IN THE MATTER OF: A grievance on behalf of Ms Patti Douglas against the refusal of a leave day pursuant to Article 28(4) of the Collective Agreement.

BETWEEN:

THE RIVER EAST TEACHERS' ASSOCIATION NO. 9 OF THE MANITOBA TEACHERS' SOCIETY,

Union

- and –

THE RIVER EAST SCHOOL DIVISION NO. 9,

Employer.

AWARD

Arbitration Board

Arne Peltz, Chair.
Gerald D. Parkinson, Nominee of the Division.
David M. Shrom, Nominee of the Association.

Hearing Date

February 13, 2003.

Appearances

Robert A. Simpson, counsel for the Division.
Garth Smorang, Q.C. and Susan E. Polz, counsel for the Association.

Nature of the proceedings

The collective agreement between the parties (Exhibit 1) allows teachers who perform 50 hours of extra-curricular duties to take one day of paid leave per school year. Article 28(4)(ii) provides that the scheduling of the leave day "shall be agreed upon between the Principal and the teacher".

The dispute in this case arose because of a Division Guideline issued after the clause on extra-curricular activities was negotiated by the parties. The Guideline (Exhibit 7, dated October 13, 1998) states as follows:

> 4. Consistent with past practice regarding leaves of absence, the paid leave of absence of one day will not be taken either one

work day prior to or following a major holiday period.

It was agreed that "major holiday period" refers to Christmas-New Year's vacation and the Spring Break.

The grievor, Patti Douglas, qualified for leave under the provisions governing extra-curricular activities, and wanted march 22, 2002 as her day off. This was one of the days excluded under paragraph 4 of the Guideline. It was the day before the commencement of Spring Break. According to the Agreed Statement of Facts (Exhibit 3), this is what happened next:

> 8. In early March 2002, Ms Douglas made a request of her Vice-Principal, Deb Reinhardt, for a substitute for March 22, 2002. Ms Reinhardt indicated that she did not believe March 22nd was a date available for taking a leave and referred Ms Douglas to the Principal, Barbara Bowles. Barbara Bowles then explained to Ms Douglas that the School Division Guidelines did not permit the taking of leave on March 22, 2002, the requested date.
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> 9. When Ms Douglas indicated to Ms Bowles that there were, to her understanding, no restrictions on the day the extra-curricular day was taken, Ms Bowles promised to speak to Assistant Superintendent Hildebrand.
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> 10. Through discussion with Assistant Superintendent Hildebrand, Ms Bowles confirmed that there had been no change in the School Division guidelines to be used for extra-curricular days. Ms Bowles then advised Ms Douglas that her request for leave on March 22, 2002 would not be granted. At no time was Ms Bowles unclear about her desire to follow the guidelines.

As a result, Ms Douglas took her Extra-Curricular Leave on another day. On April 29, 2002, the Association filed a grievance (Exhibit 2). Mr. Smorang advised the Board that no monetary relief is being sought. Instead, the Association is seeking a declaration that paragraph 4 of the Guidelines violates the collective agreement and is void.

The Association stated that the Division unilaterally created a workplace rule. Under well established principles, such a rule must be consistent with the collective agreement and must be reasonable. This Guideline was attached on the basis that the parties have, in Article 28, negotiated an arrangement whereby the Principal and the teacher would agree to schedule the leave day. The Division cannot now tie the Principal's hands by excluding certain days of the school year.

For its part, the Division put the Association to the strict proof of the grievance. Article 28(4) entitles a teacher to leave on a day agreed by the Principal. Here the Principal *did not* agree to March 22. The grievance therefore fails. More fundamentally, Mr. Simpson argued that the Division is allowed to issue reasonable guidelines based on legitimate operational considerations. The Guideline is just that – a *guide* to the exercise of discretion by Principals. Exceptions can be considered and granted, but no exception was approved for Ms Douglas. Again, the grievance must fail.

Review of the evidence

The Association proceeded on the basis of the agreed facts and documents. The Division called one witness, Assistant Superintendent Ron Hildebrand, who has held that position since 2000. It appears that the facts are not in dispute.

The Extra-Curricular Leave clause was negotiated during collective bargaining in early 1998. Between April and September 1998, there were a number of meetings involving Association members and Division administrators (Exhibits 4-6), addressing various implementation issues and culminating in a report submitted to the Superintendent by the "Committee on Extra-Curricular Activities". The precise status of the Committee was not made clear. However, the Committee held a number of meetings and received input from the elementary, junior high and high school levels. The Committee made recommendations concerning implementation, budget, monitoring, paid leave day and eligible activities. It recommended as follows with respect to the paid leave day:

> The recognition day shall be taken in negotiation and with the approval of the Principal. The timing shall be left for each school to determine. (Exhibit 6, p. 2)

On October 13, 1998, the Superintendent, J.M. Kojima, circulated to all Principals a memorandum attaching the Guidelines in dispute in this case. The cover sheet alerted recipients to the fact that the guidelines had been revised from the draft copy. In particular, paragraph 4 had been changed. Rather than leaving timing for each school to determine, a Division-wide policy was stated. As noted above, the Superintendent established the following approach:

> 4. Consistent with past practice regarding leaves of absence, the paid leave of absence of one day will not be taken either one work day prior to or following a major holiday period.

In response to the Guidelines, the Association prepared a position paper (Exhibit 8), commenting in detail on the Division's document and objecting strongly to paragraph 4:

> ….. Whether or not "past practice" is as described by the superintendent, the Association is of the view that the leave in Article 32 [now 28] is of a different nature than other kinds of leaves of absence provided for in the collective agreement. The provision of the leave of absence in Article [28] is dependent upon a teacher performing services over and above the services required for any other kind of leave of absence. As such, the only limit on the time the leave may be taken is that expressly provided in Article [28], i.e., mutual agreement between the teacher and the principal. The Association would consider a divisional directive limiting the principal's discretion to be a breach of the collective agreement.

The Association's position was forwarded to the Superintendent by Association President Cheryl Scott, shortly after the Guidelines were issued (Exhibit 9).

Mr. Hildebrand testified that he was the Principal at Kildonan East Collegiate when the Guidelines memo was issued by Mr. Kojima in October of 1998. Attached to the Superintendent's memo was a single sheet. The new "Extra-Curricular Activities Paid Leave" form was on one side and the text of

Article 32 [now 28] and the Guidelines were printed on the reverse. Since then, similar notices have gone out to Principals. Thus, anyone filling out the form would be aware of the Guidelines.

Mr. Hildebrand has been employed in the Division since 1974. He said that as long as he could remember, it had been the Division's practice not to allow any personal leaves immediately before or after the major holidays, except for special circumstances. As examples of leaves which *were* granted on these days, he cited an ill family member or a hospitalization. There would have to be circumstances beyond the teacher's control. If the teacher merely wished to extend her vacation period, this would not be allowed. Last Christmas, three exceptions were allowed. One teacher was getting married just before Christmas. The other two were cases of ill parents.

The rationale for the Guideline, as explained by Mr. Hildebrand, was to ensure that schools are able to operate normally on each teaching day. At one time, it became apparent that teachers were using leaves of absence to extend their vacation periods and take advantage of cheaper travel. The Guideline was intended to avoid a large number of teacher absences, which can make it difficult to find enough substitutes and to carry on with regular instruction. Beyond that, there is the disruption caused whenever the regular teacher is absent from the classroom.

When the new Extra-curricular Leave was introduced in 1998, the existing policy was applied to the new leave days, just as it has applied in the past to other forms of leave. However, prior to 1998, the Guideline was not in written form, except insofar as it was expressed in the minutes of various Superintendents' meetings.

Mr. Hildebrand acknowledged a distinction between the different forms of leave under Article 14 of the collective agreement. Some leaves are entirely discretionary – for example, personal leaves under Article 14(6). The Division generally did not allow such leaves before and after the major holidays. However, the Guideline was *not* applied to sick leave or maternity leave. He conceded that the best person to decide such matters is the school Principal. The Principal is aware of the school's needs and the day to day activities planned in the school. He agreed that it makes a difference, in terms of impact upon school operations, how big the school is and how many teachers are applying for a leave around major holiday periods.

Mr. Hildebrand testified that many teachers would seek to access these days under Article 28 if they could do so. Even with the longstanding policy against such leaves around holiday time, the Division has received numerous requests from teachers. Under cross examination, Mr. Hildebrand was pressed to agree that without the Guideline, administrators could still manage their schools. He agreed that a Principal could ration the leave days around holiday periods, if an excessive number of requests was received. Moreover, the Principal could exercise discretion and deny a leave if the timing was inappropriate.

At the material time, the Division had 900 teaching staff, 400 non-teaching staff and 28 schools. Since the recent amalgamation with Transcona School Division, the new Division has 1300 teaching staff, 700 non-teaching and 42 schools.

Final arguments of the parties

The parties may not be as far apart as the foregoing review might initially suggest. The essence of the Association's challenge is that a discretion has been vested in Principals under Article 28(4)(ii) of the collective agreement. Therefore the Division is not entitled to override a negotiated provision such as this by unilaterally dictating to Principals that they shall not approve certain days as Extra-Curricular Leave days. In response, the Division *agreed* that Principals may exercise a discretion, albeit guided by a Divisional policy which is based on operational considerations. Thus, it appears to the Board, the

parties share the view that the Principal's hands are not completely tied when dealing with a teacher's request to schedule an Extra-Curricular Leave day around a major holiday period. The difference may lie in degree to which the Principal's hand may be guided in making her decision.

The Association characterized the Guideline as a *KVP*-type rule: *Re KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537*, (1965) 16 L.A.C. 73 (Robinson). Under *KVP*, company rules imposed unilaterally must be reasonable and must be consistent with the collective agreement. Mr. Smorang cited authority for the proposition that *KVP* has been applied beyond the disciplinary context: *Re Miracle Food Mart and United Food & Commercial Workers, Locals 175 & 633*, (1990) 17 L.A.C. (4th) 165 (Marszewski) at p. 179. He also presented to the Board a number of cases illustrating management action which arbitrators have found to be unreasonable or contrary to the agreements in those specific cases. In *Re Family and Children's Services of Renfrew Country and City of Pembroke and Ontario Public Service Employees' Union, Local 459*, (1985) 20 L.A.C. (3d) 359 (Devlin), the collective agreement provided that "vacation leave shall be granted at a time agreeable to both parties". Wholesale cancellation of all vacation in preparation for an anticipated strike was held to be a breach of the agreement:

> Vacation is a matter which must be addressed on an individual basis. There may be consideration pertaining to the operational requirements of the employer which necessitate the employer refusing an employee's request for vacation leave at one time while granting it at another. As a consequence, the nature of the subject requires individual consideration … (at p. 365)

The Association acknowledged the Division's right to provide guidelines for Principals making decisions under Article 28, based on legitimate operational requirements. Here, however, the Principal told the grievor that the Guideline "did not permit" a leave on March 22, 2002 (Exhibit 3, para. 8). Thus, in the Association's view, no individual consideration was ever given to the grievor's request, and that was a fatal flaw.

The Division concurred that there must be an opportunity for individual consideration of requests under Article 28. In its understanding, the Guideline does not preclude such consideration. Mr. Simpson emphasized that the Guideline is exactly what it purports to be – not a prohibition, but a *guide* to decision-making by Principals. On the evidence, a number of requests for leave days were granted last Christmas, based on special circumstances presented by the individual teachers. In the current case, there is no indication that the Principal's hands were tied. The facts simply show that Ms Bowles declined the grievor's request.

The Division urged the Board to reject the grievance on this basis alone, without going further into an examination of the reasonableness of the Guideline. However should that additional step be necessary, the Division cited authority supporting its right to enact a Guideline which serves to ensure a reasonable degree of consistency across a large school operation: *Re Transcona-Springfield School Division No. 12 and Canadian Union of Public Employees*, [1994] M.G.A.D. No. 10 (Teskey), approved in *Re Transcona-Springfield School Division No. 12 and United Food & Commercial Workers, Local 832*, (1994) 44 L.A.C. (4th) 363 (Hamilton) at p. 377; *Re St. James Assiniboia School Division No. 2 and Canadian Union of Public Employees, Local 744*, (1999) 78 L.A.C. (4th) 336 (Graham) at p. 345-346.

The Division submitted that employer discretion in scheduling cases has been upheld when exercised in pursuit of "a reasonable business interest": *Re Burns Meats, Division of Burns Foods (1985) Ltd. and United Food & Commercial Workers Union, Local 832*, (1992) 30 L.A.C. (4th) 186 (Peltz) at p. 197; *Re Royal City Bingo and Canadian Union of Public Employees, Local 3999-12*, (1999) 82 L.A.C. (4th) 235

(McPhillips) at p. 245; *Re Workers' Compensation board of British Columbia and Compensation Employees' Union* (1999) 80 L.A.C. (4th) 352 (Jackson) at p. 362, applying the leading case, *Re United Parcel Service Canada Ltd. and Teamsters, Local 141*, (1981) 29 L.A.C. (2d) 202 (Burkett) at p. 213.

Analysis and conclusions

The full text of Article 28 of the collective agreement is as follows:

> (1) "Extra-Curricular Activities" means student-related athletic, social, recreational and cultural activities, occurring outside the normal school day, but does not include activities related to academic or instructional matters or curriculum subjects outside the normal school day, whether such occur alone or with students, parents or administrative staff, such as (without limitation) staff meetings, parent/teacher meetings, committee work, in-service sessions, marking and setting examinations, or marking school assignments.
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> (2) The parties acknowledge the importance of extra-curricular activities as an integral part of each student's education experience.
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> (3) An eligible extra-curricular activity is an activity that has received prior approval from the school principal.
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> (4) Commencing September 1998, and thereafter, in any school year (as per the Minister of Education and Training's definition) a teacher will be entitled to a paid leave of absence of one day provided that he or she:
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> i) performs 50 hours of eligible extra-curricular duties during the school year; and
>
> ii) the date for such leave shall be agreed upon between the principal and the teacher and such additional day shall not be cumulative beyond the current school year.

Article 28(4)(ii) uses the phrase "the date for such leave shall be agreed upon between the Principal and the teacher". The Board does not understand such wording to preclude the issuance of guidelines which can be justified by the Division on reasonable operational grounds. In *Transcona-Springfield CUPE* (Teskey), cited above, employees could take unused vacation time during the school term "provided that time requested is agreed upon by the School and Division Administration". The employer adopted a policy that such vacation time would only be granted "for special reasons/events". Examples where leave had been allowed included a family surgery, a 50th anniversary and an invitation to appear as an out of town speaker. In the evidence, consistency between the Division's 23 schools was highlighted as a management concern. Under these circumstances, the arbitration board denied the grievance:

> Given that the Agreement is silent as to criteria, it does not appear unreasonable to us that he Division should have attempted to have developed a general guideline towards the

> exercise of such discretion **…,** albeit such general guidelines must then be applied to the particular request upon an individual basis.
>
> **…..**
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> It must be remembered that when a board such as this considers what is "reasonable" or "fair", it does not deal with an absolute "right" answer. Rather, it considers whether the answer provided by the party concerned falls within the realm of reasonableness. It is not our function to set priorities between competing values if the parties have not set them themselves within the Collective Agreement. (at QL p. 13)

In the present case, although the text of paragraph 4 of the Guideline is couched in apparently prohibitory terms, the Division has clarified that exceptions may still be sought in discussion with the Principal. That is, the Division will entertain requests for Extra-Curricular Leave during any part of the school year, but should a teacher wish to join her leave with a major holiday period, this will only be allowed under special circumstances. Such was Mr. Hildebrand's evidence. In other words, there is a 4-day blackout but the Principal may grant an exception. It is not the function of an arbitration board to substitute its judgment for that of the Division with respect to the rationale for this blackout policy. We find that the employer here has acted in pursuit of reasonable operational concerns, namely, ensuring that it can maintain an effective teaching complement during days which might be difficult to cover if leaves were freely available.

This leaves only the question of whether, in Ms Douglas' specific case, there was a failure to consider her individual circumstances in applying the Guideline. The Board's task is made somewhat more difficult because of the fact that no witnesses testified as to the events in question. The Agreed Facts should speak for themselves, but the parties differ in their interpretation of the stated facts.

A somewhat similar situation arose in St. James Assiniboia School Division, cited above, where the employer required certain employees to take one week of their holidays during school vacation periods. This way, the employees did not need to be replaced and the Division could save a modest amount of money. Arbitrator Graham found that the policy was reasonable but went on to consider whether the Division had failed to consider the grievors' individual circumstances in seeking vacation during the blackout period.

> The two memoranda from the Division (Mr. Lyons) dated March 11, 1996, to caretakers and to cleaning staff, both contained the following phrase in relation to the fifth week of vacation:
>
> > v these vacation days *must be taken* during the spring or Christmas breaks or on days when replacement staff are not required. [Emphasis added]
>
> Those stark words do give rise to an inference that the Division will slavishly follow its policy without any consideration of the unique circumstances of individual employees.
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> However there are other matters in evidence that tend to indicate that the Division may not be entirely rigid in applying its policy.

> For example caretakers were directed to review their vacation plans with their respective principals, and cleaners were directed to review their vacation plans with their supervisors, before submitting their vacation request forms to the Board offices. Such reviews would present an opportunity to employees to bring any special considerations affecting their choice for a fifth week of vacation to the attention of the Division.
>
> **…..**
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> Neither [of the grievors] testified as to whether they had discussed with their principals or with any other representative of management of the Division, their individual circumstances as they related to their requests for their fifth week of vacation, prior to the Division responding to their vacation requests for 1996-1997. It is therefore impossible to determine what, if any, consideration the Division gave, or ought to have given, to the individual circumstances of [the grievors]. Accordingly the grievors have failed to discharge the onus upon them to establish that the Division acted unfairly or arbitrarily in denying their vacation requests, and their grievances cannot succeed on the basis of an argument of unfairness in the application of the Division's policy. (at p. 346-347)

In the present case, the Division argued that the Agreed Facts fail to establish any refusal to consider Ms Douglas' individual circumstances. By contract, the Association submitted that the Agreed Facts were unequivocal. March 22 was not a date which was "available" for Extra-Curricular Leave. The Principal explained to the grievor that "School Division guidelines did not permit the taking of leave on March 22" (Exhibit 3, para. 8). This was a prohibition, not a guide, said the Association.

The interpretive problem arises because there wee no witnesses who could describe the conversation between the Principal and the grievor. Did Ms Bowles say that the Guideline prohibits March 22 as a leave day? Or did she say that, after due consideration, there was no basis to grant an exception to the general rule against a leave on such a day? If the former is true, the Association would succeed on this issue, in that the Division acknowledges that special circumstances should be considered. If the latter, the grievance might well fail, although it is inherent in arbitral review that all the circumstances must be considered and that the employer must act fairly and reasonably. Here we know few if any individual circumstances.

Because the Association has withdrawn any request for a monetary remedy, and is seeking only declaratory relief, the Board sees no need to answer this question definitively. In accordance with our obligation to determine the substance of the dispute between the parties, it is important to address the proper interpretation and application of the Guideline for the future.

Award and order

The grievance is allowed in part. Under part (d) of the request for relief ("such other remedies as may be fair and reasonable in the circumstances"), the Board issues the following declaration:

> Paragraph 4 of the Guidelines issued on October 13, 1998 will not violate the collective agreement, insofar as individual

requests for leave within the blackout period are considered by the Principal and approved when the Principal deems that individual circumstances exist to justify departing from the general rule.

Jurisdiction is reserved to deal with any aspect of remedy which remains outstanding or to further clarify the declaration issued herein, upon the request of either party.

In conclusion, the Board thanks the parties and their counsel for their clear and succinct presentation of this case.

DATED at the City of Winnipeg this 12th day of May, 2003.

ARNE PELTZ, Chair

I agree/~~disagree and my reasons are attached~~/I have not written reasons.
G.D. PARKINSON, Division Nominee

I agree/~~disagree and my reasons are attached~~/I have not written reasons.
DAVID M. SHROM, Association Nominee