



2018 TAHP 01
Decision issued: February 28, 2018
Citation issued: January 26, 2017
Citation amended: August 16, 2017
File No.: [REDACTED]

IN THE MATTER OF THE *TEACHERS ACT*, SBC 2011, c. 19
AND
A HEARING CONCERNING
MYKOLA MISIAK
(An Authorized Person under the *Teachers Act*)

REASONS FOR DECISION ON CONSEQUENCES, COSTS AND PUBLICATION

Written submissions filed: November 23, 2017, December 18 and 19, 2017
Panel: Meg Gaily, Chair, Matthew Cooke, Peter Van Huizen
Counsel for the Commissioner: Maureen Boyd, Ministry of Attorney General
Counsel for the Respondent: Self-represented

INTRODUCTION

- [1] On November 9, 2017, the Panel found the Respondent guilty of professional misconduct within the meaning of section 63(1)(b) of the *Teachers Act*, S.B.C. 2011, c. 19. The Panel directed the parties to file written submissions on appropriate penalty and costs. A schedule for submissions was established for this purpose that same day (November 9).
- [2] In accordance with the schedule, the Commissioner filed written submissions on November 22, 2017. The Respondent failed to file by his deadline of December 7, 2017. The Hearing Coordinator forwarded the Commissioner's submissions to the Panel and advised that she had not received any from the Respondent. The Respondent subsequently emailed submissions to the attention of the Panel on December 18, 2017, with no explanation for the late filing. The Commissioner filed a reply the same day and the Respondent filed a response to that reply on December 19, 2017. All of this material was considered by the Panel when it made its decision.

PRELIMINARY MATTERS

- [3] In his December 18, 2017 submissions, the Respondent asserted – for the first time since the issuance of the Citation – that he was unable to write and provide the Panel with submissions because he is dyslexic. In the absence of any medical evidence to support an inability to provide submissions and given that the Respondent did, in any event, file written submissions, declined to retain counsel to assist him, and offered no explanation for not raising his disability or any need for accommodation in a timely way, the Panel considers he has been treated in a manner that has been procedurally fair.
- [4] The Respondent also maintained in his December 19, 2017 submissions that he had never been given the opportunity to give evidence under oath, contrary to natural justice principles. However, as the Panel’s Reasons for Decision on Findings and Decision (“the Findings Decision”) make plain, although the Respondent had ample opportunity to participate in prehearing conferences and give evidence at the hearing, he did not do so. Section 62 of the Teachers Act authorized the Panel to proceed in his absence. Given that express authority, proceeding in his absence did not result in a breach of the rules of natural justice. The Panel adds that the evidence on which the Panel determined that the Respondent was guilty of professional misconduct consisted of the following: (1) admissions made by the Respondent, in the presence of his legal counsel, during interviews with staff of the Teacher Regulation Branch; and (2) admissions made by him, in the presence of his union representative, during interviews conducted by his employer, School District No. 36 (Surrey) (the “District”).

CONSEQUENCES

- [5] As noted, the Panel found the Respondent guilty of professional misconduct. The details of that misconduct need not be repeated here as they are set out in the Panel’s Findings Decision. The misconduct is relatively serious, and includes making a racist remark to a student he was coaching, speaking to students in an inappropriate and disrespectful manner (e.g. calling them a “dumb ass” or “dumb idiot”), behaving angrily in the classroom (repeatedly dropping a VCR to the floor and kicking a cupboard door) and publicly circulating confidential personal information about a student to other students.
- [6] What remains to be determined is the appropriate penalty for the Respondent’s professional misconduct, as well as the matters of costs and publication.
- [7] Section 64 of the *Teachers Act* sets out a range of possible penalties that can be imposed once a finding of professional misconduct has been made. Those penalties range from a reprimand to the cancellation of a teacher’s certificate of qualification. Other discipline panels have emphasized that, in common with other professional regulators mandated to carry out their oversight activities in the public interest, the protection of the public is an overarching consideration to be taken into account in fashioning an appropriate remedy.
- [8] It has also been established that a penalty assessment must take into consideration the nature and gravity of the conduct, principles of specific and general deterrence,

proportionality, denunciation, rehabilitation (where appropriate) and the importance of fostering and maintaining public confidence in the ability of the Commissioner to properly supervise and regulate the conduct of teachers.¹

- [9] The Panel's penalty assessment weighs these considerations taking into account both aggravating and mitigating factors. Mitigating factors include such circumstances as the absence of any prior misconduct, the fact that a teacher has already suffered significant consequences, an acknowledgement by the teacher of his misconduct and any steps the teacher has taken to address it.
- [10] Aggravating factors point to the need for a more severe sanction in order to both protect the public and motivate the teacher to change the problematic behaviour. Some examples include the following: repetitive conduct or conduct which continued over a period of time; risk of harm to a student or students or actual harm; lack of insight or remorse on the part of the teacher; a prior disciplinary history of misconduct of the same or similar nature.
- [11] Turning first to the presence of any mitigating factors, the Respondent has not before been professionally disciplined for misconduct even though he has been teaching for some 15 years. This weighs in his favour. Additionally, the Respondent was suspended for a period of 30 calendar days as a result of discipline imposed on him by the District,² was required to take a course on anger management, and was relieved of his coaching duties for the remainder of the school year. These are mitigating factors that the Panel is required to take into account.
- [12] The Respondent expressed remorse about making the racist comment, which is ordinarily a mitigating factor. At the same time, however, he tried to explain away or justify the comment. The Respondent said he made the remark because he was frustrated when the administration did nothing after he made a complaint about a coach who had not had a criminal records check. With respect to the other problematic conduct, while he acknowledged it was inappropriate, he also claimed that students had lied and "provided misinformation" to the District. This suggests that the Respondent is not willing to fully accept responsibility for his misconduct.
- [13] As to the presence of any aggravating factors, the Respondent's misconduct occurred over the course of the school year, it was diverse and it involved a number of students. There can be no doubt that some of his misconduct was undermining, intimidating and disrespectful to his students. He belittled and demeaned his students by telling them they were "a dumb ass" or "a dumb idiot" for not following safety procedures. He created an unsafe teaching environment by behaving angrily in his classroom and by losing control of his emotions as a result of a personal telephone call, which he took at a time when he

¹ *In the Matter of the Teachers Act and Brisebois*, April 22, 2014, at para. 11; *In the Matter of the Teachers Act and McGeogh*, January 17, 2013, at para. 7.

² The Respondent was initially suspended for two months by the District. He grieved and agreement was reached between his union and the district to replace the two-month suspension with a 30-day suspension.

should have been teaching. He then left the classroom unattended. This type of misconduct runs contrary to the public's expectation that teachers treat their students with respect and dignity and ensure their emotional and physical safety.

- [14] The Respondent also failed to keep confidential a discussion he had with a student's mother about the student. There was evidence that this misconduct left this student feeling humiliated and ostracized by other students. He also made a racist, derogatory remark to another student. The evidence revealed that this comment was overheard by at least one other student and two or three other coaches. It was a comment that has no place in our society and warrants condemnation in the strongest possible terms.
- [15] The Respondent has not demonstrated insight into the degree to which his misconduct negatively impacts his students or the fact that such conduct cannot be tolerated in an educational setting, particularly given a teacher's unique position of power, trust and responsibility. Imposing a sanction commensurate with the gravity of his misconduct is necessary in order to instill public confidence in the effectiveness of the teacher discipline process and achieve the goals of specific and general deterrence.
- [16] The Respondent's conduct during the regulatory process is also of concern. The Respondent attempted to evade service of the Citation and was unresponsive to correspondence sent to him by email and mail, later claiming he never received it. The Respondent also failed to appear at pre-hearing conferences scheduled for April 5, 2017 and August 16, 2017. This type of avoidance behavior suggests that the Respondent does not fully appreciate the seriousness of his conduct, as well as a reluctance to take responsibility for his misconduct.
- [17] The Commissioner seeks a one-month suspension, to be served continuously during the school year when the school is in session. The Commissioner also seeks a condition that the Respondent successfully complete the Justice Institute course "Creating a Positive Learning Environment" before being permitted to return to teaching. In the event the Respondent cannot provide satisfactory proof of completion of this course to the Director of Certification before July 30, 2018, the Commissioner asks that the Respondent be suspended until that condition is satisfied.
- [18] The penalties sought by the Commissioner are authorized by section 64(b) and (f) of the *Teachers Act*, which provide as follows:

Consequences after hearing

64 If a panel makes a finding under section 63(1)(b)(c) or (d), the panel may make an order setting out one or more of the following:

(b) a requirement for the director of certification to suspend the [teacher's] certificate of qualification ... for a fixed period ...

(f) a requirement for the director of certification to suspend or cancel a certificate of qualification ... unless the [teacher] has fulfilled conditions by a fixed date imposed by the panel

- [19] The Commissioner argues that the most important factors for the Panel to consider in fashioning an appropriate penalty are the nature of the Respondent's misconduct, the need to maintain public confidence in the teaching and education system, and the need for specific deterrence. The Commissioner points out that the Respondent's misconduct occurred over a period of a year and that the evidence revealed he referred to students as "a dumb ass" or "a dumb idiot" regularly, and had been doing so for many years.
- [20] The Commissioner expressed concern that the Respondent attributed two of the incidents to his being frustrated and that this shows he has little insight into the boundary between his personal issues and his professional responsibilities when interacting with his students. With respect to the VCR incident and the racist comment, the Commissioner maintains that the Respondent's actions were egregious and fell far below the standards of conduct expected of any adult in a social setting and also below the conduct expected of students at school. When questioned about the racist comment, the Respondent's response was he said how he felt, which the Commissioner says shows no insight, but only justification for his actions.
- [21] The Commissioner also referred to the Supreme Court of Canada's decision in *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40 at para. 44, where that Court observed that teachers "must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school district". From the Commissioner's perspective, taken as a whole, the Respondent's misconduct demonstrates a repeated failure to meet societal norms of behavior and to role model appropriate conduct to students. It is also antithetical to the democratic values of equality, respect and tolerance which the public education system seeks to instill in students. The Commissioner maintains that the Respondent's misconduct falls so profoundly below the standards of conduct for teachers so as to warrant a significant period of suspension.
- [22] The Respondent believes that he has already suffered significant consequences, including being suspended by the District. He said he had to take a course and pay for it, but that the District then required him to undergo counselling sessions instead. The Respondent was not able to coach his son in his championship football game. The Respondent described the discipline imposed on him by the District as "excessive". He said that his health has suffered and the situation has been very taxing on his family. The Panel notes that the Respondent's submissions focused largely on concerns about the disciplinary measures imposed on him by the District. However, the discipline process set out in the *Teachers Act* is separate and distinct from any employment-related discipline imposed on a teacher by a school district. As noted above, the *Teachers Act* regulates the profession of teaching in furtherance of protecting the public against incompetent, unprofessional or unethical conduct by teachers.
- [23] The Panel agrees with the Commissioner that the Respondent's misconduct undermines the public's confidence in the education system, the dignity and credibility of the teaching profession and the public interest in ensuring that the educational learning environment is one that reflects and instills core values of equality, respect and tolerance.
- [24] The Panel has concluded that, based on a review of penalty decisions and taking into account all of the evidence before it that a one-month suspension would be excessive. As

the Respondent has already served a 30-day suspension as a result of District discipline, the Panel's view is that a two-week suspension would serve as a sufficient deterrent and at the same time satisfy the need to maintain the public's confidence in the teacher discipline process. The Panel has also concluded that the public's interest would be served by the inclusion of a condition requiring the Respondent to successfully complete the "Creating a Positive Learning Environment" course, at his own expense, prior to December 31, 2018. Such a condition is authorized by s. 64(1)(f) of the *Teachers Act*.

- [25] The Panel agrees with the Commissioner that a failure to successfully meet this condition should result in a suspension of the Respondent's Certificate of Qualification by the Director of Certification until that condition is fulfilled. Given the nature of the Respondent's professional misconduct, the course subject matter seems particularly necessary in order to assist the Respondent to rehabilitate himself.

COSTS

- [26] Section 65 of the Act permits costs to be awarded where a respondent's conduct during the hearing has been improper, vexatious, frivolous or abusive. As the Commissioner has not sought costs in this case and the Respondent opposes a costs award, no costs are awarded.

PUBLICATION

- [27] Section 66 of the Act expressly requires that the panel's reasons for making an order under section 64 be published, subject to limited exceptions, none of which apply here. Accordingly, the panel directs publication of these reasons.

ORDER(s)

- [28] The Panel orders that, pursuant to section 64(b) and (f) of the *Teachers Act*:

- (1) the Respondent's Certificate of Qualification be suspended for a period of two weeks, to be served continuously during the 2017/2018 school year and at a time when school is in session and the Respondent would otherwise be teaching, the dates to be determined by the Director of Certification in consultation with School District No. 36 (Surrey);
- (2) a condition is imposed requiring the Respondent to successfully complete, at his own expense, the course "Creating a Positive Learning Environment" offered through the Justice Institute of British Columbia and provide satisfactory written proof of completion of that course to the Director of Certification by December 31, 2018; and,
- (3) if the Respondent fails to provide such satisfactory written proof of completion by December 31, 2018, the Director of Certification will suspend the Respondent's Certificate of Qualification until such time as he has fulfilled the condition.

For the Panel

Date: February 28, 2018



Meg Gaily, Panel Chair



Matthew Cooke, Panel Member



Peter Van Huizen, Panel Member



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(An Authorized Person under the *Teachers Act*)

CORRIGENDUM TO

REASONS FOR DECISION ON CONSEQUENCES, COSTS AND PUBLICATION

- [1] The panel issues this corrigendum to clarify any ambiguity in paragraph [28](1) of the panel's order on consequences, costs and publication, issued February 28, 2018, by adding the underlined words as set out below.

ORDER(s)

- [2] The Panel orders that, pursuant to section 64(b) and (f) of the *Teachers Act*:
- (1) the Respondent's Certificate of Qualification be suspended for a period of two weeks, to be served continuously during the 2017/2018 school year, or as soon as possible thereafter, and at a time when school is in session and the Respondent would otherwise be teaching, the dates to be determined by the Director of Certification in consultation with School District No. 36 (Surrey);
 - (2) a condition is imposed requiring the Respondent to successfully complete, at his own expense, the course "Creating a Positive Learning Environment" offered through the

Justice Institute of British Columbia and provide satisfactory written proof of completion of that course to the Director of Certification by December 31, 2018; and,

- (3) if the Respondent fails to provide such satisfactory written proof of completion by December 31, 2018, the Director of Certification will suspend the Respondent's Certificate of Qualification until such time as he has fulfilled the condition.

For the Panel

Date: June 18, 2018



Meg Gaily, Panel Chair



Matthew Cooke, Panel Member



Peter Van Huizen, Panel Member



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VARIANCE OF ORDER

REASONS FOR DECISION ON CONSEQUENCES, COSTS AND PUBLICATION

- [1] In its Consequences Decision issued on February 28, 2018, as part of the penalty imposed in this case, this Panel required the Respondent to complete the course, *Creating a Positive Learning Environment*, offered by the Justice Institute of British Columbia (the “Course”) by December 31, 2018.
- [2] On September 4, 2018, the Respondent wrote to the Teacher Regulation Branch (the “Branch”) and advised that he will be unable to complete the Course by December 31, 2018, due to being on medical leave and stating that the Course is not being offered again before December 31, 2018.
- [3] In a letter dated September 12, 2018, the Branch advised the Respondent that the Branch could not extend the time in which he had to complete the Course and suggested that he make an application to this panel to vary our order on consequences. The Branch suggested to the Respondent that he provide medical evidence to support his application, as well as a date by which he proposed to complete the course requirement.
- [4] Both the Respondent’s letter and the Branch’s letter in response were copied to the Commissioner.

- [5] The Respondent did not correspond further with the Branch or this panel and has not applied to vary our order on consequences.
- [6] The Commissioner responded to the Respondent's letter on October 1, 2018. The Commissioner acknowledged the Respondent had not applied to vary the consequences order and had not submitted medical evidence. However, the Commissioner submits that it may be appropriate in the circumstances for this panel to grant the Respondent an extension of time to satisfactorily complete the Course.
- [7] The Commissioner tendered evidence confirming that the Respondent has been on medical leave from the Surrey School District since the panel's Consequences Decision was issued February 28, 2018, and that the Respondent is expected to be off work for the 2018-2019 school year.¹
- [8] The Commissioner submits that, in granting the extension, this panel should give clear notice to the Respondent that if he does not provide proof of completion of the Course to the Branch by March 30, 2019, his certificate of qualification will be suspended and will continue to be suspended until he completes the Course.
- [9] The panel agrees that the Respondent should be granted an extension to satisfactorily complete the Course, to comply with the panel's original order on consequences, costs and publication, issued February 28, 2018.
- [10] The panel notes that given the medical leave, the Respondent has yet to serve the two-week suspension of his Certificate of Qualification, which we ordered was to be served continuously during the 2017/2018 school year and at a time when school is in session and the Respondent would otherwise be teaching (the dates were to be determined by the Director of Certification in consultation with School District No. 36).
- [11] As a result, the panel agrees to extend the period in which the Respondent's Certificate of Qualification is to be suspended for a two-week period as described in the preceding paragraph.

ORDER(s)

- [12] The Panel orders that, pursuant to section 64(b) and (f) of the *Teachers Act*, the panel's original order on consequences, costs and publication be varied as follows to reflect that the panel has extended the period in which the Respondent must satisfactorily complete the Course, and in which the Respondent's Certificate of Qualification is to be suspended as follows:
- (1) the Respondent's Certificate of Qualification be suspended for a period of two weeks, to be served continuously during the school year and at a time when school is in

¹ Exhibit 1, Affidavit of Samia Barbosa, sworn October 1, 2018, Exhibit "F", email from Tammy McGoldrick dated September 26, 2018.

- session and the Respondent would otherwise be teaching, the dates to be determined by the Director of Certification in consultation with School District No. 36 (Surrey);
- (2) a condition is imposed requiring the Respondent to successfully complete, at his own expense, the course “Creating a Positive Learning Environment” offered through the Justice Institute of British Columbia and provide satisfactory written proof of completion of that course to the Director of Certification by March 30, 2019; and,
 - (3) if the Respondent fails to provide such satisfactory written proof of completion by March 30, 2019 (unless the Justice Institute does not offer the Course), the Director of Certification will suspend the Respondent’s Certificate of Qualification until such time as he has fulfilled the condition.

For the Panel

Date: November 6, 2018



Meg Gaily, Panel Chair



Matthew Cooke, Panel Member



Peter Van Huizen, Panel Member