

IN THE MATTER OF: Two grievances arising from the decision dated June 15, 2009 to transfer Pat Hamm from her teaching position at Carman Collegiate to Boyne View School.

BETWEEN:

PRAIRIE ROSE SCHOOL DIVISION,

Employer,

- and -

**PRAIRIE ROSE TEACHERS' ASSOCIATION
of the MANITOBA TEACHERS' SOCIETY,**

Union.

AWARD

Appearances

Robert Simpson, Counsel for the Employer

Tim Valgardson, Counsel for the Association

Nature of the proceedings

Pat Hamm ("the grievor") was transferred from her teaching position at Carman Collegiate to Boyne View School, an assignment she resisted, effective September 2009. In her grievance (Ex. 4) and the parallel Association grievance (Ex. 2) filed on June 30, 2009, it was alleged that the Division initiated the transfer as discipline for perceived misconduct and not

for the stated purpose of ensuring the best interests of the school and the grievor. The grievances also asserted the following: the grievor was disciplined without just cause; the Division exercised its discretion to transfer for an improper purpose; the Division acted unfairly and unreasonably; there was a failure to consult prior to the transfer as required by Article 19 of the collective agreement (Ex. 1). The Board of Trustees denied both grievances on August 31, 2009 (Ex. 3, 5). The matter was referred to arbitration in October 2009 and heard on March 2, 3 and 24, 2010.

This dispute had its origins in an anonymous mass e-mail distributed on March 26, 2009 by a group calling itself “Carman Collegiate Parents Who Care”. The e-mail announced an open public meeting to be held on April 9, 2009 for the purpose of organizing to “demand a higher education for our children” (Ex. 8). It was an explicit denunciation of the work being done by teachers, administrators and the Division at the school. The unsigned e-mail and the ensuing public meetings had an explosive effect in the local community. A number of professional staff at the collegiate were traumatized. None of the organizers had raised their concerns through regular channels before resorting to a public protest. It was common ground in the present case that the actions taken by the parents’ group were damaging and highly inappropriate.

The grievor’s husband was involved with the group at the outset and chaired the first public meeting. As a result of a complaint and given the spousal connection, the grievor was investigated by the Superintendent who concluded that she was implicated. She denied the accusation. Notice was given to the grievor under section 92 of *The Public Schools Act* that she may be terminated and the Board of Trustees held a hearing on June 15, 2009. The Board concluded that there was insufficient evidence to support termination or discipline. However, believing that the school was in a chaotic condition due to the controversy and given perceptions that the grievor was in a conflict of interest, it was decided that the grievor

must be transferred out of Carman Collegiate. At issue is whether this was a valid transfer in pursuit of educational needs or a disguised disciplinary penalty.

After meeting with the grievor, the Superintendent then assigned her to teach in a Hutterite Colony School operated by the Division, a placement which the grievor alleged was chosen in order to punish her. The grievor said that the Superintendent was hostile towards her due to a strained past relationship and due to his belief that she was guilty of helping organize the protest. For this reason, she was given an undesirable teaching position. The Division responded that this was the only available posting which could accommodate the complexities of the grievor's schedule. The grievor was at all material times the President of the Prairie Rose Teachers' Association ("the Association" or "PRTA") with a 25% release and also an executive member of the Manitoba Teachers' Society ("MTS") with an additional 20% release. The Division denied any ulterior motives in ordering the transfer.

The evidence

Witnesses

Fred Colvin ("Colvin") is the Superintendent and CEO of Prairie Rose School Division and has 38 years of experience in a variety of educational roles. The Division stretches 160 kilometers across three non-contiguous areas in south-central Manitoba. There are 10 community schools and 16 Hutterian Colony Schools. The latter group operate under one administrative umbrella, overseen by a supervising principal and vice-principal. Each Colony school has a teaching principal and K-8 teachers on site. Instruction for grades 9-12 is delivered via interactive television. The Colony schools comprise about 20% of the student body and utilize about 20% of the teaching staff.

Hugh Greaves (“Greaves”) has been a trustee for 19 years and has served 14 years as Chair of the present Board and the Board of the former Midland School Division. The current Division resulted from the amalgamation of Midland and White Horse Plains in 2002. He lives on a farm west of Miami, Manitoba.

The grievor, Patt Hamm, lives in Carman, Manitoba with her husband Rob Hamm and their children. She has 15 years of teaching experience and has been employed by the Division since 1999. Prior to that she worked for Winnipeg School Division in nursery and grade 1-3 settings. She holds a Bachelor of Arts, Bachelor of Education, Masters of Education and additional certification in special education. In her testimony, the grievor detailed a lengthy series of professional involvements and interests in the field of early childhood education. Her background and strength in this area was not disputed.

The grievor’s work history and relationship with her Superintendent

The Association led detailed evidence of the grievor’s employment history with the Division going back to her initial hiring in 1999. In final argument, it was suggested that both Colvin and the grievor had “tarnished perceptions” due to tensions which developed over the years around teaching assignments, transfers, collective bargaining and release time for Association and MTS business. For its part, the Division denied anything other than ordinary exchanges between a Superintendent and a teacher.

The grievor testified that she was working in Winnipeg School Division in 1999 when she applied for a position with Prairie Rose Division. By that time, she and her family had moved to Carman from Winnipeg and she was finding the commute to be difficult. One day she had a vehicle rollover with her daughter in the car. She was offered a Grade 1 teaching position at Miami Elementary School, located 34 km south-west of Carman, and accepted

the position. Colvin was part of the interview panel and according to the grievor, he was very complimentary about published materials she had helped prepare. Shortly after she started work, he approved her leave of absence request to attend an Alberta conference she brought to his attention. In cross examination, Colvin agreed that the grievor's solid resume in the early childhood field helped her obtain the position.

The grievor spent four years in Miami and was active in the Early Childhood Education Council as well as numerous professional development activities. During this time, she remained on the Winnipeg School Division seniority list and was extended year-by-year. In her third year at Miami, she was offered a position in Winnipeg. As a result, she went to meet with Colvin to assess her future prospects in Prairie Rose Division. According to the grievor, Colvin said he had noticed and appreciated her extra efforts, including for example initiating student led conferences. He told the grievor that he was supportive of her career. Based on this very positive feedback, the grievor decided to turn down the Winnipeg offer and cut her ties to the city.

All was well so far in the grievor's mind. Then in the spring of 2003, the grievor was elected President of the Prairie Rose Teachers' Association. She filed an application for a 20% release in order to handle her new duties on behalf of the Association. At the time, the Midland-White Horse Plains amalgamation process was still underway and there was a dispute over the availability of such a leave. The grievor was denied, challenged the refusal and was ultimately successful after the issue was referred to lawyers for the respective parties.

According to the grievor, during a meeting shortly afterwards related to collective bargaining, in the presence of an MTS Staff Officer, Colvin expressed his dissatisfaction to the grievor over the release time issue. He stated that he had been directed by legal counsel

to acquiesce but he was not happy doing so. Then he urged the grievor to step down from the President's position so that a high school math teacher could assume the role, which would make scheduling the 20% coverage much easier for the Division. The Staff Officer challenged Colvin and accused him of preferring a male teacher. The grievor testified that Colvin denied any favouritism, saying it was simply a scheduling problem. The Staff Officer was not called as a witness to support the grievor's version. There was no evidence to indicate that the alleged impropriety was ever raised as a written complaint or otherwise brought to the Division's attention prior to the present arbitration hearing, some seven years after the incident.

For his part, Colvin testified that the release time issue was settled by negotiation between lawyers, as the grievor stated. He denied saying that he was upset by having to deal with the dispute in this manner. He had no recall of the alleged remark about wanting a math teacher as Association President.

As for accommodating the grievor's 20% release, Colvin testified that he filled in behind the grievor without difficulty using term teachers. The necessary release time could be scheduled within a full-time teacher's normal day. He noted that in each year, it was necessary that the grievor be nominally assigned to specified full-time duties, since she maintained the right to return to a regular teaching assignment in the event that her Association role ended. He had to hold a full-time job for her potential return. However, the grievor's actual teaching assignments were only 80% once she received her leave as Association President.

Effective September 2003, the grievor was transferred to Elm Creek School in order to teach a K/1 split. Elm Creek is 18 km north of Carman. The grievor stated that she herself initiated a transfer request based on research she had read suggesting that a teacher should move after four to six years in order to stay fresh.

In order to cover her 20% release, a term teacher was hired and according to the grievor, the arrangement worked very well during the 2003/2004 school year. The term teacher came in on Fridays to relieve her while she did Association work. Sometimes the release day shifted but there was no problem. The grievor and the term teacher followed the same program and the children were very familiar with the term teacher.

During this time period, efforts to harmonize a new collective agreement failed after a set of difficult negotiations. The parties resorted to mediation and then interest arbitration. Eventually a new collective agreement was awarded. The grievor was a member of the Association bargaining committee. Despite mentioning these facts, the grievor made no allegation that there was any particular tension between herself and Colvin during or arising from the collective bargaining process. No such suggestion was put to Colvin during cross examination. Asked whether the negotiations were difficult, Colvin answered, "It was resolved in arbitration, yes."

The grievor taught for only one year at Elm Creek. Effective September 2004, she was transferred to Graysville school 10 km west of Carman with a Grade 2/3 split assignment. Again she taught for only one year and was transferred to Roland School effective September 2005. Roland is located 18 km southeast of Carman. The grievor testified that Colvin informed her that declining enrollment at Graysville was the reason for her transfer to Roland. The grievor felt frustrated by this series of short-term placements.

In her testimony, the grievor confirmed knowing in advance that Elm Creek was only a term position. "I was preordained to move again." Colvin gave the same evidence. By contrast, the grievor said she understood that Graysville was a permanent position and her assignment there would last for a number of years. She testified that in the spring of 2005, Colvin simply announced that he was moving her to Roland and that there were no other options. However,

under cross-examination, the grievor acknowledged knowing that Graysville was overstaffed in relation to declining enrollment and that “something had to change, it was me.” Colvin testified that he discussed the staffing situation with the grievor and reviewed what other positions were available. Roland was one of the openings.

The grievor acknowledged that she applied for a resource teacher position at Carman Collegiate when told that Graysville was downsizing. She was close to completing her Resource Certificate. She preferred Carman Collegiate because it was in her hometown and would likely be a more stable position given the larger student population. However, she was not successful in obtaining the Carman position.

The grievor confirmed receiving a letter from Colvin dated June 16, 2005 stating as follows (Ex. 34):

I'm aware of your displeasure in this being your second division – initiated transfer in two years, and am concerned about your reaction. When the division accepted your request to be transferred to a term position at Elm Creek School two years ago, you were made aware of the uncertainty that might create, and accepted the move on those conditions due to your strong desire to be transferred out of Miami School at that time. We have had numerous conversations this spring about your placement for next year. You have applied and were interviewed for several positions. Although the Roland position may not be your first choice, it is the most suitable available position I have open for you this time, in matching your skills and providing considerable flexibility to accommodate your release time.

The grievor admitted that as stated by Colvin, they had numerous conversations about her placement and that she pursued several positions before Roland was assigned to her.

At Roland, commencing September 2005, the grievor taught 50% Kindergarten and was

nominally assigned 25% resource and 25% Grade 5/6 as the rest of her position. By this point, she had been elected to the MTS Executive and granted an additional 20% release for MTS activities. Her Association leave went to 25%. Effectively she was teaching at 55% of full load comprised of 50% kindergarten and 5% special projects. Her total release time rose to 45%.

In direct examination, the grievor explained how she balanced her 50% Kindergarten teaching duties with her two release components. Because of busing constraints, Kindergarten is offered every second day for a full day. When the grievor needed to be absent for MTS duties, she would amend the students' schedule and teach back-to-back days. She was careful to give one month's notice to parents of the changes. In her view, it worked fine. Under cross-examination, she conceded that there were some challenges in working out a satisfactory arrangement to accommodate her two releases. She was entitled to a full-time assignment in each year because, should her role with the Association and MTS terminate, she had a right to return to full-time teaching. This requirement limited the number of assignments which were suitable for her.

Colvin testified that once the grievor was granted an additional release for MTS duties, his task became more difficult. Whereas the original Association leave could be worked into the grievor's daily schedule, MTS meetings were held for full days, often consecutively. Most MTS Executive meetings were scheduled long in advance but some arose randomly. The 20% MTS leave translated into 40 days away from the classroom over the course of the school year. As a result, the grievor's principal was required to schedule the term replacement for full days when the grievor was absent on MTS leave. Colvin said that the Division kept a running tally on the grievor's days-taken and generally it worked out close to the agreed quantum by the end of the year. The grievor was cooperative in giving as much advance notice as possible of her anticipated days off. The Division was reimbursed for

these leaves by the Association and MTS.

The complexity of the arrangement was documented in correspondence from Colvin to the grievor dated June 24, 2005 (Ex. 35). His letter stated that the Division would allow some adjustments to the Kindergarten schedule in order to accommodate the grievor's leaves, as long as there was a process to ensure parents and bus drivers were informed and given ample notice of changes. In the event of unavoidable scheduling conflicts arising during the year, the Division would consider whether the grievor could be released, but would not incur any extra substitute costs. Colvin acknowledged that the parties worked out the scheduling but he was not cross examined on whether, after a year of experience with the arrangement, he was satisfied that it adequately met the educational needs of affected Kindergarten students and their parents. As it turned out, the 55% Kindergarten teaching assignment did not extend beyond one year (2005/2006) so the point was moot.

The grievor testified that she was forced to transfer yet again for the 2006/2007 school year. In direct examination, she stated that Colvin moved her from Roland School to Carman Collegiate where she was assigned 55% resource teaching duties. The transfer was initiated by Colvin, she said, because in his view a resource teacher position would allow for better flexibility in accommodating the grievor's release time. "No options were given to me. I was just told that I was being transferred."

However, under cross-examination, the grievor was shown her own letter dated May 29, 2006 addressed to the Division (Ex. 36) in which *she* requested a transfer to the resource position at Carman Collegiate. In her letter, the grievor noted that she had recently completed her Special Education Resource Certificate. She also stated as follows: "Due to the approved leave of absence for 45% of my full time contract with the division, I believe that this position would allow more flexibility in scheduling." Faced with this letter, the

grievor stated that she did not recall sending it but conceded that she must have done so. She also acknowledged that there were ongoing discussions about her placement and how to accommodate her release times. In his evidence, Colvin confirmed that the transfer to Carman Collegiate was done at the grievor's request.

In the following school year - 2007/2008 - the grievor remained at Carman Collegiate as a resource teacher. She testified that in her first year at the Collegiate, her role was limited to performing assessments and serving as literacy coach. However, the program was restructured in 2007/2008 and she was assigned generalized resource duties. She worked with Grade 9 and 10 students. According to the Division's records, the other 45% of the grievor's nominal teaching assignment was Grade 8 but the grievor stated that she was unaware of this fact. "I assumed they were holding something somewhere as my full-time position."

In 2008/2009, the grievor continued at Carman Collegiate but was reassigned to teach Grade 8 Language Arts and Social Studies. Her 45% release time remained in place and her actual teaching time was 55%. The Division's records indicated that her nominal assignment was 100% Grade 8 teaching. The grievor testified that she was unaware of this assignment and indeed, she was not informed about any of her nominal assignments except for Roland School. According to the grievor, because of her continuing releases, the Association made several inquiries about the particulars of her nominal assignments but could not obtain the information.

Under cross examination, it was suggested to Colvin that once the grievor assumed a leadership role with the Association and later MTS, she was subjected to transfer or change of teaching duties every year. Colvin responded that those were her assignments as they evolved over time. He did not concede any ulterior motive related to the grievor's

participation in Association or MTS business. He noted that the grievor initiated the move out of Miami and also asked requested the transfer to Carman Collegiate.

Launch of the Carman Collegiate Parents' Group

No one directly involved in organizing and launching the parents' group testified in the present arbitration. The grievor's role in the group, or course, was a live issue during the period leading up to the transfer decision, but ultimately the Division did not allege before me that the grievor was an active participant. In her testimony, the grievor denied any involvement as an organizer. Thus, the group's purposes and activities may only be gleaned from the available documents and reports.

On Thursday March 26, 2009 at noon, an anonymous e-mail (Ex. 8) was sent a list of more than 80 local area recipients including the Valley Leader Newspaper, in the following terms:

Dear Parents,

There has been many discussions (*sic*) within many different circles within our community about the same issue – **Carman Collegiate!** Many of us are feeling frustrated and helpless when it comes to quality of education our children are receiving. Some have resorted to removing their children and relocating them to different schools.

Please join us and together we will make a change! Tell your family, friends, grandparents, neighbors and parents of children that have not yet made it to the Collegiate; we need you, **ALL of you!** Bring your concerns so that they may be addressed.

Areas of concern to date:

1. Non-challenging courses
2. No Exams

3. New reporting system for middle years
4. Time table with classes being broken up into half hour sessions throughout the day

As parents, grandparents, guardians and community members we need to stand up and say something. Come out to a public meeting on **April 9, 2009 on the B Side of the Arena at 7 p.m.** Let's talk about our concerns, and be together will take these issues to the Prairie Rose School Division and tell them that we demand a higher education for our children. **Together we can make a change!** If we do not speak up about all these concerns nothing will happen. We need to act now before we lose all our strong teachers and together we will provide a brighter future for our young people.

Kindest Regards,

Carman Collegiate Parents Who Care

DATE, TIME & LOCATION:

Thursday, April 9, 2009 on the B side of the Arena at 7 p.m.

PS. Help get the word out please PASS this e-mail on to everyone you know!!!! We need people to make this happen! (Emphasis in original)

Colvin testified that he was unaware of this group or the e-mail until he received a flurry of telephone calls on March 26, 2009. He was contacted by the school principal, a trustee and a number of individuals in the community. Upon reviewing the contents of the e-mail, he was immediately concerned that it was likely to cause an extreme reaction in the town and in the school. He was startled to see that the organizers had failed to identify themselves. Moreover, the proposal to hold a public forum on these issues was inappropriate, at least in the absence of some prior efforts to raise the stated concerns through existing channels. Colvin said that when parents have concerns about educational matters, they normally raise their issues with the teacher, and if necessary, there would be involvement by the principal, the Superintendent or ultimately the Board of Trustees. Carman Collegiate also has had an active Home and School Association in place for many years. To his knowledge, none of the

issues listed in the e-mail had surfaced previously.

Predictably, there was news coverage in the local press (Ex. 9, 10). The first headline read, “Anonymous e-mail causes furor.” An editorial described the unsigned e-mail as “grossly unprofessional and thoroughly rude.” Colvin was quoted as saying that the group had damaged the reputation of the collegiate and its staff. In his testimony, Colvin confirmed and reiterated this opinion. He added that the parents’ group remained a hot story in town for the next several weeks.

Greaves, the School Board Chair, became aware of the issue when he was contacted by Colvin and one of the two Carman Trustees. He decided that the Trustees would not attend or take part in the meeting in an official capacity as they disapproved of the process being followed. He did not want to lend any credence to the meeting.

In her evidence, the grievor gave the following account of her involvement. At the time the e-mail was issued, she was unaware of the parents’ group or any plan to organize a public meeting. Parent-Teacher Day was scheduled for the evening of Thursday March 26 and the full following day. She had scheduled all her appointments for Thursday, commencing right after dismissal at 3:40 p.m. She got home about 9:30 p.m. on Thursday after a full evening of parent meetings. The following week was Spring Break and the grievor’s family had booked a last-minute trip to Cuba, departing at 7 a.m. on Friday, March 27. They were required to be at the Winnipeg airport by 4 a.m. This meant leaving the house in Carman at about 3 a.m. after a full evening of parent teacher interviews. The grievor testified that Thursday evening was a chaotic time in her household as she scrambled to organize and pack the family.

As best she could recall, the grievor learned about the controversial e-mail either at the

airport, on the plane or following her arrival in Cuba. Her husband Rob told her that Lynn Melvin ("Melvin") had sent out an e-mail notice for a public meeting and that Melvin had asked him to chair the event. He had agreed to do so. The grievor testified that her reaction to this news was complete shock and surprise. Her husband was involving himself in a challenge to her school. She questioned him on why he would do so. He did not really have an answer. The grievor said that her husband is known for his ability to run successful meetings. She testified that she told him "this better not be a witch-hunt for teachers". She tried to dissuade him but he was already aware of proper protocol and "I don't control him." She told him she did not appreciate what he was doing but he went ahead anyway.

After this exchange, according to the grievor, the subject did not arise again during their vacation. They returned home on the following Friday, April 3, around supper time and the grievor saw a story in the newspaper about the controversy.

On Friday evening or possibly the following day, the grievor phoned the MTS President for advice. According to the grievor, she was told to declare a conflict of interest and stay far away from the issue. On Monday morning, the grievor also consulted with the Assistant General Secretary for MTS and receive the same basic advice - to declare a conflict and remove herself from any discussion involving the parents' group. Asked in cross examination about the nature of the conflict as she understood it, the grievor agreed that her husband was attacking her work and the work of her colleagues. She further acknowledged realizing that the group's action would create a negative situation in the school.

There was a regularly scheduled meeting of the Association Executive on Wednesday of that week (April 8), the day before the public meeting called by the parents' group. While the Executive meeting was *in camera*, the grievor reported that a parents' group was being organized, that her husband had been asked to chair the upcoming public meeting and that

she was declaring a conflict on MTS advice. In her understanding, the issue thereafter was in the hands of the Association Vice President, Gaye Birchall. The grievor testified that she was faithful to her declaration in the weeks that followed and steadfastly avoided any contact with the parents' group affair. She did not even read the precipitating group e-mail.

On April 9, 2009, the public meeting went ahead as planned and approximately 100 people attended. Rob Hamm, the grievor's husband, acted as chairperson for the meeting and led the discussion. Various issues were raised and a volunteer committee was established at the end of the meeting to take the group's concerns forward. Colvin did not attend but he received reports from several school staff who were present. He was very concerned about the prospect that student or personnel matters could be raised in a public meeting without any protection for the individuals concerned. In his view, the ramifications for teachers and administrators at the school were potentially extreme.

Press coverage of the meeting mentioned that the grievor's husband had chaired the session and reported him saying that his wife was not involved with the meeting or the e-mail (Ex. 13, "Anonymous e-mail leads to constructive meeting", April 17, 2009). The newspaper story quoted Rob Hamm as follows: "I got two children in school here, that's what this is about." The newspaper identified Lynn Melvin as being the author of the anonymous e-mail. Colvin stated that this was the first information he had about who generated the e-mail.

On April 16, 2009, the organizers of the parents' group sent out another e-mail (Ex. 12) including an apology for failing to identify themselves in their first communication. They described the initial meeting as "productive" and referred to a subsequent meeting. Notes were offered covering both meetings. The organizers stated that they would now work through "the appropriate channels" in pursuit of their objectives. Supporters were invited to submit further concerns to be considered by the group, or "even better write a letter to the

school, trustees and superintendent so that they are aware of your concerns.” This e-mail was signed by the Carman Collegiate Parents Who Care Committee, along with nine named individuals including the grievor’s husband.

The grievor testified that for about a month after the public meeting, she was preoccupied with an intense series of Association events, MTS meetings, a conference in Toronto and other meetings. Combined with an illness and medical appointments, these events kept her away from the collegiate much of the time. She estimated that she taught only 7-8 days during this period. She noticed nothing different or unusual about interactions with her colleagues on the days when she was working in the building.

Under cross examination, it was suggested to the grievor that she knew there would be adverse effects on her colleagues at the school. She readily answered in the affirmative. Then why did she not contact her employer and declare her conflict to the Division? “Because Mr. Colvin would have attached me to the group, which he did anyway.” The grievor was asked why she did not explain the facts to her Superintendent and clarify that she had no role in the group. She answered that she followed the advice from MTS to stand clear. Pressed to admit she had a responsibility to help alleviate the impact, the grievor responded again that MTS advised her to stay away from the situation. Did she ever update the advice as events unfolded? The grievor replied that she perceived no major concerns at the school so there was no reason to get further advice.

Impact of the Parents’ Group on the school and staff

Colvin testified that he quickly detected a heightened sense of anxiety among the Collegiate professional staff, especially the principal and vice-principal. He reported his assessment to the Board through his communication with Greaves. At about the same time, Colvin was

contacted by Bobbi Ethier (“Ethier”), an experienced MTS Staff Officer, who offered to serve as a supportive resource to the teachers and administrators at the school. The Board of Trustees met on Monday evening, April 13, and received a report from Colvin. As a result, Greaves wrote a letter of support (Ex. 11, April 14, 2009) addressed to Principal Phillips and the school staff, in the following terms:

The Board of Trustees is aware of the anonymous e-mail that was circulated in your community recently. We are very concerned about the effect it may have on the morale and confidence of the staff.

The Board recognizes that all schools face difficult challenges from time to time. These challenges may come from parents or community members on specific issues. The board believes respectful discussion of educational matters is healthy for a school and community. However, there are serious consequences when people do not follow the processes put in place by the School Division to facilitate constructive discussion and resolution of issues. An anonymous email such as this one can create an unfair, negative impression of the school and its staff. Conversely, such an approach also casts doubt on the credibility of the writers.

Please be assured that the Board has confidence in you and your staff, and in the educational program of Carman Collegiate. We will continue to support school staff and administration in dealing with this matter using appropriate methods of communication.

In his testimony, Greaves said that the Board recognized the community’s right to raise concerns about the quality of education. It was the format chosen by the group that created a problem in this instance. Based on information the Board received from Colvin and the two Carman area trustees, it appeared there was an attempt to target the collegiate. The letter was sent to show that the Trustees stood behind the staff and recognized that the collegiate was an excellent school.

Colvin met with the full school staff including support staff on April 15 to deliver the

Board's letter and express his own support personally. Most of the staff attended. He concluded that this was "a huge issue" for the staff. He explained his view that the anonymous e-mail was akin to cyber-bullying, something the Division and staff have tried to combat as a dangerous practice. Colvin said he was thanked by a number of staff for his supportive role. By that time, Ethier had been out to the school to speak with teachers but there had been no comment about the controversy from the Association. The grievor deliberately did not attend the April 15 staff meeting based on her decision to stay clear of the issue.

Around April 22, Colvin met with Lynn Melvin, who had been identified in the press as the author of the e-mail. He explained that regardless of the group's intentions, the effect had been inflammatory and resulted in "near hysteria" in the school. He pointed out the available regular channels through which educational concerns could be raised while still respecting the privacy of students, staff and parents. At this meeting, Melvin told Colvin that she had organized and sent the e-mail but Rob Hamm had agreed in advance to chair the public meeting. Colvin testified that given the spousal relationship, he wondered whether the grievor too had been involved in organizing the meeting. Given the damage, he considered it very disturbing if in fact she had been personally involved.

Ethier was in the school during this period interviewing the professional staff. Colvin was informed by Ethier that MTS was taking a number of steps in support of the teachers and administrators. Individual counseling was being offered through MTS. Ethier was also preparing a detailed impact report which would be provided to the Division. At that stage, Ethier wanted Colvin to know that there was considerable strife among the teachers. MTS also invited the Division to join in issuing a formal Cease and Desist letter to Lynn Melvin and Rob Hamm. Ultimately the Board declined to co-sign but MTS did instruct its legal counsel to prepare and serve the letter.

On April 30, 2009, Ethier delivered her report to Principal Jack Phillips, Colvin and the Division's Human Resources Manager (Ex. 14). Ethier stated that she collected "impact statements" from more than 60% of the staff. (This figure appears to be an error as the school had 28 teachers in total at the time and the report cited 13 responses.) Identifying information was removed from the report to preserve staff confidentiality. In her cover memo, Ethier framed the report as follows:

... the purpose of requesting the statements was to demonstrate the causal effects from the anonymous e-mail and subsequent events on the teaching staff. In reading the statements you will see that the staff require enormous support at this difficult time. The community actions have demoralized and undermined your employees. I have asked permission from the staff to share these with you and not received any objections. ... I am looking forward to chatting with you about further ways to support this wonderful group of employees. ...

The Ethier report was the subject of considerable comment and argument during the course of the arbitration hearing. Consisting of 14 single-spaced pages of excerpted staff statements, the report contained a detailed picture of staff reactions to the parent group. On behalf of the grievor, the Association attempted to minimize the significance of Ethier's findings. In particular, it was suggested that only five respondents made a direct connection in their statements between the grievor personally and the fallout from the parents' group. In response, the Division characterized the report as compelling evidence of a significant negative impact in the school, with the grievor as a central figure due to her spousal relationship.

Those staff who did comment specifically on the grievor's role made forceful statements, as illustrated by the following extracts:

There is so much mistrust and suspicion permeating the school as a direct result of the fact that the husband of one of our teachers (also the PRTA president) chaired the town hall meeting that until yesterday, no one was even willing to talk about their feelings or their outrage in any open way. The reality that conversations and information about incidents at school are somehow making their way into the community within hours of occurring (even meetings involve only teachers...) has left everyone not knowing who they can trust or how to act. (at p. 2-3)

...

The other issue I have on the professional realm is trust amongst the staff. Because a staff member's husband helped to initiate the process and is a current member of this coalition Parents Who Care, I feel guarded when I work with her. I'm not sure of her stance on her husband's actions, but I feel betrayed by her. I understand her husband is an adult who is entitled to his own opinions, but I question her involvement in the process. Even though she did not write the e-mail, she knew that something was in the works. I wonder if she took any steps to redirect the original disgruntled parent group so that the e-mail could have been avoided and a more appropriate path taken. I can still work with her on a professional level as far as the students are concerned, but that is it. (at p. 4)

...

I might also point out that the Chair of this committee is the husband of our local MTS President, so that has caused a great deal of duress as well. Instead of having someone to talk to and lean on during a difficult time, I feel the need to avoid her at all cost, and she definitely has a conflict of interest concerning this matter. How do we know for certain that she is not providing inside information to her husband? (at p. 5)

...

The nature of the e-mail, and community discussion, combined with the nature of the professional relationship between Mr. Hamm's spouse and the school, strongly indicates that this is not the movement of a small group of people to improve the school, but the motive of a couple of individuals to remove the principal. (at p. 7)

...

One of my main concerns with the group of “Parents Who Care” is that there is a conflict of interest with our MTS President, whose husband chaired their meeting. An article in the paper today, claimed that our MTS President was not involved in the e-mail or with a group meeting. This remains a concern of mine. Also, the perception others will have that our own President is somehow involved in discrediting our school is a concern. (at p. 8-9)

...

While I am confident about my efforts and abilities in the classroom and as a leader of students at the school, I don't share many of the same beliefs of this group. Does this mean I will be blacklisted and targeted in their efforts to “make change?” If so, who can I turn to for support? Normally it would be the Prairie Rose Teachers Association. However, the involvement of Rob Hamm as member of the committee has seemingly taken this support away from me. Rob is the husband of PRTA President and she has consistently defended every action of this group despite their efforts to attack teaching staff. She has even accused the administration of portraying her husband's committee in a negative light to serve their own purposes. All members of our school belong to the Association and deserve protection when being unfairly attacked as professionals. The PRTA has sat silently through all of this and has not even mentioned the possibility of showing support. This apparent conflict of interest has left me to quietly sit and ponder my future with the knowledge that if needed, the Association's leadership won't be there to support me. Further, since she is employed in the building, there are few places to turn for support from colleagues. I can never be sure about how my words will be taken or where they will be repeated. The consequences of saying the wrong thing at this time may have long-term implications on my career. As a result, the best bet seems to be to sit quietly and appear to be neutral. The resulting environment has left me in the worst state of stress that I have ever experienced in my career and life. It has had a negative impact on my teaching, my social life and on my family life. (at p. 10)

The Association made no objection to the admissibility of the Ethier report and the statements therein attributed to teachers at the school. Clearly the evidence was hearsay

except to the extent that it might be taken as establishing the declarants' state of mind, rather than the truth of the contents. Of course, the state of stress at the school was a significant issue in the decision to transfer the grievor, according to the Division. The Association maintained that minimal weight should be accorded to the impact statements and in any event, the Division's true motive was to punish the grievor for suspected misconduct. The parties were content to deal with the Ethier report in final argument as a matter of relevance and weight.

Colvin testified that he reviewed Ethier's report thoroughly and concluded that the situation in the collegiate was worse than he had feared. He was not surprised by the link some staff made between the grievor and Rob Hamm's actions as a participant in the group. It was a natural reaction to ask why a teacher's spouse would be front and centre in an attack on the school. It was normal to assume that with typical husband-wife communication, the grievor would be well aware of the group's plans. Colvin was especially troubled by the expressions of mistrust and betrayal in relation to the grievor, both in her capacity as Association President and as a teaching colleague. There was an overwhelming sense of stress in the workplace. Colvin accepted Ethier's conclusion that the staff felt demoralized and undermined.

The Association's silence in the face of all the foregoing was noticed. On April 29, 2009, seven teachers wrote to the Association (Ex. 15), pointing out that the parents' group "has opted to spread inaccurate and misleading information about the school, and to call into question the integrity of the teachers regarding their commitment and competence in providing quality education for the students of Carman Collegiate." The letter called for action by the Association. Later the same day, an e-mail was issued (Ex. 33, recipients not indicated) as follows:

Prairie Rose Teachers Association Executive members would like to publicly offer our complete support to all members of the PRTA members (*sic*) at Carman Collegiate. Please understand that Gaye Birchall, who holds the position of Vice President, will be dealing with all issues relating to the staff of Carman Collegiate and will help in any way. Please contact me at St. Laurent School ...or at home ... Thanks.

The grievor testified that she noticed no change in how her colleagues related to her. The only exception was Lynn Rempel ("Rempel"), a Carman Collegiate teacher who said he would file a complaint that she may be involved with the group. Rempel also criticized the grievor for inaction as President of the Association. She explained to him that Birchall was handling the issue. The grievor conceded that there was delay by the Association in taking a public position but was unable to provide any explanation since she had withdrawn from involvement in the issue. She pointed out that aside from Birchall, there was a school representative and a health and safety representative who were active in the Association and were both collegiate teachers. They should have been aware of the issue from the outset.

The grievor was cross examined on her appreciation of the impact statements included in Ethier's report. She was asked directly, "Do you now accept that there were teachers at the collegiate who were significantly affected by the parent group's actions?" She was evasive in response. She said there were statements referring to an impact. The question was asked again. She replied that an Association AGM was held on April 13, 2009 and no one raised the issue. The question was asked again. The grievor replied that she was seeing these teachers in town at the time. It was put to the grievor that she had already testified that she anticipated an adverse impact when she learned about the proposed public meeting. She answered that she was surprised by the severity of the impacts claimed in the Ethier report. Pressed further, the grievor accepted that some of her colleagues felt betrayal and mistrust towards her. She conceded that she had envisioned this as a reaction; hence her declaration of conflict in early April.

The grievor was re-elected President of the Association by acclamation at the April 13, 2009 Annual General Meeting.

Investigation and report by the Superintendent

The Ethier report was provided to the Board of Trustees at its May 4, 2009 meeting. Colvin then convened a meeting on May 14, 2009 with the grievor and her MTS Representative, Tom Paci ("Paci"). Colvin testified that the reason for the meeting was that Ethier had reported the staff were experiencing considerable stress. At the same time, there were growing concerns that the grievor had been involved in the parents' group, whether directly or indirectly. Richard Whitbred, Human Resources Manager for the Division, was also in attendance.

The grievor was asked about her involvement in the group. Colvin testified that the grievor denied any involvement in the anonymous e-mail. She admitted awareness that her husband chaired the public meeting. She informed Colvin that she had cautioned her husband that the meeting must not become a witch-hunt. However, he did his thing and she did hers. She told the meeting that she had not noticed any negative impact in the school. She had separated herself from the issue and turned everything over to the Association Vice-President. Colvin testified that he detected no real concern on the grievor's part about the damage which had resulted from the group's action.

Under cross examination, Colvin acknowledged that because of the grievor's marital relationship and Rob Hamm's role in the group, he felt it was impossible that the grievor was not involved in the group one way or another. However, he insisted that he approached the May 14 meeting without accusations and wanted to hear her perspective.

Colvin also attempted to investigate a recent complaint made against the grievor. After setting up the May 14 meeting, Colvin became aware of a letter written by collegiate teacher Lynn Rempel dated May 7, 2009 and addressed to Principal Phillips (Ex. 18, App. E). Rempel reported a heated debate he had with the grievor at the March Early Dismissal Meeting over curriculum, attendance policy, code of conduct, students leaving the collegiate and the absence of a standard of excellence at the school. According to Rempel, the grievor was disparaging towards the school and verging on an accusation of dereliction of duty against the teaching staff. In Rempel's perception, the March 26 anonymous e-mail raised basically the same issues which he and the grievor had debated. Now this was more than just a disagreement on professional issues.

Rempel stated in his complaint that he approached the grievor on May 5 and suggested there was an ethical problem with her conduct. Given her marital connection to the chairperson of the public meeting, she was obligated to take steps in mitigation of the damage which resulted from the parents' group. Moreover, she should have intervened in advance to counsel the group on proper protocol in dealing with educational policy issues.

According to Colvin, the grievor denied there had been a heated debate as described by Rempel at the March meeting or any other time. In her testimony, the grievor said she was at Elm Creek the day of the March Dismissal so the Rempel exchange could not have occurred in March. She did not believe that Colvin asked whether the argument happened some other time. The grievor testified that she explained her recusal as Association President, which was done on MTS advice. She told the meeting that she was not involved in the parents' group.

Colvin closed the May 14 meeting by advising the grievor that he had "a huge issue" on his hands. It was agreed to meet again on May 19, 2009 with the same participants.

In the interim, Colvin met with Rempel, who was absolutely certain that the argument had taken place. Rempel said he had felt the need to apologize to others who overheard the exchange because it had become so heated. Rempel named two other teachers who were present at the time. Then Rempel told Colvin that likely the incident had happened at the February dismissal, not March. Colvin interviewed the two witnesses and they both confirmed Rempel's account. One of the teachers added that when he saw the March 26 e-mail, "it resonated."

Armed with this additional information, Colvin re-visited the Rempel complaint again when the May 19 meeting was held. He testified that he asked the grievor whether the debate may have occurred at a different time. In response, the grievor said she had never had a heated debate or discussion with Rempel. They again discussed the grievor's recusal from the issue at the Association. She stated that she acted on MTS advice and had notified the Association at the April 8, 2009 Executive meeting. Colvin was troubled by the fact that respondents in the Ethier report all seemed unaware of the grievor's recusal decision. Moreover, Colvin knew that the grievor had not contacted the principal or any school staff to deal with fallout from the parents' group action.

In her evidence, the grievor said she told Colvin there could not have been an argument with Rempel at the February Dismissal because she was in Winnipeg at a Student-Specific Planning meeting that day. After the May 14 meeting, she checked her calendar and files to confirm her recollection so she was quite certain about the dates (Ex. 31, 32). The grievor maintained that Colvin never asked her whether she had, at any time, engaged in a passionate debate with Rempel. His questions were specific and limited to two dates.

The grievor testified that during the late fall of 2008, she and Rempel did have a discussion about professional learning communities. It was a passionate discussion, she confirmed, and

they had opposing views on the subject. However, the grievor insisted that they did not touch on the topics listed in the March 26 anonymous e-mail, except for the middle years report cards. There was no mention of non-challenging courses or half hour time tabling.

At the conclusion of the May 19 meeting, Colvin informed the grievor that she was being placed on administrative leave pending further direction from the Board, which was slated to meet that same night. He testified that his rationale was as follows. First, he was concerned about the grievor's actual degree of involvement in the parents' group. He did not necessarily accept her denial. Second, there appeared to be evidence of a heated argument with Rempel, witnessed by two teachers, but the grievor denied that as well. The issues were apparently similar to the concerns presented in the anonymous e-mail. Third, there were such significant tensions among the collegiate staff that he felt it was necessary to alleviate the pressure by temporarily removing the grievor from the school.

On May 19, 2009, after receiving Colvin's verbal update, the Board of Trustees directed him to file a full written report and summon the grievor to the next Board meeting. A formal written notice (Ex. 17, Ex. 20) was given to the grievor pursuant to section 92(3) of The Public Schools Act, a legal requirement before a teacher may be dismissed based on a complaint. Greaves testified that Colvin advised the Board there were serious concerns and discipline might be required, perhaps even termination. The Division decided to issue a legal notice after considering the Superintendent's verbal report and consulting with the Manitoba School Boards Association. Greaves said the Division has held section 92(3) hearings in the past without deciding to discharge the teacher. Thus, the grievor's future was still an open question despite the issuance of the notice.

Colvin prepared a lengthy and detailed report to the Board (Ex. 18). He outlined the chronology of events beginning with the March 26, 2009 anonymous e-mail and detailed his

efforts to clarify the grievor's role in the parents' group. His conclusions were damning (at p. 8):

1. Mrs. Hamm is implicated in the events related to the e-mail distribution, public meeting and subsequent events that occurred at Carman Collegiate since March 26. Her involvement is both direct and through her husband.

Mrs. Hamm had access to his activities and his intentions and influenced the wording used in the e-mail and public meetings. She was motivated to participate in these activities by her intense dislike of the Principal and Vice-Principal of the collegiate. This dislike was generated by the fact that both administrators had challenged her behavior and conduct over the course of the past two years.

At the very least, Mrs. Hamm stated that she has never tried to influence her husband's actions – except that she stated she told him to avoid making the actions a “witch hunt”.

2. Mrs. Hamm failed in her duty to inform her administrators that these events were unfolding and that she had material knowledge about the events and that she understood that there would be a negative impact on staff and administrators at the collegiate, if those events unfolded. She had a duty to advise her administrators that she wasn't involved in and didn't agree with those events. Her presentation that she was not involved and had no knowledge, is not credible.
3. The Manitoba Teachers Society is obviously aware of the circumstances and is taking action in support of its members. If any complaints brought forward by this parent group result in the Board being required to deal with employees, MTS will challenge the division. Mrs. Hamm would be fully aware of the stance of MTS. As a local Association president and provincial executive officer, it is impossible for Ms. Hamm not understand the impact and the seriousness of her actions.

Colvin's report attached and summarized Ethier's compendium of impact statements. He noted that collegiate teachers and their families were experiencing serious negative effects

outside the school itself. Friendships in the community were undermined, rumours were rampant and many teachers had stopped going out in public to avoid being challenged. “Clearly, the intent of the original e-mail to raise alarm had in fact happened (at p. 4).” Moreover, Colvin provided the Board with two anonymous threatening letters (App. F) directed at Principal Phillips and himself, also copied to local trustees and Phillips’ wife. The letters were forwarded to the RCMP. Colvin wrote with respect to these letters (at p. 4):

These letters directly confirm that the activities taking place in Carmen are not as stated, in the interest of providing a better education for the children of Carmen. They confirm that there is a concerted, underlying and malicious attack on the administrators at Carman Collegiate, directed by couple of people. Unfortunately, it appears that a number of well-intentioned citizens may have got caught up in this activity.

Colvin listed nine elements linking the grievor to the parents’ group: the heated argument with Rempel on issues “almost identical” to the March 26 e-mail, which the grievor denied despite two corroborating witnesses; a report from a witness that the grievor was heard explaining why the e-mail was unsigned and suggesting she was part of the organizing group; Rob Hamm’s role as chair of the public meeting and ongoing organizer, which gave him and by implication the grievor inside information about the group’s plans; several references to the grievor in the Ethier impact statements; the grievor’s contradictory position that (a) she had no control over her husband’s actions, but (b) she insisted he not let a witch hunt happen; the grievor’s claim that she had never read the anonymous e-mail, which “defies belief”; the grievor’s contention that there was no noticeable impact on her colleagues, which also “defies belief” given the depth of her professional education and experience.

In the conclusion to his report (at p. 9), Colvin wrote: “Mrs. Hamm’s actions and inaction, as an employee of the Prairie Rose School Division, are serious. We believe that she is guilty of misconduct through commission and omission. ...”. Nevertheless, he outlined two

approaches for the Board's consideration:

At worst, Mrs. Hamm is guilty of misconduct at a level that requires severe disciplinary action up to and including termination of her Contract. This would require the Board to make a decision that she cannot return to employment in the school division and to terminate her Contract of employment, indicating that they believe we have cause to terminate the Contract.

At the very least, Mrs. Hamm cannot return to Carman Collegiate. The perception that she has been conflicted by her husband's actions and her apparent in-action, has placed her in conflict with her colleagues. This puts the division in the position of having to reassign her to another school.

Finally, without specifically referring to the grievor, Colvin ended his written report with this observation about the affair in its entirety:

We wish to impress on the Board that what has occurred is a serious deviation from accepted protocol and procedure. A deviation that is malicious and purposefully designed to cause damage to staff and administration at Carman Collegiate and through association to discredit the Superintendent's office and the Board of Trustees.

In direct examination, Colvin described the transfer option as an alternative position for the Board to consider. The grievor simply could not be returned to the school. Given the staff dynamics, it was necessary to alleviate the pressure by removing the grievor. To Colvin, there was clearly a sense of betrayal and mistrust aimed at the grievor. The problem was real. Notwithstanding the grievor's denials, her presence was detrimental to the school staff as a whole. MTS had reported to the Division that the staff were demoralized. Many in the school connected the grievor to the parents' group and felt that they had been left unsupported by her as local president. In all the circumstances, she had to be removed.

Cross examined about his conclusions, Colvin initially resisted repeating the statements in his report. He had suspicions. There was evidence of inappropriate conduct. There was potential involvement. Pressed on the point, he finally stated that in his view, the grievor was guilty of serious misconduct. But he insisted that his role had been to provide the Trustees with the information they required to make their decision. Discipline was up to the Board. Colvin confirmed that his written reference to “a serious deviation ... malicious and purposefully designed to cause damage ...” was a reference to the grievor.

Under cross examination, Colvin was asked whether he still stood by the content of his report to the Trustees. He replied that he did. He was expecting loyalty on the grievor’s part and did not see it in her actions. The grievor told her husband not to start a witch hunt but failed to caution him about other obvious points - that proper channels should be used, that the public meeting would cause grief to the school staff. Apparently the grievor felt no obligation to her colleagues. Asked whether he informed the Board that the grievor had been re-elected as Association President on April 13, 2009 by her teaching colleagues, Colvin said he did not include this information.

Colvin’s written report was provided to the grievor and she consulted with MTS. The Board hearing was originally scheduled for May 25, 2009 but, at the grievor’s request, the session was deferred to June 15, 2009 (Ex. 21).

The Board of Trustees decision

At the Board meeting on June 15, 2009, Colvin presented his report, followed by the grievor and Paci. According to Colvin, Paci’s submission lasted over an hour and focused on the evidence of misconduct. Paci argued that there was no basis to impose discipline or terminate the grievor’s contract. In her testimony at the arbitration, the grievor did not touch

on the Board hearing itself and Paci was not called as a witness. There was no allegation of unfairness in terms of the Board's hearing process.

The Board met *in camera* for about 90 minutes to consider the case. In his evidence, Greaves described the discussion and outcome. The Trustees were not satisfied that there was sufficient proof of misconduct to justify discipline. However, based on Colvin's assessment that the school was in chaos and Ethier's report of serious impact, it was decided that the grievor should be moved, in the best interests of the school. For the grievor to perform as a successful teacher and for the collegiate to heal, a transfer was necessary. The particulars of the transfer were delegated to Colvin.

Greaves was adamant that the transfer was not intended as punishment in any way. He conceded that during their deliberations, the Trustees did have some doubt about the grievor's involvement in the parents' group. The honesty of her dealings with Colvin was in question. Clearly Colvin had concluded that her version of events was not credible. However, there was not enough evidence to support discipline. Greaves testified that notwithstanding Colvin's view, there was no evidence of a malicious purpose on the grievor's part. At the same time, the Board had to do something in response to the situation at the school. A transfer was best for all concerned.

Pressed in cross examination, Greaves said that the transfer was based on the problems in the school and identification of the grievor as one element highlighted by the respondents in Ethier's report. The impact statements were significant insofar as they showed the level of conflict existing in the school, but not the only factor. The Board considered Colvin's report but also the submissions made by Paci. In the end, the Board accepted Paci's point that there was not enough information to link the grievor to the parent group.

It was suggested to Greaves that on the transfer question, the Board had to look exclusively at how the grievor's presence in the school would affect other staff. He replied that was part of the consideration. He agreed that it was necessary to separate the stresses generated by the e-mail from perceptions of the grievor by her colleagues. He was not aware that all the school staff were invited to submit impact statements. The Trustees did not specifically discuss the fact that only five statements out of 13 mentioned the grievor personally. Some of the statements alleged a conflict of interest but the Board was not aware at the time of the meeting that the grievor had been re-elected Association President on April 13. The Board did know that the grievor had recused herself from involvement in the parent group issue.

On June 16, 2009, Greaves wrote to the grievor (Ex. 22) and communicated the following decision:

On June 15, 2009, you were asked to appear before the Prairie Rose School Board for Section 92 hearing as per the Public Schools Act. The Board heard your response to the report submitted by Superintendent Colvin.

After reviewing all of the information presented to us, the Board has determined that your employment will continue with the Prairie Rose School Division. The Board believes that it would not be in the best interests of you or the Prairie Rose School Division to have you continue your teaching assignment at Carman Collegiate. The Board has directed Mr. Colvin to transfer you out of Carman Collegiate to a new teaching assignment beginning the fall term of 2009. We expect that you would provide whatever assistance is necessary to complete the current school year.

Mr. Colvin will be in contact with you shortly regarding this transfer.

Implementation of the transfer decision

Colvin testified that in seeking a new teaching assignment for the grievor, he looked for a full-time K-8 position if possible but was limited by the available openings. By then it was late in the annual staffing process. He also had to consider the grievor's two release times totaling 45%. Colvin identified three options and e-mailed the applicable information to Paci on June 18, 2009 (Ex. 23). The assignments were Boyne View (at Rose Valley Colony, full-time, Multi-Grade 5-8, plus supervision of senior TV classes), Clearview Colony School (0.70 FTE, Multi-Grade 4-8, plus supervision of senior TV classes) and St. Francois Xavier (0.75 FTE Term, Grade 4). On June 22, 2009, Colvin met with the grievor and Paci to discuss the available options for transfer.

At the meeting, Colvin explained that Boyne View was full-time and permanent, which was the preferred configuration. Clearview and St. Francois were less than full-time but he undertook to make them work if chosen. Even though St. Francois was a Term, the school enrolment was rising and he felt confident he could maintain the position the following year. In response, the grievor said that St. Francois Xavier was too far to drive. She expressed no preference as between Clearview and Boyne View but Paci suggested that the grievor's qualifications were not suited to a colony school. Colvin did not accept this point. He observed that in 2008/2009, the grievor was teaching Grade 8 at Carman Collegiate, similar to the Boyne View or Clearview assignments. The grievor had nine years of teaching experience with Prairie Rose and several years in Winnipeg prior to that, so she was clearly competent and suitable for a Grade 4-8 or 5-8 classroom. Under the collective agreement, there is also a premium payable for teaching multi-grade classes.

Colvin said that the grievor requested consideration of a counseling position but no such job was available. She referred to posted Kindergarten positions in two schools - Roland and

Elm Creek. The Roland posting (Ex. 28) was 0.50 FTE and Colvin rejected it because he was required to assign a full-time position, against which the grievor would exercise her right to 45% release time. Moreover, he stated that when the grievor previously taught Kindergarten at Roland School (2005/2006), the student schedule had to be adjusted monthly to accommodate the grievor's MTS and PRTA absences. Colvin testified that "it didn't work". It was unreasonable to expect parents to continually adjust their personal schedules and daycare arrangements. In addition, the bus drivers found the arrangement confusing.

The Roland posting closed on June 18 and had already been short-listed for hiring. As for Elm Creek (Ex. 29), it was a 0.50 Term position which closed on June 10 and was about to be filled. Asked in cross examination why he did not combine the two half-time Kindergarten positions at Roland and Elm Creek to create the required full-time nominal position for the grievor, Colvin said that the idea never came up during their discussions. As well, her actual teaching time was 55% which was another complication. He acknowledged that during the meeting, Paci and the grievor argued that the Colony options did not take into account the grievor's specialty in early years education. He said he considered their input and took it into account in deciding on a placement. Colvin denied that he tried to present the grievor with the least favourable options available.

The grievor testified that the tone of the meeting was hostile. She felt that Colvin's decision had been made before they started and he was only going through the motions. Paci raised Roland School as an option but Colvin refused to consider it, saying there would be too much disruption to the students' schedule. The grievor testified that this explanation was unsound. Dates are often moved around, as for early dismissal, and the arrangement had worked for her in the past. The grievor believed that Colvin had deliberately offered undesirable options. Colony schools have experienced problems and are regarded by teachers as the least preferred placements.

Under cross examination, the grievor confirmed that she required a 100% position. She insisted that the Roland 0.50 FTE could have been assigned as her actual teaching load. When she had previously balanced a half time Kindergarten assignment at Roland with her two release times, the parents had input and the arrangement was fine. The grievor conceded that Colvin expressed a contrary view on this point and “he was entitled to his opinion.” There was another 5% she needed to perform to make up her 55% total teaching time but MTS might have paid for it. Something could have been worked out, she said. In the end, the grievor acknowledged that there was discussion of the possible options for her 2009/2010 assignment and Colvin chose Boyne View. She is entitled to seek another transfer for 2010/2011 based on the available positions in June of this year.

Colvin notified the grievor of her new assignment by letter dated June 23, 2009 (Ex. 24). Colvin testified that he applied the terms of Article 19 of the collective agreement (Ex. 1), which states as follows regarding transfer:

The Association recognizes the right of the Division to assign teachers employed by the Division to schools and classes under the jurisdiction of the Division.

Transfers may be made at the initiative of the Superintendent, or other administrative officer, or at the request of a teacher, and for any purpose which, in the judgment of the Superintendent, is best for the welfare of the teacher or the school.

Division-Initiated Transfers

- A. The Board’s right to initiate a transfer shall be exercised fairly and reasonably having regard to all the circumstances including, in particular, the educational needs of the Division, which shall be the paramount consideration and, as a secondary consideration, the needs of the teacher involved.
- B. Prior to any Division-initiated transfer occurring, the Division shall provide to any teacher being considered for such transfer an opportunity for consultation with respect to the transfer.

...

In Colvin's opinion, the transfer was necessary to serve the educational needs of the Division. As for the grievor's interest, although she denied any concern over staff dynamics at the collegiate, it would have been very difficult for her to function as a team member. It was clear that many staff felt betrayed by the grievor. Colvin believed that the grievor's relationship with her colleagues was irreparably affected. The administrators would not be able to lead the school effectively and it would not be a healthy working environment for anyone. On the other hand, Boyne View was a position the grievor could comfortably handle. Under cross examination, he rejected the suggestion that Colony placements are less desirable, harder to fill, turn over more frequently or may be inappropriate for some teachers due to cultural differences. Colvin stated that 20% of Division staff work in Colony schools. The curriculum and job expectations are the same.

According to Colvin, the current situation at Carman Collegiate is improved but there is still work to be done in recovering from last years's attack by the parents' group. There are residual effects on the staff and it has taken time to work through the issues.

Final argument of the Division

On behalf of the Division, Mr. Simpson reviewed the evidence of damage caused by the parents' group and its "call to arms". A serious impact on the school, the staff and the Division was foreseeable. With the involvement of Rob Hamm - the husband of a collegiate teacher, who in turn was the Association President - clearly the adverse effect would be greater. Both the Division and MTS reacted quickly in an effort to mitigate the damage. The Trustees received a report from Colvin and issued a letter of support, which was personally delivered to a staff meeting by Colvin. MTS assigned Ethier to assess and document the

impact. Ethier's report was sent to both the Principal and the Division with a suggestion that the staff needed significant support. Ethier stated that staff were feeling undermined and demoralized. The personal accounts from teachers showed how deep and painful the impact had been.

The Division pointed out seven references to the grievor by respondents in the Ethier report. The recurring themes were duress, betrayal, conflict of interest and avoidance. The nature and severity of the impact was not in dispute. Colvin testified about it and the grievor herself acknowledged the impact under cross examination. On April 29, 2009, a month after the e-mail was released, seven teachers felt a need to demand action from their Association. The grievor said she turned the issue over to her Vice President but these members seemed unaware of that fact. Meanwhile, Colvin worked hard to keep in close touch with conditions in the school. His findings about adverse impact were consistent with the Ethier report. While the Association found it convenient to attack or doubt Ethier's methodology and minimize her conclusions, the report was an MTS document. The respondents were teachers who consented to publication of their statements, albeit without attaching names. There was no basis to discount the force of the Ethier report.

While much was said about the grievor's alleged role in the parent group, the Division focused its argument on what the grievor *neglected to do*. Even accepting her version that she took no part in the e-mail and only discovered her husband's role after her vacation began, by the time she returned there was a major controversy happening in Carman. The grievor did not approach her Principal, the Division or her colleagues to clarify that she supported the school and its teachers. Instead she obtained advice from MTS and decided to stay clear of the dispute. Even though she recognized that her position was compromised by the turn of events, she did nothing more. Her recusal at the PRTA Executive meeting on April 8 evidently did not filter down to the membership and in any event, that action only

addressed her role as Association President, not her obligations *qua* employee and colleague at the school. Silence was not an adequate response under the circumstances, argued the Division.

It was understandable that questions arose with respect to the grievor's involvement in the group. Her husband was one of the leaders. Colvin sought to investigate but the grievor was less than cooperative. In particular, the Division characterized her response to the Rempel complaint as evasive. She must have known that Colvin was interested in whether the alleged argument took place; the specific date was not material. If it was established that the grievor had recently displayed anger over issues similar to the ones raised in the anonymous e-mail, this would be some evidence of her complicity. The grievor's testimony that Colvin never asked in general terms about a heated exchange with Rempel was not credible.

In the end, Colvin submitted a report with two options for the Board to consider. The Trustees could find her guilty of serious misconduct and impose discipline up to and including termination. Colvin was candid in giving his personal opinion that the grievor was in fact culpable. In the alternative, if misconduct was deemed not proven, the grievor should be transferred to another school. Rob Hamm's role in the group had created a perception of conflict and thus compromised the grievor as a teacher in the collegiate. By responding openly and affirmatively to the perception, the grievor might have resolved the problem. Regrettably, her inaction left all the tensions and doubts festering. Transfer was a reasonable administrative response by the Division.

According to the Division, discipline would have been justifiable on the facts here. Public employees are not free to engage in criticism of their employer: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455. As held in *Attis v. Board of School Trustees, District No. 15* (1996), 133 D.L.R. (4th) 1 (S.C.C.), "Teachers are inextricably linked to the integrity

of the school system”. Teachers occupy a position of trust and confidence. They are accountable based on their position, whether the conduct occurs inside or outside the classroom. (*Attis, supra*, at para. 43-47).

In this case, the Trustees decided on the second option and ordered a transfer. The reasons were well explained both by Colvin and Greaves. On the evidence, the transfer was not intended to punish or correct misconduct. The grievor admitted that she was free to apply for future postings in other schools. Significantly, the Divisions’s rationale for the transfer was not challenged in cross examination or refuted by the grievor’s evidence. The necessity to restore harmony in the school was self-evident. This was the Divisions’s explanation. As noted by Brown & Beatty, *Canadian Labour Arbitration (Fourth Edition)*, “An employer’s assurance that it did not intend its action to be disciplinary often, but not always, settles the question (at p. 7-134).” Here there was no contrary evidence.

The Division cited the test in *Re St. Clair Catholic District School Board and Ontario English Catholic Teachers Association* (1999), 86 L.A.C. (4th) 251 (P.C. Picher) at p. 255. Key factors are employer intent, impact on the grievor’s career, whether the employer has reserved the right to rely on the transfer for future discipline, whether the incident could amount to culpable behaviour and whether there was an attempt to correct misconduct with a sanction. In the present case, the intent and effect of the transfer was to alleviate workplace conflict. There was no negative impact on the grievor’s career. The Board made no finding of misconduct and showed no intent to correct her behaviour.

Even if the transfer is considered to be suspicious, the onus remains on the Association to prove it was disciplinary in nature. As held in *Re Pacific Press and Communications, Energy and Paperworkers Union, Local 2000* (2000), 90 L.A.C. (4th) 218 (Germaine) at para. 65:

The Union's case raises a suspicion that the grievor's reassignment was disciplinary. The facts proven by the Union are sufficient to call for an explanation by the Employer. Mr. Enchin provided that explanation in the course of his sworn evidence at this hearing. His was the only direct evidence before me in relation to the actual reasons for the grievor's reassignment. It does not eliminate doubt about the real motivation for the reassignment. But it was plausible and I am not persuaded the surrounding circumstances are sufficient to permit me to ignore or reject his evidence. I conclude the Union has not proven the reassignment was a disciplinary measure.

The Division also referred to *Re Renfrew County English Catholic District School Board and Ontario English Catholic Teachers Association* (2008), 173 L.A.C. (4th) 326 (Swan) at p. 347. A transfer to deal with relationship problems in a school is a reasonable administrative response.

Article 19 of the collective agreement in the present case explicitly recognizes the Division's right to assign and transfer teachers. The parties through their collective bargaining further agreed to accept the Superintendent's judgment with respect to the welfare of the teacher or the school. Paragraph A provides that the educational needs of the school are the paramount consideration. Teacher needs are secondary. In this context, there was no basis to question the Division's decision that a transfer was necessary and the Association did not do so.

As for Colvin's choice of Boyne View, which the grievor did criticize, the Division noted that it was very late in the staffing process by the time discussion began. In part, this was due to the grievor's request to defer the Board of Trustees hearing for three weeks. It was close to the end of June and the parties were limited in the available options. Colvin listened to the grievor and Paci. He considered their suggestions and explained his reticence over the Roland Kindergarten option, both in meeting with the grievor and again at arbitration. The grievor may have differed from Colvin over educational considerations but in the end, the collective agreement allowed the Superintendent's judgment to prevail. While the grievor

claimed the meeting was hostile, Colvin did not agree. He was professional and reasonable in his consideration of the options.

The right of consultation does not imply that the teacher's consent or concurrence must be obtained. These types of clauses provide for a meaningful dialogue before a school division exercises its discretion: *Re Rolling River School Division and the Rolling River Teachers' Association (Burgess Grievance)*, [2009] M.G.A.D. No. 41 (Peltz), at para. 78. The dialogue here was meaningful even if the result did not satisfy the grievor.

The Association tried to portray the grievor's work history as a series of forced moves which failed to recognize the grievor's expertise in early years education. It was suggested that there was a strained relationship and that this tainted the transfer to Boyne View. But on the evidence, said the Division, only the transfer from Graysville in 2004 was involuntary and that was necessitated by declining enrolment. The grievor had asked to move from Miami in 2003. She forgot that she also requested the move from Roland to Carman in 2006. In her evidence she wrongly accused Colvin of forcing her out of Roland School. There was no basis to doubt Colvin's *bona fides* in making the Boyne View decision now. Neither was there any evidence that he acted unfairly or failed to fully consult the grievor. She simply disagreed with his judgment.

The Division cited my recent award in *Rolling River, supra*, another teacher transfer case, where the superintendent's judgment was aggressively challenged on the facts, unlike the present matter. While the transfer in *Rolling River* was quashed, I noted that "arbitrators are not mandated to manage the employer's business and should not intrude into that domain. It is my role to ensure compliance with the negotiated terms of the collective agreement (at para. 87)." In *Rolling River*, there were apprehensions about keeping the grievor in the school but no actual complaints or evidence of difficulty. The Superintendent was new to

the division and had little knowledge of the culture of the school. The Division contrasted the present facts. Here MTS itself provided the evidence of conflict in the school and it was entirely consistent with Colvin's sense of the situation. In *Rolling River*, the authority to transfer was described as "case specific" and requiring "an individualized assessment of all relevant circumstances" (at para. 98). The Division submitted that both the Trustees and Colvin fully complied with this standard in making the decision to transfer the grievor to Boyne View School.

In summation, the onus was on the Association to prove a violation of the collective agreement. The Association failed on both its grounds. It was not established that the transfer was disguised discipline. Neither was there any breach of Article 19 in ordering or carrying out the transfer.

Final argument of the Association

On behalf of the Association, Mr. Valgardson acknowledged the Division's right to initiate a teacher transfer under Article 19 of the agreement. However, the power is not absolute and in particular, a transfer may not be ordered as a form of discipline against a teacher: *Re Seven Oaks School Division No. 10 and Seven Oaks Teachers' Association No. 10 (Jim Treller Grievance)*, [2000] M.G.A.D. No. 18 (Graham). Moreover, the collective agreement requires that the right to transfer be exercised fairly and reasonably having regard to the Division's educational needs and the needs of the teacher involved. The Association submitted that the transfer in the present case was ordered as punishment and therefore the Division exceeded its authority. The onus was on the Division to prove it acted for permissible, non-disciplinary reasons. If the arbitrator concludes that the transfer was not discipline, then the onus lies on the Association to establish a violation of Article 19.

There was evidence to show that the grievor and Colvin had a troubled history together at Prairie Rose. The grievor was hired in a spirit of good intentions and high expectations. Her first three or four years went very well. She declined an opportunity to return to Winnipeg School Division based on the welcoming attitude she experienced. Her extra efforts in early childhood education seemed to be much appreciated by Colvin and others in the Division. But the Association argued that things changed for the worse in 2003 when the grievor was elected President of PRTA and claimed entitlement to a 20% release.

Colvin refused the release and the Association was forced to fight for the grievor's rights. Eventually Colvin was directed to back down by his legal counsel but he clearly maintained a grudge as a result. At one point he told the grievor that she should yield her position to a male math teacher, a comment which led to an accusation of sexism and harsh words between Colvin and an MTS officer in the grievor's presence. Then came a difficult and protracted round of collective bargaining which ended with an interest award. Thereafter the grievor was transferred or assigned new duties every year. In several instances there was no consultation, merely an abrupt announcement by Colvin that the grievor was moving. In 2005 the grievor sought and obtained an additional release to perform her new duties as an MTS Executive member. This resulted in even more complicated arrangements to balance the grievor's teaching duties with her releases, all of which involved Colvin.

The Association submitted that the foregoing background resulted in "tarnished perceptions" on the part of both Colvin and the grievor. The parents' group affair must be understood in light of the inter-personal history recited above. Colvin's reaction to the incident was coloured by his perception of the grievor. He quickly came to the conclusion that she was involved. He was angered and frustrated by her denial. It was telling that under cross examination, he resisted saying that he believed she was guilty, even though he had written as much in his report to the Board. His denial was untenable. In fact, his written report

condemned the grievor in unequivocal terms, leading to a reasonable conclusion that he saw transfer as the next best punishment if the evidence was insufficient to terminate the grievor outright. The litany of findings in Colvin's report was remarkable, especially since the evidence was so sparse - she was directly implicated in the e-mail and meeting; she was motivated by dislike of school administrators because they challenged her behaviour; her denials were not credible; she knew there would be adverse impacts on staff and administrators; her actions were malicious and intended to cause damage and discredit the Division.

The Association submitted that this was the heart of the present matter. Colvin believed that the grievor had committed grave offences against the school and the Division. By inference, it must be concluded that his recommendations were intended to punish her transgressions. This includes both the main proposal of discipline and the alternative proposal to transfer her out of the school.

Turning to the grievor's perception, the Division's action in moving her out of the collegiate was definitely felt as a punishment. In her mind, she was being condemned for the actions of others, including her husband. Her evidence was straightforward with respect to involvement in the parents' group. She had no role in the e-mail or the plans for a public meeting. She was preoccupied with parent interviews on the day the e-mail was issued and the family departed for Cuba virtually in the middle of the night. During the trip, she learned about the group's intentions from her husband but could not dissuade him. Upon return, the grievor became aware of the controversy and quickly obtained advice from MTS. She followed the advice faithfully, declaring her conflict to the Association and avoiding any involvement in the issue thereafter.

The Association submitted that these steps were reasonable under the circumstances.

Nevertheless, Colvin and the Board clearly believed she was guilty of misconduct. The transfer can only be seen as a *de facto* punishment imposed despite the absence of sufficient proof of her guilt.

As for the Division's argument that the grievor had a further or higher obligation to approach the Principal, her colleagues or her Superintendent, the Association denied the existence of any such duty. The MTS advice encompassed relations in the workplace, not just PRTA matters. The grievor was entitled to take the advice of senior MTS officials in a difficult situation. Admittedly the Association was late in notifying the membership and expressing its public support, but none of this was fault of the grievor.

Once the issue reached the Trustees on June 15, 2009, the ostensible decision was to decline discipline and direct a transfer for the good of the school and the grievor. The Association argued that this position, advanced by Greaves in his testimony, was not supported by the evidence and reasonable inferences from the established facts. Greaves' claim should not be accepted at face value. Under cross examination, he admitted that the Board was concerned about the grievor's involvement in the group, concerned about dishonesty on her part and indeed believed that likely she was guilty as alleged by Colvin. Greaves admitted that these factors played a role in the transfer decision. This alone was enough to prove the Association's contention that the transfer was really discipline in disguise.

Greaves also confirmed that the Board relied on the Ethier report in concluding that the collegiate work environment had become poisoned. The Association submitted that the impact statements contained in the Ethier report should not have been given weight by the Trustees, and similarly, should not now be given weight by the arbitrator. The statements were anonymous. The respondents were not clearly informed that their statements might be used as evidence before an arbitrator to attack the grievor. The statements were riddled with

double and triple hearsay. Only five respondents made a connection between the generalized trauma caused by the parents' group and the grievor herself. Two of these five statements were confined to the grievor's role in PRTA rather than the school. The Association agreed that a serious problem had developed in Carman over the group's action but most of the Ethier report was irrelevant to the grievor's situation. Beyond that, only a minority of teachers participated in Ethier's survey, not 60% as she claimed.

The arbitrator must carefully scrutinize the evidence placed before the Trustees. Since the transfer was justified based on effects allegedly caused by the grievor in the workplace, was there adequate proof that she was responsible for such effects? The Association said there was not. The Division acted on a logical fallacy - the grievor's husband was involved, therefore she was involved, therefore she was a disruptive influence.

As for the Rempel complaint, the Association argued that this issue should not have formed any part of the Board's consideration. Colvin failed to properly investigate the complaint and the grievor's response. She answered his questions and insisted she was away for both Early Dismissals. Had Colvin compared the e-mail with the items debated by Rempel and the grievor, it would have been apparent they were far from identical. The Association said that Colvin and the Trustees fell into the trap of assuming guilt because of the spousal relationship. They jumped to a conclusion without regard to the available evidence.

In brief, everyone wanted "something done" because of the uproar in town. But there was no proof that the grievor did anything wrong. A transfer was chosen because it could be rationalized on grounds related to the needs of the school, rather than the grievor's guilt, but in reality the purpose and effect was to discipline the grievor.

Finally, regarding the June 22, 2009 meeting with Colvin to review options for the grievor's

new assignment, the grievor described the session as hostile, a claim not challenged in cross examination. A non-disciplinary transfer would have been a process of accommodation, not an adversarial exercise. Roland and Elm Creek would have been seen as viable options, but instead, Colvin rejected both. His explanation that a Kindergarten class should not be disrupted by the grievor's shifting leave days was belied by the fact that she had previously taught in just such circumstances, without any problem noted. Two Kindergarten jobs could have been combined to create the nominal full-time position Colvin said he required. The Association argued that Colvin approached the consultation process with a mind set which held the grievor guilty of grave misconduct. In his view, she had been dishonest and malicious. For that reason, he offered only two Colony schools and a 50 kilometer drive as options.

The Association insisted that the transfer was not exercised fairly and reasonably. The decision was tainted by presumptions of guilt. As held in *Seven Oaks, supra*, if discipline is a component of a transfer, an arbitrator must rescind it (at para. 206-209). In general, if irrelevant considerations intrude into the decision-making process, the transfer is invalid: *Rolling River, supra*, at para. 99.

Moreover, the educational needs of the Division were not met by placing an early years specialist in a Grade 5-8 classroom. The situation in *Seven Oaks* was similar, and in that case, the arbitrator held (at para. 226):

I do not believe the transfer of Treller to Garden City Collegiate was a decision that can be objectively viewed as one that was likely to contribute positively to the educational experience of the students to be taught by Mr. Treller. The Garden City teaching assignment certainly did not properly utilize the abilities and experience which Treller had developed as a senior level mathematics teacher.

Due to Colvin's misguided choice, students at Roland were deprived of an educational opportunity.

In summation, the Association submitted that the transfer was a disguised punishment and therefore invalid. In addition, the transfer failed to meet the criteria set forth in Article 19, even assuming that the purpose and effect were non-disciplinary as claimed by the Division.

Findings, analysis and conclusions

Onus of proof

It was common ground that the overall onus of proving a violation of the collective agreement lies upon the Association. However, with respect to characterizing the transfer as non-disciplinary, the Association asserted that the Division bore the onus of first showing that the transfer to Boyne View School was initiated for legitimate educational reasons and not as a form of punishment. No authority was cited by the Association in support of its position. By contrast, the Division relied on *Pacific Press, supra*, where the arbitrator held that the union was required to prove that the contested reassignment was a disciplinary measure (at para. 65). In that case, the circumstances raised a suspicion about the employer's motive, calling for an explanation by management. However, the onus of proof on the issue did not shift. In *Pacific Press*, the employer did provide a plausible explanation for the transfer and it was held that the union had failed to prove that the action was disciplinary.

In Mitchnick and Etherington, *Labour Arbitration in Canada* (2006), the authors state that the employer bears the onus of proving just cause and must present its case first, unless *inter alia* the employer disputes whether the employee has in fact been disciplined (at p. 165). Such was the case before me. Arbitrator Weatherill held in *Re Brown Brothers Ltd. and*

Graphic Arts International Union, Local 28B (1973), 2 L.A.C. (2d) 347 that the union must prove the fact of discipline as a basic ingredient (at para. 3):

... Certainly it is up to the union as the party processing the grievance and seeking relief for the grievor, to establish in discipline cases, that the matter is properly before the board. The existence of the collective agreement, the fact of the grievor's employment and the fact of the imposition of discipline, must be established as the "basic ingredients" of the matter and it is only when this is done that the board can be said to be seized of the substantial question, that of just cause. In most cases, these "basic ingredients" are the subject of agreement between the parties. That was so in the instant case. There may be situations, however, where these ingredients themselves are in issue and where the union is put to the proof thereof. It is therefore incumbent on the union in such a case to establish those "basic ingredients" ...

In *Seven Oaks, supra* (at para. 208), Arbitrator Graham also found, in the specific context of a teacher transfer grievance, that the onus of proving an intent to punish lay upon the teachers' association and the grievor.

In *Pacific Press, supra*, like the present case, the employer made no attempt to establish just cause for discipline. A reporter was reassigned to a beat he deemed far less prestigious and challenging, albeit with equal pay and benefits. Arbitrator Germaine analyzed the onus question as follows (at para. 22-24):

Purportedly neutral reassignments administered for undisclosed disciplinary purposes would represent a classic example of the use of management discretionary authority in bad faith. It is an attempt to deny rights under the collective agreement, specifically the right to the just cause standard in disciplinary matters. See *Markham Hydro Electric Commission* (1992), 24 L.A.C. (4th) 412 (Knopf), at pages 422-3.

Therefore, if the grievor's assignment to the small business beat and

the Monday feature was disciplinary, the grievance must be allowed. That is because the Employer concedes it did not have just cause for any discipline. Whether a demotion or not, the grievor would be entitled to a remedy for the unjustified discipline. The issue, then, is whether the reassignment was a disciplinary measure.

This characterization of the issue determines where the onus of proof falls. It is not a just cause issue so the Employer does not bear the onus of proof on that account. Rather, it is for the Union to establish the assignment was disciplinary. The onus of proving the disciplinary nature of the reassignment is the Union's, just as it would bear the onus if it were alleging the assignment was discriminatory or in bad faith for some other reason. See *Wire Rope Industries Ltd.* (1983), 13 L.A.C. (3d) 261 (Hope), at page 266; and *Markham Hydro, supra*, at page 424.

I find these principles to be applicable in the present case and hold that the Association bore the onus of establishing the disciplinary character of the Boyne View transfer.

Was the transfer disciplinary?

The Association correctly argued that an arbitrator must look beyond the formalities of a transfer decision in order to discern the true purpose and effect of the action taken by an employer. In the present case, the Board's notification letter referred to the best interests of the Division and the grievor. The transfer option discussed in Colvin's report to the Trustees cited a conflict with colleagues in the school based on perceptions of the grievor's role in the controversy and her apparent inaction after the controversy erupted. As Board Chair, Greaves specifically testified that the Trustees found the allegation of misconduct unproven and opted for transfer because of difficult conditions in the collegiate. He denied that the transfer decision was intended as punishment. Nevertheless, as noted in *St. Clair Catholic Board, supra* (at para. 5), " ... the manner in which a principal describes his or her recommendations or a School Board describes its own actions is not determinative of the character of the action. Rather, it is one of a number of elements to be considered in coming

to an understanding of the true nature of the action taken.” The criteria listed in the *St. Clair Catholic Board* award are helpful in assessing the transfer decision in the present case, as follows:

(1) Intent: The stated intention was not disciplinary, recognizing the above-noted caveat. This weighs in favour of the Division’s position.

(2) Career impact: There was no evidence led with regard to impact on the grievor’s career. I recognize the intensity of the emotions experienced on all sides in this matter and the practical possibility that there will be adverse implications for her future career development in the Division. Still, there was nothing to suggest that the Boyne View transfer *per se* would undermine the grievor’s prospects. It was acknowledged that she would be eligible without restriction to apply for available openings in June 2010 and the parties requested that this award be released in sufficient time for the annual staffing process. On balance, this factor is neutral or somewhat favours the Division.

(3) Future discipline: When its decision was made, the Division did not reserve a right to rely on the transfer in a potential future disciplinary case, which would be a hint that the transfer itself was disciplinary in character. At the same time, neither did the Division provide a contemporaneous assurance, as in some of the reported cases, that it retained full confidence in the grievor and *would not* use the transfer against her at a later time. Again this factor is neutral or somewhat favours the Division.

(4) Could the alleged incident amount to culpable behaviour? The answer depends on how one characterizes “the incident” underlying the transfer. The Division said that this was a case of conflicted relationships in the workplace. The Association focused on the allegation of misconduct which, as framed by Colvin, was damning indeed. In my view, it would be

artificial to draw a bright line between the work environment and the grievor's alleged offences for purposes of this factor. Clearly, if the grievor had in fact participated in a malicious attack on the administration of the school, this would have amounted to culpable behaviour. On balance, this factor weighs in favour of the Association's position.

(5) - (6) Was there an intention to correct undesirable behaviour through punishment and disapproval? The transfer did not explicitly or implicitly address any aspect of the grievor's behaviour, whether within or outside the school. The Division has a legal right to assign teachers to schools and classes under Article 19 of the collective agreement based on educational needs as the paramount consideration. Teacher needs are secondary. As stated in *St. Clair, supra* (at para.19), school boards are permitted to transfer teachers to alleviate a personality conflict or to ensure a safe and harmonious workplace. In *St. Clair*, the transfer was found to be disciplinary where (at para. 25):

...the transfer was not imposed primarily to solve an incompatibility issue or a relationship problem that was tied to a specific school. The problem was not a personality conflict that could be solved by removing the grievor from the school. While the transfer was intended to alleviate the strained atmosphere at St. Helen's School by removing the grievor from the school where the parents were insisting that their children not be placed in her classroom, it was also designed to change and correct the grievor's conduct.

In the present case, there was no real dispute that the collegiate staff was in turmoil, even if the grievor failed to notice the fact. It was a valid concern to the Division that some respondents in the Ethier survey specifically identified the grievor as the source of their apprehension and stress. There was no need for a majority in this regard before action could be taken. The Ethier report was prepared by MTS, the teachers' own organization, and presented the views of a significant number of staff, whether the response rate was 60% or something less. The report was entitled to significant weight as an indicator of a damaged

workplace. Separating the grievor from the situation was reasonable to relieve stress and encourage healing. Thus, the transfer was not aimed at correction or punishment. This factor therefore weighs in favour of the Division.

(7) Did the transfer set out prospective expectations or create an immediate effect? The Division did not articulate any standards for the grievor to meet in future, which the *St. Clair* award suggested would indicate a non-disciplinary transfer (at para. 23). Rather the Board imposed a measure with an immediate effect on the grievor. This factor weighs in favour of the Association.

On the basis of the foregoing review, it would appear that the balance tips somewhat in favour of the Division's position that the transfer was non-disciplinary. Even taking the view most favourable to the grievor, the evidence is roughly equal on both sides, in which case the question must be determined based on the onus of proof. To succeed, the Association was required to establish on a balance of probabilities that the transfer was a form of discipline or punishment. In my view, the evidence was insufficient to prove this claim.

In final argument, the Association emphasized Colvin's strong opinions as expressed in his written report to the Trustees. In his mind, the grievor was implicated in the parents' group and her behaviour was utterly unacceptable. The Association also focused on Colvin's reluctance under cross examination to confirm the conclusions he had reached on the issue of guilt. It was suggested that this revealed a desire to punish the grievor by any means possible. Transfer was the next best thing to dismissal. I accept the point that Colvin personally had passed judgment on the grievor. He disbelieved the grievor's denials and considered her conduct to be scandalous for a teaching professional. His report was blunt and unequivocal to that effect. But at the same time, as Colvin pointed out under pressing cross examination, it was his role to investigate and report, not to decide. Colvin was akin

to the prosecutor and prosecutors sometimes come to believe fervently in the guilt of the accused.

The 'trial' was held by the Board of Trustees. There was no evidence to establish predisposition or unfairness on their part. Greaves' testimony demonstrated an appropriate appreciation for the sensitive distinctions which needed to be addressed in this case. The Board held that there was not enough evidence to implicate the grievor as an organizer or member of the parents' group. Among many matters, the Board considered the Rempel complaint, the grievor's response to the complaint during investigation and submissions by Paci on behalf of the grievor. The Trustees determined that discipline would not be imposed. I concur with Greaves' view that the issuance of a section 92 notice was necessary to ensure legality and fairness, give the recommendation by Colvin to consider termination, but did not dictate or taint the outcome.

Having decided that there would be no discipline, the Trustees still felt obligated to address the state of turmoil created in the school by the course of events. As discussed above, administrative transfer may be a reasonable response to relationship problems or staff conflict within a school. It depends on the circumstances. Here the trustees had information from both their own administration and MTS describing a serious morale problem among the school staff. There was a perception among at least some teachers that the grievor could no longer function as a trusted colleague. In this context, I am unable to find that the Trustees' decision was a form of disguised discipline or punishment.

Was the transfer fair and reasonable?

Under Article 19, a transfer may be made at the Division's initiative for any purpose which, in the Superintendent's judgment, is best for the welfare of the teacher or the school. While

recognizing these provisions of the collective agreement, the Association challenged the Boyne View transfer as unfair and unreasonable, contrary to paragraph A of the article.

In my view, the Division's substantive obligation under paragraph A was to decide in good faith, taking into account only relevant and proper considerations. In conducting an arbitral review, it would be inappropriate to substitute my opinion for that of the Superintendent or Trustees on the merits of the transfer or any educational issues related to the transfer. In this context, if the Division had a reasonable basis to conclude that a transfer to Boyne View was necessary, the decision should be allowed to stand. As stated in *Rolling River, supra*, arbitrators should not intrude into management of the employer's business. I reiterate this point here while also noting that "It is my role to ensure compliance with the negotiated terms of the collective agreement (*Rolling River*, at para. 87)."

The duty of good faith and tarnished perceptions

I have already dealt with the line of argument advanced by the Association that the Division acted for an improper purpose, to wit, an intention to punish the grievor for alleged but unproven misconduct. However, the Association also submitted that Colvin's judgment in recommending a transfer to the Board was affected by "tarnished perceptions" based on years of strained relations with the grievor. When it came to the stage of selecting the particular school to which the grievor would be assigned, she went further in her testimony. The grievor said that Colvin was overtly hostile and deliberately offered her only unfavourable teaching options.

These allegations verged on an accusation of bad faith. However, I find there was no reasonable basis in the evidence for such a position. Despite lengthy testimony about her dealings with Colvin on a variety of matters, especially her assignments and transfers, the

grievor did not show any impropriety on the Superintendent's part. The grievor's contention that she was continually and unfairly moved through a series of short term assignments was not borne out on the facts. She chose to leave Miami. She knew in advance that Elm Creek was a one-year term. She admitted the move from Graysville was due to declining enrolment. As for the transfer from Roland Kindergarten to Carman Collegiate in 2006, she herself requested the move, a fact she forgot while testifying that Colvin summarily forced her to change schools.

The Association suggested that one factor in Colvin's antipathy toward the grievor was her insistence on taking PTRAs and MTS leaves of absence each year beginning in 2003. All the grievor's requested releases were granted after a dispute over the first one, which occurred during the divisional amalgamation process. She received two 20% leaves followed by four 45% leaves, the latter requiring complicated arrangements to balance the grievor's teaching load with her PTRAs/MTS obligations. The accusation that Colvin urged her to quit as Association President so a male teacher could take over was not corroborated by calling the MTS Staff Officer who was present at the time. Apparently no complaint or documentation was ever filed about this incident. Colvin could not reasonably be expected to recall and respond to the allegation seven years later.

There was no assertion in the grievor's own testimony that her role in collective bargaining or as an advocate for PTRAs teachers created actual conflict with Colvin. No witness was called to support any of the assertions of a strained relationship. This is not to say that there were never problems between the grievor and Colvin. The grievor presented as an articulate and forceful individual with well developed opinions. No doubt she ruffled some feathers from time to time. But I accept the Division's characterization that any clashes which occurred were within the scope of a normal interaction between a Superintendent and an assertive local union leader.

As for hostility during the June 22, 2009 meeting with Colvin to review options for the grievor's new assignment, Paci was not called as a witness even though he was present throughout the meeting and had a good command of the potential assignments and the issues at play. Moreover, there was no evidence corroborating the grievor's claim that the Colony schools offered to her were second class assignments which most teachers avoided. Colvin denied it. He also testified as to his analysis of the options and explained why he rejected the Roland Kindergarten proposal. It was his judgment that the concept did not work well the last time (2005/2006) and while she held a different view, the grievor conceded that there could be different opinions on a matter of educational practice such as this.

In any event, due to circumstances largely beyond anyone's control, the meeting to review options did not take place until very late in the staffing cycle. Elm Creek was about to be filled and Roland was already short listed. The idea of combining the two 0.50 FTE Kindergarten positions was raised at arbitration but not at the June 22 meeting when Colvin might have considered it. The grievor preferred an early years assignment, in keeping with the bulk of her experience, but I accept Colvin's point that she was fully qualified to teach the Boyne View position. At the time, she was handling a Grade 8 class at Carman Collegiate. For the two prior years she had been a resource teacher in the collegiate. I am satisfied that Colvin's decision was reasonably justified given the educational needs of the Division. He considered the grievor's wishes and needs but in the end, consistent with Article 19, he treated the Division's educational needs as paramount.

Given all of the foregoing, I find no evidentiary basis for the suggestion that Colvin acted for ulterior motives or failed to act in good faith.

Relevance of the grievor's decision to recuse herself

The Division and the Association differed on whether the grievor had a duty as an employee (a) to disclose her involvement in the parents' group to her employer, whatever the nature of the role might be, and (b) to declare support for her employer, the school and her teaching colleagues during the damaging attack by the parents' group. The Division said the grievor should have taken these steps. But the Association argued that the grievor was entitled to rely on advice from MTS to declare a conflict and remove herself from all further participation in the issue, given her husband's active role in the group. The evidence did not disclose precise details of the advice, in particular whether MTS counseled the grievor on her obligations as an employee and colleague, above and beyond her role as PRTA President. The Association's position before me was that the grievor acted correctly and had no duty to take the additional steps outlined by the Division. Once the grievor recused herself, the Division had no right to make assumptions about her connection to the controversy and no authority to transfer her based on mere perceptions held by colleagues in the school.

I leave aside for a moment the duty of employee fidelity and how far it might extend in the unique circumstances of the present case. On the facts, the grievor did not take steps to approach her employer and explain that she had no part in the group's agenda. She did not offer clarity regarding her husband's role and her relationship to his activities. She did nothing to support the school and her colleagues during a period of duress. I agree that PRTA's undue delay in taking a stand aggravated the entire situation and made the grievor's position look worse. But she was bound to take the circumstances as she found them when she opted for silence. For purposes of this award, I will assume without deciding that the grievor was legally entitled to recuse herself both as PRTA President and as a Carman Collegiate teacher.

The result of the grievor's decision was that many people around her came to predictable conclusions about her role. Given the common understanding of how marital relationships usually work, some assumed that she must be implicated. Others simply worried and wondered whether she could be trusted. Still others were traumatized by the group attack itself and did not articulate a concern over the grievor specifically. Without question, the overall damage and stress caused to the teaching staff and administrators was aggravated by the grievor's stance.

Contrary to the Association's argument, I find that perceptions about the grievor were not unjustified and unfair. The perceptions may have been erroneous but they flowed naturally from the grievor's decision to remain mute. As the grievor testified, she anticipated a negative impact to the school from the outset, including a sense of betrayal and mistrust by her colleagues toward her. This was precisely the outcome observed by Colvin and documented by Ethier. The Division made no error in treating these realities as relevant considerations in the transfer decision.

In these circumstances, it was not unfair and unreasonable for the Superintendent to recommend that the grievor must be transferred out of the collegiate to another school. Further, it was not unfair and unreasonable for the Trustees to accept the recommendation after hearing from the grievor. Had the grievor acted more openly and affirmatively, she might have mitigated some of the damage and avoided the need for a transfer. Whether or not she was legally obligated as an employee to do more, the fact remains that she stood silent. I mean no criticism of the grievor for taking the MTS advice. However, by doing so, she left the Division little room to manoeuvre. Having considered all the evidence, I find the Division reasonably concluded that a transfer was necessary in the best interests of the grievor and the school.

Was consultation adequate?

The Association did not strongly press the argument that the grievor had no opportunity for a meaningful consultation regarding the transfer. At the Board level, there was full notice and a formal hearing. Before Colvin exercised his delegated authority to choose a new school, there was notification of the options he was considering and a face-to-face meeting with full discussion. I find that consultation was adequate to meet the requirements of Article 19, paragraph B.

Award and order

For the reasons set forth above, the grievance is denied.

DATED at the City of Winnipeg this 2nd day of June 2010.

"Arne Peltz"

ARNE PELTZ, Arbitrator