



2019 TAHP 01  
Decision issued: February 19, 2019  
Citation issued: September 12, 2017  
File No. [REDACTED]

IN THE MATTER OF THE *TEACHERS ACT*, SBC 2011, c. 19  
AND  
A HEARING CONCERNING  
DUC-HUNG TRAN

**REASONS FOR DECISION ON PENALTY, COSTS AND PUBLICATION**

Date(s) and location(s): November 6-7, 2018, Teacher Regulation Branch

Panel: Karen F. Nordlinger, Q.C., Chair, Peter Van Huizen, Rebecca Blair

Counsel for the Commissioner: Maureen Boyd, Ministry of Justice

Counsel for the Respondent: Claire Hatcher, Pender Litigation

**INTRODUCTION**

[1] A Citation was issued against the Respondent on September 12, 2017 alleging that, while working as a teacher at a secondary school in School District #42 (Maple Ridge-Pitt Meadows), he

“told a female grade 11 student [“Student”] who was in his class, to come with him into a classroom and then into a storage room to speak privately. He closed the door and then he hugged her and said words to the effect that he was attracted to her. He told her not to tell anyone what he had done.”

- [2] A Disciplinary Hearing Panel (the “Panel”) was appointed to conduct a hearing with respect to the allegations set out in the Citation.
- [3] The parties filed a joint submission in which they agreed to the relevant facts as set out in the Citation, that the Respondent’s conduct as disclosed therein was a breach of standards No. 1 and 2 of the Standards for the Education, Competence and Professional Conduct of Educators in British Columbia, and that such conduct constitutes professional misconduct under s. 63 of the *Teachers Act*.
- [4] The Panel released its Decision on Verdict on April 24, 2018. Given the Panel’s review of the agreement between the parties, the law and the evidence, the Panel determined that the Respondent’s conduct in relation to the Citation amounted to professional misconduct.
- [5] The Panel directed that submissions regarding penalty, publication and costs be made in writing, which were received by the Panel January 2, 2019.
- [6] The findings of professional misconduct are based on conduct as set out in the Hearing Decision on Verdict at paragraph 4.
- [7] The Commissioner submits that the appropriate consequence under s. 64 of the *Teachers Act* is cancellation of the Respondent’s Certificate of Qualification for the following reasons:
- (a) His conduct is a significant boundary violation of a sexual nature;
  - (b) The public interest requires a strong disciplinary response that protects the safety of Students through general deterrent;
  - (c) The evidence shows that a lesser disciplinary response will not effectively serve the goal of specific deterrence.
- [8] The Commissioner submits that there is a presumption established by the authorities for cancellation of the Certificate in similar circumstances, and that there are no compelling reasons to impose a lesser penalty under s. 64. S. 64 allows for lesser penalties once a finding is made under s. 63(1) (b) (c) or (d). Those lesser penalties are in a range from a reprimand or suspension to cancellation of a Certificate with or without conditions.
- [9] The conduct complained of took place in February, 2014. The Respondent was suspended with pay pursuant to s. 15(5) of the *School Act*, on February 5, 2014 until further notice. On November 5, 2014, the Board of Trustees of the District decided to continue the suspension of the Respondent, but to make the suspension without pay, while allowing the Respondent access to medical leave benefits.
- [10] Following an investigation by an independent investigator, the Respondent was:
- (a) suspended without pay for six weeks to commence upon his return from medical leave;
  - (b) transferred to another school not attended by the Student in question,

- (c) to complete a Professional Boundaries Course;
- (d) to continue treatment for his medical condition, including counselling; and
- (e) to be monitored by administrators in the school where he taught.

[11] The Respondent served the six weeks' suspension without pay from April 27, 2015 to June 5, 2015, at which time he returned to teach in the District as a teacher on call. He was medically approved to return to work in September, 2015 at a 90% basis and returned to full-time teaching in January of 2016.

[12] It is clear that the primary principle in regulation of the teaching profession is that it be done in the public interest: *In the Matter of the Teachers Act -and- Hankey*, 2016 TAHP 06. Several factors have been determined to be relevant in imposing penalty, as follows:

- (a) the nature and gravity of the allegations;
- (b) the impact of the conduct on the Students;
- (c) the presence or absence of prior misconduct;
- (d) the extent to which the teacher has already suffered consequences;
- (e) the role of the teacher in acknowledging the gravity of the conduct;
- (f) the need to promote specific and general deterrence; and
- (g) the need to maintain public confidence in the teaching profession as a whole.

*In the Matter of the Teachers Act -and- McGeough*, (January 17, 2013)

[13] The Commissioner submits that both aggravating and mitigating factors must be taken into consideration by the Panel in assessing penalty. Aggravating factors include:

- (a) conduct which was repeated or which continued over a long period of time;
- (b) significant or lasting harm on the Students subject to the teacher's conduct or the creation of a risk of significant harm;
- (c) a lack of explanation or remorse by the teacher;
- (d) conduct intended to hide the teacher's misconduct; and
- (e) a disciplinary record, particularly with misconduct of the same or similar nature.

[14] Mitigating factors may include:

- (a) the absence of any prior misconduct;
- (b) the fact that a teacher has already suffered significant consequences;
- (c) an acknowledgment by the teacher of the misconduct (such as admissions of misconduct, timely apology to the subject of the misconduct, and any acts of restitution, such as returning funds taken without approval), and

- (d) steps taken voluntarily by the teacher to address his or her misconduct or shortcomings (such as taking appropriate courses or counselling).

*In the Matter of the Teachers Act -and- Robertson, 2016 TAHP 02,  
Hankey, 2016 TAHP 06 and  
In the Matter of the Teachers Act -and- Ammon, 2017 TAHP 01.*

- [15] The Commissioner submits that the most important factors in this case are:
- (a) the nature and gravity of conduct;
  - (b) specific deterrence; and
  - (c) general deterrence and the enhancement of public confidence in the profession and education system.
- [16] Cancellation is required to protect the Students and ensure public confidence in the profession and in the education system as a whole by the message of general deterrence.
- [17] The Commissioner submits that the conduct of the Respondent was deliberate and intentional and thus is very serious by its nature. He approached the Student knowing that he wished to tell her that he was attracted to her, and he did so by taking her into a private setting, closing the door, and asking her for a hug when he could see that she was uncomfortable in the situation. The Respondent's evidence was that the Student immediately rebuffed him and berated him for his conduct. His description was that her reaction woke him up, and he realized what he had done. The incident in total took approximately 15 minutes. After the incident, but while still in the classroom, the Respondent asked the Student not to say anything to anyone.
- [18] The next day, the Respondent asked the District if he could take a personal leave. He did not disclose his interaction with the Student. He indicated to Human Resources that he felt he was not able to "give it all to the kids" and "declining enrollment, he may help to save a colleague".
- [19] The fact that there was no progression of the conduct to any sexual activity is, it is argued by the Commissioner, solely attributable to the Student and her rebuff of the Respondent.
- [20] The Student immediately reported the conduct to her father and the next day, with her parents, met with the school principal. The Student's description of her feelings in a subsequent District interview was that she was "just really uncomfortable and scared". The Student ultimately determined that she did not wish to return to the school if the Respondent was still teaching there. The Respondent was ultimately moved to another school.
- [21] There is no evidence of any longer-term harm to the Student past the District interview. However, the Commissioner points out that it is the "risk of harm" that defines the severity of the conduct. *Ammon*, (supra)
- [22] The Commissioner submits that the conduct of the Respondent was at the more serious end of professional misconduct, as it was a planned intentional violation. He was able to

maneuver the Student into a private situation in order to advise her of his feelings for her because of his position of trust and breach of fiduciary duty to the Student. In addition, the Commissioner submits that the Respondent was not honest with Human Resources when he advised them that his reasons for requesting a leave had to do with other people's interests. The Respondent's explanation for his advice to Human Resources was that he was "trying to believe this would just go away", referring to the incident the day before.

*R. v. Audet*, [1996] 2 SCR 171 and  
*Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825

- [23] The Respondent's evidence was that, at the time of the incident, he was feeling overwhelmed and unappreciated, largely as the result of his parental and marital relationships. He was attracted to the Student because she had given him a hug and made him feel appreciated prior to this incident. The evidence differs somewhat on who initiated that earlier hug. The Respondent, in his evidence, acknowledged that it was, in any event, inappropriate. The Respondent also acknowledged in cross-examination that he controlled the Student's ability to exit the storage room, and that he let her out. He has admitted that he told her at the time that he was thinking of leaving teaching to go into real estate.
- [24] The Respondent admitted that when he told the Student not to say anything to anyone, he was concerned about his career and his family and friends. He knew that if his conduct to the Student was disclosed, it could affect his job and impact his marriage.
- [25] The Respondent sought medical assistance after the incident for his issues relating to his emotional turmoil and the effect the incident had on his relationships. He and his wife separated for a time and we accept that there were significant ramifications on the Respondent. Commencing in April, 2014, various medical certificates from Dr. Johnson, his family doctor, were provided to the District during his medical leave. Dr. Johnson's certificate stated that the medical leave was due to "Major Depressive Disorder". All of the certificates sent by Dr. Johnson give the same reason for the medical leave.
- [26] The Respondent was medically approved to return to work in September, 2015 on a 90% basis, and on a full-time basis in January, 2016. He has been teaching on a full-time basis since then.
- [27] The Respondent tendered two medical reports of his treating psychiatrist, Dr. Biju Mathew, who began treating the Respondent on January 2, 2015 on referral from Dr. Johnson. In the first report dated January 6, 2015, Dr. Mathew states:
- "Essentially, this patient presents with features of a possible Major Depressive Disorder."
- [28] He goes on to itemize the medications to be taken by the Respondent, one of which he had already been taking, and stating that the Respondent had agreed to see him on a regular basis.

- [29] In his second report dated September 29, 2015, in response to a letter from the Respondent's counsel, he summarized his findings as:
- “This patient was suspended from work for a violation of boundaries involving a female student as mentioned above. This contributed to the development of a Major Depressive Disorder in this patient.
- [30] Subsequent to the receipt of the report of September 29, 2015, counsel for the Respondent wrote to Dr. Mathew asking him to opine, if possible, on whether or not the reported symptoms of the Respondent at the time of the incident were consistent with depression.
- [31] In response, Dr. Mathew wrote a second letter dated October 26, 2015 in which he wrote:
- “I wish to clarify the following clinical features. This patient was already sliding into a depressive phase when the boundary violation occurred as indicated in my report dated September 29, 2015 in the History of Presenting Complaint.”
- [32] It is clear that Dr. Mathew was not treating the Respondent at the time of the incident. The Commissioner submits that this comment was written in response to a request “which suggested the answer which was desired.”
- [33] Clearly, Dr. Mathew was relying on the circumstances as described to him by the Respondent, as was Dr. Johnson when he provided his medical certificates. There is nothing legally inappropriate with regard to their use of such patient-reported circumstances, as that is generally the basis for all medical opinion, at least in the first instance. The comment of Dr. Mathew in his report of October 26, 2015 is consistent with the diagnosis of Dr. Johnson in his medical certificate dated April 16, 2014, a date much closer to the actual incident.
- [34] The Commissioner submits that the opinion of Dr. Mathew is to be given little weight, as Dr. Mathew was the treating physician and thus is not impartial. Nor is Dr. Mathew a forensic psychiatrist who can opine on the effect of the Respondent's mental state on his conduct towards the student during the incident.
- [35] With respect to this issue, the Panel finds that the reports of Dr. Mathew are helpful in terms of the ongoing nature of a Major Depressive Disorder, and the Respondent's willingness to deal with this disorder. We acknowledge that there is not a great deal of weight to be given to his conclusion that there was a depressive disorder at the time of the incident, as he was not the treating physician at that time. However, Dr. Johnson was the treating physician at that time, and he came to the same conclusion as set out in his several medical certificates, which were done close to the time of the incident and throughout the period leading up to the Respondent's return to work.
- [36] The Panel accepts that the Respondent was feeling overwhelmed at the time of the incident. There is no doubt that the circumstances of the incident and its ramifications contributed to the Respondent's depressive disorder after the incident. The Panel accepts

the medical evidence for context but not as a basis for excusing the conduct of the Respondent.

[37] The Respondent acknowledges his professional misconduct. The Commissioner takes issue with such acknowledgments as a mitigating factor, submitting that the Respondent gave inconsistent evidence in this regard. The Panel has noted the inconsistencies, but does not find them to be of sufficient significance to obliterate the mitigating aspect of his admission. They relate to comments he made in answer to questions at his branch interview and at the hearing. Given the lapse of time, the counselling he has had with regard to his actions and his mental state, we accept that there may be variations in what he believes now as to what he believed at the time of the incident. Those variations are not significant in the context of this matter.

[38] The Commissioner submits that the Respondent's evidence in cross is inconsistent with his answers at the branch interview with regard to his attraction to the student, and that such inconsistencies reflect a lack of insight and remorse by the Respondent into his actions. The Panel finds that the answers, again coming some years apart, are not totally inconsistent, but rather representative of his mindset then and his mindset now. In his cross-examination, he said in answer to the question "And because you knew it was not the right thing to be talking to [*the Student*] about attraction to her? Answer: "I did not think of right or wrong in that moment when I closed the door." And at his branch interview, he stated:

Question: "And to tell her you were attracted to her?"

Answer: "Absolutely."

Question: "You knew it was wrong?"

Answer: "I know it now, but I mean at the time, in that mindset, nothing mattered to me, I just didn't care."

[39] The words "Attracted to you" are not defined by the Respondent, either in the incident as reported by the Student or in his evidence before us or in his earlier branch interview. He stated at the hearing in direct that

"When I look back at it now, I think I was attracted to the idea of somebody caring for me. Somebody saw me as a human being. I mean, I think that's what stood out more than anything is that I needed just someone to be there for me at that point in my life."

[40] The two statements are not necessarily inconsistent.

[41] The Commissioner also submits that the Respondent's acceptance of responsibility is viewed from his own self-interest. He was asked in direct if he had a clear memory of the incident, and he responded that it was "super clear. It was a very traumatic event, I mean, both for myself and for [*the Student*]." He further stated that "I didn't know what was happening to me" in relation to his actions during the incident, and that "a lot of my

family members found out what happened to me” through publication of the findings decision.

[42] The Commissioner also submits that the Respondent placed a positive gloss on his conduct when he described the incident to Dr. Mathew, who set it out in his letter dated September 29, 2015 as “Around that time, a female student belonging to his class came and hugged him on a couple of occasions to show her appreciation for his good teaching. He turned around and told her that he was attracted towards her. This shocked the student very much.”

[43] In cross-examination, the Respondent was asked the following when this portion of the letter was put to him:

Question: “You told him that *[the Student]* had hugged you?”

Answer: “No. Oh, I mean—the same incident I said I recall her—if you’re talking about the first time, where she walked past me, I recall her hugging me. That’s my recollection.”

Question: “And you told him that she hugged you to show appreciation for your teaching?”

Answer: “No. I mean, I just—I wouldn’t assume anything—I can’t read into what *[the Student]* hugged me, or I’m not going to guess why she hugged me.”

[44] It seems that Dr. Mathew may have conflated two incidents reported by the Respondent in his comment in his letter of September 29, 2015. We cannot find that the Respondent necessarily described it in the way that it has been interpreted by Dr. Mathew, as Dr. Mathew’s evidence was that he sought only enough particulars to give some context to his medical treatment.

[45] The Respondent did give inconsistent evidence above the first hug in the sense that the statement in the Agreed Statement of facts was that the Student stated to the Police that he hugged her the first time. He then stated in cross-examination that he would not dispute the Student’s account, he recalled it differently, but he did not recall the exact order of events.

[46] This evidence is confusing; however, the Panel’s impression was that he did not want to say the Student was wrong or untruthful, even though his recollection was different.

[47] The inconsistencies in his evidence, correctly pointed out by counsel for the Commissioner, are largely related to the two time frames the Respondent was dealing with—the time of the incident and the time of the hearing some five years later. In the interim, the Respondent has had counselling from Dr. Mathew, gone through a marital separation, and some marriage counselling, so it is not surprising that his evidence of what he thought of his actions at the time of the incident and what he believes now have changed.



- [48] The Panel accepts that the Respondent was in a mental/emotional state at the time of the incident that clouded his judgment. He made a very serious mistake and has been disciplined for it. We also accept that he acknowledged the inappropriateness of his conduct both to the District and in these proceedings.
- [49] The Commissioner asserts that this is an appropriate case for the cancellation of his certificate. Several decisions are relied on in support of this position. The Panel has considered them, but finds that all of them relate to conduct of a much more serious nature than the conduct here. In *McGeough* for example, there was physical contact, including kissing and persistent communications of a romantic and sexual nature. The decision was to impose a 15-year ban on the issuance of a certificate.
- [50] In *Neal*, there were several text messages of a personal nature sent to the student. The teacher also lied to the District about her conduct. The teacher agreed to a cancellation of her certificate.
- [51] The other cases also involved conduct of a sexual or grooming nature more extensive and serious than the conduct of the Respondent here.
- [52] The Commissioner relies on *Young v. British Columbia College of Teachers* for the proposition that there is a presumption of cancellation for sexual misconduct. The Court of Appeal held in paragraphs 16 and 17, as follows:
- “Notwithstanding some earlier authorities, I agree with Mr. Laughton that sexual relations between a teacher and a student must be regarded very seriously. In such cases, the maximum penalty for disqualification without a right to reapply for two years would, in the absence of special circumstances, be the proper disposition. This is to ensure continued respect for and faith in the integrity of the school system. ...
- But the imposition of the maximum penalty cannot be an invariable rule. If it were, there would be no need to have a hearing to impose a penalty when this kind of misconduct is established.”
- [53] The Commissioner submits that the principle of presumptive cancellation was undermined in the 2005 decision of the Court of Appeal in *Mitchell v. British Columbia College of Teachers*, 2005 BCCA 76 wherein the Court of Appeal suggested that the panel in a discipline case must consider lesser penalties which would “adequately deter others, protect the public’s faith in the educational system, and assist in the College’s ability to regulate the conduct of its members.” (para. 12)
- [54] This principle was again undermined by the decision in *McGuire v. Law Society of British Columbia*, 2007 BCCA 442 in which the Respondent lawyer misappropriated funds and was disbarred. The Court of Appeal upheld the disbarment despite several mitigating factors, stating:
- “The public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the

public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, ‘don’t even think about it’ and that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards.”

- [55] The *McGuire* decision, *supra*, related to willful misappropriation of funds over a significant period of time by the lawyer. His personal circumstances leading up to the misappropriation were considered not to affect the penalty, given the severity of the offence.
- [56] With regard to the Commissioner’s submission on presumption of cancellation of certificate, we find that this dire consequence cannot be an “invariable rule”, *Young v. British Columbia College of Teachers* (*supra*). Each case must be assessed according to its own circumstances.
- [57] We must assess both the aggravating and mitigating factors in determining penalty, keeping in mind the goals of specific deterrence and general deterrence, including the enhancement of public confidence in the education system.
- [58] The aggravating factors to be considered are the gravity of the conduct and the effect on the Student. We accept that there was harm to the Student. She had to deal with a frightening and confusing situation. The fact that she stood up to the Respondent is remarkable and praiseworthy. Even the Respondent recognized her courage when he said he was proud of her for “berating” him.
- [59] We have no evidence of any long-term harmful effect on the Student, but common sense tells us that such a breach of trust by a teacher will be something she will remember and be affected by for some time. Hopefully, she will be able to put it behind her. Unfortunately, we do not have access to a Restorative Justice mechanism or model in this area, as the Panel thinks it may be of some assistance in helping to resolve ongoing issues for victims and Respondents arising out of inappropriate conduct.
- [60] With regard to the gravity of the conduct, we have already commented in our earlier decision that it was a marked departure from standards expected of teachers and manifestly crossed the line.
- [61] The mitigating factors in favour of the Respondent are as follows:
- (a) there is no history of previous misconduct;
  - (b) the Respondent has been disciplined by the District by a six-week suspension and there has been publication of the Panel’s Decision on Verdict. He has also suffered personal travails, such as personal shame and a marital separation with subsequent reconciliation; however, we place less weight on this factor;
  - (c) he acknowledged his mistake and is remorseful;

- (d) he has participated and continues to participate in counselling and fulfilled other conditions imposed by the District;
- (e) the incident, while serious and concerning, was a single occurrence and, upon recognizing his inappropriate behaviour, he immediately removed himself from the situation by taking a personal leave.
- (f) the Respondent has been teaching for three years on a full-time basis since the incident with no further conduct issues.

[62] The Panel has come to the conclusion that it is unlikely the Respondent will reoffend. We accept as genuine his remorse and he has shown a willingness to learn from his mistakes. He has testified that his personal life is much better and he has found some peace. He is more focused on his family and is no longer involved in pursuing other money-making endeavours such as real estate. He is and has been taking his medication.

[63] As such, we do not believe that cancellation of his certificate is necessary for the protection of the public or as a specific or general deterrence. Given he has already served a significant suspension, we find that a further suspension would serve no purpose, and would likely be disruptive to his current students. He should be reprimanded and placed on conditions to continue counselling and medications for so long as his treating physicians feel necessary.

[64] No submissions on costs or restriction of publication were made and the Panel does not order restriction or publication. If costs are an issue, submissions may be arranged in the usual way.

For the Panel

Date: February 19, 2019



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Karen Nordlinger, Q.C., Panel Chair



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Peter Van Huizen, Panel Member



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Rebecca Blair, Panel Member



2019 TAHP 01  
Decision issued: February 19, 2019  
Clarification issued: March 8, 2019  
Citation issued: September 23, 2017  
File No.: [REDACTED]

IN THE MATTER OF THE *TEACHERS ACT*, SBC 2011, c. 19  
AND  
A HEARING CONCERNING  
DUC-HUNG TRAN  
  
**CLARIFICATION OF  
REASONS FOR DECISION ON PENALTY, COSTS AND PUBLICATION**

Date(s) and location(s): November 6-7, 2018, Teacher Regulation Branch

Panel: Karen F. Nordlinger, Q.C., Chair, Peter Van Huizen, Rebecca Blair

Counsel for the Commissioner: Maureen Boyd, Ministry of Justice

Counsel for the Respondent: Claire Hatcher, Pender Litigation

Subsequent to our decision in this matter, counsel asked for clarification with regard to the continuing conditions imposed on the Respondent. Counsel have advised that they have come to agreement on an Order clarifying the conditions. The Panel accepts counsel's agreement, and makes the following Order, by consent:

- [1] The Respondent will provide a written report from his treating psychiatrist every six months for the first two years after this decision and thereafter annually, until his treating psychiatrist confirms in writing that ongoing treatment is not necessary to ensure his fitness to teach. The report will state whether the Respondent:

- (a) continues to be fit to carry out the duties and responsibilities of a teacher;
- (b) continues to receive treatment and specifically if he is prescribed medication for depression or other mental conditions, and
- (c) is compliant with treatment.

For the Panel

Date: March 8, 2019



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Karen Nordlinger, Q.C., Panel Chair



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Peter Van Huizen, Panel Member



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Rebecca Blair, Panel Member