IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION

("OECTA" or "the Association")

- and –

OTTAWA CATHOLIC SCHOOL BOARD

("the Board")

RESPECTING:

Nora Martin (Grievance # 16402-OOU-BM)

("NM" or "the grievor")

DECISION

Arbitrator:	Judith Allen, AIM
Board Counsel:	Lynn Harnden, Emond Harnden LLP
Assoc. Counsel:	Bernard A. Hanson, Cavalluzzo LLP
Hearing dates:	October 18th, 2018, March 12th, April 29th, and August 13th, 2019
Date of Decision:	September 16th, 2019

DECISION

INTRODUCTION

1. The grievance before me concerns the Board's removal of NM from the Occasional Teacher Roster effective December 20th, 2017 for alleged misconduct on November 21st, 2017. The Board's letter of termination states:

> This will confirm our discussions on this date when you were advised that you were removed from the Board's Occasional Teaching Roster.
>
> On November 21, 2017 you were assigned to replace a teacher at St. Marguerite d'Youville Catholic School. When you arrived at the School, you were critical of the teacher who you were to replace on that date. You referred to her as the 'Italian' teacher and then commented that all Italians are "corrupt and horrible people". You also made statements to the effect that children at the school should not be exposed to Italian people and that there were too many of "them". You made additional comments which denigrated individuals of Italian descent. There were several staff present in the office where your statements were made.
>
> The Principal of St. Marguerite d'Youville Catholic School reported your conduct in a Professional Development recommendation. The Board has completed its investigation of the matter and has concluded that your conduct represents a serious violation of the principles contained in the Board's Policy on Safe, Inclusive and Accepting Schools Code of Conduct and the Provincial

Code of Conduct. The Board finds such conduct intolerable and justifies your removal from the Occasional Teaching Roster for cause.

In deciding whether to mitigate the penalty of removal from the Occasional Teaching Roster for your conduct, the Board has taken account of other aspects of your employment with the Board. On March 1, 2017 you received a Professional Development Recommendation regarding the unsatisfactory manner of your classroom management during assignments at St. Luke Catholic School. On February 19, 2016 you received an unsatisfactory Long Term Occasional Teacher Evaluation relating to an assignment at St. Mary Catholic School during the period September 8, 2015 to February 19, 2016. It was therefore concluded that there were no grounds to consider mitigation of the penalty of your removal from the Occasional Teaching Roster as well as the LTO List.

ISSUES

2. The Board's position is:

   a) the grievor made the racist comments on November 21st, 2017;
   b) those comments alone are sufficient for it to find that the grievor failed to meet the higher standard of conduct required of teachers and thus it had just cause to terminate her employment;
   c) the grievor had two earlier Performance Development Recommendations (PDR's) which could be relied upon to indicate a pattern of inappropriate

conduct sufficient to remove my discretion to reduce the penalty of discharge; and, in the alternative,

d) pursuant to Article 8.04 of Part B, Appendix "A" of the collective agreement, an occasional teacher who is subject to 3 PDR's can be removed from the Roster and culpable misconduct revealed in a PDR can be relied upon for removal, subject to the standard of just cause and the right to a grievance; thus,

e) the grievance should be dismissed.

3. The Association's position is:

a) the grievor did not make the comments;

b) In the alternative, if I find that the grievor did make the comments, the penalty of termination is too severe, as it is a single incident and there are mitigating circumstances;

c) it is improper for the Board to consider i) the earlier PDR's which reveal non-disciplinary "capacity" issues to bolster justification for "culpable" misconduct, i.e., this is not a "hybrid" case; and, ii) rely upon the grievor's denial of misconduct at the hearing to justify what would otherwise be an unreasonable penalty; thus,

d) the grievance should be upheld, or in the alternative, I should retain jurisdiction respecting any remedy.

4. Issue a) involves a number of issues including credibility and character. Issue b) involves the standard of conduct expected of teachers, the grievor's personal circumstances and whether the Board can rely on a single incident to support a discharge and/or the grievor's denial as an

aggravating factor. Issue c) includes both the reliance on the PDR and the article 8.04 application, both of which impact credibility, character and mitigation. In other words, this unique case presents a number of rabbit holes to explore.

5. I will deal with the evidence and arguments in accordance with the issues in dispute.

a) Did the grievor make the comments alleged on November 21st, 2017?

6. There is no dispute that the grievor was assigned as an occasional teacher to St. Marguerite d'Youville (hereinafter, SMY) on November 21st, 2017 to replace Lisa Frangione for the morning.

7. The Board alleges that at least three individuals heard and were offended by the grievor's comments which were derogatory towards Italian people, including a statement that "all Italians are corrupt and horrible people." They are: the school's Office Administrator, Ms. Judy Burelle, Ms. Peggy Gorman, the Principal Designate and Mark Henniger, a teacher and member of OECTA. The Board only called Ms. Burelle to testify. Ms. Gorman was not called in direct and was prevented from testifying in Reply as a result of an objection by the Association and an Interim Ruling made on April 29th, 2019 (erroneously dated by me as April 28th, 2019). However, both Ms. Burelle and Ms. Gorman made written statements that were entered into evidence and both Ms. Burelle and the grievor testified about Ms. Gorman's response. The Association objects to Ms. Gorman's written statement as evidence of the truth of its assertions, due to its hearsay nature. Mr. Henniger's objection is summarized

in Ms. Gorman's written statement and is quite clearly double hearsay. I have disregarded evidence relating to Mark Henniger. In addition, Ms. Burelle testified that there were other teachers, parents and possibly students in the office at the time but there has been no evidence identifying anyone else, no evidence of whether anyone else heard the comments and no evidence of any concerns from others who may have been present.

8. The Association's evidence consists of the grievor's written statement and her testimony denying making the comments. The grievor testified that a third woman was present in the office but that individual has never been identified. The grievor agreed that there may have been other individuals present that she did not see.

9. Thus, the central issue is the credibility of two individuals: the Office Administrator, Judy Burelle and the grievor. I acknowledge that Ms. Gorman's written statement is hearsay and I cannot make a finding of fact based solely on her evidence. However, since both Ms. Burelle and the grievor attribute statements to Ms. Gorman I accept that she was present and that her written statement represents her version of what transpired, not the truth of what transpired.

10. Ms. Burelle's written evidence is as follows:

> Here is what I remember from this morning, not exact words of course! Nora Martin arrived at SMY at approximately 7:45 a.m., both Peggy and I were in the office. She proceeded to try to sign in indicating that she was coming in for who she believed was an "Italian" teacher, she proceeded to try to pronounce

Lisa Frangione's name incorrectly, which I thought she was doing purposely, then when corrected she indicated that it didn't matter anyways because Italians were all corrupt and horrible people, she then said several other things about Italians, I am not sure of her wording at this point, but she then stated that this had been happening for over seven years and were we aware what was going on? Peggy asked her if she was okay and then asked her if she thought she was okay to teach today because she was worried about her. She indicated that if Peggy had a problem with her she wanted to speak to the Principal, at which time it was indicated that Peggy was in fact the Principal Designate and was in charge and again asked if she thought she was capable of teaching? She said she was and was impatient asking for Lisa's room number so that she could get her day plans etc. She made several other inappropriate references about Italian people, of which I cannot remember her wording. Peggy noted that she was there to teach children and that her personal feelings towards others was inappropriate and not to discuss this with the students, she said she wouldn't but then Peggy mentioned not to discuss her personal feeling with anyone at the school, at which time she hesitated, and then reiterated that all Italians were corrupt and terrible people. The next time I saw [the grievor] was when she left the room key on the counter, at about 8:15 to 8:20 a.m., she did not sign out or say anything as she was leaving.

11. Ms. Burelle's testimony did not change much from her statement. She testified that the tone and exaggeration of FRAPPPPIONI, is what led her to believe that the grievor's mispronunciation was deliberate. She agreed in cross that it

was the grievor's tone and body language that led to that assumption, but never having met the grievor before she had no reference point. Ms. Burelle testified in chief and in cross that she did not wish to fill in words for words she did not clearly remember but was adamant that "all Italians are corrupt and horrible people" was said and reiterated with "corrupt and terrible people" before the grievor left for her classroom. Ms. Burelle described the grievor's derogatory comments as "a rant". Ms. Burelle described the grievor as anxious, agitated and loud. Ms. Gorman's notes were put to Ms. Burelle on cross and minor differences were noted. Ms. Burelle said she could not explain the differences but she was sure her testimony was accurate.

12. Ms. Burelle was also asked if she had seen the grievor's version of the exchange and Ms. Burelle said she saw it the Monday prior to testifying. She testified that she was shocked at the allegation that the environment was toxic. She has been the Office Administrator at the school for twenty-two years and had never heard such complaint from anyone. She testified that the office is a central hub for teachers, parents and students.

13. The grievor also took some fairly contemporaneous notes written on November 21st, 2017, albeit after speaking with her Association representative, Tom Doyle. Her hand-written statement states:

> I arrived 40 minutes early for a ½ day assignment at St. M. D'Youville school. I told the Office Administrator I was in to replace a teacher called "Linda Frappioni". The OA responded, "You mean Lisa Frangioni? I replied, "Yes, it could be her and I got the name wrong." I sensed a toxic atmosphere and environment at that

point. I apologized to her for not remembering the teacher's name. I walked over to the sign-in book and while signing in I did what teachers are taught to do, called a "Think Aloud." I said to myself, "There are many people in our board with Italian-sounding names, maybe 30% of teachers I replace and I sometimes do forget or get a name wrong. I am hungry and it may sometimes effect my memory." Then, teacher/Principal Designate then approached me and she said she found my remarks inappropriate. She added, "We could ask you to leave and find someone else this morning." I replied, that "no bad intentions were meant and I'm sorry if any comment had offended anyone." I then picked up a school key, found the teacher's classroom and entered the room. Mrs. Frangione was in the room, we introduced ourselves, and she began going over her day plans with me. I asked her about emergency information and protocol for her class and she explained some of the information for me. Approximately 10 minutes later, the Teacher/"Principal Designate" entered the classroom, saying she had spoken to the Principal and she was asking me to leave the assignment. She then added that she would be cancelling my assignment. Mrs. Frangione looked shocked, as did I. I gathered my belongings, said nothing, returned the key to the office and left the school. I was not given an explanation for being asked to leave.

14. The grievor's testimony did not depart too much from her written statement, something the grievor noted as a concern, since she fully understood that credibility was in issue. The grievor testified that she arrived at 10 to 8, walked up to the desk and a woman, Judy Burelle, stood up

at the far end of the counter and asked her who she was in for. She continued:

> And I replied Linda Fapprioni. She said "You must mean Lisa Frangioni?" I replied, "That must be the name, I'm sorry I got the name wrong." I sensed toxicity around me, so I said no more and walked along the counter to the sign in book. Judy Burrell followed me part way around the counter and she stopped and looked at me and put her hands on her hip, I had no response to that, I continued walking towards the sign in book, I muttered a couple of sentences, "at least 30% of the people I replace have Italian sounding names that's why I may have forgot and said I was hungry and trying to explain why I may have forgot; someone named Peggy Gorman swept up and said I find your comments inappropriate and we could find someone else, I said I was sorry and got the key and left the office and found the classroom and Lisa Frangioni was there and we shook hands and she started to explain her day plans, immediately go through safety, security, high needs, violent, I was afraid we'd run out of time, I asked her questions for emergency, high needs children, at this point it's about a quarter after 8; Peggy swooped into the classroom and said I've spoken to our principal and she was asking me to leave the assignment, I said nothing, she then said she'd be cancelling my assignment; both Lisa and myself were shocked, I never experienced it, I slowly gathered my belongings boots and coat and quietly left the room. I was not told why I was being cancelled. I returned the key to the office. At no time did I make derogatory comments. She seemed like a very nice person [referring to Ms. Frangione].

[In response to a question about her tone when replying she was in for Linda Frappioni, the grievor states:] I would characterize it as the way anyone would, at the time I was sure that was the name, sometimes I try and check on line, I didn't have an opportunity, I said it matter-of-fact.

[In response to teacher designate, you apologized and didn't mean any offense. Why did you apologize?] *I almost regret it now, I was defensive, I was feeling a bad toxic atmosphere at this point, my nature to be conciliatory, hoping that would dispel any bad feelings they may have had about the comments* [my emphasis].

15. In cross examination, the grievor explained her "mumbling" as "self-talk". She denied saying anything derogatory. When asked why she said she was hungry, the grievor said "I was thinking out loud; *tend to blame myself*; felt perfectly normal for anyone to forget names; have hundreds of names we have to remember over the week; I did get the name wrong." <u>She acknowledged that the alleged comments would be "racist" and "inappropriate" if she had made them</u> [my emphasis].

16. Peggy Gorman's summary of what transpired was sent to Ms. Armstrong at 11:30 am on November 21st, 2017. Association counsel noted in his cross examination of both Ms. Burelle and Ms. Armstrong that Ms. Gorman's version differed from Ms. Burelle's, in a number of respects. Ms. Gorman's account makes no mention of "all Italians are corrupt and horrible people". She writes that the grievor remarked that Lisa Frangione was an "Italian name, and that there were too many Italians here. When I said pardon me she repeated her rant with details about too many kids in

school and that they should not be exposed to these Italian people and that there were too many of them. I recovered and asked her not to speak like this. I said that this is a school setting where we show kindness and do not speak to anything about ethnicity. She ensured that she would not talk like that to the students but repeated, or re-phrased her initial comments. Then she left the room."

17. In addition to the direct evidence outlined above, the Association was able to establish that the grievor over the course of her seven years of employment had a total of 488 daily occasional assignments and three long term occasional assignments as follows: 1) September 8, 2015 – February 19, 2016 at St. Mary Gloucester; 2) November 29, 2016 – December 23, 2016 extended to March 10th, 2017 at St. Luke (Ottawa); and 3) September 5th, 2017 to December 20th, 2017 at St. Jerome. The last assignment ended coincident with the grievor's termination. The Association notes that there is no evidence of a previous ethnic slur.

18. The Board also called Jeannie Armstrong, the Principal at SMY, to whom Ms. Burelle and Ms. Gorman directed their written statements. Ms. Armstrong made a few attempts to contact the grievor to advise her that she had filled out a PDR respecting the incident. Ms. Armstrong did not seek the grievor's version of events; contact Mr. Henniger; clarify any facts with either Ms. Burelle or Ms. Gorman. The next 'event', was the termination meeting on December 20th, 2017 in which the grievor was invited to make a response but was "too upset" to make one. The letter of termination was given to her at the conclusion of that meeting.

19. The Board, as noted above, also relies upon the two previous PDR's highlighting performance concerns respecting

the grievor in terms of its mitigation argument. It also highlights a notation of a concern from a Principal about comments made by the grievor in an interview for a long-term assignment on September 1st, 2017 which were forwarded to Human Resources. Although the grievor did not succeed in getting that assignment, she did succeed in getting a .33 FTE assignment at St. Jerome from September 5th, 2017 to December 20th, 2017, which she continued to fulfill after November 21st, 2017. In addition, the grievor performed 14 additional individual assignments at other schools after November 21st, 2017. I have disregarded the evidence from September 1st, 2017 as it was not put to the grievor at the time and it was not acted upon by the Board.

20. The Association also called two "character witnesses": Maureen Shiller, a permanent teacher at St. Jerome (i.e., the grievor's last long-term occasional appointment) and Mike Beshara who hired and mentored the grievor when she was an instructor at Algonquin College from August 2014 to February 2015. Both spoke positively of the grievor and neither had ever heard the grievor make derogatory remarks about Italians or any other ethnic group.

i) Assessing credibility

21. There is no dispute between the parties in terms of how credibility is to be assessed. Association Counsel relies on the decision of O'Halloran J. A. in *Faryna v. Chorney*, [1952] D.L.R. 354 (B.C.C.A.) at pages 356-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried the conviction of the truth.

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.

In short, the real test of the truth of a story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the pat lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth" is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial judge ought to go further and say what evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the heart and minds of witnesses. And a Court of Appeal must be satisfied that the judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

22. Association counsel also relies on the formulation of the test by the Alberta Queen's Bench in *Landry v. Pratt & Whitney Canada*, [1996] A.J. No. 661 at para. 18:

> Where there are conflicting and contradictory accounts, the judge should consider what facts are beyond dispute and indisputable, add to those facts such other facts as seem very likely to be true, and then examine which of the conflicting accounts best accords with those facts.

23. Neither Board counsel, nor I have any problem with the above approach.

24. The Board's counsel argues that the grievor's story makes absolutely no sense and that Ms. Burelle's sworn and direct evidence, together with the statement of Ms. Gorman, as confirmed in part by both Ms. Burelle and the grievor, make it clear that the grievor is lying when she denies making the statements. Moreover, the Board suggests that for such statements to be made, the grievor had to be harbouring discriminatory beliefs. The Board notes that the character evidence should be given no weight, as it is not surprising that the grievor did not make ethnic slurs in front of either Mike Beshara or Maureen Shiller, neither of whom would see the grievor working independently with child students.

25. Association counsel then went on at some length to itemize the undisputed and/or indisputable facts, which I have taken the liberty of summarizing as follows as some of them were repetitive:

- Over the course of seven years the grievor had 488 daily assignments at 47 different schools and three long-term assignments, none of which produced any evidence of her engaging in in ethnic rants;
- 6 of the assignments had been at St. Marguerite d'Youville;
- The grievor has no prior discipline;
- There was no evidence of ethnic slurs or views outside the school context;
- There was no instigating/provocation preceding the allegations of November 21st, 2017;
- The grievor spent 10 to 15 minutes with Ms. Frangione with no comment or issue;
- The grievor left the school without incident; and,
- *There were others present such as Mark Henniger and possibly parents and students* [emphasis added], none of whom came forward to complain.

26. Association counsel then lists facts which are "likely true" as follows:

a. If the Grievor had made inappropriate comments about Italians and other staff and other students were present, there very likely would have been complaints from parents and staff other than Ms. Burelle, Ms. Gorman and Mr. Henniger. The absence of such complaint supports the conclusion that either no other staff or students were present and/or the Grievor did not make the comments as alleged.

b. The fact that Mr. Henniger was not asked to testify strongly supports the inference that he would not have corroborated Ms. Burelle's allegations. . .

27. I emphasized the last point, in paragraph 24 above about the number of other people who likely heard the exchange, who did not testify or come forward and complain because I do not view that as an indisputable fact. There is double hearsay evidence that Mark Henniger heard the exchange and complained verbally to Ms. Gorman. Neither Ms. Gorman, nor Mr. Henniger were called as witnesses. There was no other reliable (corroborated) evidence that others were present and if, so, overheard. The Association then concludes if the comments were made it would be likely that others would have come forward to complain. Since, no one else came forward, it's unlikely the comments were made.

28. I don't agree that there is a basis on the evidence for either assertion – certainly not one that can be described as either "indisputable", nor as "likely true". Nor do I accept that a strong inference can be made as to why Mr. Henniger was not called as a witness in the context of this case. In any case, I have disregarded the evidence respecting Mr. Henniger's evidence as double-hearsay.

29. Association counsel acknowledges that it is difficult to reconcile Ms. Burelle's evidence with that of the grievor, as he agrees that Ms. Burelle had no previous knowledge of or grudge respecting the grievor and no reason to "make up" her story. He argues that there are only two possibilities consistent with Ms. Burelle's story:

First, the Grievor held discriminatory views about Italians and perhaps other groups, but nevertheless, did not express them publicly prior to November 21, 2017. Second and alternatively, the Grievor did not actually hold discriminatory views about Italians and perhaps other groups, but nevertheless, made derogatory comments about Italians on November 21st, 2017.

30. The argument is that the first is implausible because if the grievor held such views they would have been blurted out earlier in her seven years of employment. The second is implausible because if she did not hold those views and simply blurted them out randomly on November 21st, 2017 there should be evidence of earlier blurt-outs.

31. Again, I have difficulty with this application of the test, as I do not see there being only two alternatives. We have no idea if the grievor holds discriminatory views and if she does, whether they are long-standing, in their infancy, or fluctuating in accordance with other thoughts, feelings, moods or quantity of food consumption (noting the grievor's emphasis that being hungry affects her memory). Perhaps the grievor suffers from Tourette's Syndrome, but has never sought a diagnosis or treatment. At the end of the day, we could care less what the grievor's views of Italians or any other group are because we are not the "thought police". We are only concerned with the expression of thoughts which the Association characterizes as "inappropriate" and the Board characterizes as "discriminatory" and "reprehensible".

32. The following are the factors that I believe are relevant in assessing the relative credibility of Ms. Burelle and the grievor.

33. Ms. Burelle has been at St. Marguerite d'Youville for twenty-two years and has never been accused of creating, maintaining or enabling a "toxic workplace".

34. Ms. Burelle has no previous experience or knowledge of the grievor and no reason for making up the story she has told.

35. While Ms. Gorman's email differs from Ms. Burelle's on minor points (five-minute guesstimates on arrival and departure times; who initiated the conversation about who was being replaced; and some of the specific words stated) both versions suggest that the grievor made derogatory comments about Italians in the absence of a provoking incident. Both accounts suggest that the comments were offensive. Both accounts suggest that Ms. Gorman spoke to the grievor about whether she was able to teach that day without making further comments. Both versions suggest the grievor asked to speak to the Principal and was advised the Ms. Gorman was the Principle Designate and in charge. Both accounts confirm that after being admonished not to repeat the comments, the grievor promptly repeated them.

36. The grievor's statement was written after consultation with an OECTA representative, who was not called as a witness. Ms. Burelle's and Ms. Gorman's statements were drafted without advice or consultation.

37. After the grievor mis-pronounced Ms. Frangione's name and had been corrected, she immediately "sensed toxicity"

and apologized twice - once before she began her move down the counter toward the keys and once afterward. She clearly understood that she had offended both Ms. Burelle and Ms. Gorman. It is implausible that if the only words out of her mouth was a mis-pronunciation spoken in a matter-of-fact tone, there could be an offence of any kind.

38. If the grievor understood that Ms. Gorman was the "Principal Designate" and "in charge", as she asserts in her written statement but not in her testimony, and if she was told by Ms. Gorman "we could ask you to leave and find someone else this morning", it is highly unlikely she would take her key and leave the office. It makes no sense that someone who feels "toxicity" and a sense of being threatened by someone in charge, would leave the office without permission.

39. It makes more sense and is more plausible that Ms. Burelle's version of what Ms. Gorman relayed, i.e., concern about the grievor's comments and their repetition, is why the grievor felt it was okay to collect the keys and leave. She did not sense toxicity or a threat to have her removed and that is why she took the keys and left without further discussion.

40. It is clear from Ms. Gorman's email, as confirmed by Jeannie Armstrong's testimony, that Ms. Gorman sought advice from Ms. Armstrong on how to handle the situation. Ms. Gorman did not take any action to prevent the grievor from going to Ms. Frangione's class until after she had spoken to Ms. Armstrong. Thus, the grievor's testimony that Ms. Gorman said she could be replaced does not align with Ms. Gorman's conduct of consulting with Ms. Armstrong prior to taking any action. Indeed, the grievor confirms that Ms.

Gorman "swept" into the classroom and advised her that the Principal had told her to cancel the assignment, which confirms that was the first time she was advised that her assignment was being threatened or cancelled.

41. Finally, I find the credibility of the grievor in suggesting that she is "conciliatory by nature" and someone who "tends to blame herself" is completely lacking in any evidentiary basis. She states that she apologized because she sensed toxicity. She regrets apologizing but was "defensive". A review of the grievor's PDR's, indicates a woman who is not receptive to critique, who externalizes blame and who has had a number of awkward and/or inappropriate encounters with a variety of people at the Board over the past three years preceding her termination. Physical safety in her classrooms has been an ongoing concern, due to her lack of classroom management. Inappropriate comments, while not on the same scale, have been an ongoing concern. I agree with Association counsel that such evidence relates to non-culpable conduct. Nonetheless, it does not demonstrate a woman who is either "conciliatory by nature" or "who tends to blame herself".

42. I therefore conclude that the grievor's mis-pronunciation of Ms. Frangione's name was said in a tone and volume that objectively seemed deliberate, she said the words "Italians are corrupt and horrible people"; she made other unspecified offensive comments about Italians, which likely included references to "there being too many of them and the kids should not be exposed to them"; and concluded her comments with "Italians are corrupt and terrible people."

43. I reject the grievor's evidence that the environment was toxic. I accept that the environment grew tense once

the above words came out of the grievor's mouth. I reject the grievor's evidence that she was mumbling a "think-aloud" or "self-talk". Rather, I find that the grievor continued to make offensive remarks about Italians. I make no finding as to whether the grievor knew she was making such remarks and has lied about making them or whether the grievor's unconscious mind forced her mouth to say those words and her conscious mind, simply does not believe those words came out. In the absence of a claim of disability, her intent or psychological state does not matter. Those objectively discriminatory words erupted from the grievor's mouth in a public setting and were highly discriminatory and offensive to at least two people. They are words that the grievor acknowledges, if said, would be discriminatory and inappropriate. I find they were said by her. The Board had just cause to discipline her.

ii) Character

44. I have not placed any weight on the character evidence provided by Ms. Maureen Shiller or Mr. Mike Beshara, as neither witness had much opportunity to observe the grievor in the actual classroom teaching environment with children and neither were aware of the ethnic slurs in issue in this case. Ms. Shiller was a permanent teacher at St. Jerome during the grievor's last long-term assignment from September 5th, 2017 to December 20th, 2017. Ms. Shiller testified that during that three-month period the grievor did not express any negative ethnic views, nor did any other person complain about ethnic slurs being uttered by the grievor. Mr. Shiller had hired, trained and mentored the grievor when she was an instructor at Algonquin College. He was dealing with a diverse population of adult students, none of whom ever complained about the grievor. Nor did he

ever hear such comments from the grievor despite sitting in to evaluate her teaching on a monthly basis.

45. I have addressed how the previous PDR's are demonstrative of a character that is neither conciliatory or self-blaming in addressing the grievor's credibility above.

b) Is evidence of a single incident of discriminatory comments made in the school office sufficient to support termination as the appropriate penalty?

i) Standard of Conduct

46. The Board argues that the standard of conduct expected of teachers is higher than that of other employees. It relies upon the decision in *Attis v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (SCC) at paras. 42 – 43, *per* Forest J.:

> 42. A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.
>
> 43. Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over

their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole. Allison Reyes considers the importance of teachers in the education process and the impact that they bear upon the system, in "Freedom of Expression and Public School Teachers" (1995), 4 *Dal.J.Leg. Stud. 35.* She states at p. 42:

> Teachers are a significant part of the unofficial curriculum because of their status as "medium". In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher).

47. The Board notes subsection 264(1)(c) of the *Education Act* which states "It is the duty of the teacher ...,

> (c) to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues; ..."

48. The Board relies upon the Supreme Court of Canada decision in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 respecting subsection 264(1)(c) as follows:

> 52 The language is that of another era. The requirements it sets for teachers reflect the ideal and

not the minimum standard. They are so idealistically high that even the most conscientious, earnest and diligent teacher could not meet all of them at all times. Angels might comply, but not mere mortals. It follows that every breach of the section cannot be considered to infringe upon the values that are essential to the make-up of a good teacher. However, **the section does indicate that teachers are very properly expected to maintain a higher standard of conduct than other employees because they occupy such an extremely important position in society.** The function of the section was aptly described in *Etobicoke Board of Education and OSSTF, District 12* (1981), 2 L.A.C. (3d) 265, at p. 271, in these words:

> ...even though [s. 264(1)(c)] cannot be enforced to the letter by use of disciplinary sanctions, it does stand as an exhortation to teachers to aspire to the impossible role assigned to them. The legislation, properly understood, does not require teachers to be saints; it does, however, indicate the need for a higher standard of conduct than that required of other employees. [Emphasis added, per Cory J. at para. 52.]

49. The Board characterizes the grievor's comments as racist and reprehensible which not only breach the "Catholic tenets that inform the [Board's] institutions, they are also inconsistent with expectations of the *Human Rights Code*, principles of equity and inclusion, and the Provincial Code of Conduct.

50. The Association does not dispute that teachers are held to a higher standard of conduct.

51. The Board also relies upon a number of cases where arbitrators upheld the discharges of grievors who made racist comments in a variety of workplaces. I have focused upon the two cases involving a teacher for the simple reason that the parties agree that teachers are held to a higher standard of conduct. Context matters. Both the *Toronto* case, *supra*, and *Thames Valley District School Board and OSSTF, District 11*, 2016 CarswellOnt 8459 (Russell Goodfellow) deal with teachers who made discriminatory comments and whose terminations were upheld. The Board relies upon a statement made by arbitrator Goodfellow at para. 90:

> Everyone is entitled to their beliefs, including their intolerant beliefs. But no one is entitled to bring them into the workplace, least of [all] a workplace such as this.

ii) Single Incident/Skipping Progressive Discipline

52. Although in both the *Toronto* and *Thames* cases, the grievors discriminatory comments and conduct involved more than a single incident, the Board argues that the breach in this case is serious enough to warrant skipping progressive discipline.

53. The Association goes back to first principles respecting the importance of progressive discipline (*Wm. Scott & Co.* 1976 CarswellBC 518 (BCLRB, per Weiler); the "corrective" as opposed to "punitive" nature of discipline (*Re Livingston*

Industries Ltd. and Int'l Woodworkers of America (1982), L.A.C. (3d) 4 (G.W. Adams, J.M. Bedard, M. Tait); and, the "importance of work" (Dickson C.J.'s dissent in *Reference Re Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313, at p. 368.

54. The Association distinguishes the cases relied upon by the Board where discharges were upheld for racist or threatening comments. For example, the SCC decision in *Toronto Board of Education, supra*, involved Mr. Bhaduria. Mr. Bhaduria's comments and letters were viewed as "significant, if not extreme" breaches of conduct warranting dismissal. The comments included comparisons of colleagues to Hitler, Idi Amin and Pinochet and included threats of violence. Moreover, there were more than one example, including a third letter that was sent during the arbitration process. In the Goodfellow decision in *Thames, supra*, there were a number of racist and demeaning comments made, together with a finding by the Human Rights Tribunal that the grievor had made a racially discriminatory comment, which preceded the allegations before Mr. Goodfellow.

55. The Association argues that "the Grievor's statements, although serious, were not justification not to apply the usual principles of "corrective discipline". It argues since there was no such statement made in the previous 488 individual assignments and the approximately 13 months of long terms assignments, there is no reason to assume she is likely to repeat the conduct. Second, the Association argues that if there was a genuine concern about the grievor repeating her discriminatory comments, the Board would have taken immediate steps to suspend her from further daily assignments and from her .33 FTE long term

assignment at St. Jerome which ran until December 20th, 2017. Indeed, the grievor worked an additional 14 daily assignments and all of the .33 FTE assignments from November 22nd, 2017 to December 20th, 2017, without further incident. Third, while the grievor did not admit wrong doing, she readily agreed that if she made the statements alleged, they would be highly inappropriate. In other words, unlike the grievors in the *Toronto* and *Thames* cases, this grievor understands and accepts that discriminatory comments are objectionable.

56. Thus, to use the test in *Livingston Industries*, *supra*, set out by Arbitrator Adams at page 9:

> ...the principle of corrective discipline requires that management withhold the final penalty of discharge from errant employees **until it has been established that the employee is not likely to respond favourably to the lesser penalty** [emphasis added].

57. The Association asserts that the Board has not established that the grievor is not likely to respond favourably to a lesser penalty.

iii) Grievor's Personal Circumstances

58. Further, the Association notes that the grievor is a divorced woman who was 62 years of age at the time of her testimony, who will have difficulty securing other employment. She had seven years of employment at the time of discharge. While she did not admit the misconduct, it was aberrant and she acknowledged that if she had made the comments, they would be discriminatory. Again, because there is no evidence of discriminatory slurs prior to

or in the month after November 21st, 2017, I should exercise my discretion to substitute a lesser penalty.

iv) Grievor's Denial

59. The Association also notes that it is improper for the Board to treat the grievor's denial of misconduct as an aggravating factor, justifying the termination. It relies upon three cases, which I have reviewed but not cited. I agree with that principle. In the Board's view and in mine, it has not relied upon the denial to 'boot-strap' its argument that the termination was reasonable. It relies on the denial to urge me to refrain from exercising my discretion to substitute a lesser penalty.

60. I agree with the Association that in most contexts of misconduct, a single incident, unless extremely serious, require an examination of both the context (is it actually aberrant?) and whether the grievor could correct her behaviour with a lesser penalty. I agree this is true even when the issue is discriminatory or abusive language or behaviour in a teaching environment which carries a higher standard of conduct. As noted above, context matters.

61. I also agree with the Association that by permitting the grievor to continue other assignments for a month after the November 21st, 2017 incident, the Board demonstrated a less serious level of repugnance than asserted at the hearing. The Board argues that the delays were partially attributed to the grievor and that one month does not constitute a long time to conduct an investigation. I agree that one month is not very long to conduct a thorough investigation. However, this investigation was basically completed within days of the incident. Ms. Gorman

completed her PDR on November 23rd, 2017 and provided it to the grievor and the Board by November 27th, 2017. There is no evidence of new information coming to light between November 27th, 2017 and December 20th, 2017.

62. I am not sure however, that I agree with the Association in the context of the case before me that this single incident cannot be relied upon to skip progressive discipline. The context of the *Toronto* case involving Mr. Bhaduria was a judicial review of an arbitral decision of a Board of Arbitration chaired by Mr. Shime, which reinstated Mr. Bhaduria and had been to the Divisional Court and the Ontario Court of Appeal. Thus, the arbitration board's decision to reinstate the grievor was challenged and ultimately rescinded by the SCC <u>because it lacked any evidence that Mr. Bhaduria would not re-offend</u>. Indeed, Mr. Bhaduria had re-offended during the course of the arbitration process itself. The SCC found the Board's decision to reinstate in such extreme circumstances to be patently unreasonable. Importantly, the emphasis of the Court was not on how many incidents are required to justify termination. <u>The emphasis of the Court was that there was not only an absence of evidence that the grievor would not re-offend, there was positive evidence, during the course of the arbitration process that he did and would continue to re-offend.</u>

63. Similarly, the case before Mr. Goodfellow arose after the HRTO found in favour of the applicant and against the two named respondents, the educational institution and the grievor, respecting a single incident of a racial slur. The HRTO fined the institution and wrote that the humiliation of its decision and the training that it ordered for the grievor would be sufficiently "corrective". Mr. Goodfellow's case

arose subsequently as a result of new allegations from a different complainant. The third-party investigator concluded there were numerous examples of discriminatory and harassing remarks but I note, it wasn't clear from the commencement of the investigation whether any examples would result in findings of discriminatory harassment. Mr. Goodfellow had clear evidence, from the HRTO and the grievor's testimony before him that the grievor was unlikely to respond to a lesser penalty. Again, the emphasis, as in the *Toronto* case wasn't how many incidents of racist comments are necessary to justify a termination. The emphasis was on the positive evidence of the probability of re-offending and the lack of evidence that there would not be a repetition.

64. Thus, I am not sure I agree that the lack of evidence of any previous examples of the grievor blurting out ethnic rants is equivalent to re-assurance that she will not repeat her behaviour. Although, the grievor in the case before me only engaged in a single incident of a racist rant, her rant continued after the grievor was apparently aware that both Ms. Burelle and Ms. Gorman were upset and she was counselled not to repeat the comments. The grievor, promptly repeated them. This leads to the next issue.

c) Is it appropriate for the Board to rely upon previous PDR's reflecting concerns for non-culpable conduct in determining whether to mitigate the penalty of discharge?

65. These parties have negotiated Article 8.04, Part B, Appendix "A" the relevant portion of which states:

Concern #3:

Human Resources will again review the Recommendation for Professional Development. At this time, the Occasional Teacher will be suspended from the Occasional Teacher Roster. A meeting will be held at the Board office with the Occasional Teacher, the OECTA Occasional, Bargaining Unit President or designate, Manager of Human Resources and if necessary, the Principal involved.

Following the meeting, The Manager of Human Resources will review the history of concerns and the steps that have been taken to assist the Occasional Teacher. The Manager will then decide if further support for the Occasional Teacher is warranted. If not, the Board shall exercise its right to terminate employment.

It is understood that the identification of any/or subsequent discipline, is subject to the standard of just cause.

66. The Board relies upon the decision of a Board chaired by arbitrator Swan in *Toronto Board of Education and OPSEU* 1994 CarswellOnt 6968 in which the arbitration board held that the Board was entitled to take disciplinary action on the basis of culpable misconduct disclosed in a performance evaluation because the employee has a right to grieve the discipline and the Board has the onus of proving just cause.

67. Ms. Armstrong wrote up a PDR respecting the November 21st, 2017 incident on November 23rd, 2017 and provided it to the grievor and Human Resources by November 27th, 2017. The Board suggests it elected to proceed by way of discipline for culpable conduct but it could

also have simply suspended the grievor from the Occasional Roster on the basis of non-culpable suitability, as it would have been the third concern registered against the grievor. By electing to proceed by discipline, it has not waived it's right to also consider the grievor as both "unsuitable" and culpable.

68. The Association argues that the Board cannot rely upon past performance recommendations which deal with "capacity" (non-culpable conduct) to support a termination for culpable misconduct. The Association urges me not to treat this as a hybrid case, akin to those where there is a drug/alcohol abuse incident at work (culpable) involving a grievor with a drug/alcohol addiction disability (non-culpable).

69. I understand the Association's concern and caution. There are arbitrators who, at least privately, view all culpable misconduct as "hybrid", as there is very often if not an actual diagnosed mental disability at play, characteristics of mood or personality disorders at play that contribute to conflict and/or misconduct. We are not psychiatrists and we should not apply the DSM V, to each and every case. O'Halloran J.A. noted in *Faryna*, *supra*: "[t]he law does not clothe the trial judge with a divine insight into the heart and minds of witnesses." Nor does it clothe us with the ability to diagnose.

70. However, where the parties have negotiated a "three strikes, you're out" provision relating to non-culpable or "capacity" performance concerns, I agree with the Swan board that it is open for the Board to treat a "culpable" incident as warranting the conclusion that it can also count culpable misconduct as evidence of unsuitability and vice

versa, with the caveat that if the Board alleges the conduct is both non-culpable and culpable, the grievor has to have access to the grievance and arbitration provision to challenge the culpable portion (*Toronto Board of Education, supra*).

71. Ms. Armstrong did treat the incident as indicating both culpable misconduct (uttering racist statements) and as warranting a third PDR for what was clearly conduct indicating "unsuitability". While the Board may not have followed the process outlined in the collective agreement to the letter, the grievor has had every opportunity to challenge her dismissal in this hearing. Indeed, Association counsel has utilised every argument available to him (and then some). If the Board had simply implemented Ms. Armstrong's PDR as a third non-culpable concern, the grievor would have been removed from the Roster and would have had no access to a grievance, nor to the thorough defence advanced on her behalf.

72. While none of the prior concerns involved ethnic slurs, I do not find that they are unconnected to the culpable misconduct. They indicate, erratic conduct on the part of the grievor, someone who has made inappropriate comments to children and parents and where physical safety concerns for the children through poor classroom management have been identified. As noted above, when assessing credibility, they also indicate a woman who is not conciliatory and self-blaming. Rather, they demonstrate a tendency to blame others and resist critique. They reveal a woman who regrets making an apology when she was defensive. They demonstrate an individual with no insight or judgment.

73. When assessing inappropriate behaviour, there may be a myriad of ways to conduct oneself inappropriately. However, to suggest that there are clear "capacity" and "culpability" boxes belies reality. This grievor's inappropriate conduct has operated on a spectrum, which could have resulted in her being "unsuitable", even if she never crossed the line into culpable territory. Having crossed the line into culpable territory, I do not agree with the Association that no prior discipline in her case is equivalent to evidence that she is amenable to "corrective discipline". I also do not agree that it means that she is guilty of "hybrid" conduct. I believe that she has conducted herself oddly in a concerning manner and more recently that continuum of behaviour has taken her over the line into culpable misconduct.

DECISION

74. In the unique circumstances of this case, I find that despite not crossing every "t" and dotting every "i", the Board has satisfied me that the grievor is both unsuitable and has engaged in culpable misconduct justifying her removal from the Occasional Teacher Roster. I have found her credibility and character wanting. I have found that she made a series of unprovoked racist remarks and when asked not to repeat them, promptly repeated them. The fact that there has never been a previous racial slur is a neutral fact, in this case, not a positive fact. I have positive evidence that the grievor has engaged in inappropriate behaviour, albeit non-culpable previously. She has demonstrated behaviour which, on November 21st, 2017 crossed over into culpable inappropriate and racist behaviour. In such circumstances, I have nothing to reassure me that the grievor will benefit from a lesser penalty.

75. In conclusion, I do not view this as a single incident. I view it as a continuum of inappropriate behaviour that crossed past the "unsuitable" line to the "just cause" for termination line. In my view, it is more akin to a grievor with demonstrated carelessness, who crosses over to the reckless, negligent side of the spectrum. I do not see it as a "hybrid" case, akin to the alcohol addiction/abuse cases.

76. Finally, the Association relies upon three additional cases which I have reviewed but will not cite because there is no dispute that a failure to admit wrong-doing should not serve to increase what would otherwise be an appropriate penalty. The Board agrees with this formulation, as do I. However, a failure to admit wrong-doing might dampen or remove my discretion to substitute a lesser penalty and/or award back-pay if I find that the penalty was unreasonable.

77. I have already concluded that I have no reason to exercise my discretion to interfere with the Board's decision to terminate the grievor's employment (the effect of removing her from the Occasional Teacher Roster). Her denial of misconduct at the hearing could have dampened my desire to mitigate the penalty, had I formed one. As it turns out, I have not formed a desire to mitigate the penalty because I have concluded that the Board's penalty was reasonable and there is no evidence that this grievor would benefit from a "corrective" penalty.

78. For all of the above reasons, the grievance is dismissed.

Dated this 16th day of September, 2019 in the City of Ottawa.

Judith Allen, AIM