests that dogs be permitted. He acknowledged the Division’s policy as to dogs on-site had not been followed.

On September 30, 2020, Ms. Schmidt wrote to Ms. Caetano-Gomes and Keri-Lee Zaharia concerning the issue of dogs at the School, and with regards to certain changes that she had implemented, providing:

Lloyd and I met with Curtis today around his request to have the dog at school. We reviewed the policy and told him that the dog cannot come to

school. He told us that he will have a doctor's note and that his doctor told him we will have to comply with the request immediately. I told him we are required to follow the policy.

As well Curtis told Lloyd and I that there have been numerous calls (in his words) to the union about the changes I have put in place. He was quite assertive when he told me that I would be gone soon and G is returning. He said that it is guaranteed that every change I have put in place will be changed back to how it was. Especially that his dog will come to school.

I did check with others if this is true and it was not the same response.

As the date for his return approached, Mr. Heshka had certain concerns over "the occupation" of his office by Ms. Schmidt, as the acting principal. On October 30, 2020, he wrote:

As you were informed, I plan on returning on November 16. It appears that Susan Schmidt, the person occupying my office on an interim basis, saw fit to move my desk, as well as much related paperwork, out of the office and into the crawlspace. I am assuming that she left the wall hangings, which consist of personal items as well as my awards, on the wall. What I want is for my office to be restored. This means I want the old desk back and the papers brought up from the crawlspace. I need this in time for my return. This is only fair as I can find no reason for those items being moved out. You should be aware that at the time of my heart surgery, the individual who occupied my office for that period of time did not move anything out. Please inform me when these tasks have been completed. I will also need my keys returned. These can be placed with the head clerk for convenience.

In response to this email, the Superintendent of the Education Services, Ms. Caetano-Gomes, on November 3<sup>rd</sup> wrote in part:

Thank you for your email and confirming that you will be returning on November 16<sup>th</sup>. We are looking forward to meeting with you to support your transition back to the school, given the context of the pandemic.

Please be reminded that all safety and health protocols need to be applied to all classrooms in schools, including the office. Ms. Schmidt, the Acting Principal, followed the division and provincial expectations. In fact, she ensured the desks were safely stored for you to use once the safety requirements have been lifted by the province. Please be assured your personal items and papers have also been stored for safe keeping; however, it is important for you to refer to the planning documents that

have been distributed to schools this fall such as provincial pandemic response level requirements, provincial health and safety requirements, recovery learning expectations, planning framework and weekly planning forward memos.

...

I trust you will join me in thanking Ms. Schmidt for supporting the school through the planning process in preparation for all three pandemic response levels, including the transition from the suspension of in-class learning to the return to school this fall. More recently, Ms. Schmidt and the Vice-Principals have led and supported the school in the implementation of the modified restricted orange level requirements, while ensuring students continue to have the opportunity to safely learn in school and receive recovery learning support as much as possible.

On the same date Ms. Caetano-Gomes also sent the following letter to Mr.

Heshka:

On behalf of Julie Millar, Director of Schools and Student Service, and myself, I would like to welcome you back to work later this month.

We have scheduled a meeting with you on your first day back to support you in your transition. At our meeting we will review the protocols during the pandemic and division expectations.

The meeting has been scheduled as follows:

Monday, November 16, 2020  
8:45 am – 10:30 am  
ANNEX Building

Please be advised, Keri-Lee Zaharia, Human Resources Officer will join us in the latter part of the meeting to also provide an update on Human Resource matters.

(ix) Lead-up to November 16, 2020

On November 5, 2020, Ms. Caetano-Gomes attended a “transition meeting” with the three vice-principals of Sisler High School. Her notes on that meeting read in part:

November 5/20  
Transition Meeting Sisler

w/ Susan, Lloyd, Nathan Falk

...

VP to follow up w/Kristie

### 3. ELA Exams

- School replaces prov. exam for some students not to impact average  
→ Admin team (unknown)

### 4. EAL test – admin students

- VP's failed these tests
- std. also have to write essay on why they deserve to go to (unknown) English classroom

...

### 7. VP Concerns

Wellbeing of Principal

- cannot walk down hall
- forget names of some staff
- gives his password to others to respond on his behalf

ie) Sends © directed to George to one of VP's and indicates – “Yours” which means VP needs to respond as George

Worried about their PA when he returns

Why?

- support to acting P
- reviewing processes  
→ Reviewed process  
& involvement of Director

Have they spoken to George about concerns?

No – scared

→ “Listen and Learn”

→ Encouraged to speak to him

### 3 Headed Dragon

George, Madelynne & Kristie

Culture

Fear & loyalty

but at same time grandpa

→ Role of VP's as leaders

→ Encouraged them to address issues as part of culture  
@ school

### 8. Dept Head – ELA

- teachers cry – scared
- other depts. too  
→ Admin team to formally meet w Dept Hd

Student not welcomed

- difficult to access courses ie) need STAR reader score
- extra tests – merit/qualify
- denied ability to go to a course

The meeting was followed-up by Ms. Caetano-Gomes with an email to Ms.

Clarke and Mr. Barnaby on November 6, 2020. That email reads in part:

We are providing an update on our transition meeting with the current administration team at Sisler High School. We met Thursday morning to reflect on the first term and review recommendations for the second term, including recent processes that have been introduced this year.

At the meeting, we learned that both Vice-Principals are concerned with the Principal's return as they believe it may impact their performance assessment and future career opportunities. They also shared concerns about the Principal well-being such as difficulty walking down the hallway, others bringing him food, forgetting names and sharing passwords with admin team to respond on his behalf to emails. They alluded to the culture of fear and loyalty, describing him as grandpa at times and being part of a three-headed dragon at other times. We reminded them they are part of the leadership team and have an opportunity to address the culture.

They also shared concerns about processes in the school, such as:

- Students in the ELA course being asked to write a school-based exam rather than provincial exams so as not to impact the school's average.
- EAL students being required to pass a school-based proficiency test and write an essay as to why they should be considered ready for the regular English course. Moreover, neither of the two Vice-Principals were able to pass the proficiency test therefore they would not have been allowed to take the regular English course.
- Teachers coming forward in tears that they want to leave the profession or move because they cannot meet all of the requirements from the Department Head.
- The Vice-Principals are not allowed to follow Division processes. "Now that you are here, you listen and learn." VP's do not have the opportunity to ask questions about policy and/or processes at the school.
- Concern for students and not being welcomed at the school. Counselling out. If they do not score well on reading software, then they do not meet the course eligibility requirements for a particular course. The score is arbitrary and does not meet any provincial expectations.
- Concern for staff. Not a safe place to work if they do not follow what is expected.

We have directed them to follow up with the Department Head Council with respect to provincial and division expectations, as well as to meet with the ELA Department Head to review the recent behavior and follow

up in writing. The Vice-Principals are concerned the processes will be reverted once the Principal returns. We reminded them they are part of the leadership and have a responsibility to address the school culture. If they need support, we would need more information with respect to specific incidents, dates, times, etc... We also shared there are a range of supports and resources such as WSH school committee, wellness committee, MTS, Safe Work Manitoba, or central WSH committee.

We would appreciate the opportunity to meet with you to review if there are any other options we can pursue to support the team.

Mr. Heshka testified that he was not advised of any of the concerns raised at the November 5<sup>th</sup> meeting as summarized in the email of November 6<sup>th</sup>.

Mr. Barnaby explained in cross-examination that the policy of the Division is not to contact an employee on a period of absence due to sickness. He confirmed that none of the raised concerns, then, were conveyed to Mr. Heshka. In cross-examination, he was referred to the *Code of Professional Practice*, which provides in part:

Members are bound by the following principles and each Member's professional behavior must reflect the spirit as well as the letter of these principles:

...

6. A Member first directs any criticism of the professional activity and related work of a colleague to that colleague in private. Only after informing the colleague of the intent to do so, the complainant may direct in confidence the criticism to appropriate officials through the proper channels of communication. A Member shall not be considered in contravention of this Article in the following circumstances:

- a) consulting with the Society or the Member's Local president;
- b) taking any action that is allowed or mandated by legislation;
- c) where the Member is acting in good faith and without malice in the discharge of the legitimate duties of the Member's appointed or elected position;

It was suggested that the transition meeting of November 5<sup>th</sup> breached Article

6 of the *Code*. Mr. Barnaby reiterated the policy of not contacting an employee on leave due to illness.

Mr. Barnaby, in cross-examination, was also referred to Article 30.01 of the Collective Agreement concerning disclosure of complaints. Mr. Barnaby maintained that 30.01 would only become applicable once certain investigations (still underway at the time of the hearing) were completed.

Mr. Heshka, during his testimony, was referred to the notes as to the concerns expressed by the two vice-principals. He asserted he should have been asked to be present at this meeting so that he could have dealt with their concerns. He said in his experience if “one is not invited to a meeting then one is not welcome at the meeting”. He felt that Ms. Schmidt and Ms. Caetano-Gomes clearly did not want him “in the loop”.

He maintained he had always encouraged the various vice-principals at Sisler over many years to speak openly to him, and that he always treated each of the three individuals in question respectfully. He described their concerns as unfounded, and that, frankly, he had had little difficulty with any of the three. At the same time, he reminded that the jobs of the principal and the vice-principals were to “keep the School running well”, with one not being overly concerned about personal considerations.

Mr. Heshka went on to deal with individual aspects of the concerns

expressed, including explanations that he had walked with a cane for a period of time after his recent illness; that teachers (and others) did bring food to him at times (he thought as a sign of affection); that, at times, he did forget names, as everyone does; that he did provide passwords to allow the vice-principals to perform their functions in a timely manner; and that he was not the cause of a “culture of fear” amongst the personnel at Sisler High School.

Mr. Heshka reiterated that he should have been present on November 5<sup>th</sup> to address the concerns expressed by the vice-principals. At the same time, he acknowledged in cross-examination that he was the person in the Division who was responsible for providing evaluation reviews for the vice-principals of Sisler. Mr. Heshka also questioned as to why Ms. Caetano-Gomes had not seen fit to defer discussion of the concerns being raised by the vice-principals until he was back in the high school (to allow for a frank discussion of those concerns with him).

The transition meeting was scheduled for November 16<sup>th</sup>. In response to an email confirming the meeting of November 3<sup>rd</sup>, Mr. Heshka wrote on November 8<sup>th</sup>:

Apropos of your email with respect to our meeting on this date, it was mentioned that HR would be involved. My experience with HR has been that there is always a possibility of a fractious nature entering into the discussion. Consequently, I am asking what agenda items you have in mind for that portion of the meeting. I need a response prior to our meeting date.

Ms. Zaharia, the Human Resources Officer assigned for Sisler, responded by email on November 12, 2020, as follows:



My apologies for the delay but my priorities are continually changing each day as we navigate through our current situation and you were still on my list to respond to by the end of this week as you noted.

The two matters at hand are:

1. Why were dogs permitted on an ongoing nature into Sisler High School into the classroom by 5 teachers;
2. Why was one of the Computer Techs permitted to work a modified schedule outside the parameters of their collective agreement without any type of discussion between their Union or HR.

Should this turn into a fractious nature, we will discuss at the end of the transition meeting an additional time to focus on those matters and get your response. I will also ask the Director to attend those meetings as well so we will be coordinating schedules.

Mr. Heshka was reassured by this email, saying that he was “mollified”. He, thereby, did not deem it necessary to attend with a Union representative.

Ms. Schmidt, the acting principal, wrote Mr. Barnaby on November 11, 2020, as follows:

Celia told me that you may be able to help around Safe Work. This is what was told to me. Safe Work said that the person needed to go back to the WPHS school rep and submit the issue in writing. This is inline with the WSD policy. The WPHS rep has met with several staff.

In the past these staff have brought forth complaints around harassments and toxicity to WTA and the school division. In all cases the results have been damaging to staff. They were all brought into the Sisler School office and made to feel small. All staff were reassigned to roles they didn't want.

These numerous issues all continue to exist. In my short time I have seen them. Staff have the right to be safe in the workplace. This issue only occurs in one department in the school.

How do we proceed when staff are so fearful because of what happened in the past?

I look forward to your response. Susan.

Mr. Barnaby testified that he did not work on November 11<sup>th</sup>, that is,

Remembrance Day. On November 12<sup>th</sup>, he reviewed Ms. Schmidt's email and then spoke to Ms. Schmidt. He was advised that a staff person was considering calling Workplace and Safety to launch a complaint. During that telephone conversation, details were discussed with regards to the concern over toxic workplace, and Mr. Heshka's abuse of power as principal, and the favouritism he extended to the head of the English Department.

During testimony, Mr. Barnaby was asked whether in hindsight there should have been a meeting of himself and other senior staff. He felt, though, that the matters were still "school-based".

Ms. Schmidt wrote an extensive email to Mr. Barnaby on November 12, 2020. It reads in its entirety:

Good afternoon Eric

Thank you for your phone call. In the past two months of my time at Sisler I have heard from several staff of the toxic culture and bullying behavior that exists within the English Department. The effect of this toxicity permeates throughout the school. Staff report a fear based culture that has gone on for many years. Staff have also reported that any professional questions or suggestions are identified as disloyalty. Current and past English teachers have been reassigned and/or they have left the school due to the negative treatment they received after stating a concern. This has caused a huge turnover at Sisler and the school has lost many excellent teachers in the English department. I am certain that other staff have not come forward as they have witnessed the punishment and the untruths that were told about their character.

It is my observation that the English Department has received favoritism over the years.

An example:

- The Dept. head teaching half the day at a full salary.
- Having the English Department head oversee the Independent study of Physical Education in the summer, without qualifications.
- Until I came to Sisler the main office was left unsecured to allow this person access until 11:00pm every week night.

- The Engl. Dept. staff have reported the unethical practice of a not allowing low achieving Grade 12 students to write the provincial exam. The result was an inaccurate, but high and favourable score for Sisler English data. This practice has gone on for many years.

Abuse of power is also noted by teachers:

- English teachers are not allowed the freedom to choose the best instructional strategies and resources for their students. Instead they must comply with the strict guidelines that do not align with the curriculum and are very failure based ex. Handwriting, Demand writing and if achieved to the Dept Heads standard the students fail
- Multiple barriers are created for student failure
- An overreliance on an outdated assessment tool ex Star Reader and refusal to use updated assessment tools
- EAL testing is so difficult that many students fail and are improperly placed in courses
- In the past the Eng. Dept. head read report cards and it is not her role
- Comes into classrooms and ridicules teacher in front of their students because they are not handwriting
- Overrides the guidance and vice principals in student placement
- Has furthered her agenda by constantly persuading the principal that her instructional methods and resources are better than anything that WSD and Manitoba Education provides

Sisler High School has tremendous potential for students and staff. The staff here are thirsty for change. Thank you. Susan

This led to the following string of emails between Mr. Barnaby and Ms.

Schmidt:

a) *Nov. 13, 2020 at 5:21 PM – Barnaby to Schmidt:*

In our discussion you also mentioned staff being removed from classes and relocated after bringing concerns to administration. Would you be able to share what you have heard on those matters and anything else like this?;

b) *Nov. 13, 2020 at 5:25 PM – Barnaby to Schmidt:*

In our discussion you also mentioned staff being removed from classes and relocated after bringing concerns to administration, staff favouritism, and withholding information. Would you be able to share what you have heard on those matters and anything else like this?;

c) *Nov. 13, 2020 at 5:37 PM – Schmidt to Barnaby:*

Yes these issues have been shared with us. Matthew Stacey raised a concern to Kristie and it was deemed as insubordination. Then one day he was removed from the English Dept and he was moved to geography and history. He has his Masters in English. He did report this.

Natalie Fichowsky disagreed with KP and was moved from Grade 11 English to Grade 9 low enrollment. At this the Eng Dept head would say that Natalie was moved to the bottom feeders.

Marlene Friesen was moved to the French imm wing because standing up to the bullying behavior and she was only allowed to return to the English wing when a term position was over and she required physical accommodations.

██████ has been ridiculed in front of her students about her handwriting by the Dept head.

I am not sure what you are referring about withholding information.; and

d) *Nov. 13, 2020 at 5:51:57 PM – Schmidt to Barnaby:*

During the shutdown there were no meetings with staff. Staff also have reported that until I came there were not staff meetings, no PD and staff were essentially in the dark. The school operated on its own. When I introduced the Pandemic Planning documents no one had seen them. In the summer Nathan Falk had to design the recovery learning back to school plan. George was not part of it. It is a way to keep control.

Ms. Schmidt had written, as well, on November 13, 2020, the following email to the Sisler staff, with a copy to Mr. Heshka:

I am writing to you to welcome Mr. Heshka back to Sisler on Monday. I will be here as Acting Principal Monday and Tuesday. During these two days we will be working together as an administrative team to facilitate a smooth transition. I have been honoured to work alongside with all of you. I wish you the best of health in these unique and difficult times.

Her email led Mr. Heshka to respond during the afternoon:

I shall assume my role as Principal upon my return Monday. I will be at a meeting at the board office up until about 11:00 Monday morning and will attend to matters upon my return. I shall meet with administrators to determine what provincial protocols have been put in place regarding the virus. I will meet with department heads on Wednesday. Department

heads, please inform me what time would be the least disruptive. Please come up with ideas as to how I can make your lives easier.

Ms. Caetano-Gomes wrote in response to Mr. Heshka's email to Mr. Barnaby and Ms. Clarke later that afternoon:

We are forwarding an email that was sent to Susan Schmidt from George. We believe this is an example of bullying as he copied MTS and WTA, while including all of the staff.

Please advise as to how we should follow up.

Mr. Barnaby reviewed the whole series of emails he had received during the evening of November 13<sup>th</sup>. He decided to "sleep on them".

The next morning he reviewed the series of emails again. He had what he referred to as an "oh shit" moment. He was concerned that over recent years students, if they had not written the Provincial examinations (in English and Math), were graduating without fulfilling the Provincial requirement to graduate. In his mind, the situation at Sisler High School suddenly crystallized as very serious for him.

He wrote a text message to Ms. Caetano-Gomes on Saturday morning, November 14, 2020 (8:06 A.M.) as follows:

I am looking at the info from Susan two things really stand out for me. The first is allegations of test tampering – if it is true that students were not required to write the provincial exam and were given a different test to keep the school marks up we need to investigate this as it's professional misconduct. The second is the toxic work environment whereby staff are punished (removed from their teachable and physically moved in the building) – this would be bullying, mental abuse and abuse of power. When you have a chance give me a call on (204) 794-6605. I'm thinking we need to conduct the review we discussed and temporarily

remove George and likely Kristy from the workplace while the investigation is ongoing.

His text led to a telephone conversation between Ms. Caetano-Gomes and himself. They discussed the concerns raised in the emails, particularly with regards to the Provincial testing issue and work environment at the School. Mr. Barnaby said that together they made a decision during that telephone call that it was inappropriate for Mr. Heshka to return to the School pending an investigation. The decision was made based primarily on the concerns over the alleged test tampering and toxic work environment claimed by senior staff to exist at the School.

Mr. Barnaby explained that, in his experience in Human Resources, it was preferable to remove the concerned employee from the School. Once such allegations surfaced, he said, it was best to remove the person being complained about, so that an investigation could be carried out unobstructed. This was the case whether the investigation was carried out internally or externally (by contract).

He also explained that the decision was made to remove Ms. Kristy Peterson, the head of the English Department, during that telephone conversation as well.

Mr. Barnaby testified that he was concerned about having Mr. Heshka stay in his position as principal concerning the allegation of exam tampering. Mr. Heshka, as

principal, would have access to the examination records and there was a possibility that Mr. Heshka might tamper, alter, or destroy exam records.

Mr. Heshka, in cross-examination, acknowledged that he did not have any experience in regards to the Provincial Department of Education requirements surrounding Provincial examinations. He acknowledged that this year, with the pandemic, such Provincial examinations had been cancelled. He still maintained, however, that the possibility of tampering existing examination records could occur, given the all-encompassing authority of a principal.

The concerns of a toxic environment and exam tampering were put to Mr. Heshka for comment during his direct examination. With regards to toxic workplace, he said that he was “hurt by that allegation”, maintaining he always had an open-door policy, and that he prided himself on being able to talk and listen to people. He denied the allegation as false, but also said that “it was okay” because in his position he was paid to do his task and that he appreciated that certain “soft skills” were involved in dealing respectfully with people.

Mr. Heshka was directed in his direct to extensive sets of positive comments contained in various documents from former teachers who had worked at Sisler High School and from former students of the School.

With respect to the claim of exam tampering, Mr. Heshka explained that he

understood if a student did not write the Provincial examinations in English and Math that the student could still be allowed, by a decision made by the High School staff, to write the School examinations in English and Math. Thereby, that student might still graduate.

It was noted by Counsel that as arbitrator of this grievance, which seeks the return of Mr. Heshka to the School, it was not necessary for me to determine whether Mr. Heshka was correct in his view that students might not write the Provincial examinations yet still graduate. Counsel for Mr. Heshka maintained that it was only necessary that Mr. Heshka had this *bona fide* view; Counsel for the Division maintained that Mr. Heshka, by acknowledging that awareness of students graduating without having written the Provincial examinations, had made a striking admission.

A decision was made by Mr. Barnaby and Ms. Caetano-Gomes to proceed with the scheduled meeting of November 16, 2020, with Mr. Heshka to be advised at that meeting of the basis of the suspension.

It was also determined that it was best that Ms. Zaharia, as the designated Human Resources Officer for the School, not attend the meeting, the practice being that it was best that she, because of her involvement with the School (and her role as the “single point of contact” between the Human Resources Department and the School personnel), should not attend.



Mr. Barnaby denied that the decision to place Mr. Heshka on leave of absence with pay was based on his medical conditions, or based on any intention on the part of the Division to force the Grievor to retire.

(x) The Meeting of November 16, 2020

Mr. Heshka first became aware of the suspension at the meeting on November 16<sup>th</sup>. He maintained he would have attended the meeting with the Union representative if he had known of the suspension decision, but with no forewarning he attended alone.

Notes were taken as to what occurred and what was said at the meeting on November 16, 2020. It was stipulated that those notes were accurate. Mr. Heshka, Ms. Caetano-Gomes, Ms. Julie Millar, Director of Student Services, and Lizette Grivicic, Senior Human Resources Officer, were present. The notes provide:

C - Nice to see you back, we wanted to have this meeting to go over a transition plan but we have had serious allegations that have come forward and we have the duty to investigate.

Exam tampering and contributing to a toxic work environment.

GH – What is that exam tampering?

C – We would want to have MTS here to go through the details.

GH – Came from who?

C – Can't share, you will be placed on admin leave w pay pending investigation.

GH – Treating me like a criminal.

C – We are not treating you like a criminal, we are needing to investigate based on serious allegations. If a serious investigation comes to you, you know you would investigate and follow the process as Principal.

GH – When?

LG – Next steps when we are ready to meet, we would get in touch w your union rep., arrange a meeting that works for all. We will get into the details at that time when we have your union rep. present.

GH – What is this about?

LG – I know that you are asking the question but you are entitled to union representative and it is not for this meeting today where we are required to respond to the allegations.

GH – Treating me like a criminal, you don't have a leg to stand on.

LG – There is a investigation process, meeting will be held w you and your union rep.

GH – How long?

LG – Based on availability and process. This is an open and active investigation and it's important that you are not attending to the school. Do you have personal belongings that you need right away.

GH – I will pick it up.

LG – You are not to go to the school. I will ensure the items are couriered.

GH – You can't find me, northeast of Birds Hill.

LG – We will get to your home address. What items?

GH – Bag in room 13.

Treating me like a criminal – resent that.

C – Duty to investigate.

GH – Pretty weak. Staff expecting me back.

LG – We maintain confidentiality, no one is advised you are off on admin leave w pay. Up to Sy?? and Director to commentate.  
How did you get here today did you get a ride, do you need a ride

GH – Brought a vehicle, going to school to pick up my car.

LG – OK, not to contact staff, go into building.

GH – Boges, being set up and I think I know who it is. Good day ladies.

Meeting adjourned.

Ms. Peterson was also suspended on November 16<sup>th</sup>. (To date, she has filed no grievance concerning that suspension.)

Mr. Heshka testified that he was in a state of shock over the suspension. He had been given the email (quoted above) as to the nature of this “transition meeting”. He was taken completely by surprise. He acknowledged that in the days after the meeting, he was contacted by a number of teachers and staff of the School, expressing their surprise over what had occurred.

(xi) Subsequent Developments

Subsequently, the Union became involved. On November 25, 2020, Mr. Andrew Peters, a Union staff officer of the Association, wrote to Ms. Clarke, the Chief Superintendent with the Division, a letter, which reads in part:

At the meeting of November 16 George was essentially ambushed. At this meeting, attended by the Director of Student Services, the Superintendent of Education Services, and a representative from Human Resources, George was advised, for the first time that there were complaints filed against him and that he was being placed on administrative leave and suspended with pay effective immediately. When he asked for particulars of the complaint he received none, other than generalities about a toxic workplace and exam tampering.

Mr. Peters went on to express the following concerns:

I am writing at this time to express significant concern with the way the Division has handled these apparent complaints. Firstly, the collective agreement specifically provides, under article 30.01 that complaints of this nature must be communicated to the member in writing and that, prior to making any judgment regarding the complaint, the Division shall afford the member an opportunity to appear and answer to the complaint either personally or by representative. Neither of these mandated safeguards was complied with by the division prior to George being

placed on suspension. Secondly, the action taken by the Division in suspending him, is seen both by George and his colleagues as punitive.

Mr. Peters then raised the following questions:

- Particulars regarding each of the complaints against George including the specific allegations in each, and the date these complaints were made;
- the names of the individuals who made the complaints;
- the date the Division began any investigation it has commenced with regard to this matter;
- the reason the Division has concluded that George cannot continue in his position as Principal of Sisler High School pending the resolution of these complaints;
- any further information in the Division's possession that is pertinent to these complaints and was considered in making a decision to suspend him with pay;
- the reason why George was not advised that he could consider bringing a representative or MTS Staff Officer to the November 16 meeting;
- the reason why George was not provided accurate information as to why HR was attending this meeting in advance

The letter concluded by maintaining that Mr. Heshka should be returned to work.

In response, Ms. Clarke provided a letter dated November 26, 2020, setting out:

We have your letter of November 25, 2020 for response. Mr. Heshka was placed on paid administrative leave pending the investigation of several matters, the general outline of which were identified at the November 16, 2020 meeting. The placing of teachers on administrative leave pending investigation is a practice which the Division has utilized

for many years, and is consistent with labour relations principles where serious allegations are at issue.

As conceded by the withdrawing of Mr. Heshka's last grievance, article 31.01 does not apply in these circumstances. Further, once the investigation is underway, which we expect to be very shortly, appropriate information will be provided to Mr. Heshka, which will include the particulars of any allegations that are determined to be credible as well as opportunity to respond. Mr. Heshka will of course have the right to union representation during the process.

With respect, your concerns about process are premature as the investigation is just being commenced. You will be involved as Mr. Heshka's representative as that investigation proceeds.

(xii) Grievances

On November 30, 2020, grievances were filed both by Mr. Heshka and the Association. They are both extensive. As for the grievance of Mr. Heshka, he begins by referencing a dispute between the Division and himself over violation of Articles 2, 30(b), 30.01 and 32 of the Collective Agreement violation of Divisional policies with respect to Workplace Safety and Health and harassment convention, violation of Sections 79 and 80 of *The Labour Relations Act*, violation of Section 4(1) of *The Workplace Safety and Health Act* and a violation of Section 14(1) of *The Human Rights Code*.

After reciting the background facts and Mr. Heshka being placed on administrative leave and suspended with pay, reference is made to the request set out in the letter of November 25, 2020. The grievance goes on to reference the cited violations, including:

- Failed to act fairly, reasonably, and in good faith by:

- leading Mr. Heshka to believe that certain matters would be discussed at the November 16 meeting when those matters were not the subject of the meeting;
  - leading Mr. Heshka to believe that he did not require union representation at the November 16 meeting, notwithstanding the Division's knowledge that he would be suspended with pay at that meeting;
  - allowing the teaching and other staff at Sisler to be notified of Mr. Heshka's impending return to his position as principal of the school on November 13, when the Division knew, by that date, that it would be suspending him with pay pending an investigation;
  - suspending Mr. Heshka when, in all the circumstances, such an suspension is not warranted and, necessarily, creates questions amongst his staff as to Mr. Heshka's conduct, no matter what the result of the investigation will be;
  - exercising its management's rights in a bad faith manner;
- utilized the complaint process to keep Mr. Heshka from returning to his position at Sisler High School, in an effort to induce him to retire, and in an effort to entrench Ms. Schmidt as the next principal of the school;
  - failed to initiate the investigation process in a timely manner;
  - discriminated against Mr. Heshka on the basis of his age;
  - unfairly disciplined him by placing him on suspension with pay, without cause;

The grievance seeks, *inter alia*, the immediate return to his position as principal of Sisler High School, that the Division takes steps to provide a safe, healthy and respectful workplace for him, general damages and damages under *The Human Rights Code*.

(xiii) Investigation

Mr. Barnaby testified that a decision was made to retain a third party to carry out the investigation into the allegations made against Mr. Heshka. He explained that the Human Resources Department was busy with the pandemic and he, therefore, decided it best not to attempt an internal investigation.

Ms. Pamela Clarke was initially contacted on November 17, 2020, to carry out such an investigation. After Ms. Clarke had an opportunity to review materials provided to her, she determined on December 4, 2020, that she had a conflict and was unable to carry out the investigation. After further consideration, it was determined to have Ms. Carolyn Sztaba and Ms. Lori Grandmont to carry out the investigation of the allegations of a toxic work environment.

A memorandum, dated February 19, 2021, was filed as to the status of their investigation. It indicates that 17 people have been interviewed and an additional seven people would be interviewed “in the near future”. The result of those interviews to date are summarized as follows:

- The two most consistent and “overarching” themes are:
  - Concerns regarding the school’s English Department and its department head Kristy Peterson.
  - Concerns regarding the school’s principal George Heshka (primarily in regard to actions taken by him in support and defence of Kristy Peterson).

With respect to Mr. Heshka, the summary of the investigation to date

provides (with certain redactions):

- Many people had positive comments about Mr. Heshka including in regard to his devotion to students, high academic standards, pioneering ways and his loyalty to those who remained in his good graces.

At the same time, it was noted that if you were not in Mr. Heshka's good graces (either because of a personal falling out with him or because you had upset Ms. Peterson) Mr. Heshka could make your life quite miserable.

- While the majority of people interviewed by us did not express any major concerns about Mr. Heshka separate and apart from matters related to Ms. Peterson, there was an overwhelming expression of concern regarding:
  - The nature/closeness of the relationship between Mr. Heshka and Ms. Peterson. [REDACTED]
  - The huge and powerful influence that Ms. Peterson appears to have over Mr. Heshka.
  - Mr. Heshka's favoritism toward Ms. Peterson (including with respect to requests for departmental funding).
  - Ms. Peterson consistently invoking Mr. Heshka's name in regard to decisions made by her.
  - Ms. Peterson consistently requesting Mr. Heshka's assistance/intervention in Departmental matters (particularly where teaching staff had questioned her or otherwise upset her) and Mr. Heshka's willingness to oblige Ms. Peterson in that regard.
  - Mr. Heshka being an active participant in the "punitive" actions taken against teaching staff who questioned or otherwise upset Ms. Peterson.
- [REDACTED]
- Mr. Heshka has been aware of the matters/practices leading to the concerns express about the English Department and has either been complicit or an active participant with respect thereto.



There is no indication in the interim report into the allegations of a toxic workplace as to when it will be completed.

A decision was made in January, 2021 to carry out a separate investigation into the allegation of exam tampering. Mr. Rob Olson, a lawyer with Thompson Dorfman Sweatman LLP, was contacted by Mr. Barnaby (after Mr. Olson had an initial discussion with Counsel for the Division) on January 11, 2021. This led to him meeting with Mr. Barnaby on January 15, 2021. Mr. Barnaby had carried out an extensive review of materials concerning Provincial and Sisler School examinations for grade 12 students for the years 2014 to 2019. Those assembled materials were provided to Mr. Olson at that meeting.

At the hearing, those materials were filed with them reviewed during the direct- and cross-examination with Mr. Barnaby.

Mr. Barnaby testified from the review of the materials that had been gathered, it was confirmed that certain students who had not taken the Provincial examination had been allowed, ultimately, to take the Sisler School examinations, and some students thereby had graduated with grade 12 standing without the Provincial examination credits.

The investigation into exam tampering is ongoing at present.

Mr. Barnaby said as a result of the initial status report concerning the toxic environment allegations and his assembly of materials with regards to the exam tampering allegation, that he has not changed his view that it was necessary for Mr. Heshka to be placed on administrative leave.

Mr. Heshka, in testifying, advised that he had no input into the selection of the investigators. He learned of the name of the investigators during the course of the present hearing.

Mr. Heshka has also not been asked to provide any statement, or be interviewed by the investigators to the present time. It was explained by Mr. Barnaby that this was consistent with past practice of the Division in such investigations, whether internal or external; that is, the employee being investigated is to respond to the allegations only after all of the investigation work, involving interview and assembly of materials, has been completed. Mr. Heshka received no indication of when he might be asked to attend for an interview.

Mr. Heshka maintained the belief during his testimony that a decision had been made in the fall of 2020 to force him to retire. He referenced that his desk and possessions had been put into storage and that from his review of the email exchange by the administrators, a case had been built against him through the fall leading to his suspension. He also maintained in testimony that both investigations had been allowed "to drag", with the delay in the investigation process designed to prevent him from

returning to Sisler High School during the 2020-2021 school year.

(xiv) Recent Development

A petition has been commenced to have Mr. Heshka return as principal of Sisler High School. The petition reads in part:

**TO THE LEGISLATIVE ASSEMBLY OF MANITOBA:**

These are the reasons for this petition:

1. George Heshka has been the Principal of Sisler High School in Winnipeg since 1980. During his tenure, Sisler High School has been shown to be one of the top public schools in Canada. This success is a direct reflection of the leadership, wisdom, dedication and integrity shown by Mr. Heshka during this time. Since November 16<sup>th</sup>, 2020, Mr. Heshka has been suspended by the Winnipeg School Division from his position as Principal of Sisler High School.

Request:

We, the undersigned, petition the Legislative Assembly of Manitoba as follows:

1. *To urge the Minister of Education to consider immediately reinstating George Heshka to his position as Principal of Sisler High School.*
2. *To recognize George Heshka for his outstanding work in the field of public education at Sisler High School over the past four decades.*

In an email concerning the petition, Mr. Collin Moskal writes in part:

I am currently working to enlist the help of former Sisler student and current Tyndall Park MLA Cindy Lamoureux to bring the petition to the Legislature floor. I have reached out to CBC Winnipeg journalist Marina Von Stackelburg (who wrote the first article about George being suspended without due process) to gain media coverage of our support of George.

Spread the word to any staff you feel might be interested, ideally verbally ("meet me in the parking lot after school"). Of course, this is bizarre as it relates to our employer, so please respect the boundaries of our workplace, I will not be bringing this petition into the building as I am

seeking to shed light on this injustice as a private citizen and not as a WSD employee, so please don't come by my classroom (Room 24) looking to sign, and please do not print this email using WSD printers or the like to distribute it.

Mr. Barnaby stressed concern over this petition, feeling it could apply peer pressure to the witnesses being interviewed in the investigation process.

Mr. Heshka denied involvement with respect to this petition. He acknowledged, however, that he had been contacted by numerous persons expressing concern over his suspension. Mr. Heshka appreciated the support that he was receiving and felt that such support could be viewed in a constructive way as positive feedback to the Division administration. He recognized, though, that it could be unconstructive as the nature of "rabble-rousing".

Mr. Heshka maintained during his direct-examination that if returned to his position as principal, that he "would stay in his office" and take no role and would not attempt to interfere in the two ongoing investigations.

He did reference an earlier grievance investigation into a safe workplace complaint between two teachers in 2015, saying that he had taken no role with respect to that complaint.

Mr. Heshka testified that despite the negative comments made by at least two of the vice-principals currently working at the School concerning Mr. Heshka's

performance as principal of the School, he would be able to work with them and treat them in a respectful manner.

In cross-examination, Mr. Heshka was presented with a series of documents concerning his involvement in the complaint brought in 2015 of harassment and/or bullying by Ms. Marlene Friesen against Ms. Kristy Peterson. In July 7, 2015, Mr. Heshka had written a detailed letter which provides, *inter alia*, the following:

Your visit to Sisler to indicate that Marlene Friesen was charging Kristy Peterson with harassment and/or bullying and that there would be a subsequent investigation prompted me to review events of the past several years because, quite frankly, I was astounded by this allegation. I have, therefore, read and re-read the email exchanges between Kristy and Marlene and, indeed, Kristy and the English department. Upon reviewing these emails I have found that Kristy has not breached any protocols of civility and/or professionalism. Her emails have always reflected the prevailing ethos of Sisler. I can say this because I have had input, direct or indirect, into these emails. She carries out my policies and the contents of the emails reflect this. The same can be said of other department heads. No department head operates as an independent entity. Therefore, if Marlene finds fault with Kristy, she must find fault with me. Kristy's relationships with the members of her department as well as Sisler staff as a whole have been marked by politeness and helpfulness. I expect this behavior from all of my department heads. If it is not forthcoming, I change the department heads and have done so eight times during my tenure here. If in fact there had been harassment by Kristy towards Marlene, why did it not reach my ears, either directly or indirectly? I have heard nothing, not even a whisper, because there hasn't been any. This latest outburst from Marlene represents the first of its kind. She had never raised the issue with me, never even alluded to it. And she is wrong, dead wrong.

In addressing the issues raised by the allegations, it is necessary to provide information regarding Marlene's past behaviours since they are of interest. This information, even though it does not all pertain to Kristy, should help in providing perspective regarding Marlene's baseless attacks upon Kristy. My own regret is that I never documented every instance of interest, but the few I have will suffice.

The letter went on to attach an extensive set of exhibits with detailed

comments concerning various of those exhibits. Mr. Heshka concluded his letter as follows:

Marlene has complained to me often and to the computer technicians that she does not receive good service from them. I have checked out the complaints and found that she doesn't follow procedures. When a teacher has computer problems, a work order must be completed and submitted. Marlene doesn't like waiting her turn and tried to get preferential treatment. The technicians complain of harassment and state that Marlene feels they work for her and not the school division.

I don't want her here – she is toxic. I myself have spent about 50 hours (on weekend) reviewing this issue. If she is not moved, she will consider it a victory and will not change her behavior. And we will be revisiting these issues once again since there will have been no consequences for her. I can say this as a result of experience. At the last evaluation I did of her, I raised the topic of her aggressiveness. She reacted with great sensitivity and did not want that as part of her evaluation. I then suggested that I use the word “assertiveness” instead. She still recoiled at this and appeared to be still very concerned. Since she had come through some personal stress in her life (it may have been an illness or perhaps a death – I forget). I felt sorry for her and decided to leave it out. In retrospect, this was a huge mistake.

To summarize, Kristy has done nothing wrong or improper. She carries out my policies. She acts according to my directives; she discusses all relevant issues with me, and conducts herself as department head in a respectful manner.

Mr. Heshka was not interviewed during the investigation process into this complaint. (This complaint by Ms. Marlene Friesen had led to a counter-complaint by Ms. Peterson). Not having been interviewed, on February 6, 2017, Mr. Heshka wrote to the investigators a further letter attaching his letter of July 7, 2015, together with all of its exhibits. He wrote in part:

You will recall that last week I discovered that Kristin Peterson inadvertently revealed that I was to be interviewed. When I broached the matter with you later you stated that you had read a memo or memos of mine that precluded the necessity of interviewing me. When I asked to see the document(s) you stated that they were not on your person and that I should ask Lois Pare for them. Upon reflection over the weekend I have concluded that the documentation you have received might not

provide you with the total picture. I am seeking to correct this by asking you to read the material contained in this package. You will note that the covering letter is addressed to Chris Rhodes who was the associate director of Human Resources at the time.

At the same time, he also wrote to Ms. Lois Pare a memorandum concerning the complaint and the ongoing investigation. In that memorandum he provided in part:

It was revealed at the start of the investigation session by Bob Young and Dale Neal that they felt that they need not interview me despite my being identified by Kristin Peterson as her prime witness. This belief was based on their being in possession of a memo, or memos (Bob was vague on this point) that they felt provided them with all necessary information that they would require. I wanted to see the memo or memos to verify this claim.

Bob replied that he didn't have them with him and that I should get them from you. I do not believe that you and Eric have sufficient documentation from me. I believe I can state this since I am the author of whatever documents I have sent you.

In cross-examination, Mr. Heshka maintained that the extent of his involvement in the investigation of the February 15<sup>th</sup> complaint were the letters of memorandum. He maintained the position set out in those documents that he should have been interviewed in that process and that as principal of Sisler High School he was entitled to set out his opinions concerning the complaint brought by Ms. Friesen. (Ultimately, Mr. Heshka was not interviewed by the investigators.)

Mr. Heshka also testified that he took no "punitive" steps against Ms. Friesen concerning her 2015 complaint, and presented examples of how he had taken various subsequent concerns of Ms. Friesen into account to assist her (in such matters as parking availability). Having said that, he also maintained that he believes Ms. Friesen is

the principal, or one of the principal persons, behind the present campaign to have him removed as principal of Sisler High School.

Mr. Heshka, in testifying, asked that he be allowed to return to his role as principal immediately. He explained that the whole experience since mid-November, 2020 has been very stressful on him, as he misses the students, his staff, and believes he has been unfairly “character-assassinated”. He maintained he deserved better.

For him, the longer this matter of the investigation drags on “with him at home”, the more difficult it has become for him. From his discussions with various persons that while people are supportive of him, the public also began to think as time goes on there must be something behind the rumored allegations.

Mr. Heshka appreciated that it would be difficult to return to the School with the allegations from staff persons having now become known to him. He said, though, he would be in a position to take such persons as his vice-principals “for lunch”. He said he could get on with the running of the School without bearing grudges against anyone.

#### **D. SUBMISSIONS**

Counsel for the Division began by background review of the applicable case law.

Mr. Lercher noted the onus on the Division to justify the leave of absence. He summarized for the onus to be met the Division must prove it had acted reasonably in



exercising its management rights in all of the circumstances.

He reminded of the serious allegations brought against the Grievor involving toxic workplace and examination tampering.

Counsel reviewed the following cases in terms of the test of reasonableness:

- (a) *Salvation Army (Sunset Lodge) and BCNU (Smardon)*, 2003 CarswellBC 4033 (Sanderson) (emphasizing the analysis at paras. 36-38);
- (b) *British Columbia (Public Service Employee Relations Commission) and B.C.G.E.U.*, 2002 CarswellBC 3763 (Hall), noting the importance attached to the analysis of Arbitrator Hall in the *Salvation Army* analysis;
- (c) *Canadian Imperial Bank of Commerce and Union of Bank Employees*, 1987 CarswellNat 2369 (Burkett); and
- (d) *TForce Final Mile Saskatoon and Winnipeg Branches and C.U.P.W. (Darwinder Singh)* (unreported, February 1, 2021) (Wood).

Based on those decisions, he summarized that the key question was whether it was incumbent on the Division to exercise management rights to remove the Grievor

from the School pending investigations, maintaining it was reasonable, justified, and necessary in all of the circumstances.

He sought support in that finding on the decision in *Loblaws Companies Ltd. and UFCW, Local 401 (Jibril)*, 2013 CarswellAlta 4 (Sims) (emphasizing the analysis at para. 154).

Ms. Gibson continued the Division's submission by reviewing the background circumstances. Those circumstances are set out above.

She reminded that with regards to the examination tampering allegation, it was clear that over some years there had been students who had graduated from Sisler High School without having taken and passed the Provincial examinations in English and Math.

She then turned to a review of the circumstances which had rapidly unfolded in the early part of November, 2020. She rejected Mr. Heshka's view that certain teachers had set out in the fall of 2020 to prevent him from returning to the School.

In that regard, she reviewed the various emails, saying that the intent had been to transition Mr. Heshka back into the School on November 16, 2020. Then the serious concerns emerged as summarized in several emails. She paused to consider the concerns raised by the vice-principals. For her, they were serious in nature and

called upon senior management, that is, Ms. Schmidt and Ms. Caetano-Gomes, to investigate and raise those concerns with Mr. Barnaby.

Counsel then turned to the grievances brought. She denied the suggestions of bad faith and ulterior motive alleged throughout those grievances. She reminded, again, of the background circumstances of Mr. Heshka having been ill. The Division, in good faith, had prepared for his return once he was cleared medically. Rather, she said, it was only during the process of that preparation that the serious allegations of significant misconduct on the part of the Grievor had surfaced. She again reviewed those allegations as contained in the emails.

Ms. Gibson then turned to consideration of Mr. Barnaby's decision, emphasizing it was made jointly with Ms. Caetano-Gomes. She reviewed what took place on November 13<sup>th</sup> and 14<sup>th</sup>. It was only at that point that the concerns for management crystallized, with the epiphany moment for Mr. Barnaby on the evening of November 13<sup>th</sup>.

Ms. Gibson turned to the role played of Ms. Schmidt in the fall of 2020 in bringing out the allegations. From cross-examination of Mr. Barnaby and the testimony of Mr. Heshka, she recognized the view that Ms. Schmidt was somehow conspiring to replace Mr. Heshka. For Counsel, it was quite the opposite; rather, Ms. Schmidt had "no dog in this fight". Furthermore, there was no indication of any interest on her part of

taking over the position, being involved only as acting principal initially for a period of one month.

Division Counsel considered further the concerns set forth in the emails, maintaining that on any objective assessment, they must be found to be significant. From the Division's perspective, no determination needed to have been made by Mr. Barnaby, only that an investigation must be launched. During that investigation period, she opined, it was inappropriate for Mr. Heshka to stay on as principal. The leave was necessary, surely in those circumstances, according to Ms. Gibson.

For her, it was important to note Mr. Heshka, during his testimony, had been critical that he had not been at the meeting and had not been given an opportunity to explain himself. What he was really saying, in Counsel's view, was that he wanted an opportunity to confront his vice-principals, exactly the situation to avoid.

She turned to a review of the evidence on the allegation that Mr. Heshka had been ambushed at the meeting of November 16, 2020. She urged careful consideration be given to the lead-up to that meeting. Ambush was on no one's mind; rather, management had dealt appropriately with Mr. Heshka at that meeting, appreciating that he was without Union representation. Management present had declined to become involved in any extensive discussion with him.

The Division was sympathetic to Mr. Heshka's description of his dismay and

upset at the announcement of his suspension and his anguish over the subsequent months during the course of the investigations. But in all of the circumstances, she maintained that the Division had been reasonable in its decision to suspend.

Ms. Gibson also denied the suggestion that underlying the cross-examination of Mr. Barnaby somehow the investigations had not proceeded in a timely fashion. She maintained that on any objective review of Mr. Barnaby's evidence, such a suggestion was unfair. She reviewed the steps taken in launching and carrying out of the investigations. The investigations, she acknowledged, were taking some time, but there was no undue delay.

She also considered the current state of the investigations.

Concerning the actual allegations, she first reviewed the concerns set forth in the emails quoted above. She reminded that Mr. Heshka, despite his claim that he would be able to "stay in his office" during the course of the toxic workplace investigation, had seen fit in the 2015 complaint investigation to become involved and taken a position in favour of one of the teacher parties to the complaint.

With respect to his claim that he "doesn't hold grudges", she reminded that Mr. Heshka, during his testimony, had accused Ms. Friesen as being the principal instigator of the current allegations. She also pointed out that included in the letters of reference filed at the hearing were endorsements from former vice-principals of the

School, who he had approached after the suspension. This was not, Ms. Gibson maintained, a person who could carry on his job while such investigations were ongoing without interfering in the process.

With respect to the pending petition, Counsel for the Division expressed concern over its nature and potential affect, noting the old expression: "I was born at night, but not last night." She challenged that Mr. Heshka, in fact, had become involved in a campaign to have persons take sides with respect to him being placed on the leave of absence. She referenced, as an example, one teacher who was named as a potential witness in the tampering allegation investigation. That person, she noted, is on the list of potential persons to contact to seek support of the petition. Imagine the position, Ms. Gibson stressed, that this put that teacher "in".

She turned to challenge Mr. Heshka's decision, by filing various sets of materials in support of his character, to have put his character at issue. In that regard, she cited examples of his refusal to abide by the policies of the Division (such as the work hours of Mr. Paradis, and the allowing of dogs into the School).

She finally returned to the issue of the test of reasonableness, urging a finding that the decision to suspend was reasonable.

In response, Mr. Smorang began by citing the test of reasonableness set out in such cases as *Salvation Army*. He noted the Division cited this award. Both sides

acknowledged the test as applicable. He emphasized that underlying that test is the need to balance the employer's management rights to the employee's right of being presumed innocent of allegations.

Mr. Smorang briefly reviewed the circumstances set out above. He noted that certainly, based on the totality of that evidence, Mr. Heshka took the position that at the end of the day he will be absolved. From his testimony it was clear that he enthusiastically wished to prove his innocence at a subsequent hearing.

In the interim, though, Mr. Heshka obviously seeks to have his employment regained.

Counsel then turned to consideration of several decisions applicable to these grievances, those being:

- (a) *Industrial Alliance Life Insurance Company, Appellant v. Gilbert Cabiakman, Respondent*, 2004 SCC 55, emphasizing the following statement:

This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be a little different from a resiliation or dismissal pure and simple; and (4) the

suspension must, other than in exceptional circumstances that do not apply here, be with pay. (para. 62);

- (b) *Riverdale Hospital and C.U.P.E., Local 79*, 2000 CarswellOnt 5876 (Surdykowski), with the arbitrator noting the impact of an administrative leave involves much more than financial considerations, in the following terms:

Although there may be some such extraordinary case, I also find it difficult to understand how an unpaid suspension can be said to be non-disciplinary. Indeed, although there may also be exceptions, I don't know how as a general matter even a paid suspension can be said to be non-disciplinary. Although the effect of an unpaid suspension on the employee is more obvious and direct, in the case of both unpaid and paid suspension the employee is being prevented from working and must usually stay away from the workplace. The fact that a paid suspension may be imposed pending investigation or other developments changes nothing. First, the employer has determined that it has sufficient cause for concern to justify the suspension. Second, the fact that it is paid or is pending investigation or other developments changes neither the effect of the suspension on the employee, nor the perceptions of other employees or an outside observer. Whatever the employer's subjective intent, it appears that the employee is being chastised or punished and the subjective effect on the employee is one of discipline. (para. 30);

- (c) *Salvation Army, supra* (at para. 21) referencing the limbo situation created for an employee pending investigation;
- (d) *Ontario Jockey Club and Mutual Employees' Assn., S.E.I.U., Local 528*, 1977 CarswellOnt 762 (Kennedy) (particularly at paras. 7-11);
- (e) *Phillips Cables Ltd. and United Steelworkers, Local 7276*, 1974 CarswellOnt 1384 (Adams) (particularly at paras. 63-64);



- (f) *Humber Memorial Hospital and C.U.P.E., Local 1080*, 1982 CarswellOnt 2534 (Davis), emphasizing the balancing of interests to be considered in the application of the reasonableness standard (at para. 11);
- (g) *St. James-Assiniboia School Division and St. James-Assiniboia Teachers' Assn. (MTS)*, 2014 CarswellMan 331 (Peltz), with the extensive review by Mr. Peltz of a series of decisions; and
- (h) *Concordia Hospital and CUPE, Local 1973 (Austria)*, 2010 CarswellMan 864 (Wood), in particular, as to its test application (at paras. 93-106).

Counsel for the Grievor summarized the principles that emerged from these series of decisions.

He turned to a review of the essential circumstances surrounding the present grievances. These circumstances are set out above.

In consideration of those facts, Mr. Smorang emphasized that the present grievance is not a case "about ultimate guilt". That determination, if you will, was for another day. He emphasized, though, that there had been no attempt to seek Mr. Heshka's explanations at any point to the present. In fact, he reminded, it was only at the hearing that his clients had learned even the names of the investigators.

He challenged as to why no one in management had gone to Mr. Heshka when these allegations had emerged. He reminded, in fairness, that Mr. Barnaby had become aware of these allegations very late. He was called to consider them suddenly. In that regard, he reminded of the initial concerns involving dogs and the hours of a computer tech. It was concerning those matters that Mr. Barnaby first heard of issues involving Mr. Heshka's conduct. Then, suddenly, Mr. Barnaby was faced with the "oh shit" moment on November 13, 2020. While Mr. Smorang, on behalf of his clients, recognized that the lateness of Mr. Barnaby becoming involved was "all water under the bridge", it still remained that Mr. Barnaby should have been provided with the opportunity for timely consideration of the significant allegations (of tampering and toxic environment).

Counsel described the fundamental unfairness of Mr. Heshka having no opportunity, even to the present hearing, to explain himself. He referenced the admonition in the decision of Arbitrator Kelleher in *Chilliwack General Hospital and Hospital Employees' Union*, (1993) B.C.C.A.A.A. No. 401, (as referenced in *Concordia Hospital*) over the lack of any proper investigation. Similarly, in the current circumstances, there had been no consulting with Mr. Heshka prior to him being placed on leave.

Counsel acknowledged Mr. Barnaby's explanation of the Division policy that employees on sick leave were not to be disturbed. But he reminded that Mr. Heshka had been contacted by the administrators, in terms of such matters as his medical

considerations and plans of his tentative return to work. Certainly, in these circumstances, according to Counsel, contacting him meaningfully before he was suspended would have been understandable.

And in answer to a question from myself, Mr. Smorang denied that it was the Grievor's position that there was any conspiracy against Mr. Heshka. Instead, as matters unfolded, as shown through the extensive emails filed, Mr. Barnaby had been placed in a position of being unable to carry out a proper balancing during the hectic epiphany "moment" on November 13<sup>th</sup> to 14<sup>th</sup>.

In that regard, concerning the non-investigation, Mr. Smorang referenced Mr. Heshka's responses at the meeting of November 16<sup>th</sup>. Mr. Heshka called out for an opportunity to respond at that meeting. Yet there was no such opportunity afforded.

Counsel also referenced Article 30.1 of the Collective Agreement requiring in the case of a "serious complaint" the member to be provided with the opportunity to "appear and answer to that complaint". This obviously did not occur. He also reminded in *Industrial Alliance*, albeit a non-Union situation, of the import of the restrictions placed by the Supreme Court on the employer's right to suspend.

Mr. Smorang then turned to consideration of certain positions set out in the grievances. In answer to a question from myself, he acknowledged that at the moment there was no direct evidence to the grievance claim that Mr. Heshka was being forced

to retire, given his age. He reminded, however, of the recognition of arbitrators in decisions such as *Salvation Army* and *Riverdale Hospital* of the considerable impacts on an employee being placed on leave, even when being paid.

In response to a further question from myself, Counsel acknowledged that Mr. Heshka clearly had a strong personality - frankly the Division's concerns over the possibility of him interfering in the investigation had to be considered in the context of his involvement in the investigation of the 2015 complaint. However, Mr. Smorang, on reviewing Mr. Heshka's letter concerning the 2015 complaint, noted the unique circumstance faced by Mr. Heshka that he never was provided with the opportunity to be interviewed.

In summarizing, Mr. Smorang maintained that Mr. Heshka should be placed back into the School on an interim basis, pending the investigations and any decisions that are reached based on the results of those investigations. He reminded that a School setting has a structural environment; safeguards, which he somewhat summarized, could be placed.

Mr. Smorang, with the concurrences of Counsel for the Division, reminded that I was to reach no conclusion in this award with regards to the whole issue of exam tampering. He reminded of Mr. Heshka's explanation as to what he had understood concerning students graduating without successfully passing the two Provincial

examinations (in English and Math). That explanation would have to be examined subsequently.

He concluded by re-emphasizing the approach taken in the *Ontario Jockey Club* decision, thereafter followed in the whole series of cases cited by both Division Counsel and himself.

In reply, Mr. Lercher first referenced the *Ontario Jockey Club* decision, maintaining that Union Counsel was incorrect in emphasizing that an investigation must take place before a suspension can occur. In *Ontario Jockey Club*, the investigation aspect was a minor consideration. He also cautioned care in applying decisions such as the *Ontario Jockey Club* and *Phillips*, given their criminal context.

He reminded also of the policy of the Division to generally remove the employee from his/her job pending an investigation into alleged misconduct.

Mr. Lercher also challenged the suggestion that Article 30.01 was applicable to the current hearing, given that the investigation had not yet been completed. The complaints, rather, would have to be presented to the Grievor in an orderly manner, on completion of the investigations.

Mr. Lercher pointed out that virtually all of the cases referenced by Mr. Smorang involved pending criminal charges, therefore being distinguishable.

Ms. Gibson reiterated her colleague's comments, maintaining that there was no requirement for pre-investigation before a suspension was imposed pending subsequent investigation.

She also challenged Mr. Smorang's implication that Mr. Barnaby had been unaware in the lead-up to the decision to suspend Mr. Heshka. This was unfair, in her view. She reminded that Mr. Barnaby had explained that he had considered not only the series of emails, in the course of his discussions with Ms. Caetano-Gomes, but had also reviewed Provincial regulations and Division policies before making his decision.

Ms. Gibson also challenged as unfounded the position that the investigation had been allowed to drag and currently was being delayed. Careful consideration of Mr. Barnaby's testimony must be given as to the substantial efforts he had made in that regard. With respect to the application of Article 30.01, she pointed to the position set out in Ms. Clarke's letter of November 26, 2020, that 30.01 was inapplicable while the investigations were currently underway.

#### **E. ANALYSIS**

Counsel were wise by first emphasizing in their submissions the arbitral principles established by the cited cases. The submissions define the issues to be considered. In this analysis the arbitral principles detailed in the submissions are first considered. Of course, the analysis then turns to application of those principles to the circumstances of the grievances.

(i) Principles

An employee who has been charged with a criminal offence may be suspended pending a determination of that offence. Arbitrators note that at one time, this suspension was permitted by arbitrators without any consideration as to whether the alleged offence affected the employment relationship. Now, arbitrators have given consideration as well to the employee's interest in preserving his/her employment. Today, instead, in arbitral law there is a balancing between the employer's concern for the interest of its enterprise against the employee's interest in maintaining his/her livelihood.

This balancing has been expressed by arbitrators in various ways. In *Ontario Jockey Club v. Service Employees International Union, supra*, the balancing is explained as follows:

The better opinion would appear to be that the employer's right to suspend where an employee has been charged with a criminal offence must be assessed in the light of a balancing of interests between employer and employee. The employee, of course, has a legitimate interest in being considered innocent until he has been proven guilty. If, however, the alleged offence is so related to the employment relationship that the continued employment of the employee would present a serious and immediate risk to the legitimate concerns of the employer as to its financial integrity, security and safety of its property and other employees as well as its public reputation, then indefinite suspension until the charges have been disposed of would appear to be justified.

And in *Phillips Cables Ltd. v. United Steelworkers of America, supra*, Arbitrator Adams comments:

Finally, it is this same employee interest which requires that the existence of the criminal charges must reasonably give rise to a legitimate fear for the safety of other employees, or of property, or of substantial adverse effects upon business. It is not enough that the

charges be sufficiently work-related so that if proven they will support the discharge of the employee. This cannot be the test because the charges have not yet been proven. The employee cannot be treated as if he has committed the offence.

A leading consideration of the governing principles is set out in *B.C. Public Service Employee Relations Commission v. B.C.G.E.U.*, *supra*, with Arbitrator Hall referencing several awards and then writing:

Drawings on these and other authorities, I accept the Employer's basic proposition that a suspension pending investigation represents an exercise of management rights. At least for purposes of this award, it is not necessary to consider whether a suspension for alleged workplace misconduct should be subject to a different type of arbitral scrutiny than a suspension pending investigation for off-duty conduct. I adopt the approach found in cases such as *Ontario Jockey Club*, *supra*. The question thus becomes whether the continued presence of the Grievor at NFPC] presented a reasonably serious and immediate risk to the legitimate interests of the Employer. Stated somewhat differently, could the interests of the Employer and others only have been safeguarded by removing the Grievor from the workplace pending an investigation into whether discipline would be imposed? (para. 34)

In *Salvation Army*, *supra*, the developed law concerning suspensions pending investigations is reviewed in detail (at paras. 36 to 38). Arbitrator Sanderson writes:

I find Arbitrator Hall's approach to be the proper way to decide this case. Since all of the grievor's conduct on July 21 was off-duty conduct, and since the only objectionable or potentially culpable act was the grievor's telephone call to Bonnie Craig during the evening in question, the issue becomes whether the employer's interests, having regard to the particular circumstances, could only be "safeguarded by removing the grievor from the workplace pending an investigation in to whether discipline would be imposed". (para. 38)

The need to balance the employer's and an employee's interests upon the employee before deciding whether to suspend has caused arbitrators to set several



general principles. I reviewed those general principles in *Concordia Hospital, supra*, (at para. 75). They include:

- (a) a suspension in circumstances of a criminal charge or certain impugned conduct is not disciplinary in nature, but rather is protective of the company's interests (*Ontario Jockey Club, supra*, at para. 8). It is a significant business interest in the employee's off-duty conduct which supports the suspension, with the employer not being the "moral custodian" of the community or its employees (*CIBC and Union of Bank Employees, supra*, at para. 8);
- (b) The presumption of innocence can still be recognized by the balancing of the interests of employer and employee (*Salvation Army, supra*, at para. 37). In certain circumstances the presence of the employee, with the criminal charges pending or impugned misconduct, is felt to pose a serious threat to the legitimate interests of the employer, with the employee rendered ineffective to that employer. Most important, such a determination is not believed to pre-judge the guilt or innocence of the employee in the case of a criminal charge. Rather, it simply recognizes the existence of the criminal charge in all of the particular circumstances of the case disrupts the legitimate business interests of the employer. In *Ontario Jockey Club, supra*, this distinction is explained as follows:

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.

And in *Phillips Cables, supra*:

In the first place, the board accepts the general principle that in some circumstances a company can suspend an employee charged with a criminal offense pending its outcome in the criminal courts. The presumption of innocence has its purpose and relevance grounded in the substantive area of criminal law. It is not a doctrine that can be unqualifiedly transported to the context of labour relations. Many situations can be envisaged where a work-related criminal charge against an employee will substantially undermine his effectiveness in the work environment. And in these same circumstances it may not be fair to impose any financial obligation upon an employer whether the employee eventually either escapes the charges or does not;

- (c) The onus to prove the detriment to the business interest is placed on the employer (*Ontario Jockey Club, supra*, at para. 7). In *Hamilton Regional Cancer Centre and CUPE, Local 3566 (Ritchie)* 200087 L.A.C. (4<sup>th</sup>) 341, Arbitrator Beck adopted the following in considering the onus:

The employer still bears the onus of proving, on balance, that its interests should prevail over those of the employee, even though the action is not disciplinary. The employer must prove that the charge against its employee has provided it with just cause for suspending the employee for the time being, in the same way that it must prove that an employee's chronic innocent absenteeism has provided it with the just cause for concluding that the employment contract cannot be fulfilled. The employer does not have to establish culpable behaviour on the part of the employee; however, it does have to establish that the risk involved in keeping the employee in the workplace pending the ultimate disposition of the charge is one which it reasonably should not have to bear;

- (d) The onus on the company includes some obligation to have investigated the impugned conduct "...to the best of its abilities in a genuine attempt to assess the risk of continued employment" (*Ontario*

*Jockey Club, supra*, at para. 7). It is recognized, however, that it may not always be possible to proceed ‘very far’ in an investigation. Much depends on the circumstances;

- (e) Various aspects of the test to be applied in balancing the interests of the employer and employee have been defined in a number of arbitral awards. In *Ontario Jockey Club* this balancing is stated as follows:

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; (para. 8) and

- (f) In *Concordia Hospital, supra*, I comment on the test as follows:

It is succinctly defined in *Kenora Association for Community Living and OPESU (Pride)* (2005), 141 L.A.C. (4<sup>th</sup>) 160 (Springate), as follows: “At issue is whether the grievor’s conduct could be said to have adversely affected the employer’s reputation and impacted on its legitimate interests such as to justify his discharge.” In *Province of Manitoba and MGEU (Martens)* (1999) M.G.A.D. No. 45 (Teskey), the arbitrator adopted the following concerning the test:

It is the board’s view that the *Phillips* case is further support for the proposition that the greater the number of contact points existing between the alleged criminal conduct and the employment relationship then the greater the probability of finding cause in a suspension pending results of a criminal trial.

...

The employer must consider such points of contact as: the nature of the discharge; together with the type of operation of the employer and the type of work of the employer within the employer’s operation;

consequences which may arise in connection with the business interests of the employer; the attitude of the co-workers and possible other jobs within the employer's operation. (from *Ontario Liquor Control Board and Ontario Liquor Board Employees Union* (1984), 18 L.A.C. (3d) 251 (McLaren)). (para. 75)

Arbitrator Peltz, in *St. James-Assiniboia School Division*, helpfully reviews a number of authorities concerning interim suspensions in a wide variety of circumstances (beginning at para. 18). As he summarizes from that review: (i) "it is evident that outcomes are largely driven by the particular facts" (at para. 18). Amongst the other awards cited is my award in *Concordia Hospital*, with Mr. Peltz concurring with my distillation of the general principles that are summarized above (at para. 75).

It is noteworthy that in various awards arbitrators have commented on the difficult nature of this type of grievance. The concept of the presumption of innocence combined with the employee's interest in maintaining his employment is often difficult to balance against the employer's appropriate business concerns. After review of the cited awards, one realizes the test employed of balancing these interests does have the nature of comparing "apples to oranges". The difficult nature of these cases is understandable, given the strong, competing interests.

It is important, as emphasized by the arbitrators in the awards cited by both parties, to take care in applying the balancing test. When a criminal charge is involved, this emphasis is possibly most bluntly stated in *Phillips Cables*. Arbitrator Adams cautions arbitrators from failing to be sufficiently aware of the employee's interest,

where his performance and conduct at work is not in issue, but who nevertheless is suspended for alleged misconduct while away from work. In that regard, he notes:

Secondly, while recognizing this interest of an employer, the board is also conscious of the competing interests of the innocent employee who is tragically and mistakenly the victim of a criminal charge. To await the outcome of a criminal charge in the courts without benefit of employment in the interim can often render a subsequent acquittal quite meaningless.

He goes on to emphasize that one not fall into thinking of the employee as somehow guilty of the pending charges. He writes:

The employee cannot be treated as if he has committed the offence. Rather, he is labouring, under the risk of his guilt, and so may be his employer and fellow employees. Accordingly, the company must establish that this risk of guilt presents a substantial and immediate hardship to itself or to its workers, and that this hardship cannot practicably be met by anything other than the suspension of the employee. This requirement accommodates situations where workers or customers refuse justifiably to deal with the employee, or where he cannot be transferred or watched more closely pending an official determination of his status.

The care in the test application is illustrated by Arbitrator Peltz's assessment of the test of reasonableness to the facts in *St. James-Assiniboia School Division*. He writes in the assessment:

It is this demanding professional standard that persuades me, on the objective test outlined in the authorities, that there would be serious potential harm to the Division's reputation if it retained the grievor in a teaching position with regular student contact. Of course every case is different and I do not intend to declare a universal rule. The facts can be crucial in driving an outcome, as illustrated in the review of arbitral precedents. In the present case, as emphasized by the Division, there are apparently admitted facts that suggest the grievor was guilty of a simple sexual assault if not more. Earlier in these reasons, I indicated that caution should be exercised when an arbitrator is asked to make a finding that properly belongs to the criminal court, applying the appropriate rules of evidence and standard of proof. For this reason, I do not intend to say more. But a fair minded and well informed observer would take into account all the known and apparent facts in this case. (para. 130)

Certainly the majority of the awards cited and relied upon by arbitrators in other awards involve criminal charges having been commenced before the leave of absence/suspension is imposed.

But the general principles have been applied in non-criminal charge situations. In *St. James-Assiniboia School Division*, reference is made to such a situation (*St. Amant Inc. and MGEU (Tawo)* (2010) M.G.A.D. No. 34 (Gibson). In *Humber Memorial Hospital, supra*, no criminal charge had been laid and on applying the *Phillips Cables/Ontario Jockey Club* principles the employee was ordered reinstated.

Certainly the principles quoted above from the Supreme Court of Canada decision in *Industrial Alliance and Cabiakman, supra*, are consistent with the application of the general principles of *Phillips Cables* and *Ontario Jock Club* to suspension situations without a criminal charge having been laid. And in *Riverdale Hospital, supra*, no criminal charge had been brought.

(ii) Application

I have deliberately set out, both in reviewing the submissions and the principles section, the law developed in *Phillips Cables* and *Ontario Jockey Club* and the subsequent line of awards applying those two decisions in order to provide context to the general principles I have discerned.

The parties both draw on the same line of authorities. Both sides, then,

accept the balancing of interests test as applicable in determining whether the Division was reasonable in its exercise of its management rights in suspending the Grievor. Mr. Lercher took care to show that the suspension was not disciplinary in nature according to arbitral law. Mr. Smorang does not disagree. Rather, both define the test to be applied as whether the Division's suspension of Mr. Heshka was a reasonable employing of its management rights.

I appreciate there are two legitimate interests being cogently advanced by the parties in applying that balancing test. It goes without saying that such balancing is difficult and involved in that if both interests are proven, then one legitimate interest must prevail over the other.

The parties also agreed that the onus is on the Employer to prove that it acted reasonably in the suspension of the Grievor. Ultimately, then, the question is whether that onus has been met.

Drawing on the analysis in *Ontario Jockey Club*, the starting point is whether the presence of the Grievor in the School would present "a reasonably serious and immediate risk" to the School's interests (*B.C. Public Service Employee Relations Commission, supra*, at para. 34).

The factual circumstances set out above show that the Employer was presented with concerns over potential exam tampering by Mr. Heshka and a toxic

workplace environment allegedly being caused by him. Other human resources issues considered in various emails (that is, dogs on site and irregular hours of work of a computer technician) were not consequential in determining to suspend. Mr. Barnaby specifically testified that the decision to suspend was based on the allegations of exam tampering and toxic environment.

Understandably, to meet the onus (*Hamilton Regional Cancer Centre, supra*, at p. 347), Division Counsel press several factors as establishing the risk to the School's interest by Mr. Heshka continuing as principal. The Union's Counsel disputes those factors.

Concerning the exam tampering allegation, Mr. Barnaby explained the Division's concern that Mr. Heshka, by having access to the School records, might destroy or alter those records during the course of any investigation. Grievors' Counsel challenges that there is no evidence presented that Mr. Heshka has the character to take such a step or that he has ever acted in such a manner, maintaining this refutes such a concern.

This risk raised as a concern by the Chief Human Resources Officer could constitute, if proven, a serious and immediate risk to the School's interests. But I agree that the background of Mr. Heshka does not raise concern that he is capable of such a devious course. Certainly management was aware of his background. It is exemplary –



without any indication that he would act to cover up what has occurred with respect to the administering of Provincial exams.

As important, the applicable examination records have been assembled by the Division. Mr. Barnaby had no difficulty in organizing those records for delivery to the investigator retained to carry out the exam tampering investigation. Further, I accept the Grievors' position that the Division could have safeguarded those records and taken steps in mid-November to prevent Mr. Heshka having access to them.

I have been cautioned against reaching any conclusion on the testimony I heard as to this allegation. But, I believe I can go so far as to note that Mr. Heshka acknowledged during his testimony that in the past years there have been Sisler students who graduated from grade 12 without having written the Provincial examinations, but instead having written Sisler School examinations (in English and Math). The question appears to be whether this explanation (of students graduating by having passed School exams but not Provincial exams) falls within the Provincial educational regulations governing such matters. Part of the difficulty in any assessment by Mr. Barnaby is what information he had on the exam tampering allegation on November 13 and 14, 2020. Mr. Heshka gave his explanation for the first time at the hearing. Mr. Barnaby fairly noted he is not a teacher and has no expertise in regards to the regulations for Provincial examinations. What he had when the decision to suspend was made was a broad concern of exam tampering set out in the above quoted emails.

The point is, regardless of whether the Heshka explanation is valid or not, I do not believe the explanation raises a substantial concern that Mr. Heshka would be anxious to destroy or falsify student records.

Drawing on the comments of Arbitrator Beck in *Hamilton Regional Cancer Centre, supra*, I do not find there was, in mid-November 2020, such a risk to the preservation of school exam records that the Division should not reasonably have to bear with Mr. Heshka remaining as principal.

The impact on the School's reputation (*Ontario Jockey Club, supra*, at para. 8) is also a factor. Mr. Barnaby expressed the concern in his testimony. I agree. The School has the right to consider the impact on its reputation having Mr. Heshka in the role of principal with such an allegation pending.

Of assistance in considering this reputation concern is Mr. Peltz' analysis in *St. James-Assiniboia School Division*. He concluded on the reputation issue on the facts before him that a fair-minded and well-informed person would appreciate that allegations are only that, unproven and subject potentially to satisfactory explanation. Here, on an objective basis, I do find that fair-minded members of the public would not be overly concerned over the allegation of exam tampering with Mr. Heshka still the principal until the pending investigation reaches a conclusion. That is, the allegation being raised does not reasonably impact on the School's reputation to the extent of requiring Mr. Heshka's suspension.

The seriousness of the allegation of tampering was stressed during the submissions. And “the admission” of the Grievor during his testimony of students graduating without having taken the Provincial examinations was emphasized by Division Counsel. But that admission came as part of an explanation, with a denial of the claim of tampering. Counsel agree I am not to reach any conclusion on whether there was misconduct in the exam system administered at Sisler.

I cannot, therefore, conclude that analbeit serious allegation of exam tampering constitutes such a reasonably immediate risk to the School’s interests to require the removal of Mr. Heshka as principal pending an investigation.

A challenge is also raised in argument over how serious the allegation of exam tampering is, given the delay in proceeding with the investigation. I note in that regard that Ms. Clarke, in her letter of November 26, 2020, writes of the investigation being underway “very shortly” and Mr. Heshka to be provided appropriate information on the allegations. The investigation, though, was somewhat delayed. Explanation for the delay was provided. But Mr. Heshka only received particulars of the allegation of tampering with production of the assembled materials at the present hearing.

It is not my role to comment on the length of time that the investigation of exam tampering has taken to unfold. But, and with all respect, the delay in the investigation proceeding and in providing particulars does not denote that serious and

immediate risks to the School's interests are involved as required in the balancing of interests test.

Concerning the allegation of a toxic work environment caused by Mr. Heshka's course of conduct, again these are recognized by both sides as serious allegations. They could constitute a risk to the Sisler High School's interests. Specifically, the School has an obvious obligation and commitment to maintaining a respectful workplace for its teachers and support staff.

The seriousness of the allegations, though, are impacted by the circumstances under which they arose. They emerged at a single meeting on November 5, 2020, the notes of which are quoted above. The concerns were conveyed to Mr. Barnaby in a subsequent contact on November 6<sup>th</sup>. Tellingly, these allegations did not cause Mr. Barnaby to consider at that point the placing of Mr. Heshka on leave or to launch an investigation. Instead, the plan for Mr. Heshka to return as principal carried forward for the next week. Ms. Schmidt, instead, was co-ordinating the transition meeting (set for November 16<sup>th</sup>) during this period.

Then on November 12, 2020, in an email, Ms. Schmidt summarizes the concerns about abuse of power and favouritism.

As stressed, Mr. Heshka had no knowledge of these allegations having been advanced. I appreciate there was fear expressed by vice-principals and others if the

claims of abuse were brought forward to him.

But the allegations are denied by the Grievor in the course of his testimony.

A difficulty in this grievance hearing is the nature of the evidence presented by the Division. This was commented on by the Grievors' Counsel in his submission. Mr. Barnaby, as the only witness for the Division, in his testimony reviewed the November 6<sup>th</sup> and 12<sup>th</sup> emails, setting out the allegations of others of abuse of power, favouritism and such. This is no criticism of Mr. Barnaby, who presented his testimony in a forthright, careful manner. But, no one with firsthand knowledge of such allegations was called to testify and to be subject to cross-examination. And, of course, with Mr. Heshka not being made aware of them, Mr. Barnaby had no response to the allegations at the time they were presented from Mr. Heshka to judge their seriousness and validity.

I appreciate Mr. Barnaby's explanation that the Division policy of not contacting employees on sick leave prevented him from raising the issues with Mr. Heshka. But in my mind, allegations described as serious at this hearing should have caused an exception to that policy, with Mr. Heshka being contacted. The Division must understand its onus to show the basis of such allegations to support harmful or detrimental effect to the Division's interests (*Kenora Association for Community Living*, as quoted in *Concordia Hospital*, at para. 75). This is also stressed in *Salvation Army*, *supra* (at, for example, para. 23 and para. 43).

One example of the difficulty with Mr. Barnaby's testimony is the claim that Mr. Heshka's email of November 13, 2020, with copies sent to the Association, constituted "bullying" by Mr. Heshka. As pointed out by Grievors' Counsel, there is serious issue of whether that email constitutes bullying, even with it being copied to the Association. The email is quoted above. The point is, such claims put Mr. Barnaby in a difficult position in determining the degree of risk to the interests of the School in having Mr. Heshka re-assume his role as principal. In turn, the question is whether the test of reasonableness in applying management rights is met, given the third party nature of the allegations of toxicity presented to Mr. Barnaby.

As repeatedly noted by arbitrators, the outcome of the balancing test is largely driven by the particular facts.

Here, in considering the reasonableness of the decision to suspend, the employee's interests to be contemplated are of an employee who has served the Division for almost a half century, 41 years as the principal of one of its major high schools.

By arbitral principles, the onus is on an employer to show that on balance of interests of the employer called for the suspension of the grievor. Given the information that Mr. Barnaby had received (as he explained during his testimony), I do not find that it was established on an objective basis that the interests of the School called for Mr. Heshka's removal. All he had received were mostly general and non-specific

allegations, all of which were hearsay in nature. He had no opportunity to test those allegations. I do not believe it was established that the risk of keeping Mr. Heshka in the workplace pending investigation is one that the Division reasonably should not have to bear (*Humber Memorial Hospital, supra*; referencing *Ontario Jockey Club*, at para. 11).

The “fair-minded and well-informed member of the public” test in assessing potential impact requires an objective assessment of that potential harm to the employer’s interests (*St. James-Assiniboia School Division*, at para. 28). Overall, in all the circumstances, in my view, a reasonably serious and immediate risk to Sisler High School’s interests on an objective assessment was not made out from the allegations of several employees of a toxic workplace.

In weighing the interests of the Division and the Grievor, I am not satisfied that some restrictions could not have been placed on Mr. Heshka to allow him to return to his position, yet protect the interests of the Division. In Awards such as *Humber Memorial Hospital* (at para. 16), the requirement on the employer is to show reasonable steps being taken to ascertain whether a risk from continued employment might be mitigated. On the basis of all the testimony, I am satisfied reasonable steps should have been taken to ascertain whether the risk of Mr. Heshka returning as principal could be mitigated through some techniques other than suspension. Such steps were not.

For example, I appreciate Mr. Barnaby spoke of the possibility of tampering of examination documents. But, as already noted, Mr. Heshka could have been put on a

prohibition from having any contact with such materials. Similarly, Mr. Heshka could have been placed under prohibition from conduct in his role as principal that resulted in a disrespectful workplace environment. There was no serious contemplation of such alternatives to suspension.

Closely tied to the above comments on the nature of the allegations presented to Mr. Barnaby is the whole consideration of the lack of any investigation before Mr. Heshka was suspended. The awards collectively note the nature and extent of an investigation can vary considerably, depending on the circumstances. Cases such as *Ontario Jockey Club* and *Phillips Cables* establish that in order to determine the detriment to the employer's interests by the employee's continued presence in the workplace, there should be some assessment of the allegations. Depending on the factual circumstances, that assessment may be minimal.

I drew on *Chilliwack General Hospital* in my award in *Concordia Hospital*. In *Chilliwack* the employer's concerns about its interests were found to be legitimate. But it was found some investigation should have been conducted or even an explanation sought. I found a duty to investigate to exist.

I appreciate the frankness of Mr. Barnaby's testimony of what occurred, or if you will, what came together for him on November 13, 2020. He expressed an "oh shit" moment occurring for him concerning, in particular, the allegation of exam tampering on the evening of November 13<sup>th</sup>.



And I also appreciate that the next morning he reviewed the emails raising the allegations which have been quoted above (and considered Division policies and Provincial directives). He sought the views of Ms. Caetano-Gomes. Ultimately, he said that the decision to suspend was the joint decision of the two of them.

Taking all that into consideration, I am satisfied there was some weighing by Mr. Barnaby and Ms. Caetano-Gomes of the respective interests of the Employer and the Grievor. But there was no investigation whatsoever once he determined on November 13<sup>th</sup> the concerns were serious.

The lack of any investigation must be addressed in terms of two other points. Counsel for the Division argued that there was no need for what was referred to as “pre-investigation” before the decision was made to suspend. With all respect, I disagree. Given the above analysis of the principles on such suspensions, I believe there is recognition that some investigation process is necessary in arbitral law to assess the allegations on which the risk to the Employer’s interests is to be determined and the balancing test is to be applied.

Also, Mr. Barnaby was frank in his testimony that the Division’s policy is generally to remove an employee once allegations are made that may impact on the Division’s interests. Such a policy, though, seems contrary to the arbitral principles set out above. Cited cases such as *Salvation Army, supra*, (at para. 42) (in which, for example, reference was made to the failure to make any inquiry), note the importance of

some investigation before determining the reasonableness of suspension of the employee.

Counsel for the Grievor made it clear that he was not suggesting there was a conspiracy afoot against Mr. Heshka. Rather, he summarized that in properly applying the test of balancing the interests of employer and employee the Chief Human Resources Officer was required to “do more” before being in a position to reasonably conclude that Mr. Heshka should be suspended pending investigation. I agree, based on the arbitral principles summarized above.

I, therefore, have reached the conclusion, for the reasons set out above, that the Division acted unreasonably in failing to carry out an appropriate balancing of its interests to those of the Grievor. Given the onus on the Division, I do not believe that the suspension of Mr. Heshka has been justified.

#### **F. DECISION**

It follows, from all of the above, that I have determined to allow the grievances.

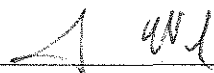
As a consequence, I am ordering that Mr. Heshka be re-instated now to his position as principal of Sisler High School.

The Division may consider reasonable prohibitions and restrictions upon Mr.

Heshka in his role as principal of Sisler High School to mitigate risks that the Division believe exist arising from the allegations of exam tampering and of the creation of a toxic work environment. Mr. Smorang acknowledged some safeguards may have to be put in place should Mr. Heshka be returned. Similarly, the Division may consider restrictions upon Mr. Heshka to facilitate the carrying out of the two investigations that are presently ongoing. I reserve jurisdiction to deal with any issues that may arise with respect to the imposing of such prohibitions and restrictions.

I thank Counsel for their helpful and comprehensive presentations.

DATED at Winnipeg, Manitoba, this 9<sup>th</sup> day of March, 2021.

  
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Gavin Wood, Sole Arbitrator