

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**St. Vital School Division No. 6
(hereinafter referred to as the "Division")**

-and-

**Canadian Union of Public Employees, Local 3470
(hereinafter referred to as the "Union")**

Grievance of Linda Normand

AWARD

Board of Arbitration:	Diane E. Jones, Q.C. Sole Arbitrator
Date of Arbitration:	January 21 st and 22 nd , 2003
Counsel on behalf of the Division:	Robert A. Simpson
Counsel on behalf of the Union:	Kathy McIlroy

This matter came before me as Sole Arbitrator and at the outset of the hearing the parties confirmed that I had been properly appointed and had jurisdiction to determine the matter before me.

The grievance filed by Linda Normand (Ex 2) states:

On November 14, 2001, I was unjustly terminated. This is a violation of Articles 1, 4, 7 and all other relevant articles of the Collective Agreement.

I request that I be reinstated in my current classification with all retroactive wages, benefits and seniority.

The grievance was denied by the Division (ex 3, 4).

There were two witnesses called during the course of the hearing, Mr. Peter Kolba, Director of Facilities for the Division and the grievor. There were thirty-one exhibits filed, the majority of which set out the documentary evidence on which the Division relied. It is not my intention to recite all of the evidence which I heard and have considered, but only to comment on its most salient points when necessary. I also note that evidence concerning the grievor's work history is generally uncontested.

Mr. Kolba told the Board that the grievor had been employed by the Division since October 1987 in custodial positions and had been a full time custodian from October 1995 until her termination on November 14 2001. From January 31, 1999 until November 14, 2001 she had worked at Dakota Collegiate. Mr. Kolba said he had numerous dealings with Ms Normand during her employment.

Mr. Kolba told the Board that in her role as custodian during the evening shift (from approximately 3:30 p.m. to 11:30 p.m.) the grievor was responsible for the building and its cleaning, including the supervision of the building when it was being used for school functions and by the public, under permit issued by the Division.

Mr. Kolba reviewed Ms Normand's record. He noted that initially his concerns with the grievor centered around her attendance difficulties. Her days absent were in excess of the 3-7 days average in the Division's custodial/maintenance staff for incidental illness. Mr. Kolba testified that it was his practice to meet with Ms Normand, as he did with other employees who had difficulties, and then write her a letter to document and formalize the meeting. Mr. Kolba wrote the grievor in this manner on May 24, 1988 (Ex 18), November 2, 1993 (Ex 19), February 9, 1994 (Ex 20), February 19, 1996 (Ex 21), November 21, 1996 (Ex 22), April 7, 1998 (Ex 23), and May 18, 1999 (Ex 24). Suffice it to say these letters were detailed and clearly reveal Mr. Kolba's growing dissatisfaction with the grievor's ability to provide the Division with consistency of attendance. In the letter dated April 8, 1998 (Ex 23) Mr. Kolba notes that during the grievor's past 10 years she had missed 183 work days due to major illness or incidental illness. It was his view that this was placing additional strain on the Division and its staff and he advised the grievor *"It is important for you to know that your current level of attendance is placing your employment with the Division in jeopardy."*

Mr. Kolba testified that he again wrote the grievor on May 18, 1999 (Ex 24) and expressed his continued dissatisfaction with the level of her attendance. Mr. Kolba said that at that time he was of the view that Ms Normand should be terminated, but that the Division's Superintendent, Norbert Phillippe, had allowed her one more opportunity to improve. This was clearly set out in the May 18, 1999 letter, which stated:

In our meeting I shared with you a report that had been forwarded to the Superintendent related to your continued employment in the Division. It was my recommendation that the Division consider releasing you as an employee on the basis of your inability to meet the School Division's standard related to attendance. After reviewing this correspondence and your file, the Superintendent requested that I meet with you to advise you that we are providing you with one last chance and formal notification that we expect an improvement to a reasonable standard of attendance on a continual and consistent basis or your services will be terminated.

Mr. Kolba said in his evidence that he didn't think that there was another employee in the Division on whom he had spent so much administrative time. He also noted that the Union had been apprised throughout about Ms Normand's attendance difficulties.

Mr. Kolba testified that in November 2000 he received a call from the principal of Dakota Collegiate requesting an immediate meeting to deal with an issue concerning the grievor. Mr. Kolba said that he investigated and discovered that Ms Normand had refused to set up for the school's award night when requested to do so by a teacher and had gotten into a verbal altercation with a colleague in view of the public. The grievor had her children come to pick her up from the school after the altercation, at which point discussion ensued between the children and Division staff and contracts which was perceived to have been threatening and intimidating by the staff and contractors, Mr. Kolba testified.

Mr. Kolba set out the results of his investigation and formalized his concerns after meeting with the grievor and the Union president in a lengthy letter to the grievor dated November 8, 2000 (ex 25). Addressing himself to the grievor he stated *"...[you have] alienated yourself to such an extent from the staff at Dakota Collegiate that there is nothing the School Division can do to repair this issue. I have to*

be honest with you and share that in most of the schools that you have worked in there have been similar situations."

Mr. Kolba stated that he asked the Union president to provide him with a letter from the custodial staff at Dakota Collegiate that they were comfortable working with the grievor before he took any further action with respect to the most recent issues which confronted him. Mr. Kolba advised Ms Normand by letter on January 10, 2001 (Ex 26) that:

Firstly, your Union representative has advised me that he has met with your colleagues and they are not prepared to formalize a position as to whether or not they want their statements, related to their feelings about working with you to stand as their final position. Their reasons for this is they do not want to be held responsible for any action the School Division may take towards you as a result of their response. I believe that their position speaks clearly towards their feelings about working with you. Obviously they have not changed their opinions since their initial comments were provided to the School Administration.

In his evidence Mr. Kolba said that he had again met with the grievor prior to sending out the letter of January 10, 2001 (Ex 26) and concluded that the grievor recognized that her conduct had been inappropriate and that punitive discipline would not be beneficial to her or the Division. Mr. Kolba testified that he had decided he would give the grievor one last change to be a "good employee" and he said he went to great lengths to explain this to the grievor so that she would understand. He said he set out the terms of the "last chance notice" in the January 10, 2001 (Ex 26) letter.

I do, however, advise you that you are being provided with a "last change" notice that any further actions on your part which are:

contrary to rules, policy, procedure or common understandings of employees, disrespectful conduct to either the public or your colleagues, or poor workmanship,

will result in immediate suspension pending a recommendation for termination. This decision is made on the basis of historical documentation, which clearly outlines your inability to conform to our expectations as an employee. I am attaching a summary of the more prominent issues, which have been documented in your employee file related to my decision. All of these issues have been formalized with you in the past.

Mr. Kolba further testified that concerns had been raised in late May 2001 by the head custodian at Dakota Collegiate that he was not happy with the grievor's work and that he had brought this to her attention numerous times. Mr. Kolba said that the head custodian had asked that the grievor's cleaning area be certified since Ms Normand had taken the position that the workload was too heavy for the amount of time given to complete the work. Mr. Kolba, along with Burt Bonneteau, the Division's Building and construction Supervisor, conducted two on site inspections, one on June 1, 2001 and one on June 5, 2001 and recorded their observations (Ex 27, Ex 28). Mr. Kolba said he had Mr. Bonneteau were not satisfied with how the grievor's work areas had been cleaned. He said they analyzed the floor square footage as well as the required work and concluded that there was lots of time to do the work required.

It was Mr. Kolba's evidence that although Ms Normand's work performance fell below Divisional standards in June 2001 he decided to give her the benefit of the doubt since the month of June, being year end, is not a "normal setting" and sometimes things were "let go" in anticipation of a major clean up over the summer.

During the week of October 22, 2001 Mr. Kolba said he was again in receipt of complaints about Ms Normand's work. As a result Mr. Kolba and three other Divisional employees conducted inspections of the areas of the school Ms Normand was responsible for and determined that cleaning was less than satisfactory. Mr. Kolba said that he met with the grievor and reviewed all of his inspection findings, including those done in June. During the meeting Mr. Kolba said that Ms Normand confirmed that she had "slackened off" with respect to her cleaning duties. Mr. Kolba said this was not acceptable and that she had to conform to expectations. He advised the grievor that further impromptu inspections would occur and put into place a plan in case Ms Normand ran into difficulty with her cleaning. Mr. Kolba said that once again the meeting and Division concerns were formally documented to the grievor and Union by letter dated October 29, 2001 (Ex 29).

It was Mr. Kolba's evidence that on November 9, 2001 another inspection of the grievor's area was done in response to further complaints by the head custodian and it was found that the cleaning was inadequate and some cleaning had not been done at all. Mr. Kolba said he personally conducted a follow-up inspection on November 12, 2001 and found that the cleaning was poor and that it was obvious many parts of her area had not been cleaned at all. Mr. Kolba said he spoke to Ms Normand on November 12, 2001 about this and that she initially agreed with him. He testified that he had said to her that he had seen it himself and told her where the deficiencies were. He said Ms Normand then said the vacuum cleaner was not working and that the head custodian had not fixed it despite her requests to have it fixed. It was Mr. Kolba's evidence that he personally had used the vacuum and found it to be working perfectly and when he told Ms Normand this he said Ms Normand conceded the head custodian did fix the vacuum cleaner. Mr. Kolba said that at this point Ms Normand started to "negotiate" with him and "tried to make a deal". He testified that he told Ms Normand she was suspended immediately pending termination.

Mr. Kolba said that he asked the grievor to leave the school and that he would contact her later, but she refused to leave. He said she went into the staff room, where an in-service was being conducted, and said she was phoning a lawyer. Mr. Kolba said he asked her to come to the principal's office to phone and she walked out of the staff room through the foyer saying to people *"this guy canned me"* and yelling all kinds of things at him. He said this continued out into the parking lot where she accused him of *"trying to get her forever"*, *"chasing her because of her period"*, and said *"Peter Kolba you'll be getting yours. I'll be getting my lawyer. Fuck you!"*

Mr. Kolba said he went back to his office and formalized the grievor's suspension pending termination by way of letter dated November 12, 2001 (Ex 30). Subsequent to the letter Mr. Kolba said he met with the current superintendent, Terry Borys, and reviewed with him all of the grievor's file and the incidents involved. Mr. Borys concurred in the decision to termination. Mr. Kolba said that he recommended termination on the basis of everything before him. He told the Board that "It's over. What more can we do? It's not getting any better, it's getting worse. At some point it has to end. I don't want her here. It's over."

Mr. Kolba commented that there was no alternative work available for the grievor in the Division because the work she could do involved interaction with others, required her to do the job on her own, and required her to come to work consistently. Mr. Kolba said he felt the grievor would therefore be in the same circumstances in an alternative job.

Mr. Kolba was cross-examined about his views of progressive discipline. He said he was familiar with the steps but thought there was little purpose in imposing a suspension on someone who was already having trouble coming to work. He further said that what was important was the need to stress to employees the seriousness of the conduct and to make sure the employees understand.

Mr. Kolba agreed with Ms Mcllroy that in 1999 Ms Normand's incidental illness days were declining but he cautioned that the grievor's workers compensation days were increasing in the same period.

Mr. Kolba also confirmed that after the altercation in November 2000 he had rejected the idea of a conflict mediator as proposed by Anne Robbins from the Union, but said he did so because he preferred to rely on the procedure of speaking to the then Union president, Brent House. He noted that the Union could have used a mediator itself when dealing with the difficulties between Ms Normand and her colleagues.

Ms Mcllroy questioned Mr. Kolba about the process of filling out forms to note deficiencies as set out in the letter to the grievor on October 29, 2001 (Ex 29) and the letter sent explaining this process to the head custodian (Ex 31). She asked Mr. Kolba if he had received any forms of expressing concern about Ms Normand's work. Mr. Kolba replied that he had not received any such forms but that the letter (Ex 31) encouraged the head custodian to contact Doug Kyle directly if the problem required more involvement from the facilities office. This in fact was what was done, he said.

In redirect Mr. Simpson asked Mr. Kolba to expand on his views about suspension as discipline. Mr. Kolba said it was his view that to penalize an employee financially by suspension is counter productive, especially after a person has said he was sorry, or that he is going to do better. Mr. Kolba noted that this is how Ms Normand had responded and that response had kept the employment relationship going.

Linda Normand testified very briefly on her own behalf. She described her various duties and that she had worked hard at her job. Ms Normand said that she had met with Mr. Kolba on November 12, 2001. She agreed that even though Mr. Kolba had said that two rooms were clean, others were not and that after meeting with him she knew she was suspended. Ms Normand said that Mr. Kolba was accurate in his testimony about the day.

Mr. Simpson cross examined Ms Normand very briefly and confirmed that she had not been able to work because of a medical problem from her termination until October 2002. She also confirmed that she had told Mr. Kolba on approximately October 29, 2001 that she had "slackened off" in her cleaning duties.

Mr. Simpson argued on behalf of the Division. He directed the Board's attention to the termination letter (Ex 8) which cited the grievor's "...inability to perform your duties to divisional standards ... (despite) ... numerous occasions where you have been provided direction and clarification pertaining to your work and our expectations of you as an employee ..." It was asserted, said Mr. Simpson, that the grievor won't and can't, or, is unwilling or unable to live up to Divisional requirements even after repeated warnings and instruction. The letter from Superintendent Borys dated March 26, 2002 (Ex 4) further clarified the three areas of the Division's concern – attendance, work relationships and performance – which had been drawn to the grievor's attention and the fact that the grievor had been aware of and understood she had received a final warning.

Mr. Simpson also noted that neither the Division's documentary evidence nor its viva voci evidence had been challenged by the Union and that it was basically without contradiction and was not in dispute.

Mr. Simpson argued that the facts before this Board revealed that the grievor's conduct was a combination of non-culpable and culpable behaviour with the most recent being culpable, since the

grievor could perform her work but chose not to do it. He asserted that the events of late October 2001 (Ex 29, 30, 31) set out grounds for discipline, perhaps even termination, but, when considered in addition to the attendance and work relationship matters, that termination was clearly the Division's only choice.

Mr. Simpson reviewed the events which began in late October 2001 which confirmed that the grievor was not performing her required duties and had "slackened off", by her own admission. Despite an intense period of supervision and procedures to be followed as outlined in the letter of October 29, 2001 (Ex 29), by November 8, 2001 concerns about the grievor's work performance were again raised by the head custodian and verified by Mr. Kolba. Mr. Simpson noted that, further, the grievor attempted to place blame for her unsatisfactory work on the head custodian when she accused him of not fixing the vacuum.

Mr. Simpson urged the Board to consider the work performance concerns in light of the January 10, 2001 letter (Ex 26) and the "last chance notice" it contained. It was the position of the Division that this was a clear, unequivocal and express warning to the grievor as to the perilous position she was in, and the letter also contained a summary of the many issues which had been formalized with the grievor in the past.

Mr. Simpson also noted that Mr. Kolba had recommended severing the grievor's employment in May 1999 (Ex 24), but was overruled by his then superintendent. That letter also contained a clear warning to the grievor that her employment was in jeopardy, Mr. Simpson said.

Mr. Simpson stated that there could be no argument that the grievor had been lulled into a false sense of security by the lack of suspension. The letter of termination (Ex 8) and the follow up letter (Ex 4) established that the grievor knew what her status was and what the consequences of her actions would be. Further, he argued the grievor in her testimony did not testify or even suggest that she didn't know or anticipate what was coming.

It was the position of the Division that the employment relationship with the grievor was irretrievably severed by virtue of her course of conduct over the period of her employment and that her behaviour on November 12, 2001 "capped it". There could not have been a salvageable relationship after that argued Mr. Simpson.

Mr. Simpson provided the Board with the following cases which he reviewed: Re Pirelli Cables and Systems Ltd. and USWA, Local 2952 97 L.A.C. (4th) 63; Re Island Farms Dairies and Teamsters, Local 464 (1996) 52 L.A.C. (4th) 275; Re Emergency Health Services Commission and Ambulance Paramedics of British Columbia and CUPE Local 873 100 L.A.C. (4th) 267; Re Pope & Talbot Ltd. and IWA, Local 1-423 106 L.A.C. (4th) 19; Re Vancouver General Hospital and H.E.U. 107 L.A.C. (4th) 392; Re National Sea Products Ltd. and CAW 16 L.A.C. (4th) 65; St. Vital School Division No. 6 and CUPE, Local 3470 June 3, 2002.

It was Mr. Simpson's position on behalf of the Division that, while some case law refers to different standards to be met depending upon whether a grievor's conduct is culpable or non-culpable, under either standard the Division meets the test. Mr. Simpson referred the Board to the Pirelli Cables case (at page 70) which outlined the standards.

Mr. Simpson told the Board that some arbitrators require an employer to elect as to whether an employee's conduct is culpable or non-culpable. He stated he was of the view that there does not need to be an election made, but, if so, it was his position that the culminating events of October / November 2001 in light of the last chance warning amounted to culpable conduct. In support of this position Mr. Simpson cited Re Island Farms Dairies.

Ms McIlroy began her argument by commenting on the case law supplied by Mr. Simpson. She urged the Board to conclude that while there existed some cause for discipline with respect to the grievor's performance of cleaning duties, discharge was excessive.

Ms McIlroy argued that the evidence showed that when the Division put the grievor on notice about her attendance she took it seriously and improved. Similarly, when the grievor was put on notice about her work relationships, she admitted her fault and made changes and improved. With respect to the grievor's work performance the position of the Union was that, between October 29 and November 12, 2001, the grievor was unaware of the concerns raised by the head custodian because he had not submitted them in writing as set out by the process outlined in the October 29th letter and the grievor was unable to respond to them. Had the grievor been made aware, argued Ms McIlroy, then in all likelihood she would have been able to change and improve as she had in the past.

Ms McIlroy was also critical of the Division's failure to follow the steps of progressive discipline with respect to the grievor. She noted that the grievor was not violent, nor had she committed theft, for example, which may be grounds for immediate termination without progressive discipline. Ms McIlroy urged the Board to exercise its discretion and reinstate the grievor.

Ms McIlroy reviewed the following case law: Leading Cases on Labour Arbitration, Mitchnik and Etherington; Re Intellicom and UFCW, Local 832 August 4, 1998 (Peltz); Re Industrial Family (Hamilton) Credit Union Ltd. and OPEIU, Local 343 51 L.A.C. (4th) 443.

In reply, Mr. Simpson took exception to any suggestion that because the grievor was not disciplined progressively that the grievor was surprised or didn't know about her position. Progressive discipline arguments were a red herring in this case, said Mr. Simpson, because the grievor's knowledge that she had been given a final warning that her performance must improve was clearly established in the March 26, 2002 letter (Ex 4) which was not challenged.

Mr. Simpson took issue with the Union's assertion that the Division breached the process outlined in the October 29, 2001 letter because no forms had been submitted to Ms Normand. The process was to be abided by the grievor and it was clear that she was not doing her work said Mr. Simpson. Further, the process contemplated direct contact with the facilities management if more direct involvement was required and this was done.

I have carefully reviewed all of the evidence and arguments before me. The essence of the Union's submission was that the grievor had not been progressively disciplined and that something less than termination should suffice, particularly since the grievor had shown she could improve and change her behaviour. I agree with Arbitrator Teskey in St. Vital School Division and CUPE (Tarko grievance) where he said, "While I certainly accept the concept of progressive discipline, it is not an automatic or mechanical process. In certain instances ... which involve extremely serious offences there may not be the necessity of having a suspension step. Each case has to be decided upon its facts." (p. 14)

When reviewing the facts of the case before me it is apparent that the grievor was a difficult employee who required extensive management. The letters which the Division sent to Ms Normand chronicle the many difficulties she had and contain clear and unequivocal warnings to her about those, and the need to conduct herself appropriately. It is not difficult for me to conclude that the Division had just cause to discipline her. In particular, I note the attendance problems as described in the letter of May 18, 1999 (Ex 24) and the work relationship problems as described in the letters of November 8, 2000 and January 10, 2001 (Ex 25, 26). These two sets of problems give ample cause to discipline. The work performance problems, which occurred in October and November 2001, also give rise to discipline.

I don't think there is any question that the grievor knew she was "on the edge" in terms of her employment as of January 10, 2001 (Ex 26). Despite the Union's assertion that progressive discipline in the form of suspension should have been invoked, I do not see what benefit it could have had in these particular circumstances and none was brought to my attention. Generally, progressive discipline gives "...the employee an inducement to mend his ways and conform to an acceptable standard of behaviour... Discipline which is imposed on a progressive basis also precludes any argument by the employee of surprise by the seriousness with which the employer views the misconduct" (Mitchnik and Etherington at 10-152). Surely the letters of May 18, 1999 (Ex 24) and November 8, 2000 (Ex 25) and January 10, 2001 (Ex 26) did this.

The "last change notice" which the grievor received, encompasses "poor workmanship". Like the grievor in Pirelli Cables (at 72) Ms Normand is capable of performing to an appropriate standard. She failed to perform her duties as evidenced by the inspections on November 9th and 12th, even after she admitted she had "slacked off" in October, committed to pay more attention and was aware impromptu inspections would be conducted. It would appear from the grievor's own admission, and the observations of Mr. Kolba, that she chose not to perform her duties. That is within the grievor's sole control and her conduct in that regard is clearly culpable.

I am mindful of the grievor's length of service and age, particularly with regard to her employability, but no other mitigating circumstances have been disclosed.

Although at first glance it might appear that the penalty of discharge is too severe, when the whole of the grievor's record is examined, and the "last change notice" is given due consideration, in these particular circumstances, I am not prepared to exercise my discretion and set aside the termination. The grievance is therefore denied.

Dated at the City of Winnipeg in the Province of Manitoba, this 17th day of February 2003.

Diane E. Jones, Q.C.
Sole Arbitrator