



Education Law eBulletin

A newsletter for educators

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Progressive Discipline: The Key to Disciplinary Decision-Making

With the advent of *Safe Schools* legislation and ongoing concerns of providing a safe and healthy learning environment for students, School Boards are continually required to make disciplinary decisions that will, out of necessity, adversely affect the student that is subject to the disciplinary sanction. However, parents and students are becoming increasingly knowledgeable of their appeal rights and school boards are constantly facing the threat of having disciplinary decisions overturned. Very often "problem students" walk in and out of the office on a daily basis. In some cases, small and ongoing infractions are not recorded, students may receive the same punishment time and time again regarding these matters. Indeed, at times, the issue may become routine such that the incidents and/or discipline are not recorded in any meaningful way. As parents and students become more knowledgeable about their rights, it is becoming more important for school administrators to take these small and ongoing infractions more seriously.

Progressive discipline and proper record-keeping can provide a simple and effective way to ensure that disciplinary measures will be enforced. Expulsion should be regarded as a last resort sanction and school administrators should ensure that other disciplinary steps have been taken and recorded, as appropriate, to support any significant disciplinary action taken against a student. Failure to employ progressive discipline or adequately record the steps taken can result in the disciplinary sanction being reduced or quashed altogether.

To illustrate, in *K.C. v. Rainbow District School Board*, 2008 CFSRB 43, a principal witnessed, from a second-storey window, an exchange between a grade 10 student and another student. The students were taken to the office and searched; 8 heat-sealed packages of marijuana, a pipe and a \$5 bill were found. One student was suspended and ultimately expelled from all board schools. The parents of the expelled student appealed the expulsion on the basis that there was no evidence that their son was trafficking illegal drugs and that no transaction involving drugs occurred. In this case, the Child and Family Services Review Board (the "CFSRB") found that the evidence established that, on a balance of probabilities, the student was trafficking illegal drugs. In this case, the school board adduced evidence that the student in question had failed to maintain the grade levels required to stay in the Science and Technology Education Program. Further, the school board was able to demonstrate that the student had been subject to progressive discipline regarding smoking on school property and fighting. Trafficking illegal drugs is a serious offence, and it was in the best interests of the school board to uphold the expulsion.

However, the opposite conclusion was reached in *K.R. & M.R. v. Greater Essex County District School Board*, 2010 CFSRB 8. In this case, a Grade 10 special needs student was expelled from all board schools for trafficking marijuana. The student had been caught selling marijuana in the "smoking pit" located off school premises; at that time the student admitted to selling drugs and having 33 joints (12 grams) of marijuana on his possession at school. The student appealed the expulsion. The CFSRB found that the student was trafficking and that selling marijuana does impact the school climate, but held that the pupil's continued presence in the school would not create an unacceptable risk to anyone's safety and that the pupil's history, ongoing education and lack of progressive discipline all mitigated against an expulsion. In addition, the CFSRB held that the sale occurred off school property and that there was no evidence that he sold on school premises. In this case, it was specifically noted that the school board's failure to use progressive discipline was significant.

Finally, in *C.V. v. Simcoe Muskoka Catholic District School Board*, 2010 CFSRB 5, a 14-year-old student was expelled when he used a pellet gun to shoot another student in a park adjacent to the school, causing bruising on the student's legs. Based on the nature of the incident, the student was expelled from his school and recommended to a program for expelled students. The student's parents appealed the decision and the Child and Family Service Review Board found that, after a

psychological assessment, the student was a low risk for acts of extreme violence and that it was unlikely that the student would be involved in a weapon-related incident in the future. The CFSRB relied on the opinion and found that the student did not present an *unacceptable risk* to the safety of any person. The CFSRB also found that the discipline imposed by the school board was not progressive in that "it was only punitive" insofar as the discipline was based solely on the seriousness of the incident and contained no corrective or supportive measures. School boards may disregard progressive discipline only if the student is an unacceptable risk; this was not the case so progressive discipline was in order.

The above cases demonstrate that even in the face of serious infractions, the use of progressive discipline and the history of discipline is important when school administrators are considering taking significant action against a student. When comparing the first two cases, it is evident that the CFSRB acknowledges that trafficking drugs is a serious offence; however, the CFSRB appears reluctant to expel a student based on one incident, without more information. To be clear, in both decisions the students had only been caught with drugs on one occasion, but in *K.C. v. Rainbow District School Board* there was evidence that the student had already been disciplined regarding other incidents allowing the CFSRB to conclude that it was in the best interests of the school to uphold the expulsion. By recording incidents and employing progressive discipline, the school administrators in *K.C.* were able to demonstrate that its ultimate decision to expel was not unwarranted or an over-reaction to a single incident.

In addition, the *C.V. v. Simcoe Muskoka Catholic District School Board* decision demonstrates that progressive discipline does not consist of mere disciplinary measures. Progressive discipline also requires school administrators to attempt to correct students' undesirable behaviours, as opposed to being solely punitive.

School administrators will often be required to make disciplinary decisions regarding students through ongoing and continual trips to the office, visits with parents or teacher complaints. However, unless these issues are properly recorded and disciplined by school administrators, when it comes to an ultimate decision it is possible, if not likely, that any decision regarding expulsion or a lengthy suspension will be quashed unless the incidents have been appropriately recorded and disciplined. In short, although a principal or vice-principal may recognize that a student is a significant problem and should be dealt with accordingly, in the absence of evidence that the school has attempted to deal with the maladaptive behaviours, any substantive discipline imposed by the school may be set aside on appeal.

Should you have any questions regarding progressive discipline or expulsion or suspension decisions, please feel free to contact us at 1-866-422-7988.

Off-Duty Conduct – Different Standards for Different Employees

It is trite to say that teachers are expected to be positive role models for students, both in and out of the classroom. Indeed, the Ontario *Education Act* specifically provides that it is incumbent upon teachers to lead by example. Jurisprudence across Canada has demonstrated, time and again, that off-duty conduct may amount to professional misconduct because teachers hold a position of trust, confidence and responsibility. When teachers act in an improper manner, on or off-duty, there may be a loss of public confidence in the teacher and in the public school system. Therefore, it is readily apparent that teachers may be judged by the appropriateness of their off-duty actions. However, a recent arbitration decision entitled *Toronto District School Board v. Canadian Union of Public Employees*, 2009 CanLII 1363, demonstrates that not all school board employees will be held to as high a standard of off-duty conduct.

In this arbitration, the grievor was employed by the Toronto District School Board as a "School Based Safety Monitor" whose duties were to uphold "law and order" and act as a "peacekeeper" in one of the School Board's secondary schools. On November 13, 2005, the grievor assaulted a man at a gas station located approximately two kilometres from the secondary school where the grievor was employed. The grievor was intoxicated at the time and was unaware that the man who he assaulted was the father of a Grade 9 student at the same high school at which the grievor worked. The school board became aware of the incident after the police contacted the principal of the high school to request the grievor's attendance at the police station to discuss the incident. The grievor was subsequently criminally charged with assault and uttering death threats. The school board responded by suspending the Grievor and ultimately terminating the grievor's employment on the basis of the off-duty conduct, which was "inconsistent and contrary to the qualities, skills, and acceptable standards of conduct/behaviour expected of a School Based Safety Monitor." The union grieved both the suspension and termination.

Ultimately, Arbitrator Luborsky found that Board had cause to suspend the grievor without pay pending the disposition of the criminal charges (which were later withdrawn) but did not have just cause to terminate the employment relationship. In holding that the termination was excessive, Arbitrator Luborsky noted that, as a School Based Safety Monitor, the grievor was not subject to the same statutory obligations and consequences of off-duty misconduct as that of a school

teacher. Further, the grievor's admission of misconduct, his recognition of wrongdoing and the withdrawal of the criminal charges were considered as mitigating factors. Finally, the arbitrator noted that there was little connection between the grievor's misconduct and his job other than the assault coincidentally involved a parent. The arbitrator also found it significant that the decision to terminate was made before the criminal charges had been resolved. Therefore, the arbitrator held that the appropriate penalty was a suspension pending the outcome of the criminal proceedings, after which the Grievor must be reinstated with compensation for his losses from that date forward.

In our view, this decision is significant for two reasons. First, it serves as a reminder that if a school board is going to rely solely on police investigations regarding criminal acts as cause for discharge, it should wait until a conviction is entered before doing so. Indeed, if a school board does not conduct its own investigation of the matter, even a conviction may not be cause if the employee is successful on appeal. We recommend that school boards perform appropriate investigations and consult legal counsel when attempting to determine if termination is warranted in any given set of circumstances. Second, the above-mentioned decision is significant as it seems to imply that the same standards of off-duty conduct do not apply to all school board employees, and what may constitute just cause for a teacher may not constitute just cause for a differently-situated employee. However, we note that the off-duty conduct in this case was only coincidentally connected to the Grievor's employment and that the criminal charges were ultimately withdrawn. If the assault had more directly affected a student, or if the criminal charges had not been withdrawn, it is possible that this case may have been decided differently.

CASES

An Ontario Labour Arbitrator upheld a school board's decision to discipline a teacher who became separated from her class during a field trip, but required the school board to alter the wording of the disciplinary letter. *Toronto District School Board v. Elementary Teachers' Federation of Ontario (Bandurak Grievance)*, [2010] O.L.A.A. No. 4.

The British Columbia Court of Appeal held that legislative amendments allowing universities to ticket and tow vehicles on university property, enacted after a lower court's decision finding such activity unlawful, was valid and set aside the trial judgment accordingly. *Barbour v. University of British Columbia*, [2010] B.C.J. No. 219.

The British Columbia Supreme Court held that university-owned student union buildings, leased to commercial tenants, were held for university purposes and exempt from taxation. *British Columbia (Assessor of Area No. 1 - Capital) v. University of Victoria*, [2010] B.C.J. No. 164.

The Saskatchewan Court of Appeal overturned decisions of the Saskatchewan Human Rights Tribunal and the Court of Queen's Bench, holding that homophobic statements which were published in materials criticizing local school boards' curriculum amendments were not sufficiently egregious to justify limiting the appellant's freedom of speech.

The Nova Scotia Supreme Court dismissed a school board's application for judicial review from an arbitrator's decision to reinstate a teacher who had a sexual relationship with a 15-year-old girl.

The Manitoba Court of Appeal reinstated the decision of a Board of Arbitration, finding that it had considered the reasons for a teacher's dismissal and that the reviewing judge erred in finding that the Board of Arbitration had lost jurisdiction in the matter.

The British Columbia Supreme Court dismissed an action for damages resulting from a shop class accident on the basis that the school met the standard of care of a prudent parent in the operation of the class and the provision of equipment to students in that class.