

ARBITRATION BULLETIN

No. 01-90

March 2nd, 1990

TURTLE MOUNTAIN SCHOOL DIVISION #44

and

FRIEDA SAWATSKY-CARRILLO

TEACHER TERMINATION

Chairperson: Paul Teskey
Division's Nominee: Gerry Parkinson
Nominee of the Teacher: L. Marks

COUNSEL:

For the Division Rob Simpson and
L. Murray
For the Teacher M. Myers, Q.C.

The teacher was employed by the Turtle Mountain School Division as a Teacher/Librarian at Killarney Collegiate from the fall of 1970. In the school year 1984/85 she was transferred to Mayfair Colony School in a multi-grade situation. In the third quarter of that school year, there were concerns with respect to the lack of organization, discipline and learning taking place at Mayfair School.

After close to a three-year intensive evaluation period, numerous concerns persisted regarding the teachers competency despite the assistance provided to her by the Division. The Board of Trustees made a decision to terminate her contract effective December 31, 1988. Pursuant to Section 92 (5) of The Public Schools Act, the teacher requested reasons be given for termination and by letter the Superintendent replied as follows:

"In general, your contract was terminated due to your unwillingness or inability to teach to the standards expected in the Turtle Mountain School Division No. 44. Your overall performance has been a subject of intensive evaluation and discussion with you since March, 1986. During the past two (2) years particular areas of concern have included your unwillingness or inability to plan for effective instruction and to provide any/or appropriate classroom management and control.

Furthermore, in spite of these and other areas of concern being identified and in spite of the assistance that has been provided, there has been little, if any improvement in your performance during this period.

In taking everything into consideration, the Board is not prepared to continue your employment as a teacher in this school division."

The teacher referred this matter to a Board of Arbitration to determine whether the reasons constituted cause for termination pursuant to Section 92(5) of the Public Schools Act.

BACKGROUND

The Board of Trustees met on November 22, 1988 to deal with the matter of the teacher's termination. On the same day, an M.T.S. staff officer suggested to the Superintendent that the teacher be placed on extended sick leave for one year. It was further stated that the teacher's doctor had confirmed that she was ill and wouldn't be working. It was suggested that because the teacher was ill, that the Board defer the meeting and the decision until the teacher had recovered and an assessment could be done at that time. The M.T.S. staff officer further stated that a medical certificate would be produced but was not available at that time and requested an opportunity for the same time to produce it.

The Superintendent refused to recommend that the Board defer its consideration. He was not aware of any element of illness until twenty minutes prior to the Board meeting and indicated to the M.T.S. staff officer that the request would have to be made to the Board.

It was shown that the teacher had no absences for medical reasons in 1987 and prior to November 22, 1988, there was one-half day's absence due to illness. The teacher was absent on November 22 due to sickness and remained so until December 31, the date of termination.

On November 24th, the Division received a medical certificate which indicated that the teacher *"has not felt well for 4 years and this being acute for the last 4 months, she has been off duty since November 22nd, I would advise a period of sick leave during which she will have a period of medical investigation."*

THE DIVISION'S ARGUMENT

The Division called a number of witnesses including the former superintendent, an acting superintendent and the current superintendent all who had been involved in an extensive evaluation process with the teacher during the former three years.

Counsel for the Division stated that the jurisdiction of the Arbitration Board was limited to the issue defined in s. 92(4) (d), that being *"whether or not the reasons given by the school board for terminating the agreement constitutes cause for terminating the agreement"*.

It was suggested by Counsel that the onus rested with the Division to establish such cause but once that onus had been met, the onus then switched to the teacher to establish such "excuses" as depression or unfairness of the process. It was suggested, that what might usually be considered as mitigating or ameliorating factors might not be within the Board's jurisdiction to consider once the initial onus of cause had been established.

Counsel for the Division placed great stress upon the fact that the teacher had not testified herself and, therefore, the Arbitration Board could not know how she felt physically or mentally day by day, nor how she felt about the fairness of the process.

He suggested that the cause was quite simply that the teacher could not teach to the standards required based upon her overall performance since March of 1986. In a nutshell, the reason for dismissal was incompetence.

Counsel submitted, and provided various authorities in support of the proposition, that incompetence clearly was a basis upon which cause could be established.

It was submitted that even if the Arbitration Board felt it was within their jurisdiction to consider the "excuses" put forward by the teacher, same simply did not "wash" and that's what was being requested by the teacher was that the unchallenged incompetence be excused.

It was the Division's position that the medical evidence was not sufficient to establish that the depression diagnosed by the teacher's psychiatrist in December of 1988 played a materially operative role in the teacher's performance. It was noted that the teacher could have been depressed as a result of the termination itself. The depression, even if it pre-existed to some degree, could have been aggravated by the termination and would not serve to explain the three years previous.

It was also noted that the medical reports furnished to this Arbitration Board were not provided to the Division until after (and in some cases well after) the contract had been terminated.

Mr. Simpson stressed that the medical evidence, even if it was accepted, could not account for and excuse all of the problems encountered by the teacher, which problems indicated that she lacked the ability to teach. There was not a sufficient evidentiary basis to arrive at the conclusion that the evidence of occasional improvement or attempts could be linked to non-depressed intervals.

Neither did he feel that the evidence as to defects in the process was sufficient to prevent a finding of cause.

It was submitted that evidence relating to the Division's Evaluation Policy was based solely upon the documentary evidence and, therefore, little weight could be put upon it. As well, it was suggested that this evidence should not be considered as truly independent in that it was admitted that the witness was there to make a case in defense of the teacher and was acting in an advocacy role. As well, the witness did not testify at any time that the teacher was competent but, rather, acknowledged that she appeared to have some difficulties.

It was further noted that this witness acknowledged that not all pre- or post-conferences or discussions or informal visits would always be recorded and, therefore, at most his evidence could be considered as casting criticism upon the recording procedures followed but that in no way invalidated the conclusion reached as to cause.

As to the issue of process, stress was also placed upon the fact that the teacher did not testify, nor did she ever utilize the appeal processes found in the policy itself. The Arbitration Board did not receive any evidence from her as to any perceptions of unfairness between 1986 and 1988 that she might have felt.

In conclusion, Mr. Simpson reminded the Arbitration Board that the Division was in the business of providing an education to children and suggested that the evidence was clear that the teacher could not perform that function.

THE TEACHER'S ARGUMENT

Counsel for the teacher called a number of witnesses. The first being her physician. He testified that he treated the teacher for minor problems in Spring 1987 and June 1988 for problems, he believed that were related to menopause. He saw her again Nov. 22, 1988 (date of the hearing) at which time she did not mention to him any trouble at work at that time. He was concerned about her weight loss and ran some tests for physical problems which were negative. He then referred her to Dr. Moggey, a psychiatrist. Her physician saw her again in June 1989 at which time he testified that she had regained some of the weight

loss, regained her colour and was not "twitching or shaky" nor did she seem harassed. During the hearing, he was unable to say whether or not she was capable of returning to teaching.

The next witness, a psychiatrist, first saw the teacher December 19, 1988. In her evidence, she described the teacher as having "psycho motor retardation", being slow in movement, slow in response to questions and slow mentally and physically.

The psychiatrist's diagnosis at that time was that the teacher was suffering from a major depressive illness which in turn produces physical symptoms and requires medication. She considered the problem to be biochemical although conceded that it was impossible to directly check the biochemistry of the brain. She indicated that such a condition could be genetic or created by severe stress (e.g. a child who loses a parent, someone who feels totally helpless) or can result after childbirth. It could also be related to menopause. The symptoms which the teacher's doctor testified existed in 1987 could be consistent with menopausal depression.

The psychiatrist felt that all of the teacher's conduct from 1985 on was consistent with the diagnosis of major depressive illness. The doctor suspected that the teacher was much more depressed than her own doctor realized and noted that the teacher, when initially seen, had no insight into the fact of her own depression. She indicated that it was quite possible that she had been depressed since 1987 and perhaps earlier.

A major depression would affect everyone, not just a teacher, in that it would impair problem solving, figuring things out and judgment. In her opinion, it would definitely interfere with teaching.

She testified that it was not really the colony school per se which would complicate the condition but indicated that the grievor had a basically passive nature and should not be in an administrative position such as a one room school with limited supervision but rather in a school situation where support was available. The one room school situation may have exacerbated or precipitated a major depressive illness.

Since March 1989, the psychiatrist had suggested that part-time teaching be attempted to see how she could do. She was concerned that returning to her former position in the colony school would create too much stress and that she should not go back to such a situation if she was the only teacher present. In July 1989, the doctor provided a report to the teacher's lawyer indicating that the teacher has been severely depressed for several years and she really is just now recognizing the seriousness of the depression as it has been treated. It was the doctor's opinion that the teacher could return to work, in a supervised position and continue with medication.

It was submitted by the teacher's counsel that the Division had to establish substantial and significant grounds for a determination of cause, particularly in light of the fact the grievor had served eighteen years within the Division.

While Counsel admitted that it was difficult to deny incompetence based on the "recorded conduct", there were two bases upon which the "recorded conduct" or evaluations were unreliable. The first basis was the evidence as to the illness of the teacher. If the Board were to determine that that illness was operative during the evaluation period, then the incompetence, even if it were established, could be considered as involuntary since it arose from illness.

He suggested that the evidence of two doctors who testified was consistent and credible. While the teacher's doctor may not have initially provided the proper diagnosis, nonetheless the symptoms he recorded were consistent with the ultimate diagnosis of the psychiatrist and suggested that the condition had been in existence for a considerable period of time.

Counsel noted that both the Superintendent and the Division had been alerted to the existence of a medical condition (although not the specifics of same) prior to the decision to terminate. As well, neither the Superintendent nor any other member of the Board had attempted to follow up the medical information that was received or to place the teacher on sick leave or attempt to make any other alternative arrangements with the teacher and/or MTS to defer the decision until the investigation had been completed.

Counsel suggested that all of the symptoms would contribute to an inability to teach based upon illness and that the actual teaching environment may also have exacerbated the illness itself.

The second basis for doubting the reliability of the evaluations was suggested to be failure to follow the Division policy itself and failing to provide a fair and reasonable evaluation process, particularly in the lack of remedial help offered to the teacher and in the shortening of the evaluation time lines pursuant to the policy.

It was suggested that evidence submitted by a principal in River East School Division who has done numerous workshops on the subject of teacher supervision and evaluation was credible and, although his evidence had limitations, Mr. Myers suggested that his evidence was based upon his honest opinion. A certain degree of objectivity was reflected by the fact that when positive statements could be made (for example, the policy itself), they were.

Mr. Myers also exhaustively canvassed the evidence as to the evaluation process and suggested that there were deficiencies in recording, pre- and post-conferencing, specificity as to the remediation plan, and a lack of collegiality or a sincere attempt to assist the teacher throughout. It was his view that the most proper evaluation had been done by the current Superintendent in February of 1988 (the recommendations of which were agreed to by the teacher's doctor) and which indicated that the teacher ought to have been transferred from the current teaching environment. However, the Superintendent did not follow his own recommendation and it was suggested that he had actually "given up" on the teacher prior to the remediation plan being put into effect since the plan was only put in place after he and the acting Superintendent felt the teacher could not teach in any classroom. It was submitted that after that, the result was inevitable.

In totality it was submitted by counsel that the process was unfair and unreasonable in itself and even more dubious in light of the medical evidence.

In conclusion, counsel submitted that the teacher should be reinstated. Although he recognized the limitations to the Board's jurisdiction under s. 92(e) of the Act, he requested that the Arbitration Board record that the remedy being sought by the teacher was reinstatement and the only monetary remedy to be pursued was the recapture of utilized sick leave (approximately forty days) and nothing more.

DIVISION REBUTTAL

In reply to Mr. Myers comments as to the compassion exhibited by the Board of Trustees, Mr. Simpson requested the Arbitration Board to "put on their shoes" in light of the information they had received at the time. He disagreed strongly with the proposition that status could not be changed (i.e. to termination from sick leave) and suggested that adopting such logic could lead to the result that a teacher would simply call in sick on the day a decision as to termination was to be made or to become effective, thus avoiding the consequences of that decision if it were negative.

He stressed that the teacher was not terminated for illness but solely for incompetence.

It was his view that the evidence disclosed that, rather than "giving up" on the teacher or adopting an attitude of "shape up or ship out", the Division had lived with the situation for some three years and had made reasonable attempts to assist the teacher inclusive of sending her to the W. Martin Workshop in the summer of 1988.

He also noted that the Superintendent had changed his February 1988 recommendation both because he felt it was no longer appropriate and, as well, there was no vacancy within the Division available as an alternative position for the teacher into an alternate position.

As to the time frame of evaluation being shortened, it was suggested that the policy was a guideline rather than an absolute and, as well, it had to be remembered that the teacher had already been on probation on Level 2 for some two years.

THE DECISION

"There are two basic issues upon which this matter turns. Those are: (1) The impact of the medical evidence and what, if any, causal relationship can be drawn between the medical condition and the conduct of the teacher; and (2) The alleged defects in the evaluation process itself.

It appears to us that the primary issue is that of the teacher's medical condition. If one accepts the evidence of Dr. Moggey, the psychiatrist, that the teacher suffered from major depressive illness which would "definitely interfere with teaching" to the extent that "she would not be able to teach even one student" it is difficult to see how any assessment process, no matter how flawed or how perfect, could be considered as appropriate or even material to the end result. Leaving aside for the moment the issue of when the medical information was made available to the Division, the grounds of attack on process need only be considered if we do not find a medical basis for the probability of medical causality for deficient conduct.

We need not find that the teacher is competent, rather we need only find that the assessment of incompetence was upon the proper test of the balance of probabilities, conducted during a time when the medical condition influenced the outcome of the assessment.

While it is fair to say that much of what the teacher's physician related was based upon symptoms told to him by the teacher, it is difficult to accept that the symptoms related to him were concocted on a premonition of a need to establish a justification for the events to come.

While, doubtless the condition could be exacerbated by the actual fact of termination itself, we accept Dr. Moggey's evidence that it was more probable that the condition existed prior to the termination. We also accept that, on the balance of probabilities, the medical condition would have detrimentally affected her performance as a teacher and coloured the assessment of that performance.

We do not believe that the Board of Trustees would find it appropriate cause to dismiss a teacher who had clearly defined physical symptoms which adversely affected conduct and which were treatable.

There are various possibilities which may emerge but which are not within our jurisdiction of determining whether or not the reason given by the Board constituted cause for termination. Based upon the medical evidence, we find upon the balance of probabilities, that it did not. Having made such a finding, we therefore must direct that the agreement be continued in force and effect without the imposition of any other conditions. Our jurisdiction is also limited by the fact that the agreement we are ordering to be continued in force and effect [pursuant to the language of s. 92(4)] is that of the teacher at Level 2.

In finding as we have, we need not deal with the alleged errors in process for the reasons we have already indicated. We would simply note that we agree with Mr. Simpson that the evidence relating to the division's evaluation process must be seen as being limited in scope, being based only upon the documentary evidence which in no way could contradict the evidence of the Division witnesses as to the various discussions etc. which took place. This issue is one where the lack of testimony by the teacher could well have played a more significant role. As well, we wish to note that we did not find any lack of bona fides in the conduct of the Superintendent or the Board of Trustees but we do find that a serious error (albeit honest) has taken place."