CORNWELL-LEBANON SCHOOL DISTRICT **Ralph H. Colflesh, Jr., Esq., Arbitrator**
and
CORNWELL- LEBANON EDUCATION ASSOCIATION, PSEA/NEA
(Discharge of Todd Scipioni)
Appearances
For the District:
Timothy D. Sheffey, Esq.
Riley, Wolfson, Sheffey, Schrum and Lundberg LLP
Lebanon, Pennsylvania
For the Association:
Robert J. Daniels, Esq.[1]
Killian & Gephart, LLP
Harrisburg, Pennsylvania

DECISION AND AWARD

Pursuant to the terms of a Collective Bargaining Agreement (JX 1)[2] by and between the parties hereto, the Cornwell-Lebanon School District ("the District") and the Cornwell-Lebanon Education Association ("the Union"), and the Labor Arbitration Rules of the American Arbitration Association ("the AAA"), the above named arbitrator was appointed to hear and determine the dispute described below. Upon due notice arbitration hearings were conducted in 2015 on February 23, March 23, March 25, April 29, and June 2 at the District's offices in Lebanon, Pennsylvania. At those hearings both parties had an opportunity to call and confront witnesses; introduce documentary, demonstrative and all other forms of non-testimonial

[1] Michael J. O'Connor, Esq. was the original hearing counsel for the Association and appeared on behalf of Mr. Scipioni at the February 23, March 23, March 25, and April 29 hearings. Without notification or explanation to the arbitrator Mr. O'Connor did not appear at the June 2 hearing, and Mr. Daniels assume responsibility for the case. Although Mr. Daniels ably represented Mr. Scipioni at hearing and on the brief, had the undersigned been a judge he would not have permitted Mr. O'Connor, as attorney of record in this case, from failing to complete the representation of in any case where a an individual's career is at stake, absent compelling circumstances shown at a hearing on the withdrawal request in the presence of the Association and Mr. Scipioni.
[2] Exhibits admitted at the hearing and referenced herein are designated ("JX____") for Joint Exhibits, "DX_____" for District Exhibits, and "AX_____" for Association Exhibits.

evidence; and, present arguments in support of their respective positions. At the conclusion of the last hearing, the parties agreed to submit post-hearing briefs in lieu of making oral summations. When the briefs were received by the arbitrator, the record closed. There being no procedural issues this matter is now ready for adjudication on its merits.

Background:

The District provides public education from pre-Kindergarten through Grade 12 to pupils residing in the City of Lebanon and the surrounding vicinity. Although hedged and somewhat invaded by suburbanization, the District is still rural and even agricultural to a large extent and bears the markings of a fairly socially and religiously conservative 21st Century community. The Association is the majority representative for a collective bargaining unit of teachers and other professionals employed by the District.

Terms and conditions of employment for the unit are set forth in the Agreement which, among other provisions contains a grievance procedure for the resolution of any alleged "violation, misinterpretation and/or misapplication" of the terms of the Agreement." (JX 1, p. 21). Those grievances within the meaning of Section 903 of the Pennsylvania Public Employment Relations Act, 43 P. S. 101, *et seq.* that cannot otherwise be resolved by the parties may be submitted to binding arbitration. (JX 1, p. 22).

On or about June 24, 2014 the Association filed a grievance over the suspension of the Grievant, L. Todd Scipioni, without pay and without a pre-disciplinary hearing as putatively required under *Cleveland Board of Education v. Laudermill*, 470 US 532 (1985). (JX 2). That grievance was followed by and consolidated with a second grievance filed October 21, 2014 after the District had fired Mr. Scipioni the previous evening. (JX 3). Although the grievances state various complaints, their gravamen is that the District violated a covenant that "No professional employee shall be demoted, suspended or discharge without just cause." (JX 1, p. 15).

When the parties were unable to resolve the consolidated grievances, the Association demanded arbitration, and the parties chose the undersigned to serve as arbitrator.

Facts:

Although this case rightly required no fewer than five hearings, most of the essential facts are undisputed. Mr. Scipioni was a tenured high school social studies teacher[3] at the District's Cedar Crest High School for 14 years, having originally been hired as a long-term substitute in 1996. Prior to the instant matter, his only discipline from the District was a one-day suspension for downloading personal software on a District computer. (NT 244-45; DX 45).

In the late fall and winter of 2003-2004, Mr. Scipioni assumed the extra-curricular position of head coach of the Cedar Crest High School girls basketball team. Girls basketball is an important sport in the District, and the 2004 team, led by two future Division I athletes, drew special attention because it advanced deep into the Pennsylvania Interscholastic Athletic Association playoffs for schools of its size.

Rather late in the season, one of those senior athletes, designated herein, AH, alleged to the coaching staff that she had been the victim of abuse from her step-father. The staff, including Mr. Scipioni—who never had taught AH and was only familiar with her from basketball until then-- contacted law enforcement immediately and that same night local police brought AH and her mother in for questioning. AH's step-father was subsequently removed from the home and faced criminal charges. Although AH later repudiated her allegations against her step-father[4], at hearing AH said the allegations were true and that she only denied their truth after pressure from her mother who, according to AH feared economic consequences for the family if the step-father were to be criminally convicted.

From that time, through AH's graduation and the ensuing summer, Mr. Scipioni had a closer relationship with AH than one would reasonably expect, as demonstrated by an intense number of phone and text message contacts between the two during the summer months. (DX 1-7).[5] That relationship cooled, if not ended, around the time or shortly after AH reported to college for pre-season basketball workouts in late August or early September 2004. Mr. Scipioni

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[3] In his testimony, Mr. Scipioni described himself as an "American Cultures" teacher. (N 403).
[4] See the testimony of AH at NT 341-342.
[5] The contents of those communications are now lost.

did not coach the team in the following season or any season after that due, he said, to family pressures.

Apparently rumors that the Scipioni-AH relationship was improper long circulated in the District after the 2004 season. Sometime around 2010-2012 Mr. Scipioni expressed interest in coaching or assisting with the girls basketball team again and was told that the District did not want him involved because of whispers about him and AH. (*Cf.* NT 250). However, there was no allegation of or suspicion about Mr. Scipioni's teaching performance at any time from September 2004 forward and he continued teaching in the District without incident.

Nearly ten years passed until, in the early summer of 2014, District Superintendent, Dr. Philip Domencic, took seriously a phone call from an anonymous female who claimed to identify people with information about the 2004 Scipioni-AH relationship. (NT 248). It so happened that at the time Mr. Scipioni and his estranged wife, known in the record as Jennifer Hartman, were in protracted matrimonial litigation. As described by Ms. Hartman at hearing[6], the Scipioni- Hartman marriage had been in difficult straits for years, with her having first filed for divorce against him in 2004 after she allegedly found evidence and obtained a confession from him that he had been sleeping with AH that summer. That original complaint was abandoned, and the couple went through marriage counseling from 2004 to 2012 until they separated and Ms. Hartman filed a second complaint for divorce which was still pending in the spring of 2014.

On the basis of the anonymous caller, Dr. Domencic personally carried out an investigation. That investigation included interviews with both AH and Ms. Hartman as well as AH's step-father, and Mr. Scipioni.

Ms. Hartman told him what she testified to at hearing: that she suspected Mr. Scipioni and AH were having an affair during the last half of the 2004 school year, that her suspicions

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[6] The undersigned denied a motion by the Association and Claimant to bar Ms. Hartman's testimony on the basis of spousal privilege. After giving the parties an opportunity to brief the issue, the undersigned issued a decision permitting Ms. Hartman's testimony in accordance with *East v. WCAB,* 828 A.2d 1016 (Pa. 2003) in which the Pennsylvania Supreme Court held that P42 Pa CSA 5923 and 42 Pa CSA 5924, which establish the privilege, do not apply to administrative hearings. The undersigned observing that this arbitration is a surrogate for what would have been an administrative hearing before the Secretary of Education had Mr. Scipioni chosen to follow that route or had there been no provision to arbitrate his discharge.

took her to his computer in the late summer of 2004 where she found messages between the two about their sexual relationship during that summer, and that she confronted Mr. Scipioni with this data at which point he confessed his adultery.

As to AH, according to Dr. Domencic but denied by her at hearing, the latter wept at their meeting around July 1, 2004 and admitted to having a sexual relationship with Mr. Scipioni at some time in 2004 after she was a student and had turned 18. (NT 263-266).

Dr. Domencic met Mr. Scipioni on three occasions. The first was briefly June 16, 2014 when Dr. Domencic asked Mr. Scipioni several questions. After the latter said he knew AH and that they were friends after she graduated on June 4, 2004. Dr. Domencic asked if Mr. Scipioni "ever had a physical relationship, physical/sexual relationship" with AH while she was a student, to which M. Scipioni only answered that they were friends. (NT 256-257). When Dr. Domencic asked Mr. Scipioni *ever* had such a relationship, Mr. Scipioni did not answer, and his Association representative Amy Wolfgang, ended the meeting, saying she needed to call an attorney from the Association's state affiliate, the Pennsylvania Education Association. (NT 258). Dr. Domencic then told Mr. Scipioni he was not cooperating and suspended him without pay.

Thereafter, Dr. Domencic had the District's Director of Technology, Dr. Jason Murray, examine the District-owned computer that was assigned to Mr. Scipioni. Although unsuccessful at finding any data relating to AH, which was his charge from Dr. Domencic, Dr. Murray did find several salacious—but not pornographic—images and captions as well as messages containing crude as well as sexual jokes. A very few of the images and captions involved sexually precocious girls seemingly of high school age and contained various inappropriate comments. However, none of the images is alleged to depict anyone connected with the District.

Dr. Murray also found 61 songs that had been downloaded on Mr. Scipioni's computer without licensure. (DX 25).[7]

On July 30, 2014 Dr. Domencic and Mr. Scipioni met again, this time in the company of others including counsel for the District and Michael O'Connor, Esq., who was then

[7] In his testimony, Mr. Scipioni denied willfully downloading music illegally and said he would not have because he had been previously reprimanded for it. (NT 461-462).

representing the Association and Mr. Scipioni. (NT 275). At that meeting, Mr. Scipioni was confronted with the music downloads, call billing records garnered through AH's step-father who was the billing party on the cell phone AH used in 2004, as well as the allegations of Ms. Hartman. Mr. Scipioni and his representative said they did not wish to respond but would do so at a later date. That date occurred on August 12, 2014. But even then, according to Dr. Domencic, Mr. Scipioni offered no explanation about the downloaded music except that must have occurred automatically. (NT 278). Dr. Domencic said at hearing that Mr. Scipioni gave the same answer as to the images and emails found on his computer. (NT 280).

Issue to be Determined:

At hearing, the parties stipulated that the generic issue to be determined in this case is the following:

> Did the District have just cause to suspend and fire Mr. Scipioni and, if not, what should the remedy be? (NT 17).

The District's suggested answer is in the affirmative on the basis that Mr. Scipioni committed five generic violations of either law or policy and that termination is justified on those five, jointly or severally. They are:

1. Failure to be frank, candid and intellectually honest and acting in an insubordinate manner.
2. Being immoral by lying to the Superintendent
3. Having a physical, sexual relationship with an 18 year-old female former District student beginning shortly after her graduation on June 4, 2004.
4. Repeatedly and willfully failing to comply with the school laws of the Commonwealth and official directives and policy of the Board of School Directors by illegally downloading and saving music onto a District computer despite copyright protection of such music.

5. Similar repeated and willful failure to comply with school laws of the Commonwealth and official directives and policy of the Board of School Directors by reviewing and preserving e-mails with inappropriate and offensive photographs and captions. (NT 12-16; DX 26).

Contentions and Arguments of the District:

The District argues that several, if not all, the above constitute immoral conduct for which a school professional can be terminated in the Commonwealth of Pennsylvania. *McFerren v. Farrell Area School District,* 993 A.2d 344, 353-354 (Cmwlth Ct. 2010). The District claims that where a teacher engages in conduct that is a bad example for students, immorality will be found. *Zelno v. Lincoln IU, 12, 786* A.2d 1022, 1026 (Cmwlth. Ct. 2002). Such bad conduct is failing to be frank, candid and intellectually honest with an employing District. *Board of Public Education, Philadelphia v. August*, 177 A.2d 809, 812 (Pa. 1962; *Riverview School District v. Riverview Education Association*, 639 A.2d 974, 978 (Cmwlth. Ct. 1994).

Emails and Images

Moving from this proposition, the District argues that four emails[8] and many of the 90 images accompanying them found on Mr. Scipioni's District-owned computer support his termination.[9] In making this argument, the District addresses several of the items individually:

a. One is an image of a woman with facial bruising posing with three men. The caption under the picture reads, "Domestic Violence. Because sometimes you have to tell her more than once." (DX 12). The District says Mr. Scipioni's download and

[8] There were four separate such emails, each with pictures. The first was stored in his District owned computer on April 7, 2007 (NT) 116, the second was stored on February 28, 2008 (NT 123), the third on February 20, 2009 (NT 127-128) and the fourth on April 7, 2009 (NT 132).

[9] In his testimony, Mr. Scipioni admitted the emails and images were on his computer, were inappropriate, and should have been deleted. (NT 459).

retention of this picture and those like it violates Pennsylvania's policy contra domestic violence. (DX 14).

b. Another picture is captioned "Chances" and reads "Don't be a pussy. This guy seems legit." The portrayal is of a truck with the sign "Free Candy." (DX 12). The District claims this and other images are references to child molesters enticing children, which violates Pennsylvania's policy against kidnapping, luring, child sexual assault, and corruption of minors.

c. Another contains a picture of a young woman with the caption, "Play Dumb. If she looks TOO young..just assume she is 18." (DX 19)

d. Yet another has three youthful looking girls or women with the caption, "Sometimes you just wanna break the law." (DX 19).

e. Perhaps the most troubling is a picture of girl, obviously of high school age, between a rows of lockers wearing an extremely short skirt with the caption "Every male teacher that day contemplated the consequences." (DX 19, 24).

f. Many of the other images found contain extremely distasteful and vulgar material and some are accompanied by obscenity and references to sexual activity, including one showing a well-developed student bending over a teacher's desk in a suggestive manner with the caption: "Booty. The difference between getting an A or just barely passing." (DX 12, 19, 22).

The District contends that Mr. Scipioni was untruthful when asked about these emails and whether he forwarded any of them to others. At the August 12, 2014 meeting with Dr. Domencic, Mr. Scipioni explained he did not know how any of the foregoing became stored in the computer, although they were in a folder titled "Personal within a folder title "Pool Board" which was within another folder called "Saved mail." (NT 115-118). The material remained in his folder from 2007, 2008, and 2009 until it was discovered by Dr. Murray in 2014. (NT 116). In fact, the District points out, computer records show Mr. Scipioni forwarded images with the first email on April 4, 2007 and others on February 20, 2009 and February 29, 2008, both during the school day (NT 152-53), and April 8, 2009 during the school day. (NT 150-154). The email forwarded on February 20, 2009 had actually been forwarded from Mr. Scipioni's home

computer to his District-owned computer on February 20, 2009, the same day he forwarded it from the District computer.

The District stresses that Mr. Scipioni denied willfully forwarding any of the four emails to Dr. Domencic at their August 12, 2014 meeting and made the same denial at a January 7, 2015 unemployment compensation hearing. (DX 35). The District further points out that Mr. Scipioni agreed at hearing that the images were not appropriate and should have been deleted from his school computer. (NT 459). However, at hearing he maintained having no memory of forwarding the images. (NT 459-60, 480-83). Finally the District emphasizes that besides consistently lying about them, Mr. Scipioni has never expressed remorse for having saved the emails or forwarding them. The District cites the fact that former Pennsylvania Supreme Court Justice Seamus McCafferty resigned from the Court in part because of inappropriate emails on his Court computer and that some 15 employees of the Office of Attorney General were recently fired or suspended for similar behavior.

Music Downloads

The District also contends that Mr. Scipioni should also be fired for unlawfully downloading music on his District computer without proper licensure in violation of the federal Copyright Act, 17 USC 101 *et seq*.. Dr. Murray had found 61 songs downloaded on Mr. Scipioni's District computer, and, as referenced above, on January 25, 2002 he had been disciplined for similar downloading and got a one-day suspension (DX 48). According to the unrebutted testimony of Dr. Murray, the downloads he found occurred between March 15, 2006 and March 9, 2011 with many of the occasions being dates or times when school was not in session. (NT 135-145). As testified to by Dr. Murray, again without contradiction, the 61 songs in question could not have been downloaded through synchronizing with Itunes or other licensed individuals and under the law they should have been deleted within 30 days of the download. (NT 139, 144-145). According to Dr. Murray, the songs could not have been downloaded without the person doing the downloading knowing the act was illegal. (NT 157).

Relationship with AH

The District premises its charges against Mr. Scipioni as to his alleged conduct with AH on principles set forth in 24 PS 2070.1a *et seq.*, known as the Educator Discipline Act. The Act addresses conduct between a certificated educational professional, such as Mr. Scipioni, and an individual less than 18 years old or a student, defined as "an individual enrolled in a public school." It defines sexual misconduct for its purposes as

> "any act...directed toward or with a child or a student regardless of the age of the child or student that is designed to establish a romantic or sexual relationship with the child or student, with prohibited acts including, but no limited to, sexual or romantic invitations, dating or soliciting dates, or any sexual, indecent, romantic or erotic contact with the child or student." Under the Act, consent of the child or student does not insulate an offender from punishment.

The District implies the Act is a partial codification of the *in loco parentis* responsibility that schools and teachers have for their students and makes the undisputable point that both as a teacher at Cedar Crest High School and AH's coach, Mr. Scipioni had such responsibility toward her and was covered by the Act. As such, the District says, it had not only the authority but responsibility to investigate Mr. Scipioni's treatment of AH even after she had turned 18 and graduated[10] in order to determine whether Mr. Scipioni had acted properly prior to her graduation.

Factually, the District relies on the testimony of Ms. Hartman as well as Aubrey Carhart, AH's younger sister. The latter testified that AH confided to her prior to Ah's graduation on June 4, 2004 that AH had developed a deep romantic attraction toward Ms. Scipioni, who at the time was about 22 years her senior, and wanted to have a sexual relationship with him. (NT 572). According to Ms. Carhart, AH was "very excited for graduation" because at the time she would be both 18 years old and no longer a student and would be able to have a romantic and sexual

[10] As noted above, AH's graduation date was June 4, 2004. She turned 18 on May 17, 2004. (NT 41, 571).

relationship with Mr. Scipioni without endangering his employment. (*Id.*). On the night of her graduation, Ms. Carhart testified, AH told her she was going to and did meet Mr. Scipioni in the parking lot of a swim club where he was a board member and AH got a job that summer and that they kissed "intimately." (NT 574). According to Ms. Carhart, her sister told her she thereafter met with Mr. Scipioni frequently at night that summer at which times she would dress provocatively. (NT 576). Ms. Carhart also averred that AH told her she had sex with Mr. Scipioni at the club, at his house, (NT 577-78) including nights one whole week when Ms. Hartman was away.[11] (NT 579). Ms. Carhart also testified that AH told her she and Mr. Scipioni had sex at the home of a District coach one evening when the house was empty. (NT 579-580). Ms. Carhart's testimony also included an account of AH, who had once babysat for the Scipioni family, going to talk to Ms. Hartman about the relationship between AH and Mr. Scipioni. (NT 582-84).

The relationship between AH and Mr. Scipioni was also the center of Ms. Hartman's testimony. She testified that she filed a complaint for divorce on grounds of adultery in September 2004 (DX 9); NT 67-68). Ms. Hartman said she took the action after finding evidence of a relationship between AH and her husband in August of that year. (NT 69-70).

Ms. Hartman said she had become suspicious of Mr. Scipioni's feelings toward AH in January 2004, claiming he had what Ms. Hartman called "an inappropriate closeness" with AH at the time including "numerous behaviors that...I had never seen with he [*sic*] and another student." (NT 93, 94). Ms. Hartman said she shared her concerns with Mr. Scipioni's father, her mother, and friends. (NT 94). She said she discovered his adultery with AH in late August of 2004 when she searched their home computer while Mr. Scipioni was away and found a log showing times her husband and AH had communicated on MySpace, including one communication in which the couple recounted being on the couch in a coach's home and how much they loved each other. (NT 78-79, 82). At the time AH was already at college. (NT 79). Ms. Hartman said she called Mr. Scipioni's father who came to the house and read the communication when Mr. Scipioni arrived. She then confronted him, she said, and he admitted

[11] Ms. Hartman and Mr. Scipioni were lived together until 2012, when Ms. Hartman left the household. 9NT 74).

the affair. (NT 81). According to Ms. Hartman, Mr. Scipioni told her he and AH first became intimate the night of her graduation when they met at the swim club. (NT 82). Ms. Hartman introduced an email dated October 14, 2005 (DX 8) between her and Mr. Scipioni in which they have a conversation that is predicated on—but does not expressly admit to—his having had an affair.

Similar to the denials of any physical, sexual, or romantic involvement with AH Mr. Scipioni made to Dr. Domencic on June 16, July 30, and August 12, 2014, the District says Mr. Scipioni was deceptive when speaking with Dr. David Helsel in 2010 and 2012. At the time, Dr. Helsel was principal of Cedar Crest High School where Mr. Scipioni taught. Dr. Helsel, who is now Director of Secondary Education in the District testified that Mr. Scipioni asked to meet with him in May 2010 after the Board of School Directors refused to appoint Mr. Scipioni to head boys basketball coach. (NT 170-71). Dr. Helsel testified that he told Mr. Scipioni that in executive session the board had discussed "a lot of the rumors that were going on around him regarding his interaction with a former player," AH. (NT 171). After Mr. Scipioni expressed frustration with the rumors, Dr. Helsel said he asked him whether he were sure "that you did not do anything with that—with her," to which Mr. Scipioni answered "no." (NT 172). Two years later, when Mr. Scipioni wanted to serve as a volunteer coach with the boys team he was again rebuffed, according to Dr. Helsel, and said he wanted to clear his name. Dr. Helsel said he once more asked Mr. Scipioni directly if anything "happened between you and AH and you" and again the answer was "no." (NT 174, 175). However, according to Dr. Helsel, Mr. Scipioni did admit he had gotten "too close" to AH as he was helping her though the abuse allegations she made against her step-father and that the closeness cost him "a lot of marital problems." (NT 175).

Contentions and Arguments of the Association:

The Association posits that the District has utterly failed to show Mr. Scipioni was guilty of "immorality" as that term is used to justify termination under the Pennsylvania Public School

Code at 24 PS 1122. Nor, says the Association, has the District proven that Mr. Scipioni was guilty of "persistent and willful violation of or failure to comply with school laws of [the] Commonwealth , including official directives and established policy of the board of directors," which is the only Code provision applicable to this case. In that regard, the Association cites *Lauer v. Millvale Area School District*, 657 A2d. 119, 121 (Comwlth. Ct. 115) for the holding that Section 1122 is to be interpreted as providing "the greatest protection possible against dismissal." Moreover, the Association points out, in *McFerren v. Farell Area School Dist.*, 993 A2d. 344, 353 (Cmwlth Ct. 2010) the court held that grounds for dismissal must be strictly construed in favor of the employee and against the employer. When an employer charges an employee with immorality, that charge requires substantial evidence that an employee violated the moral standards of the community. *McFerren*, at 354, citing *Horton v. Jefferson County-Dubois Area Vocational Technical School,* 630 A.2d 481, 483.

The Association maintains that the District has not met the *McFerren* standard in this case for a number of reasons.

First, the Association asserts that District failed to present substantial evidence that a physical relationship ever occurred between Mr. Scipioni and AH after graduation. The Association derides the account of Ms. Hartman as perjured testimony from an estranged spouse embroiled in a divorce case with Mr. Scipioni. Further, the Association dismisses the testimony of AH's sister, Ms. Carhart, who is estranged from AH and with whom she had a dysfunctional relationship and Tim Manning, who is AH's husband[12] and who was upset that she testified in Mr. Scipioni's defense and from whom she is separated. The Association emphasizes that besides being biased against AH, none of these individuals had first-hand knowledge of any sexual relationship between the two.

The Association also argues that even if there were a post-graduation sexual relationship between AH and Mr. Scipioni, it is none of the District's business and the District has shown no policy that governs relationships between staff and students who have already left the school district.

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[12] Manning testified that AH told him a physical relationship between her and Mr. Scipioni developed in the summer of 2004 but he could not put an exact timeframe around the event. (NT 544-545).

Beside the lack of first hand evidence of the Scipioni-AH relationship and any law or policy barring one post-graduation, the Association argues that the District has not shown the relationship offended the moral standard of the community. As held in *McFerren, supra*, community moral standards are not to be presumed. Rather, they must be proven.

The Association cites two recent arbitration decisions in cases with fact patterns similar to the relationship alleged here. The first is *Council Rock Education Association v. Council Rock School District* (Parker, Arb. 2013) in which the arbitrator found for the accused employee because of lack of policy, evidence of community standards, or statutory prohibition against a female teacher having an affair with a graduated, 18-year old former student who was male. The second decision, Columbia-Montour Area Vocational –Technical School Education Association and Columbia-Montour Area Vocational –Technical School (Mounts, Arb. 2014), contained similar facts but they were peripheral to the real issue in dispute which was whether the employee had borne false testimony at an earlier arbitration hearing.

The Association also accuses the District of a due process violation in that the District's accusations concerning AH and Mr. Scipioni were based on conduct that occurred—if it did at all- some ten years prior. The Association cites *Mead Corp.*, 1133 LA 1169, 1182-84 (Frankiewicz, Arb. 2000) for the holding that "[d]iscipline based on stale offenses is disfavored for a number of reasons" including the decay of evidence and memory and the accused's performance in the years between the alleged infraction and the time charges are brought. The Association says those same factors interfere here, especially the passage of time which tends to dull memories. The Association extends this defense to the downloading and email/images charges.

As to the latter, the Association says the fact Mr. Scipioni had distasteful and sexually referenced images downloaded to his computer shows no more about him as a teacher than would be the case had he seen an R-rated motion picture. In effect, the Association claims the possession or viewing or downloading cannot show an individual endorsed the attitudes and behaviors depicted in those downloads, and calls such thinking erroneous because it is based on a false equivalency. In connection with that argument, the Association underscores that there is no evidence Mr. Scipioni solicited any of the emails found on his computer and no

evidence students ever saw or were aware of them. The Association further suggests that since the total number of saved emails is not of record, there is no way of putting the four found offensive by the District into any proportion in order to show the possibility they were received or forwarded in advertently. The Association also points out that another teacher who once sent some of the offending emails was given a three-day suspension, even though he, like Mr. Scipioni, had previously been disciplined for inappropriate use of a school computer.

Regarding the music downloads, the Association points out that there were about 1500 songs stored on Mr. Scipioni's computer and that the District found no fault with any of the other 1439. The Association argues that the 61 which appear to have been unlawfully downloaded may have been inadvertently placed on Mr. Scipioni's District-owned computer and could even have been placed there by others. And, the Association contends, the District did not prove that the songs in question were copyright protected at the time of the download.

The Association closes with a reminder that in "just cause" cases, not only the guilt or innocence of the accused must be weighed—the measure of discipline must be reviewed. One of the factors to be considered is the length and merit of the employee's service. In this case, Mr. Scipioni had been employed for many years, had performed satisfactorily, and aside from one instance, he had not been disciplined. Given that history, the Association reasons, any discipline that is imposed should be in mitigation of the termination.

Opinion:

There have been many descriptions of what is required for a finding of "just cause," which is the standard required in disciplinary cases before labor arbitrators, but all of them include affirmative answers to all of the following critical questions:

(1) Was there a rule in place at the time of the employee's alleged act?

(2) Did the accused have knowledge, either actual or constructive, of that rule?

(3) Is there a rational relationship between the rule and the employer's legitimate endeavors?

(4) Was application of the rule against the employee rational, or, stated differently, is there any reason, including excuse or justification, why the rule should not be applied?

(5) Has the employer proven—where necessary by a full and fair investigation—an unreasonable violation of the rule?

Where the answers to all the above are in the affirmative, the "just cause" inquiry turns to the nature of the penalty imposed, unless the penalty has been set by a negotiated agreement between the employer and the employee's union. Assuming there is no such agreement, an arbitrator looks to the nature of the offense, the harm or potential harm caused to the employer, the employee's length and merit of service, and penalties administered to other similarly situated employees who were guilty of the same or a similar violation.

In this matter, the District has established "rules" in the form of statutory and what it calls "dominant" policies of the Commonwealth requiring moral behavior, truth-telling to public school employers, possession of copyrighted material, use of District computers, and other acts which the District has accused Mr. Scipioni of doing. Those "rules," by their very nature, were known or should have been known to Mr. Scipioni. Further, as a general matter, there is no reason the "rules" should not have applied to him in general—that is, he had no generic basis for being excused from or justified in not obeying the said "rules." Further, for all but the allegations of a sexual relationship with AH and the claim he lied to the District about it, there is no doubt in my mind that Mr. Scipioni engaged in the behaviors the District claims were violative of the "rules."

Aside from the relationship charge and the related lying charge, these conclusions leave open only one question in my mind: did Mr. Scipioni's behavior fall within the scope of any of the "rules" or did it fall beyond their reach? Put differently, did any of his conduct actually violate the "rules."

Music Files

I begin with the accusation of improper music downloads, something the District says it discovered in June 2014 when Dr. Murray combed through Mr. Scipioni's District-owned computer, originally looking for evidence of involvement with AH. Indeed, the District's sole witness in this part of the case is Dr. Murray. He began his testimony by establishing the credentials that seem to qualify him for his position of District Technology Coordinator. (NT 107. In addition to a BA in Mathematics and secondary education, Dr. Murray has an MS in Instructional Technology and a doctorate in computer science from Colorado Technical University. (NT 108). As part of his education, Dr. Murray was trained in forensic analysis and cyber security. (NT 109). However, the record does not establish that Dr. Murray has education in the law of copyright or intellectual property, nor is he a member of the bar.

He testified that he found several music files in Mr. Scipioni's school computer that did not have "meta tags," described by Dr. Murray has "embedded file labels that discuss where the origins [a] particular file came from and also describe that file." (NT 135). He continued

> Meta tags are placed onto documents, images, music files by entities who sell that particular type of media. For instance, if you purchase something from iTunes or Rhapsody or an entity that's licensed to sell music, they always have those meta tags labeled on those particular songs. Oftentimes, if meta tags are missing, it's reference to hide the particular origins of that particular file. (NT 136).

He then explained the tag is missing for the purpose of hiding the file's origin. (Id). Dr. Murray then offered this definition of an illegally downloaded song:

> An illegally downloaded song is any type of song that has copyright to a particular entity like a Columbia Record or record company or Itunes that has not been given to that particular person through a licensed entity. (Id.)

He then described an "illegal file-sharing file" as one in which a person shares the file of another. Dr. Murray explained:

So if you have copyrighted files on your computer, you've now opened them up and accessible to others to collect, download without purchasing, so you're giving out music that you don't have a license to distribute. (NT 137)

He then stated that the above circumstance is what makes the file sharing "illegal." (NT 137).

It is clear from this testimony that the *sine qua non* component of illegal downloads is the copyright on the material itself. The District's problem here is that there was no evidence any of the song files contained material that was copyrighted. Dr. Murray and the District only inferred the copyrights from the fact that the meta tags were missing. Further testimony from Dr. Murray fares no better. He testified that many of the sites the 61 files in question appear to be taken from sites or individuals who were guilty of copyright infringements (NT 140-144) but no direct evidence establishes that, or that a particular song downloaded on Mr. Scipioni's computer was unlawfully on one of those sites when the song was downloaded, or that Mr. Scipioni would have known the song was from an illegal site. Thus the whole allegation is based on the fact that the songs bore no meta tags with no evidence whatsoever of who removed the tags. Although one can infer that the music was not lawfully appropriated from a site, there is no evidence Mr. Scipioni would have known that or who appropriated it before Mr. Scipioni downloaded it from that person's file.

I do not find this evidence sufficiently convincing as to the accusation Mr. Scipioni deliberately, purposefully, or willfully downloaded copyrighted songs, as the District asserts. Even Dr. Murray's testimony about 2 songs that were from a music site that allows short-term sampling of songs before they have to be purchased is insufficient. (NT 144-145). Those songs were on Mr. Scipioni's school computer, but there is no evidence that Mr. Scipioni himself "over kept" them or knowingly downloaded them from someone else who had.

For all the above reasons, the music files charge will be dismissed.

Emails and Images

There is no question that the images and captions contained in the four emails cited by the District are incompatible with professionalism. Some are variously scatological, misogynistic, homophobic, sexist, insensitive as to the plight of exploited children, sexually suggestive, and one—mocking poverty in a Black dialect—is racist. The vast majority of the 90 email images, however, are simply examples of crude, vulgar, jejune humor, more typical of adolescents than adult professionals. Importantly, not one is pornographic.

Besides the technical fact that none of them belong on a District-owned computer, I find there are only four with content that would reasonably trouble the District. I have briefly described them before, but the descriptions bear repeating here.

One is a Black dialect image captioned "Why Does poor People be Poor?" as though all poor people are Black. The others depict young women of likely high school age. One of those is of a girl leaning over an instructor's desk with the caption "Booty. The difference between getting an A and just barely passing." A second shows a young woman in a roadway with the caption "Play Dumb. If she looks TOO young..just assume she is 18." And the third shows what looks like a high school girl in a micro skirt in a hallway lined with lockers with the caption "Every Male Teacher That Day contemplated the consequences."

Although few, the fact that Mr. Scipioni possessed them, harbored them on the District computer, and forwarded them is rightly cause for concern because they not only trivialize the prohibition against sexual interest in pupils and underage females but they seem to celebrate such interest. Although God forbid we prosecute each other for perverse thoughts alone, knowing and deliberate possession of such images can support some degree of discipline. However, since the images involved are clearly not pornographic, I do not find such possession to be "immoral." In the *McFerren* framework, I only find them unprofessional. Nor do I find they are the basis for a termination case, given their miniscule number and the fact there is no evidence Mr. Scipioni ever displayed them to anyone in the school community or that the individuals portrayed were members of that community.

On the other hand I do not find Mr. Scipioni's explanation for how the images got in the computer or were forwarded convincing or exculpatory. I am convinced he deliberately downloaded them and kept them. For that, some penalty short of termination is in order.

Relationship with AH

The District does not contend that Mr. Scipioni had an improper relationship with AH prior to her graduation on June 4, 2004. Moreover the evidence that the two had significant communication and more interaction than usual between a coach or former coach and athlete while AH was still a student does not demonstrate any impropriety.

Rather, the District argues that Mr. Scipioni was guilty of immorality because, as stated in the Board's Statement of Charges, he had a "physical, sexual relationship with [an] 18 year old female former student beginning shortly after graduation." (DX 26). Moreover, the District charges Mr. Scipioni with lying when he denied the allegation during Dr. Domencic's investigation.

I find the District's charges to be founded on both counts.

Despite the acrimony between Ms. Hartman and Mr. Scipioni, Mr. Manning, who is AH's estranged husband[13] and AH, and the estrangement between Ms. Carhart and AH, I find their testimony to be credible.

Ms. Hartman testified that she appeared at hearing because she had been subpoenaed and further testified that if Ms. Scipioni were to lose his job it could adversely affect her financially. (NT 65, 66). Despite her interests, she steadfastly testified that in August 2004 she found messages (now deleted) on a MySpace account between AH and Mr. Scipioni about a sexual interlude involving her husband and AH and how much they loved and missed each other now that AH was at college. (NT 78-79). She further testified that Mr. Scipioni admitted the affair to her that very night (NT 81, 84) and that in an email in the fall of 2005 (DX 8) Mr. Scipioni made statements that appear to confirm his involvement with AH during the summer of 2004. (NT 86-89).

[13] At the time of hearing the couple was separated, largely because of turmoil created by this matter.

Tim Manning, AH's husband, testified that in the summer of 2006, before they were married, AH told him that her step-father had sexually abused her (NT 536, 537) and that in 2007 AH confided that in the summer of 2004, after she had graduated, she had had a sexual relationship with Mr. Scipioni. (NT 544, 545). According to Mr. Manning, AH admitted to two events with Mr. Scipioni. (NT 545).

Ms. Carhart testified that in the spring of 2004 AH told her she was attracted to Mr. Scipioni, that she was anxious for graduation, that the two had a physical encounter the night of AH's graduation, that a sexual relationship ensued during that summer, and that AH eventually spoke in person to Ms. Hartman about the affair. (NT 571-586; 592-593).

I further note Dr. Domencic's testimony, which has also been referenced above, regarding Ah's behavior when they discussed her relationship with Mr. Scipioni in 2004. According to him, when he brought up the topic "she immediately became very emotional. She couldn't talk. She was—she was crying, not sobbing, but just tearing up." (NT 265). Dr. Domencic said AH told him she had been 18 and an adult at the time, and that "nothing happened while I was a student, but it was after I was 18." (Id.) In fact, according to him, he directly asked her if she ever had "a physical/ sexual relationship with [Mr. Scipioni]" to which she answered, "yes." (NT 266). I credit Dr. Domencic's account of the conversation.

Contrasting with that is the hearing testimony of AH and Mr. Scipioni.

AH recalled her meeting in July 2014 with Dr. Domencic and said that when he asked her if she ever had sex with Mr. Scipioni she relied "I never had sex with that man, ever. " (NT 320, 322). She also denied crying at the meeting. (NT 322). AH further denied physical or sexual involvement with Mr. Scipioni during the summer of 2004 at hearing. (NT 349). She did, however, admit to many, many communications, either in the form of phone calls or text messages with Mr. Scipioni in the spring of 2004 when she was still a student[14] and over the summer, when she was not. (NT 354-358; DX 1, 2 3, 4, 5, 6, 7).

Called on rebuttal, she testified that she was "in shock" when she learned Dr. Domencic had reported that she admitted to an affair with Mr. Scipioni. (NT 609). She also denied ever

[14] AH and Mr. Scipioni testified that in the spring of 2004 she was a student assistant to him. (NT 360-361; 443).

having a MySpace account, the location Ms. Hartman claimed of the communication she found on Mr. Scipioni's computer in August 2004. (NT 614). AH further described her relationship with her mother and both sisters, including Ms. Carhart, as "not normal" (NT 621) and averred that Ms. Carhart, who lived in the household with their mother and step-father was "influenced," inferring that the "influence" was from her mother's household. (NT 623). She also claimed that Ms. Carhart had psychological problems and used to "self-mutilate" by cutting herself. (N 639).

She also testified to her belief that Ms. Carhart's testimony about what Ah told her in the summer of 2004 was suborned by promises of money or threats from AH's step-father and mother. (NT 634). AH specifically denied telling Ms. Carhart why she had spoken to Ms. Hartman, but confirmed that she did meet with Ms. Hartman in August 2004. (NT 635).

Finally, AH denied being with Mr. Scipioni the night of her graduation (NT 636), and denied having any reason to lie for the sake of Mr. Scipioni. (NT 627). Moreover, she denied having contact with him in recent years until the summer of 2014, stating, "We haven't spoken in over a decade..." (NT 627-28).

All this testimony has to be evaluated in the light of testimony from William Rakow and Mr. Scipioni. The former is a retired school psychologist who worked for the District. (NT 502). He testified that during the instant hearings AH lived for a time with him and his wife because of tensions between her and Mr. Manning over her participation in this case. (NT 521). During the time AH stayed in the Rakow household and the Rokow's were in California on vacation, Mr. Scipioni was a visitor. (NT 522, 531, 532) a fact admitted by AH. (NT 629).

Mr. Scipioni testified that he did not admit to an affair with AH in August when his wife confronted him with what he called "a printout" of instant messages between him and AH. (NT 446). In fact, he denied that the messages had anything to do with an affair. (NT 447). He also said that as to the 2005 email between him and Ms. Hartman which she claimed implicated him he denied having any sexual relationship with AH. (NT 449). He also testified not having any idea about the subjects of the many, many phone and electronic communications between him and AH during the summer of 2014. (NT 475, 477).

My assay of the credibility of these conflicting witnesses, based not only on their words but my observation of their demeanor while testifying, leads me to believe that Dr. Domencic, Ms. Hartman, Mr. Manning, and Ms. Carhart are more believable than the testimony of AH and Mr. Scipioni on the subject of the relationship between AH and Mr. Scipioni during the summer of 2004. I am convinced particularly by AH's meeting with Mr. Scipioni at Dr. Rakow's home during the course of this hearing that she was seeking to protect him, just as he was trying to protect himself. I therefore conclude that AH and Mr. Scipioni were involved in a both a physical and sexual if not romantic relationship beginning on or shortly afterward AH graduated from Cedar Crest High School until the end of August 2004.

This credibility determination is important but not because Mr. Scipioni has any culpability for whatever relationship he had with AH after her graduation. She was no longer a student of the District, and she was an adult so no consensual sexual relationship with her could be the basis for discipline. In that regard I agree with my colleague and former mentor, Joan Parker in her *Council Rock* decision, noting however that contrary to what she seems to suggest there, I would not find a basis for discipline even if the District had a policy forbidding relationships with former students. In my view such a policy would improperly stretch the jurisdiction of the employment relationship beyond the point where a district has responsibility for its students or a right to control its employees' associations.

The conclusion I have reached concerning the post-graduation relationship goes directly to the District's claim that Mr. Scipioni breeched his duty to it by lying about his affair with AH when interviewed by Dr. Domencic. At the close of the last day of hearing, I advised both counsel that I had questions as to whether the District had authority to question Mr. Scipioni and other of its employees as well as AH about the post-graduation relationship. In connection with that inquiry, I expressed a further question: if the District had no right to investigate that relationship, did Mr. Scipioni or other employees owe the District an honest response or any response at all.

After considering those questions, with the aid of counsels' briefs, I have answered both queries in the affirmative. There is no question the District has a compelling interest to assure

its staff are not acting inappropriately with students. The enforcement of that interest requires investigative efforts, which, in the case of suspected acts during a student's enrollment in the District, would logically include acts even after the potential victim has left the District.

That was the case here, where there was some reasonable suspicion of a sexual relationship between Mr. Scipioni and AH shortly after her majority and her exit from Cedar Crest High School. Indeed, I have found there was such a relationship. Given suspicions of such a relationship and its temporal proximity to her graduation date, it was completely reasonable for the District to suspect there had been an untoward relationship *during* AH's school days since it is uncommon for such relationships to mature without a gradual advance. It was for that reason the District had every right to investigate and question its employees, including Mr. Scipioni, about his post-graduation connections with AH. Having established those, the District could logically move to an investigation of whether there was any illicit relationship while AH was a student. The fact that the District was unable to procure evidence of a pre-graduation relationship is immaterial. What matters is that it had the right to question Mr. Scipioni, and as its employee Mr. Scipioni owed the District a duty of honesty.

He failed that duty. The question thus becomes whether, when considered singly or jointly with his possession of inappropriate emails on his District-owned computer, he should be terminated or be subjected to a lesser penalty.

Having carefully considered the circumstances of this case, I have determined that termination must be mitigated in the interests of justice.

First, as suggested above, I do not find the distasteful email images that serious an offense. Although none of them belonged on a school computer—even if not discoverable by students--very few of the images are really so offensive they merit discipline. I have discussed the ones that I find most objectionable above and note once more that although they celebrate or encourage undesirable impulses they are not pornographic nor do they advocate acting upon the impulses that they draw upon. I believe that discharge as to them is a disproportionate response, but that they should support some penalty.

Second, as to Mr. Scipioni's falsehoods regarding his post-graduation relationship with AH, I find them somewhat excusable and understandable while at the same time acknowledging that the denials were self-serving.

By divulging the truth, he would have put AH at risk of embarrassment. It should be noted that up until this investigation, AH, who has had a troubled life, appears to have been in a stable marriage with her husband and two sons. In addition, an admission by Mr. Scipioni may have damaged his position in his divorce proceedings and jeopardized his relationship with his children, particularly the remaining minor child from his marriage. Third, divulgence would have meant that all the actors in what was a tumultuous period in the life of AH, Mr. Scipioni, Ms. Hartman and others would be subject to re-opening old wounds.

Indeed, that seems to have been the unintended result of this investigation as demonstrated by the further alienation of AH and her sister, the disruption of AH's marriage, the humiliation of Mr. Scipioni before his children, and the aggravation of Ms. Hartman's grief over her husband's act, now eleven years old. With the exception of Mr. Scipioni—and him only to a degree—none of the actors here deserved to suffer having the zombies of their past roam mercilessly through their present because of an obviously vindictive anonymous caller.

Given these considerations I believe the punishment for Mr. Scipioni's failure to meet his obligations to the District, taken in concert with his otherwise good and lengthy record with the District, should afford him a second chance, albeit one with a serious contingency and penalty.

Mr. Scipioni's termination should be mitigated to a year- long suspension without pay or District contributions to any benefits for the school year 2014-2015, followed by his reinstatement for school year 2015-2016. However, the District may at its discretion and upon written notice to the Association reinstate him at his salary for the 2013-2014 school year without increment, if any, and without a negotiated increase for the 2015-2016 year. That is, if he is still in the "step" system, he is not to be granted credit for the year of his suspension and if he is at the top step in his education column on the guide, his percentage or dollar increase will

be calculated on his 2013-2014 salary rather than the salary he would have earned had he not been suspended for the 2014-2015 year.

In addition, Mr. Scipioni may be, at the District's discretion and upon written notice to him and the Association, placed on probationary status for the duration of his employment with the District. Should he be found guilty by an independent tribunal of any further material dishonesty to the District, he may be terminated at the District's discretion.

An Award shall be entered accordingly.

Award:

The Association's grievance is sustained in part and denied in part, consistent with the conclusions above. It is denied as to the charge of lying to the Superintendent about his relationship with AH and as to his receipt, retention and forwarding, of certain email images.

The Association's grievance is sustained as to the charge of having an inappropriate relationship with AH and possession of music downloads.

Mr. Scipioni's termination should be mitigated to a year- long suspension without pay or District contributions to any benefits for the school year 2014-2015, followed by his full reinstatement for all pay and benefit purposes except as further provided for school year 2015-2016; provided that the District may at its discretion and upon written notice to him and the Association reinstate him at his salary for the 2013-2014 school year without increment, if any, and without a negotiated increase for the 2015-2016 year. That is, if he is still in the "step" system, at the District's discretion he may not to be granted credit for the year of his suspension and if he is at the top step in his education column on the guide, his percentage or dollar increase may be calculated on his 2013-2014 salary rather than the salary he would have earned had he not been suspended for the 2014-2015 year.

In addition, Mr. Scipioni may be, at the District's discretion and upon written notice to him and the Association, placed on probationary status for the duration of his employment with the District. Should he be found guilty by an independent tribunal of any further material dishonesty to the District, he may be terminated at the District's discretion.

_____ *Ralph H. Colflesh, Jr., Esq.*

Date Ralph H. Colflesh, Jr., Esq., Arbitrator