

IN THE MATTER OF AN ARBITRATION

Between

THE BOARD OF EDUCATION OF SCHOOL DISTRICT
NO. 79 (COWICHAN VALLEY)

(the "Employer")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 606

(the "Union")

Re: LH Suspension and Termination Grievances

APPEARANCES: Judith C. Anderson, for the Employer
Sun Wong, for the Union

ARBITRATOR: Mark J. Brown

DATES OF HEARING: January 31 and February 1 to 4, 2011

DATE OF AWARD: February 16, 2011

I. ISSUE

1 I note at the outset that this case involves a grievor employed at a school where her son attends the school as well. The matter has no doubt had a profound impact on the family. Given the sensitive nature of the case I have not used names in the Award. I have also only summarized some evidence in order to put the matter into context while at the same time protect the privacy of those individuals involved to the greatest extent possible. The only evidence set out in detail is evidence that is material to my decision.

2 In a letter dated May 25, 2010, the grievor was terminated for allegedly changing answers to test questions on behalf of her son. The letter stated in part:

On April 26, 2010, I presented you with a letter informing you of allegations of potential misconduct that have been made against you. The allegations are that you have altered the answers your son put on bubble sheets before you scanned them.

Since that time we have conducted an investigation into the matter. On May 18, I sent you a copy of the investigation report prepared by Mr. Bailey. In his findings, Mr. Bailey wrote, "Taking all things into consideration, I feel there is sufficient evidence for a normal person, of normal experience and intelligence to conclude that the balance of probabilities show that [the grievor] altered the test sheets to benefit her son."

On May 20, I met with you and representatives of CUPE Local 606, to offer you an opportunity to provide me with any additional relevant information. At that meeting, you and the CUPE representatives told me that:

1. the report was based on the investigator's opinion and without evidence to support that opinion;
2. you had no motive to modify your son's bubble sheets;
3. your and your son's reputations have suffered by these allegations;
4. you questioned the credentials and methods of the investigator; and,
5. there was a need to determine the sensitivity of the Scantron machine to determine whether or not it would be able to read a bubble sheet that had been altered.

Subsequent to that meeting, I emailed you copies of evidence we have in our possession to give you an opportunity to review and

respond to the evidence. In our meeting of May 25th, you denied changing his marks, saying, "I did not change his marks" and "I wouldn't do that to [son]."

I have reviewed the information you provided to me on May 20 and 25 and I have reviewed the findings in Mr. Bailey's report. I accept Mr. Bailey's findings and conclude that on at least three separate occasions you altered answers to test questions your son recorded on bubble sheets after they were given to you for processing but before you processed them. The net result is that your son received higher marks on those three tests than he would have received with his original answers.

This misconduct is a breach of the position of trust you hold as a secretary in a school. As a school secretary, you have access to confidential student information including the database containing the academic achievement records of every student enrolled in School District No. 79. In your current position, you are also entrusted to mark tests and exams of students who are enrolled at Cowichan Secondary School. This breach of trust is so significant that it irreparably destroys the very foundation of the relationship between the School District as employer and you as an employee.

As a consequence of this misconduct, you are hereby discharged from your employment with School District No. 79 (Cowichan Valley) for just and reasonable cause effective immediately.

3 The Employer asserts that it had just and reasonable cause to terminate the grievor.

4 The Union asserts that the Employer's investigation was flawed and that it has not met its onus to prove just and reasonable cause; and therefore, the grievor should be reinstated with full back pay and seniority.

II. BACKGROUND

5 The grievor worked in the administration office at a high school in Duncan. There are three support staff in the office. The grievor's job functions included running test results for teachers who utilized bubble sheets for answering tests, preparing report cards and entering data into the District and Ministry data system.

6 The grievor posted into the position in December of 2008. Prior to that the grievor worked in the School Board office in the payroll department since July of 1999. There is no dispute that the grievor was an effective and productive employee with a discipline free work record.

7 The grievor worked from 7:30 a.m. to 3:30 p.m. with a coffee break at 9:30 a.m.
to 10:00 a.m. and lunch at 11:30 a.m. to 12:30 p.m.

8 The high school starts classes at 8:00 a.m. The first class block is 8:00 a.m. to
9:20 a.m.; second block is 9:25 a.m. to 10:45 a.m.; lunch is 10:45 a.m. to 11:30 a.m.;
third block is 11:35 a.m. to 12:55 p.m.; and fourth block is 1:00 p.m. to 2:20 p.m.

9 The grievor's son commenced attendance at the school in the 2009/2010 school
year. He enrolled in the Excel Program. Students apply to enrol in the program in
Math/Science and/or Social Studies/English. In addition to covering the normal required
curriculum, teachers enrich the subject areas with more challenging aspects due to the
academic achievements of the students. The grievor's son took all four courses.

10 The subjects are paired as noted above so that the students take, for example,
Math one day and Science the next day in the same block alternating from day to day.
The four courses were scheduled on a linear basis so that the subjects are taken for the
entire school year. Other courses taken by the students are scheduled on a semester
basis.

11 A great deal of evidence was entered regarding the academic standing of the
grievor's son. For purposes of this decision, in keeping with my concern about the
sensitivity of the personal situation, I need only to summarize the evidence.

12 All the Employer witnesses spoke in very positive terms about the grievor's son.
He is a good student, well liked by all the teachers. He was described as an above
average student in comparison to the total student population, and average within the
Excel Program. He is somewhat of a perfectionist. He held on to assignments and
became stressed at test time. This led to a higher than average absenteeism record, a
significant number of assignments not handed in and some tests missed or written late.
Some of the absences from class were the result of him actually not attending class but
working in the counsellors' office to catch up on school work.

13 Although the grievor testified that she was not actually concerned about his
actual marks, she was concerned about relieving his stress level. In an email to his
teachers dated January 14, 2010, the grievor requested a printout of all her son's marks
to date. She stated that "he's feeling a little overwhelmed with some of his classes and
due to the nature of his personality I'm trying to intervene before he has a meltdown. I
will do what I can to bring him back on task...".

14 The three teachers that testified stated that they, on several occasions,
discussed the son's absenteeism and late assignments with the grievor at the school.
The grievor in testimony asserted that the discussions were less frequent than asserted
by the teachers, and that she did emphasize with her son the need to hand assignments
in to the teachers in a timely manner.

15 In a report card for the period ending January 22, 2010, her son received a C+ in
Science and an "In Progress" in Math. The Math teacher mailed an "In Progress" report
home and advised that the son would receive a letter grade after he rewrote the mid-
term exam. Other marks were either A or B.

16 The three person administration office is busy. Students, parents and teachers
frequent the office. The three support staff work behind a counter in their own open
cubicle area. While the area is open, neither of the other two support staff have an
open view of the grievor's work area while they are working themselves as their backs
would be to the grievor. To actually see what the grievor is doing, staff would have to
stand and approach her work area.

17 Some teachers use bubble sheets for multiple choice tests. Students enter their
student number and name on the bubble sheet. The student pencils in the bubble
corresponding to the right answer for each question. The teacher attaches an answer
key to the class bubble sheets and takes all the sheets to the grievor.

18 The grievor's computer is the only computer with the requisite software program
to operate the machine to scan the bubble sheets. The machine to scan the answer
key and the students bubble sheets (the scantron machine) is located at her work
station. The grievor opens the program, enters the course number, teacher, course
title, description, day/time and term/year into the computer. She then scans the answer
key and the students' answer sheets. The computer then prints out a Class Response
Report ("Report") setting out the student's name and the answers that were wrong. The
date the bubble sheets are run through the scantron is shown on the Report in the
bottom right hand corner.

19 During the week of April 12, 2010, the grievor was spending a great deal of her
work day preparing report cards for the administration's signature.

20 The Math teacher scheduled the first part of a two-part test on April 13, 2010.
After the students complete a test he has a habit of taking the student's bubble sheet on
top and a couple of other bubble sheets to check the results by hand to gauge the level
of the test before having the entire class marked through the scantron.

21 On the day in question, the grievor's son was the last student finished the test.
His bubble sheet was on the top of the pile. In reviewing his answers, the teacher
estimated that he scored 16 or 17 out of 25. The teacher locked the bubble sheets in
his cabinet in his room.

22 On April 14th during the first block (8:00 a.m. to 9:20 a.m.), the teacher took the
bubble sheets to the grievor. The teacher stated that the grievor said she had heard
about the test the night before on the drive home with her son.

23 The teacher picked up the completed Report during the same block. He reviewed the class marks and was surprised to see that the grievor's son got 20 out of 25.

24 The Math teacher was concerned and discussed the matter with the Science teacher. The Science teacher had scheduled a test for that day (April 14th) so the teachers decided to photocopy the son's bubble sheet before the sheets were taken to the office to be run through the scantron.

25 In the Excel Program because the teaching blocks are paired together (Math/Science and Social Studies/English) when a test is scheduled both classes in the pairing write the same test at the same time. For example, when the Science test was scheduled, the test was taken by the students in the Science class and the students in the Math class.

26 After the Science test was completed, the Math teacher brought the bubble sheets from his class to the Science teacher's class. He took the son's bubble sheet to the library and photocopied it. At the end of the class at 10:40 a.m., the Science teacher then took all the test results to the office. According to the Science teacher, the grievor was at her desk. The teacher left the bubble sheets on the scantron machine. They did not engage in any conversation.

27 The Science teacher stated that on April 15th between 9:00 a.m. and 9:10 a.m. he picked up the test results from the office. The Report is dated April 14th. He returned to his room and compared the son's photocopied bubble sheet to the test results. The son's score had improved by 11.

28 On April 15th in the second block (9:25 a.m. to 10:45 a.m.) the second part of the Math test was written. The son was in the Science teacher's class. During the test the teacher noticed some unusual behaviour between the son and another student. The Science teacher stated that at the end of the class he retrieved some paper from the recycle bin deposited by the son. He concluded that the students were cheating on the test but given the issue with the scantron he decided not to pursue the matter. At the conclusion of the Math test, either the Science teacher or Math teacher photocopied the son's bubble sheet. The Math teacher stated the bubble sheets were then locked in his cabinet.

29 The Math teacher stated that he took the answer key and test sheets to the office at approximately 3:00 p.m. The grievor was talking to another teacher. He did not interrupt them and left the sheets by the scantron machine.

30 The Math teacher stated that he returned to the office at approximately 4:00 p.m. The bubble sheets had not been run through the scantron yet. He took the son's bubble sheet, photocopied it and then returned it to the pile. He returned to the classroom and

compared the bubble sheet photocopied after the test and the one he had just photocopied from the grievor's desk. Four answers had been changed.

31 The Math teacher stated that he went to the office the next day (Friday, April 16th) and picked up the Report. The Report results confirmed that four answers had been changed. The Report is dated April 16th.

32 The Math teacher talked to one of the Vice Principals that day expressing his concern and reviewed what the two teachers had done to that point.

33 The Principal met with the Math, Science and Social Studies teachers on Monday, April 19th. He also met with the Secretary-Treasurer to advise him of the situation. The Social Studies teacher had a test scheduled for that day. She was told to photocopy the entire classes bubble sheets at the conclusion of the test. The grievor's son was ill that day and wrote the test with several other students in the library on April 21st.

34 The Social Studies teacher then photocopied all the bubble sheets of the class in which the grievor's son was enrolled, not the entire class including those students who wrote the test in the English class. Between April 19th and April 21st the completed bubble sheets were on the teacher's desk in her classroom.

35 The Social Studies teacher took the bubble sheets to the office on April 21st at approximately 2:30 p.m. She stated that she believed the grievor was there. She picked up the results on April 22nd at approximately 10:35 a.m. The Report was dated April 22nd. The teacher checked the photocopied bubble sheet with the one returned with the results. The answers were changed on the son's bubble sheet.

36 On Friday, April 23rd, the Principal and Vice Principal took the bubble sheets from the second Math test, the Science test and the Social Studies test. They compared the photocopies of the son's bubble sheet and the bubble sheets returned with the results. They confirmed the number of changes. In addition they checked all the class bubble sheets photocopied by the Social Studies teacher. The only test results altered were those of the grievor's son.

37 The Principal asked the three teachers for a written statement setting out the events to that date. All the teachers provided a statement. The Math teacher subsequently provided an amended statement a week later correcting some dates from the original statement.

38 The Principal met with the Secretary-Treasurer on April 26, 2010 and reviewed the circumstances to date. The decision was made to meet with the grievor and send her home with pay pending investigation. The meeting occurred at the end of the day

on April 26th. The meeting was attended by the Principal, Secretary-Treasurer, the grievor, a Union Representative, and another employee requested by the grievor.

39

A letter dated April 26, 2010 was given to the grievor. It stated in part:

This letter is to inform you of allegations of potential misconduct that have been made against you. The allegations are that you have altered the answers your son put on bubble sheets before you scanned them.

Teachers at Cowichan Secondary School use "bubble sheets" for students to record answers to questions given on a test. The practice is that the teacher gives the completed bubble sheets and the answer key to you and you scan them through the "Scantron" and return the bubble sheets, answer key and the test results to the teacher.

[Name omitted], your son, attends Cowichan Secondary School. Three of your son's teachers have reported that the answers on your son's bubble sheets have been altered after they were given to you for processing but before you processed them. The net result is that your son received higher marks on the tests than he would have received with his original answers.

Pursuant to Article 14(f) of the Collective Agreement, you are hereby notified that I am requesting a meeting with you so that you can respond to the allegations. You are entitled to have your steward present at the interview as discipline may result. We will notify you of the time and location of the meeting once we conclude our investigation into these allegations. In light of the severity of the allegation, we are sending you home with pay until the completion of our investigation.

40

The Union viewed the action to be a suspension and filed a grievance.

41

The Secretary-Treasurer stated that he decided to engage an independent investigator to investigate the allegations. He asserted that he did so in order to ensure credibility for the investigation given some other unrelated matters that were occurring in the District between employees and involving the Union.

42

An investigator was engaged on April 29th. He interviewed the three teachers, the other two office staff, the Principal, the grievor and another employee who was aware of the office procedures. The investigator also reviewed the bubble sheets, grades of the son and other documents obtained from the District. At the end of the day he concluded that "there is sufficient evidence for a normal person, of normal experience and intelligence to conclude that the balance of probabilities show that [the

grievor] altered the test sheets to benefit her son". The investigator did not testify at the hearing.

43 The investigation report was received on May 18, 2010. The Secretary-Treasurer sent a copy of the report to the grievor on the same date. In a covering letter he requested that she attend a meeting on May 20th for "an opportunity to meet with me to provide me with any information you feel will be helpful to me in making those decisions" (i.e., whether or not to discipline her). A meeting had already been scheduled for May 20th to discuss the grievance relating to the alleged suspension.

44 At the conclusion of the grievance portion of the meeting, attended by the grievor, two Union Representatives, the Secretary-Treasurer and a Human Resources staff member, the Secretary-Treasurer stated that the Union questioned the investigator's credentials, asserted the report was flawed and requested copies of the evidence. The grievor did not deny the allegations.

45 On May 20th, the Secretary-Treasurer provided the grievor and the Union with 47 pages of material including the tests, answer keys, son's original test bubble sheet and the altered bubble sheet. A meeting scheduled for the next day was postponed until May 25th.

46 The May 25th meeting was attended by the grievor, Union Representatives, the Secretary-Treasurer and the Human Resources staff member. The grievor denied the allegations. The Secretary-Treasurer stated that he considered the teachers' statements, the evidence and the investigator's report and concluded that termination was warranted. The termination letter was provided to the grievor at the conclusion of the May 25th meeting, after the Secretary-Treasurer and Human Resources person caucused to consider the discussion at the meeting.

47 The grievor denied altering any bubble sheets. She testified that on April 14th she ran the Math teacher's scantron in the morning prior to a staff meeting that commenced at approximately 10:00 a.m. Another office employee was talking to her while she was running the bubble sheets through the scantron prior to the meeting.

48 The staff meeting was attended by the Principal, a Vice Principal and the three office staff. The grievor asserted that the meeting ended at about 11:15 a.m. and she left for the day at 11:30 a.m. to attend two appointments. No one was called in to replace her.

49 The Principal testified that the meeting ended at 10:45 a.m. when the lunch bell sounded because they had lunch duties to perform. One of the other office staff testified that the meeting ended before lunch at 10:45 a.m. The Science teacher also testified that the grievor was at her desk when he delivered the class bubble sheets at the end of the class at 10:40 a.m.

50 The grievor testified that she did not run the scantron machine on April 15th. She left at around 3:00 p.m. after talking to one of the teachers. She did not recall seeing the Math teacher drop off the test sheets. When she returned to work on April 16th she asserted she was busy with report card issues. She asserted she did not run the scantron. In cross-examination she stated she must have run the scantron on April 16th as the sheets would have been there to do and the Math teacher picked them up that morning. The Math teacher stated he picked up the results that morning and the Report is dated April 16th.

51 The grievor testified that she arrived at school at 7:30 a.m. on the 21st, and left at 9:25 a.m. to take her husband and son to an appointment, returning at approximately 10:00 a.m.

52 The grievor stated that the Social Studies teacher brought the test sheets to the office on April 21st at approximately 2:30 p.m. The teacher said they were grade 10 tests. The grievor ran them through the scantron right away. She also asserted that the answer key noted in error that the class was a grade 11 class. The grievor asserted she corrected that error when entering the data for the Report.

53 The Report picked up by the teacher on April 22nd at approximately 10:35 a.m. is dated April 22nd and even though the students are grade 10 students the Report shows it was a grade 11 class.

III. ARGUMENT

54 The Employer argues that the first grievance relating to the alleged suspension should be dismissed. The Employer argues that it is entitled under its management rights to send an employee home with pay pending investigation in order to ensure the integrity of the investigation. Furthermore, the Employer argues that Article 14(b) of the Collective Agreement notes that "suspension will mean loss of pay for the time or the duration of the suspension".

55 With respect to the termination grievance, the Employer argues first that I can review and consider the investigator's report but I am not bound by the conclusions: *British Columbia Institute of Technology (Pacific Marine Training Campus) and British Columbia Government and Services Employees' Union (Re: T. Noack and R. Wotherspoon)* (February 22, 1995), A-50/95 (Blasina); *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (Gillis Grievance)*, [2005] O.G.S.B.A. No. 142 (Abramsky); *Fraser Health Authority v. Hospital Employees' Union (D'Emilio Grievance)*, [2004] B.C.C.A.A.A. No. 84 (Dorsey); *British Columbia Ferry Corp. v. British Columbia Ferry and Marine Workers' Union*, [1999] B.C.C.A.A.A. No. 385 (Blasina).

56 The Employer argues that the crux of the case is the credibility of the grievor. After reviewing the evidence the Employer cited several cases to support how it argues the evidence should be assessed given the test of the balance of probabilities: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.); *Calgary General Hospital and C.U.P.E., Local 8* (1989), 6 L.A.C. (4th) 292 (Johnson); *Board of School Trustees of School District No. 62 (Sooke) and Sooke Teachers' Association (D.G. Dismissal Arbitration)* (July 4, 1995), A-248/95(a) (Hope).

57 The Employer argues further that given the grievor's actions and dishonesty, the termination should be upheld. The Employer cites several cases to support its position: *The Board of Education School District No. 70 (Alberni) and Canadian Union of Public Employees, Local 727 (Re: C. LaForge)* (June 30, 2010), unreported (Burke); *Board of School Trustees of School District No. 39 (Vancouver) and International Union of Operating Engineers, Local 963 (Re Ken Wai Wu Termination)* (July 25, 2007), A-117/07 (Sullivan); *Board of School Trustees of School District No. 62 (Sooke) and Canadian Union of Public Employees, Local 459 (Korby Grievance)* (October 21, 2001), A-235/02 (Moore); *School District No. 42 (Maple Ridge-Pitt Meadows) and C.U.P.E., Local 703 (Grievance of Jim Hewson)* (1997), 50 C.L.A.S. 14 (Munroe); *North Okanagan-Shuswap School District No. 83 and Canadian Union of Public Employees, Local 523 (Anthis Grievance)* (June 26, 1998), A-209/98 (Thorne); *School District No. 39 (Vancouver) and International Union of Operating Engineers, Local 963 (Illicic Arbitration)* (February 11, 1994), A-61/94 (Albertini); *Niagara Catholic District School Board and C.U.P.E., Local 1317 (Balsor)*, 103 C.L.A.S. 302 (Levinson); *Renfrew County Catholic District School Board and Canadian Union of Public Employees, Local 1202 (Grievance of Heather Lambert)* (January 2, 2006), unreported (Newman).

58 The Union argues that I am entitled to receive the investigator's report but I have the ultimate authority to decide the matter.

59 The Union is critical of the report as the Employer did not consider other possible people who may have altered the tests. Instead, the Union argues, that the Employer was focused solely on the grievor.

60 The Union argues that the Employer relied upon the report as the backbone for its decision and given its flaws the Employer failed to discharge its onus. The Union argues I should also consider other mitigating factors such as the fact that the Employer's policy on cheating is not consistently applied, there was no progressive discipline, the Employer has not terminated anyone before, they never looked at alternate worksites where breach of trust may not be a concern, the Employer has made no change to the work procedures even though the investigator recommended some changes which contradicts the alleged severity of the incident and the grievor has a clean work record. The Union cited the following cases to support its argument: *AFG Industries Ltd. and U.S.W.A., Local 295G (Re)*, 54 C.L.A.S. 88; *Treasury Board (Solicitor General Canada Correctional Service) and Archambault (Re)*, 12 C.L.A.S. 40; *School District No. 33 (Chilliwack) and Chilliwack Teachers Assn. Re*, 16 L.A.C. (4th) 94;

TRW Canada Ltd. and T.P.E.A. (Latimer), Re, 45 L.A.C. (4th) 306; *Phillips Cables Ltd. and International Union of Electrical, Radio and Machine Workers, Local 510*, 6 L.A.C. (2d) 35; *Accucaps Industries Ltd. and C.A.W. Local 195 (Re)*, 76 C.L.A.S. 11; and, *Canadian Broadcasting Corporation and Canadian Union of Public Employees*, 23 L.A.C. (2d) 227.

IV. AWARD

61 First, I will address the suspension grievance. I agree with the Employer that there are circumstances where an employer may want to have an employee who is under investigation to be away from the worksite. In some circumstances employers suspend without pay pending investigation. In the case at hand, the Employer continued the grievor on salary. The absence from work does not fall within the scope of suspension as defined under the Collective Agreement. Even if the absence was deemed to be a suspension, because the grievor was paid for the absence the only remedy would be a declaration. I am not persuaded by the Union's argument that the Employer should have transferred her to an alternate worksite. This is not an accommodation case. Furthermore, given my conclusion regarding the termination grievance, the suspension grievance is academic.

62 Second, I will address the investigator's report. The Employer could have conducted the interviews using internal staff. It chose not to do so. The parties spent a great deal of time with each witness establishing the accuracy and inaccuracy of various parts of the report.

63 At the end of the day, I am of the opinion that the report mixes findings of fact and conclusions within the same paragraphs resulting in some of the confusion when it is initially reviewed. However, on the main points with respect to the timing of the test delivery to the office, the pickup of the test results and the accessibility of the bubble sheets, the report is not fundamentally flawed.

64 In any event I have the teachers' statements before me, *viva voce* evidence of the teachers, the grievor, the Principal, the Secretary-Treasurer and one other office person so that I can reach my own conclusions without the necessity to put weight on the report.

65 I do not agree with the Union that the Employer used the report as the backbone for its decision to terminate. The Secretary-Treasurer testified that the decision was based on the evidence of the test bubble sheets, teachers' statements and the report.

66 Third, I will address the applicable test to be applied. There is no dispute that the Employer has the onus to prove that based on the balance of probabilities the grievor altered the bubble sheets. The test is not the criminal justice test of beyond a

reasonable doubt. The grievor during the investigation, and the Union in argument, placed weight on the fact that no one actually saw the grievor alter any bubble sheet. Under the balance of probabilities test, an eye witness is not necessarily required.

67 Furthermore, the parties do not dispute that an arbitrator's approach with respect to discipline and discharge cases is set out in *Wm. Scott and Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can L.R.B.R. 1 ("*Wm. Scott*"). The arbitrator asks three questions.

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the discharge an excessive response in all the circumstances of the case?
3. Finally, if the discharge is considered excessive, what alternative measure should be substituted as just and equitable?

68 In assessing the appropriateness of the penalty, the arbitrator considers several factors:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.

10. Any other circumstances which the board should properly take into consideration.

69 There is obviously conflict in some of the testimony. In order to reconcile this conflict, I must determine the version of events that I accept based on the principles set out in *Faryna v. Chorny, supra*. My task is to piece together a version of events based on the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (page 357). That does not mean that I must accept a person's testimony in its totality in preference to that of another witness. Certain aspects of various witness' testimony may in fact reflect the probable sequence of events.

70 In my experience the vast majority of witnesses do not lie under oath. Their version of events may differ because of fading memories, miscommunication, different perceptions, cultural issues, or other factors that lead witnesses to different stories based on honestly held beliefs. In a small minority of cases some witnesses do lie under oath.

71 I agree with the Union that altering the bubble sheet test card is not difficult. The person would only need a pencil and an eraser. The person would have to look at the answer key and then change wrong answers to correct answers.

72 I also agree with the Union that the office area is open and busy and that any number of individuals would be near the grievor's desk in any given day with opportunity to change the bubble sheets as the cards are not secured.

73 Further I agree with the Union that for the Math test parts one and two and the Science test, there is no proof that other bubble sheets were not altered; and that only one class was checked for the Social Studies test.

74 And lastly, I agree with the parties that the real issue is when the bubble sheets were altered, not when they were run through the scantron. The bubble sheets could have been altered by one person and then run through the scantron later by another.

75 However, when one considers all of the above, it is critical to look at the window of opportunity between the teachers dropping off the answer key and original bubble sheets to when the results are picked up.

76 There is no doubt that the crux of this case is a review of the testimony, and in particular the testimony of the teachers and the grievor.

77 First, I conclude that the grievor had motive. As any parent, she was concerned about her son's well-being. The teachers stated that they talked to her on several

occasions showing concern about absences, late assignments and marks. The grievor could not recall the same frequency of discussions.

78 Even if I give the grievor the benefit of the doubt relating to her lack of concern about actual marks, she was obviously concerned about her son's stress level by virtue of the January 14th email regarding her son being overwhelmed. Subsequent to that date, she received a report card with an In Progress in Math and was aware of upcoming report card marks during the report card preparation period in the week of April 12th.

79 With respect to the first Math test, there is no dispute that the teacher dropped the original bubble sheets into the office between 8:00 a.m. and 9:20 a.m. and picked the results up in the same block. The office staff are there at that time. The staff meeting commenced at approximately 10:00 a.m. because one staff member was busy getting a bulletin ready. The grievor stated that that staff member was talking to her about the meeting while she was running the bubble sheets through the scantron. That may very well be true. However, the issue is not when the bubble sheets are run through the machine. Alterations would be done before that.

80 The Union argues that any number of people would have access to the bubble sheets on the grievor's desk. However, during that window of opportunity one would have to conclude that someone either sat at the grievor's desk unnoticed to alter the bubble sheet; or, came and took the answer key and the bubble sheet, made the changes, and returned both unnoticed before 10:00 a.m.

81 I conclude it is more probable that the grievor altered the bubble sheet at her desk prior to running all the bubble sheets through the scantron in the presence of the other staff member.

82 The Principal and a staff member testified the staff meeting ended at around 10:45 a.m. The Science teacher testified that he delivered the answer key and bubble sheets to the office at the end of the class at 10:40 a.m. and that the grievor was at her desk. Given the testimony of those three individuals I do not believe the staff meeting ended at 11:15 a.m. as asserted by the grievor.

83 The grievor left the school at 11:30 a.m. and asserted that she did not run the tests through the scantron. However, no casual employee was brought in to replace her. The teacher picked up the results on April 15th; however, the Report shows that the bubble sheets were run through the scantron on April 14th. The grievor had the opportunity to alter the bubble sheet and run all the bubble sheets through the scantron between 10:45 a.m. and 11:30 a.m.

84 On April 15th the Math teacher delivered the bubble sheets and answer key to the office at 3:00 p.m. The grievor was there and left shortly thereafter. The teacher

returned around 4:00 p.m. and the bubble sheet was already altered. The grievor had an opportunity to alter the card before she left. The bubble sheets were run through the scantron on April 16th and picked up by the teacher on April 16th.

85 With respect to the Social Studies test, the teacher delivered the answer key and bubble sheets at 2:30 p.m. The grievor asserted that she ran them through the scantron immediately. She asserted that the Report picked up the next day, April 22nd, is not the Report she ran because she asserted she corrected the reference to grade 10 versus the grade 11 reference that the teacher made in error.

86 I find this explanation to be highly unlikely. It would mean that someone destroyed the Report that she ran allegedly on April 21st, then altered her son's bubble sheet, and then ran a scantron Report on April 22nd, all without being noticed by anyone.

87 I conclude that the Employer has shown on the balance of probabilities that the grievor altered her son's bubble sheet on at least three occasions resulting in him receiving a higher mark on the Report when the altered bubble sheet was run through the scantron.

88 The grievor was aware of the answer key and bubble sheet system. The bubble sheet could be easily and quickly altered with a pencil and eraser. The grievor's job involved handling the bubble sheets so that this type of activity at her desk would go unnoticed. She had a small window of opportunity in the morning on April 14th (Math test part one), and at 10:45 a.m. to 11:30 a.m. (Science test) to alter the bubble sheets. She had opportunity on April 15th (Math test part two) to alter the bubble sheet before she left the school. She also had opportunity to alter the Social Studies bubble sheet before they were run through the scantron on April 22nd; not April 21st.

89 To conclude otherwise is not plausible. It is not plausible that someone changed the Math test bubble sheet of her son during the first block on April 14th in the office unnoticed; changed the Science test bubble sheet on April 15th unnoticed; changed the Math test bubble sheet in a one-hour period on April 15th unnoticed; and, on April 21st destroyed the Report of the scan the grievor did, altered the bubble sheet and ran a Report on April 22nd. Someone other than the grievor would have to know when the tests are scheduled, when the teachers brought the bubble sheets to the office and then enter the office to alter the bubble sheet. It is simply not probable.

90 Given the above I answer the first *Wm. Scott* question in the affirmative. There is just cause for discipline.

91 Is termination excessive? I acknowledge that the grievor has a good work record and 10 years of seniority. I am not persuaded by the following Union arguments with respect to other mitigating factors. The Union argues that I should consider the fact that

the Employer's policy on student cheating is not consistently applied. The case at hand is not about a student cheating. The Union argues that there was no progressive discipline and that no one has ever been terminated by the Employer. This argument is not persuasive. In some cases termination is warranted regardless of the discipline record of an employee depending on the seriousness of the event as long as the *Wm. Scott* principles are applied. The Union argues further that the fact that the Employer has not changed practices regarding the handling of the bubble sheets as recommended by the investigator demonstrates that the matter was not considered as severe as suggested by the Employer. While that argument may have some initial attraction, I conclude that the following factors outweigh that initial reaction.

92 The grievor was in a position of trust. The integrity of the Employer's student records is very important to the education system. The acts were not a spur of the moment. They were calculated and repeated. Furthermore, to this day she denies any wrongdoing. If she had acknowledged the wrongdoing and shown some remorse my conclusion may have been different.

93 Given the above I conclude that termination is not excessive. The grievances are dismissed.

"MARK J. BROWN"

Dated this 16th day of February, 2011.