**IN THE MATTER OF AN ARBITRATION:**

**BETWEEN:**

**THE ST. JAMES-ASSINIBOIA TEACHER'S ASSOCIATION NO. 2**
**OF THE MANITOBA TEACHER'S SOCIETY**
**(hereinafter referred to as The Association")**

**-and-**

**THE ST. JAMES-ASSINIBOIA SCHOOL DIVISION NO. 2**
**(hereinafter referred to as "The Divisions)**

## ARBITRATION AWARD

**BOARD OF ARBITRATION:**
Gavin Wood, Arbitrator
Rob Simpson, Nominee for the Association
Bill Semerlus, Nominee for the Division

**DATE OF HEARING:**
April 27 and June 26, 2000

**LOCATION OF HEARING:**
Winnipeg, Manitoba

**APPEARANCES:**
Mel Myers, Q.C., Counsel for the Association
Gerry Parkinson and Keith Eyrikson, Counsel for the Division

## A W A R D

The Arbitration proceeded on April 27 and June 26, 2000. The Arbitration Board consisted of Gavin Wood as Chairperson, and Bill Sumerlus and Rob Simpson as Nominees. Mel Myers appeared as Counsel for the Association and Gerry Parkinson and Keith Eyrikson as Counsel for the Division. At the outset, the parties confirmed that the Board was properly constituted. With respect to jurisdiction, Mr. Parkinson indicated that he would argue that the relief sought was beyond the authority of the Board.

The grievance arises over long-term sick in the *"Professional Staff Leaves and Absences"* policy of the Division (Exhibit 13). The Association takes the position that a series of paragraphs of the long-term sick leave policy ("the policy") are in violation of the Collective Agreement, sections 93 and 94 of the Act and Sections 12 and 14 of the Manitoba Human Rights Code. All of the alleged violations are denied by the Division.

### Evidence

The parties filed by consent a number of documents including the Collective Agreement for the period of January 1, 1997 - June 30, 1998 ("The Collective Agreement") (Exhibit 5), the policy (Exhibit 13) and the long-term disability plan (Exhibit 6).

The Association called Mr. James Robertson, President of the Association. Certain stipulations were made. The Division did not call viva voce evidence.

**Factual Circumstances**

The Collective Agreement and the Public Schools Act, R.S.M. 1987, c. p 250, ("the Act") has several provisions relevant to long-term sick leave. Articles 3 and 4 of the Collective Agreement set out the salary schedule. Article 5 deals with leaves of absence. With respect to illness, Article 5.05 provides:

5.05 (a) i) Where the employment of a teacher is continued for more than one year the unused portion of the sick leave to which the teacher is entitled by law may be carried over from year to year to a maximum of one hundred and ten (110) teaching days.

ii) Where an employee has been in the continuous employ of the Board for more than ten (10) years and is returning from Salary Continuance, and has no paid sick days remaining, this employee shall be granted additional sick leave of twenty (20) teaching days.

(b) In the event of teacher's being absent for a lengthy period of illness, the Board if it so wishes, may have the case checked by its local nurse or local health officer, or its appointed Doctor, who shall report on the teacher's ability or inability to return to duty."

Section 93 of the Act deals with the accumulation of sick leave. It provides:

93(1) Each teacher who is continuously employed by a school board shall accumulate entitlement for sick leave at the rate of one day of sick leave with pay for every nine days of actual teaching service, or fraction thereof, unless a collective agreement governing the working conditions of the teacher provides for another manner of accumulating sick leave.

93(2) No teacher shall accumulate more than 20 days sick leave with pay under subsection (1) in any year unless a collective agreement governing the working conditions of the teacher provides otherwise.

93(3) No teacher shall accumulate more than 75 days sick leave with pay under subsections (1 ) and (2) unless a collective agreement governing the working conditions of the teacher provides otherwise.

93(4) For the purposes of determining sick leave under this section and for the purposes of determining sick leave under a collective agreement, unless the collective agreement provides otherwise,

(a) any day during which a teacher is absent from school because of sickness does not constitute part of actual teaching service; and

(b) the number of days a teacher is on sick leave with pay shall be deducted from his accumulated sick leave with pay entitlement when he returns to work.

93(5) Where a teacher whose sick leave is governed by subsections (1), (2) and (3) is sick, he is entitled to be paid his salary during his sick leave up to the maximum entitlement as determined in accordance with this section.

93(6) Where a teacher whose sick leave is governed by the provisions of a collective agreement, whether entered before or after the coming into force of this section, is sick, he is entitled to be paid during his sick leave whatever is provided in the collective agreements

Section 94 of the Act specifies the Division may require a medical certificate in the following terms:

s.94 "Subject to any collective agreement governing the working conditions of the teacher, where a teacher is absent from school because of sickness, the school board may require the teacher to submit to the school board a medical certificate from a duly qualified medical practitioner certifying that the teacher was sick during the period of absence.

Sub-section 95(1 ) provides the Division with the authority to extend sick leave entitlement.

It provides:

s.95(1) "Notwithstanding section 93, a school board may in any school year grant to a teacher sick leave with or without pay for a period longer than that authorized under section 93."

s.95(2) Notwithstanding any other provision of this Act, a school board may negotiate, and shall be deemed always to have had authority and capacity to negotiate with the local society representing teachers employed by it, as part of a collective agreement, the right and entitlement of teachers to sick leave and to accumulate sick leave and all maters relating to the manner of accumulating and limiting the accumulation of sick leave as part of the working conditions of the teachers and, where the school board and the local society cannot agree on those matters, the matter may be referred for arbitration under Part VIII in the same way as any other dispute arising out of negotiations for a collective agreement."

Article 5.05(a) (ii) makes reference to a long-term salary continuance program. Article 10.02 provides specifically for a long-term plan for teachers in the following terms:

10.02 "As a condition of employment, all eligible teachers engaged on or after January 1, 1969 shall be required to participate in the St. James-Assiniboia Teachers' Association salary continuance insurance plan. Premiums shall be deducted each month for the duration of their employment."

The long term disability plan (Exhibit 6), administered by the Manitoba Teacher's Society, provides in Section I for certain eligibility requirements. Section II of the plan sets out the insuring provisions, and Section III the benefit provisions.

A written staff leave and absence policy (Exhibit 14) for the Division has been in effect since at least 1976 (the "1976 policy"). In 1998 a grievance was commenced concerning certain aspects of the 1976 policy. The Division then determined to revise the 1976 policy. As a result, the present policy entitled "Professional Staff Leaves and Absences" (Exhibit 13) was brought into effect in 1998. Part I of Exhibit 13 deals with short-term leaves of absence. Sub-part A of part I provides:

> Each teacher continuously employed by a school board shall accumulate entitlement for sick leave at the rate of one day of sick leave for every 9 days of actual teaching service, or fraction thereof, to a maximum of 20 days per year but the total sick leave which he shall be entitled to accumulate shall not exceed 110 days. (REFERENCE: Public Schools' Act section 93 (1-3) and the Teachers' Collective Agreement 5.05)."

Part II of the policy provides for educational leaves and professional leaves. Part III deals with long-term leaves. The introduction to Part III provides:

> "Teachers, vice-principals and principals must receive approval from the Director of Education for all long term leaves according to the policy guidelines listed below. All requests for long term leave of absence must be submitted through the principal on the appropriate forms to the Director of Education."

After the introduction section, Part III sets out the Division's policies for long-term leave in certain specific circumstances, including: (1) improvement of qualifications, (2) teacher exchange, (3) executive duties with the Manitoba Teachers' Society, (4) maternity leave, (5) adoption leave, and (6) long-term sick leave.

The grievance is brought over parts of the first five paragraphs of the long-term sick leave policy. That policy provides:

para.1 "Sick leaves, when recommended by a teacher's physician and requested in writing, may be granted by the Director of Education without pay or fringe benefits up to a maximum of one year duration. Such a leave may be requested to take effect after accumulated sick leave under Section 93 of the Public Schools Act and/or Article 5.05 (a)(l) of the Collective Bargaining Agreement has been used up by the teacher.

para.2 When a teacher has been absent due to illness or accident more than twenty consecutive working days and/or when a teacher anticipates being absent due to illness or accident for more than twenty consecutive working days, he/she shall apply in writing for sick leave accompanied by a written statement from a physician certifying the inability to work and giving an expected date for return to work.

para.3 When a teacher intends to return to duty following a sick leave which has lasted for twenty consecutive teaching days or more, the teacher shall first provide to the Division a written statement from a physician certifying the fitness of the teacher to fulfill his or her duties. The Director of Education may

require a teacher to submit to a physical and/or mental examination prior to return to duties.

para.4 A teacher who has been absent on sick leave for more than twenty consecutive teaching days as of April 30 of any year shall on or before April 30 of that year notify, in writing, the Director of Education of his/her prognosis for return to work accompanied by a physician's statement specifying the likely date of ability to return to duty. Failure to provide such information may result in sick leave being extended for up to the entire up-coming school year and/or disciplinary action.

para.5 The assignment of a teacher who has been absent on sick leave for more than seventeen weeks in any school year shall be at the discretion of the Director of Education upon being fit to return to duties. The leave without pay or fringe benefits will be continued until a vacancy occurs for which the teacher is fit and able during that school year. Pending that assignment the teacher will be given a preference for substitute opportunities for which he/she is fit and able and paid for such substitute duties on a pro rata basis to his/her annual salary on the salary schedule as held when the leave was granted. The Director of Education may, if he determines it is not adverse to the best interests of the students return the teacher to his/her previous assignment during that school year. At the beginning of the next school year, an assignment to a comparable position from that vacated at the time of commencement of sick leave is guaranteed, provided the teacher is fit and able to resume full duties at that time.

para.6 Teachers absent due to illness shall return to the same position and the salary schedule as held when the leave was granted."

Mr. James Robertson testified. He has been employed by the Division since September 1971. He has been active in the Association since 1983, serving on various committees of the Association over the years. In particular, he has been on the negotiating committee for various collective agreements. He has been the President of the Association since June 1995.

Mr. Robertson was called by the Association to present the factual background of the various parts of the grievance and to explain the specifics of each complaint. Mr. Myers, in argument, relied upon this testimony as the basis of each of the grievance points. The testimony of Mr. Robertson is summarized immediately before considering each of the Association's arguments in order to avoid duplication in setting out the various grievance points.

Mr. Parkinson voiced concern during Mr. Robertson's direct examination that aspects of his testimony involved legal opinions and interpretations. Mr. Myers countered that Mr. Robertson's testimony included "his understanding" of the nature of the various complaints. Counsel agreed that the Division's case would not be prejudiced with the Board if Mr. Parkinson did not cross-examine Mr. Robertson on these interpretations and understandings.

As well, the parties stipulated that the practice was for many years that the Division before a teacher could return to work after extended sick leave could require: (1) a written statement of a physician certifying the fitness of the teacher to fulfill his/her duties; and (2) the teacher to submit to a physical and/or mental examination by a physician of the Division's choosing. The Division had maintained, over the years, that Article 5.05(b) of the Collective Agreement authorized the Division to require the physician's certificate and the independent medical examination. The parties further stipulated that in the

past the Division's interpretation of Article 5.05(b) had been acknowledged as correct by the Association.

The sick leave from prior collective agreements between the Division and the Association for the period from January, 1968 to the present were filed (Exhibit 15). As well, a series of documents were filed showing changes proposed by the Association to the leave of absence provisions of these collective agreements (Exhibit 16).

**Submissions**

The grievance first deals with paragraph 1 of the long-term sick leave policy. Part I of the grievance reads:

> I "In respect to Paragraph No. 1 of said "Policy" the Association submits that a teacher's entitlement to long term disability benefits is not dependent upon the approval of the Director of Education, but is only dependent upon meeting the qualifications as set out in the "Plan", and as a result this provision is contrary to Article 10.02 of the Collective Agreement."

Mr. Robertson testified that the Association has three concerns with paragraph 1. First, it references sick leaves as "without pay", thereby ignoring the long-term disability plan, which provides for income after the accumulated sick leave under Article 5.05 (a) (1) of the Collective Agreement had been exhausted by the teacher. Also paragraph 1 of the policy references sick leaves "without...fringe benefits", again in disregard of the long-term disability plan. Second, paragraph 1 makes no reference to Article 10.02 and of the entitlement for income protection under the long-term disability plan. According to Mr. Robertson, a person looking at paragraph 1 of the policy would assume that a teacher on long-term sick leave has no pay or fringe benefits. Third, paragraph 1 requires a teacher to apply for long-term sick leave to the Director of Education. Mr. Robertson testified that this clause misrepresented the teacher's long-term sick leave entitlement as being at the discretion of the Director of Education (rather than as a contractual entitlement).

Mr. Robertson acknowledged in cross-examination that paragraph 1 does not make any reference to the long-term disability plan, and certainly not to long-term entitlement having to be exhausted before sick leave under paragraph 1 may be requested. Mr. Robertson explained that the Association's concern was that paragraph 1 may be misconstrued to mean that the Director determines whether or not long-term disability benefits are available. In fact, it is not necessary for a teacher to apply to the Director in order to obtain long-term disability benefits. Mr. Robertson agreed with Mr. Parkinson that paragraph 1 does not provide that it applies only after long-term disability has been exhausted.

Mr. Parkinson, during cross-examination, also referred Mr. Robertson to sub-section 95(1) of the Act. Mr. Robertson accepted that 95(1) does not provide that the Division can grant sick leave for a period longer than authorized under Section 93 only after long-term disability plan benefits have been exhausted. Mr. Robertson said that 95(1) should be amended in that regard.

Mr. Parkinson also challenged Mr. Robertson's claim that a teacher could be confused or intimidated by paragraph 1 (and thereby might not apply for long-term benefits). While Mr. Robertson maintained this possibility, he was unable to cite any example of this having occurred. He also commented that one could only speculate as to whether it had occurred.

Mr. Robertson clarified in cross-examination that he was not suggesting that the Division was deliberately attempting to have teachers fail to apply for long-term disability benefits. While he

maintained that paragraph 1 was inappropriately mix-worded, he did not attribute any such motivation to the Division.

In argument, Mr. Myers first dealt with the jurisdictional issue, maintaining that the grievance of the policy was arbitrable. He referenced the principles set out in Re: Lumber and Saw Mill Workers Union and KVP Company Limited (1965), 16 L.A.C. 73 (Robinson), specifically that a rule unilaterally introduced by management must be consistent with the collective agreement (and, as well, the applicable statutory provisions), must be reasonable, and must be unequivocal. For Mr. Myers, the Board's jurisdiction was established by the KVP principle. He granted that there was no individual teacher grieving. But the Association relied on the arbitral principle of Obey now and grieve later". He referenced Brown and Beatty, Canadian Labour Arbitration (3d), which provides the following:

> "One of the most basic and widely accepted rules of arbitral jurisprudence holds that employees who dispute the propriety of their employer's orders must, subject to the considerations which follow, comply with those orders and only subsequently, through the grievance procedure, challenge their validity." (page 7-165).

Mr. Myers, on the issue of jurisdiction of the Board, also referenced the following authorities:

(a) Re: WardAir Canada Inc. and Canadian Air Line Flight Attendants' Association (1987), 28 L.A.C. (3d) 142 (Beatty);

(b) Re: Municipality of Metropolitan Toronto v. Canadian Union of Public Employees. Local 43 (1990) 69 D.L.R. (4th) 268 (Ont. C.A.), emphasizing the following (281-282:

> The majority of the Board justified its use of the "obey now, grieve later" rule, by saying that it would be "hypocritical, and transparently so, to deny employees the promise of the rule having exposed them to its command". In other words, if the purpose of the rule is to avoid insubordination and anarchy in the workplace, the obvious trade-off is that employees in a unionized environment will have the right to grieve rules, the breach of which would likely have led to discipline, even as they continue to obey them.
>
> Would avoiding this directive give rise to discipline? Counsel for the Employer did not strongly argue that it would not, although he did argue strenuously that the directive was within the exclusive contractual competence of the Employer until and unless a driver/attendant was actually disciplined for not using lights or sirens in responding to an emergency call. The fact is that, subsequent to the filing of the original grievances, some employees were disciplined for failure to obey the directive. Even had this not occurred, the likelihood is that management would have taken a dim view of the breach of a policy going to the heart of its System-oriented" approach. It is not idle speculation to presume that discipline, up to an including dismissal for repeated infractions, would have been imposed.
>
> Furthermore, if discipline were imposed, it likely would have been grieved. Once the grievance reached the stage of arbitration, the arbitrator would have been compelled by art. 3.01 (ii) of the collective agreement to determine if the "employee has been discharged or disciplined without reasonable cause". The Board stated that this task would require it, *inter alla,* to examine the directive for reasonableness. This point will be examined later. Suffice it to say this Board, at least, would have embarked on

> virtually the same inquiry if the grievance had arisen from actual discipline as it embarked on to deal with "discipline in the abstract." The only major difference, of course, is that, if the grievers had been insubordinate, the mere fact of their insubordination might have teen held against them, especially if the Board ultimately found the directive itself to be Unreasonable, but not ~unsafe", using the test described above."

(c) Charlottetown (City) v. Charlottetown Police Assn., (P.E.I. Sup. Ct., App. Div., unreported, July 8, 1997)

Concerning jurisdiction of the Board, Mr. Myers further pointed out that Article 17 of the Collective Agreement was broadly worded. It provides in part:

> "Where there is a dispute between the parties to or persons bound by the Agreement or on whose behalf it was entered into, concerning its meaning, application or violation, the aggrieved party shall, within 35 teaching days from the date on which the Grievor became aware of the event giving rise to the dispute or alleged violation, whichever is later, notify the other party in writing stating the nature and particulars of the dispute limit imposed under the Collective Agreement has not been complied with, the parties shall proceed to appoint the Arbitration Board and, if the Arbitration Board is satisfied that the irregularity with respect to the time limit has not prejudiced the parties to arbitration and will not affect validity of the decision of the Arbitration Board and the declaration is binding on the parties to the arbitration and on any person affected by the decision of the Arbitration Board."

This wording, according to Mr. Myers, provides a wide discretion for the Board to deal with the grievance.

Turning specifically to the grievance, Mr. Myers reviewed the testimony of Mr. Robertson on the Association's concerns with paragraph 1 of the long-term sick leave policy. While the Board was familiar with Section 93 of the Act and Article 5.05 of the Collective Agreement, he maintained that a teacher who was unfamiliar with those provisions, might well conclude that paragraph 1 requires the Director's permission for long-term sick leave. For Mr. Myers, the paragraph creates needless confusion. It was not possible to know if teachers had been confused to the point of failing to apply for their entitled benefits. Nevertheless, Mr. Myers maintained that paragraph 1 of the policy should set out teacher's rights and contractual entitlements. Instead it was confusing and misleading.

Part II of the grievance challenges paragraph 2 of the Division's long-term sick leave policy as follows:

> "In respect of Paragraph No. 2 of the said "Policy, the requirement therein for a teacher to apply in writing for sick leave, accompanied by a written statement by a physician certifying the inability to work and giving an expected date of return to work is contrary to Articles 5.05 and 10.02 of the Collective Agreement and Sections 93 and 94 of the Public Schools Act."

Mr. Robertson explained that the Association did not object to the requirement for a written statement from a physician. However, he emphasized that paragraph 2 requires not only that the physician certify the inability of the teacher to work, but also that the physician give an expected date for return to work. A teacher cannot control the satisfying of that requirement, for a physician may or may not be prepared to state an expected date for return. Mr. Robertson clarified that the Association certainly recognized

that when a teacher has been away sick for a period of time that it is reasonable that notice be provided if the teacher knows when he/she will be returning.

Mr. Robertson also challenged the requirement in paragraph 2 that a teacher must apply for sick leave. Articles 5.05 and 10.02 provide for entitlements for sick leave in certain circumstances. Therefore, the Association rejected the requirement to apply as inconsistent with the Collective Agreement.

On cross-examination, Mr. Robertson confirmed that the Association did not object to the requirement of notice. Nor did it object to the requirement of a physician's certificate. Such medical certification is provided for by Section 94 of the Act. Further, he conceded that a teacher has "control" to the extent that the teacher must authorize the physician to provide the certification. Mr. Robertson went on, however, to point out that a teacher cannot force a physician to provide an anticipated return date. Mr. Robertson agreed with the suggestion from Mr. Parkinson that if a doctor refuses to provide an anticipated return date that the teacher-patient could change to another doctor; but Mr. Robertson also said that in many circumstances it is not possible for that change to occur.

Mr. Robertson also conceded that in some circumstances a physician on being asked of the anticipated return date will simply advise that it is indeterminate. Mr. Robertson knew of no circumstance in which the Division had required from a doctor "a guaranteed" date of return. The Division, he said, had not administered paragraph 2 of the policy as requiring such a guaranteed return date.

The Association also filed a medical report, dated February 22, 2000, from Dr. Gary Mazowita (Exhibit 8). Dr. Mazowita is the head of the Family Medicine Department at Seven Oaks General Hospital in Winnipeg. He was asked to comment "on the appropriateness and logistics" of physicians providing "expected return to work dates" months in advance. In his report (Exhibit 8) Dr. Mazowita notes that there are many illnesses and disabilities which allow for ready and accurate prognoses. However, with illnesses that are "more chronic or multi-factorial", or "with significant concomitant social or psychological factors", Dr. Mazowita explains that the treating physician becomes less able to give precise predictions. He writes:

> "There are may illnesses and disabilities that lend themselves, on balance of probabilities, to ready and accurate prognoses. These may include both physical and psychological diagnoses, but in general they are characterized by the following:
>
> (i) a discreet diagnosis/procedure that historically has been identified as having a specific convalescence;
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> (ii) absence of medical complications;
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> (iii) absence of confounding psycho-social factors;
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> (iv) relatively short duration;
>
> (v) good premorbid health including mental health;
>
> (vi) good social support." (Exhibit 8)

He then concludes:

> "However, as illnesses become more chronic, or multi-factorial, or with

> significant concomitant social or psychological factors, a treating physician becomes less able to give precise predictions. This is particularly true when the rate of improvement of an illness or disability is minimal or erratic from month to month, as is often the case with a longer-term problem.
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> The prognosis of "I don't know yet" is no less valid than "yes he can return" or "no he can't". It is unrealistic and unreasonable to expect physicians to be able to provide in April a definitive return to work date for September in all cases. Physicians themselves may have contributed to the perpetuation of this problem by feeling compelled to choose between "yes" or "no" since these are often presented as the only acceptable options by a desperate and vulnerable patient, who is fearful of being without income. Thus, decisions are sometimes made prematurely, under duress, and therefore inappropriately.
>
> I can understand the administrative need for early notification, but this is not always possible. Furthermore, the patient who is not yet ready to have this subject of return to work broached may well be caused undue psychic distress when being asked to think 5 months ahead at a time when making day to day living decisions is itself difficult. In these situations, the request for a definite prognosis can become counter-therapeutic, especially when accompanied by the implied or overt coercion that benefits may terminate in the event a definite decision is not rendered. The timing of return to work discussions requires skilled judgment and an intimate knowledge of many factors. Compelling a premature decision may benefit the employer, but can impact negatively on the patient.
>
> It would seem to me that the solution to this problem is to acknowledge the fact that for certain individuals it is impossible to answer other than "prognosis for return to work in September is uncertain at this time."

In response, the Division filed a report dated March 28, 2000 (Exhibit 9) from Dr. G.R. Cumming, the Medical Director of Great West Life. In his report, Dr. Cumming disagrees with the opinion of Dr. Mazowita. He writes:

> "l would not agree with him on this. I think any physician should be able to form an opinion. Everyone would realize fully that this opinion is not carved in stone and that on disease outcome and cause circumstances change. I can see the importance of the school Board requiring some indication of the intent of the patient to return to work and the intent of the physician to encourage this. I would think that any physician treating a difficult case should have a treatment plan and that treatment plan should have a t least some target as to where the patient is expected to be six months down the line, i.e., either back at work, dead, or in a sanitarium, etc."(Exhibit 9)

Later in his report Dr. Cummings summarizes his view as follows:

> "It would seem to me that if the doctor knows enough about his patient to label him or her totally disabled, he should know enough to estimate a return to work time, even though there is no measurable impairment."

He goes on to explain:

> "Often the patient will profess to be really wanting to get better, and will be going along the right track to achieve this, but as the day draws near for a return to the classroom, the symptomatology suddenly resurfaces and return to work does not occur. This is not the fault of the physician, and the physician should not expect to be right in this preognostication."

Dr. Mazowita filed a response in a letter dated April 17, 2000 (Exhibit 10). He notes:

> "Dr. Cumming is an experienced physician, knowledgeable in matters concerning convalescence and rehabilitation. He is correct that, in general, the treating physician attempts to anticipate the length of disability, as one of several strategies to prepare the patient for eventual return to work. Again, as a general rule, the accuracy with which one can do this improves as illnesses become shorter in duration, or simpler in morbidity." (Exhibit 10)

And:

> "In essence, we are talking about the uncertainty of the individual response as opposed to the collective statistic. The reality of one does not detract from the other. At some point in time, I agree with Dr. Cumming that every physician should be able to prognosticate reasonably accurately; this is not the case at every point in time in the course of an illness.
>
> I would certainly not consider filling out a return date during the first several days of a serious illness. For some clinical situations this period of uncertainty is prolonged."

The Division also filed a letter dated April 20, 2000, (Exhibit 11 ) from Mr. Donald F. Yuel, who, for over 35 years, worked in the disability claims department of Great West Life. He ultimately managed the department. In the letter he reviews the information sought by the policy from physicians. He concludes: The above information is essential to an insurer in adjudication disability claims and assists it in determining the claimant's entitlement to ongoing and future benefits...".

In argument, Mr. Myers began by emphasizing that pursuant to the Collective Agreement and the Act, sick leave is a teacher's right. He noted that it was recognized, despite that right, that a teacher should give notice when he/she will be away due to sickness for an extended period of time, and as well provide notice when he/she intends to return. However, Mr. Myers asked rhetorically why a teacher should be required to apply for sick leave. For him, such a requirement is inconsistent with the provisions of the Collective Agreement and with the Act. Further paragraph 2 of the long-term sick leave policy requires the teacher to obtain from a physician an anticipated date of return to work. Mr. Myers reviewed Section 94 of the Act and Article 5 of the Agreement. He concluded that review by emphasizing the lack of any such date of return requirement.

Part III of the grievance provides:

> "In respect of Paragraph No. 3 of said "Policy", the association submits that the

requirement of the Director of Education to require a teacher to submit to a physical and/or mental examination prior to returning to duties, after an absence of twenty (20) consecutive teaching days or more, is contrary to Article 5.05(b) of the Collective Agreement."

Mr. Myers clarified that Part III effectively seeks an interpretation of Article 5.05(b) of the Collective Agreement. The Association recognized the contractual right of the Division to require a teacher returning from a lengthy sick leave to produce a medical certificate confirming his/her fitness to return to work. Yet, Mr. Myers maintained that Article 5.05(b) did not allow for an independent medical assessment of a returning teacher. Paragraph 3, however, of the long-term sick leave policy provides that the Director of Education may require the teacher to submit to an independent medical examination prior to returning to duties. He granted that this provision of the policy is consistent with the long-term practice of the Division. Further it was stipulated that the parties had, for many years, interpreted Article 5.05(b) as consistent with the practice of the Division requiring an independent medical examination.

During his testimony, Mr. Robertson acknowledged that the Association had not challenged this practice until the grievance was filed. He maintained that the provision in Article 5.05(b) for having "the case checked" could not be interpreted to mean that the teacher must, at the request of the Division, submit to an independent examination.

In argument, Mr. Myers began by acknowledging that for many years the parties had had a "singular interpretation" of Article 5.05(b). The Association had proposed changes to the wording of 5.05(b) from time to time during the bargaining process based on that joint understanding that Article 5.05(b) provided for the established practice (Exhibit 16).

Having said that. Mr. Myers challenged that longstanding interpretation. He referenced Brown and Beatty, Canadian Labour Arbitration (3d) with respect to the general reluctance in arbitral law to force an employee to undergo an independent medical examination (at p.7-80). With that general reluctance in mind, he turned to a review of the actual wording. The article requires a medical certificate of fitness prior to the return of a teacher who has been on sick leave for an extended period of time. Beyond that, according to Mr. Myers, the provision allows for the Division only to check on the teacher's ability or inability to return to duty. That is, the plain wording of 5.05(b) did not provide the Division with the authority to require an independent medical examination. Rather the teacher's case could be checked by a doctor (or other health care person) of the Division's choosing.

Mr. Myers presented a series of cases dealing with the reluctance of arbitrators and the courts to require medical examinations. He referenced the following:

(a) Re: Thompson and Town of Oakville Re: Ruelens and Town of Oakville (1963), 41 D.L.R. (2d), 294 (Ont. H.C.);

(b) Re: Dartmouth General Hospital & Community Health Centre and Canadian Brotherhood of Railway Transport & General Workers Union. Local 606 (1992), 30 L.A.C. (4th), 115 (North) - in which the following principles summarized in Re: Martindale Sash and Door Ltd. and C.J.A.. Loc. 802 (1972), 1 L.A.C. (2d) 324 (Fox) were accepted:

"Extrapolating from these conclusions, the board believes that in the absence of anything in the collective agreement to the contrary (which is the case here), the employee upon returning to work from sick leave, has

an initial onus of showing that he is medically fit This onus is discharged by merely presenting himself for work. If, then, the employer has reasonable grounds for suspecting that the employee is a source of danger to himself, other employees, or company property, or that he is unfit to perfo rm his duties, the employer has a right and duty to demand a medical certificate If the employee refuses to produce such a certificate, the employer has the right to discharge the employee."

(c) Re: Braemore Home and Canadian Union of Public Employees, Local 753 (1988), 34 L.A.C. (3d) 271 (Outhouse);

(d) Re: St. Michael's Extended Care Centre and Canadian Health Care Guild (1994), 40 L.A.C (4th) 105 (Smith);

(e) Re: Brinks Canada Ltd. and Teamsters Union, Local 141 (1994), 41 L.A.C. (4th) 422 (Stewart);

(f) Re: Laurentian Hospital and Canadian Union of Public Employees, Local 161 (1990), 15 L.A.C. (4th) 340 (Charney);

(g) Re: Province of British Columbia (Ministry of the Attorney General) and British Columbia Government and Service Employee's Union (1997), 72 L.A.C. (4th) 309 (Jackson);

(h) Re: Tele-Direct (Publications) Inc. and Office & Professional Employees' International Union, Local 131 (1989), 8 L.A.C. (4th) 159 (Foisy); affirmed 73 OR (2d) 52 (Ont. H.C.); and

(i) Re: Thompson General Hospital and Thompson Nurses M.O.N.A.. Local 6 (1991), 20 L.A.C. (4th) 129 (Steel).

Counsel for the Association emphasized that a strict interpretation is required of any provision in a collective agreement providing for the medical examination of an employee. Arbitral law necessitates such a strict construction.

Mr. Myers referenced the definition of the word "check" as including: "to control or restrain, to hold within bounds" (Blacks Law Dictionary, 215). The Employer then has the authority on being presented with a medical certificate to ask for better information and to otherwise check the teacher's claim that he/she is capable of returning to work. The Association's position, however, is that 5.05(b), on its plain wording, does not extend to an independent examination.

Mr. Myers candidly said both parties have been mistaken in their interpretation of Article 5.05(b) for many years. Certainly the Association recognized that this created an estoppel should the Board find that the article does not provide the right to an independent medical assessment.

Part IV of the grievance provides (Exhibit 19):

"In respect of Paragraph no. 4 of said "Policy" the Association submits that this provision is contrary to Article 5.05(b) of the Collective Agreement and is unreasonable."

In his testimony, Mr. Robertson noted that paragraph 4 of the policy requires a teacher to provide a "prognosis for return to work". The Association grieves this prognosis requirement as it calls upon the teacher to speculate without having the necessary expertise to do so. Such a requirement, for Mr. Robertson, would in some circumstances place an ill teacher in a prejudicial position.

Further, paragraph 4 requires a physician to specify "a likely date of ability to return to duty". Again, as in paragraph 2 of the policy, for the Association this places the teacher in an untenable position by having to obtain this information from a physician who may not be willing to specify the likely date.

Mr. Robertson also referred to the "patently unreasonable" disciplinary provision in paragraph 4. It provides that sick leave may be extended unilaterally by the Division, or there may be discipline, if the teacher is unable to provide both his/her prognosis for return to work and the physician's statement as to a likely date of return. In cross-examination, Mr. Robertson re-iterated that the principle concern was the inability of a teacher to force the physician to provide the statement specifying the likely return date. Mr. Robertson agreed with Mr. Parkinson, however, that if the necessary statement of return date was provided by the physician to the teacher then it was incumbent on the teacher to provide that statement to the Division.

Mr. Robertson knew of no disciplinary action being taken against a teacher as a result of a physician failing to specify a likely date of return. However, he maintained that it was too early in the history of this paragraph to comment on "its experience".

In cross-examination, Mr. Robertson also emphasized his objection to" the unilateral and arbitrary" extension of sick leave should the teacher fail to provide the necessary prognosis and physician statement. He conceded that if no prognosis was available, then it was reasonable for the extension of sick leave to occur. But he objected to the proviso that such sick leave could be unilaterally extended without input of the teacher.

In his submission, Mr. Myers began by emphasizing the difficult position that a teacher can be placed in by the requirements of paragraph 4. The employee and his physician may legitimately be unable to provide a prognosis as to a return date. He recognized there can be exceptional circumstances when it would be reasonable to discipline a teacher for willfully withholding such information. However, in the normal circumstance, a teacher can be subject to discipline or to having sick leave extended (potentially for the entire up-coming school year) simply as a result of being unable, through no fault of his/her own, to provide the necessary information.

Mr. Myers went on to emphasize that paragraph 4 could be modified, first, by simply making the prognosis non-mandatory and, second, by dealing with the circumstance of a physician refusing to provide the likely date of return to duty. Instead, in its current wording, the paragraph was unreasonable. Again for Mr. Myers, the issue was not one of requiring reasonable notice. Certainly, Mr. Robertson in speaking on behalf of the Association, recognized the reasonableness of such notice. However, the additional requirements were unreasonable as in clear violation of Article 5.05(b) of the Collective Agreement and Section 94 of the Act.

Part V of the grievance provides:

> "In respect of Paragraph No. 5 of said "Policy" the Association submits that the last three sentences of this paragraph are contrary to Section 93 of The Public Schools Act, Article 4.01 (a) and Article 5.05(a) of the Collective Agreement, Sections 12, 14(1 ) and 14(2) of the Manitoba Human Rights Code."

Mr. Robertson, in his direct examination, explained that a teacher returning from an absence of over 17 weeks is justified in expecting to return to his/her original assignment, unless the Division determines to assign him/her a comparable position. The returning teacher is entitled to a job. He maintained that by the Collective Agreement, the teacher upon being capable of return must be paid his/her regular salary. So while there is a discretion on the part of the Division as to the placement of the teacher, the teacher is entitled to full benefits upon return.

In cross-examination, Mr. Robertson agreed that the returning teacher must give reasonable notice. The Division and the substitute teacher certainly should be advised in advance of that return date. Mr. Robertson also agreed that after a teacher had been absent during the school year for over 17 weeks from a classroom, it may be inappropriate to return that teacher to the same classroom. And certainly it was appropriate after a lengthy absence that the Division request medical information from the teacher. Mr. Robertson also confirmed that the long-term disability plan requires such medical information.

In argument, Mr. Myers began by summarizing the situation facing a resuming teacher. He maintained that on return the teacher is entitled to a comparable job at the same pay. Paragraph 5 of the policy, however, provides for less than "a comparable job at regular pay". He maintained that this paragraph failed to recognize the rights of the returning teacher.

Mr. Myers further maintained that paragraph 5 was in breach of the right provided to employees for accommodation under the Manitoba Human Rights Code, S.M. 1987-88, c. 45. (The Code") He referred to the Section 9(1) of the Code, which provides:

> 9(1) "In this Code, "discrimination" means:
>
> ---
>
> Failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection(2).

He pointed out that sub-section 9(2) of the Code recognizes physical disability. He pointed to sub-section 14(1) and section 12 which provide:

> 12. "For the purpose of interpreting and applying sections 13 to 18, the right to discriminate where bona fide and reasonable cause exists for the discrimination, or where the discrimination is based upon bona fide and reasonable requirements or qualifications, does not extend to the failure to make reasonable accommodation within the meaning of clause 9(1 )(d)."
>
> 14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."

Mr. Myers referenced the scope of the Employer's duty to accommodate set out in the Human Rights Reporter (at 4-64 to 4-66) and referred to the decision of the Supreme Court of Canada in Central Okanagan School District #23 v. Renaud (1992) 2 S.C.R. (4th) 970 with respect to the employer's duty to accommodate.

In summarizing the Association's overall position, Mr. Myers reminded that the Association sought a declaration that the five paragraphs of the Division's long-term sick leave policy were: inconsistent with the Collective Agreement and the Act, were unclear and unequivocal, and were unreasonable, and therefore should be rescinded.

In response, Mr. Parkinson first raised a jurisdictional challenge. He pointed out that the grievance sought rescission of the first five paragraphs of the long-term sick leave policy. He noted, however, that Mr. Myers seemed to be suggesting, in argument, that the relief could be a "modification" of those paragraphs. The Board, he pointed out, had no authority to modify the policy. Mr. Parkinson maintained that unless the Board found a breach of the Collective Agreement, that there was no jurisdiction for the rescission, in whole or in part, of that policy. For him, the request for rescission amounted to the Board being asked to go beyond the provisions of the Collective Agreement and "to step into management's shoes". In effect, the Association was asking for the Board to re-draft the policy, or, if you will, to make it clearer. This was not its function in arbitral law.

Mr. Parkinson reminded that the policy had been largely in effect for thirty years. He referenced the earlier policy (Exhibit 14). While he acknowledged that Mr. Robertson had testified in a forthright manner, much of that testimony consisted of opinions on perceived problems. Yet it was acknowledged there were no actual complaints by individual teachers with the policy over the past thirty years. In cross-examination, Mr. Robertson had been unable to give any specifics of a teacher being impacted.

As well, he challenged whether the Association was advancing this grievance "with clean hands". In that regard, the Board was asked to consider the long-term disability plan (Exhibit 6) administered by the Manitoba Teacher's Society. Mr. Parkinson maintained that the Society, in administering the plan, required the same information as required by the Division under the long-term leave policy. And similarly he pointed out that while the Division was said to be unreasonable in asking for such information, by the Society's disability plan if such information was not forthcoming, the teacher's disability claim could be rejected.

Further, Mr. Parkinson also argued that the grievance was an academic exercise with "no where near a real case being brought forward". He reviewed his cross-examination of Mr. Robertson. There was no evidence proffered of any teacher having been denied benefits by the policy in breach of the Act and the Collective Agreement. He maintained there was no linkage to any actual circumstance calling on the Division to re-write the policy.

Counsel maintained that without a factual basis, the Board was effectively being called upon to comment on the internal policy of the Division. In that regard, the Board was reminded that there had been no evidence of any teacher being prejudiced as a result of the policy in the past 30 years. The following authorities concerning the need of a factual base were cited:

(a) Re: Beachvilime Ltd. and Energy & Chemical Workers Union, Local 3264 (1989), 7 L.A.C. (4th) 409 (Hinnegan);

(b) Re: Steelco Inc. and United Steelworkers of America' Local 1005 (1999), 78 L.A.C. (4th)118 (Pickier);

(c) Re: Young and Treasury Board (Revenue Canada - Taxation) (unreported, September 8, 1992) (Canada Public Services Craft Relations Board); and

(d) Re: International Brotherhood of Electrical Workers. Local 115 (unreported, March 20, 1990) (Ontario Labour Relations Board).

He also urged the Board to reject the argument advanced concerning the Human Rights Code, for there was no evidence of non-accommodation upon one's return to work after a lengthy absence.

Mr. Parkinson then turned to a review of the entire policy for leaves and absences, which had been filed (Exhibit 13). It provides for leaves in a variety of circumstances. A leave, Mr. Parkinson noted, is not a punishment, but rather a grant in specific circumstances, including that of long-term sick leave.

Mr. Parkinson also reviewed the various parts of the grievance. With respect to Part I of the grievance, he denied any breach. He reviewed the wording of paragraph 1, of the Collective Agreement denying that it was vague. He pointed out that Section 93 of the Act also references sick days. He noted that the second sentence of paragraph 2 was consistent with the wording of sub-section 95(2) of the Act, which provides the Division with the authority to grant leave for a period longer than authorized under 95(1).

With regards to Part II, Mr. Parkinson maintained that all that is specified in paragraph 2 of the Collective Agreement is what one would expect the Division to require. While Mr. Parkinson acknowledged that the paragraph might be worded differently, he questioned why anyone would bother.

In terms of the contractual entitlement of an employer to seek medical certification, the Board was referred to Section 94 of the Act. Also referenced were the following authorities:

(a) Re: Brown and Beatty Canadian Labour Arbitration (3d) at p. 8-74;

(b) Re: St. Jean De Brebeuf Hospital and Canadian Union of Public Employees. Local 1101 (1977), 16 L.A.C. (2d) 199, in which Arbitrator Swan writes:

> "There is no doubt that, in a case such as this, an obligation rests on the Grievor to make out a case to support her statement that she was ill and thus entitled to the sick pay benefits under the collective agreement. This is so not only because of the general rule that a party alleging a fact may be put to the proof of it, but also because the medical state of an individual is a matter clearly within the sole knowledge of that individual except in the rare case where external signs of illness identifiable even to the lay person may be observed. (203)

(c) Re: Salvation Army Grace Hospital, Windsor. and Canadian Union of Operating Engineers and General Workers. Local 100 (1980), 25 L.A.C. (2d) 241, (McLaren);

(d) Re: Hussman Store Equipment Ltd. and Canadian Automobile Workers. Local 397 (1990), 16 L.A.C. (4th) 19, (Brown).

With respect to the right of an employer to be informed of an employee's return date to work, the following decisions were cited:

(a) Re: Maple Leaf Meats Inc. and United Food and Commercial Workers Union. Local 832, (unreported, October 23, 1998) (Hamilton); and

(b) Re: Inco and United Steelworkers (1988), 35 L.A.C. (3d) 108 (Burkett).

Concerning paragraph 3 of the policy and Article 5.05(b) of the Collective Agreement, Mr. Parkinson began by reminding of the longstanding practice whereby the Division, in its discretion, could require an independent medical examination prior to a teacher's return from an extended sick leave. That practice was codified in paragraph 3. He maintained that this practice was based on the authority of the Division established in Article 5.05(b).

He cautioned against reliance on the authorities referenced by Counsel for the Association, pointing out that these decisions generally involve Privacy law" rather than the situation of a collective agreement specifically providing for an independent medical examination. Further, he noted that Mr. Myers, in argument, had requested that the Board interpret article 5.05(b). The interpretation of a contractual term involves the determination of the intention of the contracting parties. He reminded that here the contracting parties had had a common interpretation of 5.05(b) for many years. For Mr. Parkinson, this was powerful evidence as to that interpretation.

Counsel then turned to a review of the actual wording of Article 5.05(b), pointing particularly to the phrases fits appointed doctor" and "the case checked". For Mr. Parkinson, it was clear that Article 5.05(b), on a straight-forward reading, provided the Division with the right to appoint an independent doctor to examine the teacher. And in that regard, he emphasized that paragraph 3 of the policy dealt with a teacher's fitness for return to work after a lengthy period of illness, an issue of primary concern to the Division.

In summary, Mr. Parkinson maintained that on its plain wording, Article 5.05(b) provided for the long established practice of the Division to require an independent medical examination. Further, he argued, if it should be found that 5.05(b) was ambiguous, the overwhelming evidence from the practice established by the parties favored the interpretation of the Division.

Mr. Parkinson also pointed out that if the Board supports the interpretation of Article 5.05(b) propounded by the Association, that by the doctrine of estoppel the existing practice should only end on proper notice, and after a reasonable period for adjustment.

On behalf of the Division, Mr. Eyrikson referenced the following cases recognizing the Employer's contractual right to require an independent medical examination:

(a) Re: Thompson General Hospital and Thompson Nurses M.O.N.A. Local 6, supra;

(b) Re: Maple Leaf Meats Inc. and United Food and Commercial Workers Union. Local 832, supra;

(c) Re: Inco Ltd. and United Steelworkers (1988) 35 L.A.C. (3d) 108 (Burkett); and

(d) Jobes v. Zolinski and Shell Canada Limited (unreported, April 28,1999, Man. C.A.).

With respect to the use of past practice in interpretation of a collective agreement provision, the Board was referred to the following:

(a) Re: United Packinghouse. Food & Allied Workers Union, Local 459.

and Heinz Co. (1967), 18 L.A.C.362 (Thomas);

(b) Re: Board of Education for City of York and Ontario Secondary School Teachers' Federation. District 14 (1992), 28 L.A.C. (4th) 390 (Burkett);

(c) Re: British Columbia Teachers' Federation and British Columbia Teachers' Federation Administration Staff Union (1995), 47 L.A.C. (4th) 221 (Germaine); and

(d) Re: British Columbia Nurses' Union and Communications, Energy & Paperworkers Union of Canada, Local 444 (1995), 49 L.A.C. (4'h) 374 (Macintyre).

Finally, Mr. Eyrikson also provided the following authorities on the doctrine of estoppel:

(a) Re: Auto Family Credit Union (Niagra) Ltd. and United Automobile Workers. Local 374 (1981), 29 L.A.C. (2d) 37 (McLaren);

(b) Re: Eurocan Pulp & Paper Co. and Canadian Paperworkers Union. Local 298 (1990), 14 L.A.C. (4th) 103 (Hickling);

(c) Re: Ivaco Rolling Mills (Rod Mill). Division of Ivaco Inc. and United Steelworkers, Local 7940 (1992), 29 L.A.C. (4th) 372 (Bender);

(d) Re: Ford Motor Co. of Canada and Canadian Auto Workers, Local 707 (1996), 56 L.A.C. (4th) 257 (Palmer);

(e) Re: Ferraro's Ltd. and United Food & Commercial Workers, Local 1518 (1989), 7 L.A.C. (4th) 221 (Cadner); and

(f) Re: Corporation of City of London and Canadian Union of Public Employees, Local 101 (1990), 11 L.A.C. (4th) 319 (Roberts).

With respect to Part IV of the grievance, Mr. Parkinson began by noting that Mr. Robertson had recognized that the Employer was entitled to receive reasonable notice of a teacher's return date. Yet, according to Counsel, if paragraph 4 is struck out, then one must conclude that the teacher has no obligation to tell the Employer when he/she will be returning to work. Mr. Parkinson also emphasized that over the past 30 years of the original policy being applied, the Division had not required (or expected) a guarantee from physicians on the anticipated return date.

With respect to the final sentence of paragraph 4, Mr. Parkinson reminded the Board that without the policy, if a teacher remained absent (in the circumstances therein set out) that the teacher would be absent without leave. The policy articulated in paragraph 4 allowed in that circumstance for the absence to be extended for the balance of the up-coming school year. The Division reserved the right to discipline in those circumstances, which Mr. Parkinson urged was reasonable in the circumstances. Certainly a board of arbitration would have arbitral jurisdiction should discipline be improperly employed under paragraph 4 of the policy. However, the Board during this hearing had received no evidence of any unfair application on the policy in the 30 years that it had been in effect.

With respect to paragraph 5 of the policy, he emphasized that there was no grievance concerning the first two sentences. Mr. Robertson had acknowledged that a teacher on sick leave could not return to work by giving notice of his/her return "for the next days. He further recognized the need for a prognosis so that both the teacher and the Division could plan for the teacher's orderly return to work. Mr. Parkinson pointed out that by the third sentence of paragraph 5, the Division provides the returning teacher with the first work available. With regards to the fourth sentence, Mr. Parkinson noted that Mr. Robertson had no complaint that a returning teacher might be reassigned. With regards to the last sentence in paragraph 5, Counsel said that there had been no evidence advanced that the policy thereby established was unreasonable. He asked rhetorically how there could, given the fundamental fairness of the policy whereby there was a guarantee of assignment to a comparable position.

With respect to the medical opinions provided (Exhibits 8, 9 and 10), Mr. Parkinson noted Dr. Cummings' reference to a counter-therapeutic result of a physician not being prepared to provide an anticipated return date to work. In any event, Counsel suggested that both doctors recognized that if a physician is unable to determine a return date, that it is appropriate to the doctor to say so. He maintained that the Division, by its policy, was only asking that the physician give an opinion. He noted as well that Dr. Mazowita and Dr. Cummings recognized there may be a need to adjust the anticipated return date over time. There was no evidence that the Division had not accepted such a revised return date in the past.

Mr. Parkinson also referenced Mr. Yuel's report (Exhibit 11). Mr. Yuel notes that the information sought in the policy is regularly sought by all insurers. Further, Mr. Parkinson reminded that the Manitoba Teacher's Society, for its long-term disability plan, requires such information.

In summary, Mr. Parkinson rejected the Association's position that the sick leave rights of teachers are being infringed by the policy. He reminded that there is no right to sick leave on demand, but rather only pursuant to Sections 93 and 94 of the Act and the terms of the Collective Agreement. He emphasized management's rights to set such policy, with reference to the following:

(a) Re: Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al (1981),124 D.L.R. (3d) 684; (Ont. C.A.)

(b) Re: Four Seasons Hotel and Hotel. Restaurant & Culinary Employees & Bartenders' Union, Local 40 (1994), 46 L.A.C. (4th), 367 (Hope);

(c) Re: York Region Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association (1995), 49 L.A.C. (4th), 123 (Keller);

(d) Re: Fording Coal Ltd. and United Steelworkers of America. Local 7844 (1998), 70 L.A.C. (4th), 33 (Larson); and

(e) Re: QBD Cooling Systems Inc. and Canadian Union of Operating Engineers and General Workers. Local 101 (1996), 57 L.A.C. (4th), 263 (Newman).

Finally, Counsel for the Division questioned the delay on the part of the Association in bringing the grievance forward. While the current policy had been implemented in 1998, the previous comparable policy had been in effect since 1976. The following authorities were referenced on delay:

(a) Brown and Beatty, supra. 2-101;

Re: London Tavern and International Beverage Dispensers' and Bartenders' Union. Local 280 (1981), 2 L.A.C. (3d) 411 (MacDowell);

(c) Re: Abitibi-Price. Inc. and United Paperworkers International Union, Local 1375 (1993), 38 L.A.C. (4th) 58 (Rennie);

(d) Re: Cybermedix Health Services Ltd. and Ontario Public Service Employees' Union. Local 544 (1990), 11 L.A.C. (4th) 334 (Brown); and

(e) Re: Corporation of the City of Kitchener and Kitchener City Hall Office. Clerical and Technical Staff. C.U.P.E. Local 791 (1998), 71 L.A.C. (4th) 223 (Newman).

In reply, Mr. Myers emphasized that the Association had not withdrawn its request for recession of the policy. He denied the suggestion by Mr. Parkinson that the Association was calling only for a modification of that policy. He maintained that the Division was unreasonable by its inflexible position, refusing to recognize the vagueness of the paragraphs or to acknowledge the inconsistencies between the policy and the provisions of the Act and the Collective Agreement. Granted the Board did not have jurisdiction to modify the policy. But he maintained that with the inconsistencies and vagueness of the policy, the Board had authority to grant relief by way of recession.

With regards to the claim of breach of the Code, he maintained that it went against the duty to accommodate to provide that a teacher coming back from sick leave was not entitled to a position at full pay once a physician had certified the teacher was fit to work. Specifically, paragraph 5, in providing that a teacher on return would not receive pay until placed in a position, was inconsistent with the Division's obligation to accommodate.

In regards to paragraph I of the policy, Mr. Myers denied any suggestion that the Association was challenging the appropriateness of section 95 of the Act. Rather the challenge was to the refusal by the Division in paragraph I to set out the long-term disability plan. Further, Mr. Myers reiterated the key concern of the Association that it was unreasonable to require that a physician give an expected date of return. Certainly the Association was not challenging the Division's right to know when the person would be returning to work once the teacher obtained that anticipated date. However, it was wrong, according to Mr. Myers, to require by way of the policy that the employee provide that anticipated return date.

Further, Mr. Myers maintained that the Division was being inconsistent in suggesting that it would be acceptable if the doctor was unable to provide a prognosis. Mr. Myers reviewed paragraphs 2 and 4 of the policy, noting that the requirements for an anticipated date of return was mandatory. He agreed that it was inappropriate for a teacher to willfully withhold his/her anticipated date of return to work. But the concern of the Association was for the teacher who innocently was unable to provide the required medical information. He asked rhetorically why these provisions could not have been worded to deal solely with willful withholding of that medical information.

With regards to paragraph 3 of the policy and Article 5.05(b) of the Collective Agreement, Mr. Myers agreed with Mr. Parkinson that Article 5.05(b) was unambiguous. By Article 5.05(b), according to Counsel for the Association, the Division was entitled to have another doctor review the medical information of a teacher seeking to return to work after a period of illness. However, the Association's position was that without express wording, the Division did not have the contractual right to require an intrusive independent medical examination. Certainly in taking that position, the Association was

challenging a long established practice. However, arbitral law did not preclude such a challenge. Given that Article 5.05(b) was not ambiguous, Mr. Myers argued, the past practice could not be looked to" in order to interpret that provision.

Finally, on the issues of estoppel, Mr. Myers proposed that the interpretation of Article 5.05(b) urged by the Association should be effective as of the end of the Collective Agreement (that is, June 30, 2000). There by the collective bargaining might proceed based on that interpretation.

With regards to paragraph 5, Mr. Myers asked the Board to carefully consider whether the policy did not effectively lay off the teacher who was fit to return to work after a sick leave.

Mr. Myers denied that this was a case whereby the doctrine of delay was applicable. Any violation alleged by the Association was of a continuing nature. Furthermore, the Division was unable to show any prejudice arising from any alleged delay. He further asked the Board to consider the "old" and "new" policies, noting that there are differences in the wording of the two policies.

In summary, Mr. Myers challenged the suggestion that the Association was impinging on the Division's right to manage. Rather the Association properly grieved the policy given its violation of the Collective Agreement, and the Act and given that it was uncertain, confusing and created a situation whereby innocent teachers could be disciplined for violations of the policy.

**Analysis**

Mr. Parkinson, in his opening submissions and in argument, raised a jurisdictional challenge. He denied the appropriateness of the KVP principle to establish jurisdiction. Also, Mr. Parkinson suggested that the Association ultimately sought for the long-term sick leave policy to be modified by the Board. He maintained that the Board has no such jurisdiction. Mr. Myers, in reply, expressed the view that the Division was being unreasonable in adopting an inflexible position given what he maintained was a reasonable set of concerns by the Association. For him, the policy required modification. But Mr. Myers conceded the Board's jurisdiction did not extend to such a Modification remedy".

Mr. Myers maintained that the Board had jurisdiction to deal with the grievance both by the wording of Article 17 of the Collective Agreement and on the basis of the KVP principle. The Association brought the grievance on the arbitral principle of "obey now and grieve later", maintaining that the long-term sick leave policy breaches the provisions of the Collective Agreement and the Act.

Brown & Beatty, Canadian Labour Arbitration (3d), Section 4:1500, considers company rules. In the absence of specific language to the contrary, the making of such rules lies within the management's prerogative. Such rule-making authority, however, is not without limitations. The KVP principles summarize these limits. Brown & Beatty, in considering these principles, write:

> "Reformulated, these criteria may be said to require that any plant rules which are unilaterally promulgated must not be inconsistent with the terms of the collective agreement, that their enforcement not be unreasonable, and that they must be brought to the attention of those intended to be regulated by them."

Concerning the consistency requirement, Brown & Beatty write:

> "With respect to the first requirement, arbitrators uniformly have held that a unilaterally promulgated rule must not violate an express provision in the

> collective agreement. And, to determine whether the rule infringes upon subject-matters occupied by a provision of the collective agreement, the arbitrator must compare the rule with the terms of the collective agreement. Furthermore, in determining whether an inconsistency exists, arbitrators have applied a canon of construction which posits that where the language of a document is equivocal it should be interpreted against the party who prepared it."

The long-term sick leave policy prescribed by the Division is within management's prerogative. A series of authorities were provided recognizing that prerogative (including Re: Metropolitan Toronto Board of Commissioners of Police, supra, at 687; and Re: Four Seasons Hotel. supra, at 381-382). But such a policy is subject to the KVP requirements. Thus, for example, in Re: Timmins (City) and C.U.P.E. Local 210 (1997), 66 L.A.C. (4th) 391 (Brown), the employer's policy concerning notification of absence was reviewed as to whether it met the "often-quoted requirements" of KVP (395).

Counsel for the Division also challenged the grievance as amounting to a mere academic exercise.

The "obey first, grieve later" rule is recognized in arbitral law (as commented on in Re: Municipality of Metropolitan Toronto, supra). That rule can result in a certain academic flavor" to a grievance. As the Board understands Counsel, however, the grievance is challenged as without factual base and as designed to inappropriately infringe upon (and impact on) the internal policy of the Division. A series of authorities were cited in support of that position. In Re: Beachvilime Ltd., supra. for example, Arbitrator Hinnegan noted that The function of an arbitrator is to determine whether there has been a violation of the collective agreement and arbitrators, in fact, have no jurisdiction until a violation has occurred" (at 412). As well, in Young and Treasury Board, supra, a grievance in response to a memorandum of management interpreting a provision of a collective agreement was held to be premature, given that that interpretation had never been applied.

However, after consideration of that line of authorities, the Board does not accept that the grievance is simply an academic exercise. The authorities cited by Counsel raise the question of whether in a grievance there is an arbitrable difference rather than a mere hypothetical question. Here the long-term leave policy is currently being applied. The terms of the various parts of the policy are impacting on teachers. Granted no teacher has grieved. However, on reflection, the Board is satisfied, given that the policy is in force, that there is a "real" controversy between the Association and the Division, which affects the contractual right of the parties and of individual teachers.

Having reached that conclusion on jurisdiction, however, one must remain mindful of the admonition from the authorities (and from the submissions of Counsel for the Association) that the function of the Board is to consider whether management has improperly exercised its rights in that the implemented policy conflicts with a provision of the collective agreement or is unclear or unreasonable.

Counsel also challenged the arbitrability of the grievance based on undue delay. As the authorities point out, a claim of undue delay does not go to the jurisdiction of the arbitrator, but rather is equivalent to the equitable doctrine of laches (Brown & Beatty, Canadian Labour Arbitration, (3d) 2-101 ). The authorities cited to the Board on delay each turn on particular circumstances. Here the long-term sick leave policy (Exhibit 14) in place for many years was replaced in 1998, after a grievance was brought. The present policy was then challenged by this grievance. While the new and old policies on long-term illness leave contain similar, and in part identical, wording, the prompt challenge of the new policy is a

significant factor weighing against the application of [aches in the present circumstances. The Board rejects the challenge of undue delay.

In analyzing the grievance, it is most convenient to deal with the various parts of the grievance in turn.

With respect of Part I, paragraph 1 of the long-term sick leave policy provides that the Director of Education may grant sick leave without pay or fringe benefits after a teacher has exhausted accumulated sick leave benefits under Section 93 of the Act and Article 5.05 of the Collective Agreement. Certainly, paragraph 1 does not deal whatsoever with the long-term disability plan, which by Article 10.02 of the Collective Agreement all teachers are required to participate in. The paragraph does not suggest that a teacher can only apply for sick leave without pay after the long-term disability plan benefits are exhausted.

A teacher, then, when unable to work due to sickness, is entitled firstly to his/her accumulated sick leave. After that is exhausted, the teacher may apply: (1) for sick leave without pay or fringe benefits: and (2) for benefits under the long-term disability plan administered by the Association.

Mr. Myers raised several concerns on the part of the Association in maintaining that paragraph 1 was in breach of the Collective Agreement. The Board does not agree with those concerns. Paragraph 1 of the policy specifically deals with what occurs when sick leave provided for by the Collective Agreement and the Act has run out. It does not deal with the long-term disability plan. That plan is quite separate from sick leave. The Division is not acting unreasonably in dealing specifically with sick leave, and not with the long-term disability plan, given that the latter does not fall within its authority.

Dealing specifically with the concerns raised by the Association over the wording of paragraph 1, there is no obligation set out in either the Act or the Collective Agreement obliging the Division to reference the long-term disability plan. And in our opinion, paragraph 1 should not, by its wording, cause a teacher to assume that there is no long-term disability plan. In fact, as pointed out by Mr. Parkinson, the wording of paragraph 1 is quite consistent with the wording of Section 95 of the Act.

Paragraph 2 of the sick leave policy does require a teacher who has been absent (or anticipates being absent) due to illness or accident for more than 20 consecutive working days to apply in writing for sick leave, accompanied by a written statement from a physician certifying the teacher's inability to work and providing an expected date for return to work.

The grievance raises two issues concerning paragraph 2. First, paragraph 2 requires the teacher to apply for sick leave. There is no issue that a teacher has a right to sick leave (as accumulated) pursuant to the Act and the Collective Agreement. Certainly a teacher should give notice when sick, for an extended period of time. But is paragraph 2 inconsistent with the Act and the Collective Agreement in requiring a teacher to apply for sick leave if an illness (or accident) prevents the teacher from returning to work for over 20 consecutive workdays? The Board believes it is inconsistent. The wording of the paragraph goes too far. The requirement that the teacher apply for sick leave fails to recognize the contractual right provided for by the Act and by the Collective Agreement. Certainly the paragraph might require that the teacher give notice when absent for more than 20 working days due to illness. But the paragraph by going further and requiring that the teacher apply for sick leave is inconsistent with the Act and the Collective Agreement.

The second issue as to paragraph 2 is its requirement that the teacher provide a physician's statement as to an expected date for return to work. The Association maintains that this is in conflict with the Act and the Collective Agreement. The Board does not agree. Specifically, paragraph 2 in requiring that a physician provide an expected date for return to work is not in conflict with the provisions of either the Act or the Collective Agreement. The Association acknowledged the Division's need to know, for

planning purposes, the expected return date of a teacher from sick leave. On that basis, that requirement is not unreasonable.

Certainly the Board received evidence which suggests that there could be circumstances in which a teacher may be unable to obtain from a physician an expected date for return to work. In such circumstances the teacher might have cause to grieve if denied his/her accumulated sick leave benefits due to the physician having not provided an expected date for return to work. But the general requirement that the teacher's physician provide an expected date for return to work is consistent with management's rights to set such policy, given that the requirement does not contradict the Act or the Collective Agreement.

In considering Part III of the grievance, the parties both presented considerable argument and referenced a number of authorities. But ultimately the issue raised by Part III is quite narrow. Specifically, the longstanding practice of the Division requiring a teacher resuming from sick leave to submit to an independent medical examination is challenged on the basis that Article 5.05(b) does not provide for this practice.

The Association provided a number of authorities recognizing the intrusiveness of medical examinations. The authorities impose strict limits on employer's rights to seek independent examinations at common law (for example, Re: Dartmouth General Hospital, supra, at 120-121; Re: Brinks Canada Ltd., supra, at 428-430). However, as pointed out, the issue arising from Part III of the grievance turns on the extent of the Division's contractual right.

There is considerable comment in the cases referenced by Counsel on independent medical examinations authorized by provisions of collective agreements. Specifically, the authorization must be in clear and positive language Brown & Beatty, Canadian Labour Arbitration (3d) at 7-80 - 7-81).

The general rules of contractual interpretation are well established. One is to assume that the language is used in its normal ordinary sense or plain meaning. It is presumed that all the words used in a collective agreement are intended to have some meaning and, if possible, not to conflict. Also the purpose of the particular words and phrases under review, and the context within which those words and phrases are found, must be considered. Those words and provisions must also be considered in the context of the collective agreement as a whole (Brown & Beatty, Canadian Labour Arbitration (3d) at 4-33).

Both parties maintain that Article 5.05(b) is unambiguous. They differ in their interpretation of what the article provides, however. To the Association, Article 5.05(b) only allows the Division to appoint a physician of its choosing to review the medical information submitted by the teacher seeking to return to work (and, possibly, to request additional medical information). The Division maintains 5.05(b) authorizes the current practice (as reflected in paragraph 3 of the policy).

On consideration, the Board agrees that article 5.05(b) is unambiguous. The Board disagrees with the restricted nature of 5.05(b) as proposed by the Association. The article as worded authorizes the Division to have the "case checked". That phrase is broad enough and specific enough, in our opinion, to include an independent examination by a physician chosen by the Division.

Supportive of this interpretation is the final clause of Article 5.05(b), which deals with the purpose of the undertaking by the doctor chosen by the Division. That purpose is to report on the teacher's ability to return to work. The purpose of the independent examination is an aid in interpretation, as recognized in the following passage: "...an employer's right to require medical examinations and reports for the purpose of determining whether or not an employee is fit to return to work is implied much more readily in collective agreements than is the right to require such reports and examinations for the purpose of verifying a claim to sick-leave benefits (Re: Braemore Home, supra, at 281). Given that the doctor is

required to report on fitness, it is reasonable to interpret the article as providing authorization for an actual physical or mental examination.

As noted with respect to Part II of the grievance, this ruling should not be interpreted to preclude a teacher from grieving on the basis that the Division has unreasonably applied the policy concerning a return to work situation.

With respect to Part IV, paragraph 4 deals with the situation of a teacher who has been absent on sick leave for over 20 consecutive teaching days as of April 30 of any year. The paragraph provides that the teacher must notify the Division in writing of his/her prognosis for return to work together with a physician's statement specifying the likely date of the teacher being able to return to duty.

The Division and the Association are on common ground in recognizing the need for such notice in order to allow management to plan for the next school year. The concern of the Association is that if a teacher is legitimately unable to provide a prognosis and/or a physician is unable or unwilling to specify the resumption of duty date, that management can unilaterally extend the teacher's sick leave for up to a year and/or can discipline the teacher. The question facing the Board is whether the authority provided to management in the case of the non-fulfilling of the requirements set by paragraph 4 is inconsistent with the Act and the Collective Agreement.

Certainly neither the statutory provisions nor the Articles of the Collective Agreement deal with such a circumstance. Nevertheless does the setting of the policy set by paragraph 4 breach the Act and the Collective Agreement?

The cases referenced on management rights support the authority of management to set rules and policies. The requirements established by paragraph 4 and the authority provided to management under paragraph 4 do fall within management's prerogative. The need for planning for the upcoming school year provides the rationale for the demands made upon teachers on sick leave each April 30th.

On that basis, the Board is satisfied that paragraph 4 does not breach the provisions of the Act or the Collective Agreement. Specifically, the requirement with regards to a return date set out in paragraph 4 does not infringe upon the contractual right of teachers for sick leave. Those demands do not impact on the teacher's right to receive sick leave benefits. While failure to comply with those demands can have repercussions for a teacher, they do not limit the teacher's entitlements.

The Board is also satisfied that the Division is not unreasonable in setting this policy. The requirements set are a balance between the Division's needs for planning and the obligation not to unreasonably make demands on a teacher on sick leave.

Again, it is important to note that there may be, in a specific circumstance, a teacher who, through no fault of his/her own, is unable to fulfill the requirements of paragraph 4. That teacher could grieve on the basis of his/her sick leave being unilaterally extended and/or discipline being imposed by management. Such a grievance would presumably be brought on the basis of arguing that the policy has been unreasonably applied by management. It would depend on the specific circumstances extent.

As to Part V of the grievance, it is important at the outset to clarify the alleged breach. Part V submits that the last three sentences of paragraph 5 of the long-term sick leave policy are contrary to the Act, the Collective Agreement and the Code. Specifically the complaint is that by those three sentences a resuming teacher may not necessarily be returned to his/her previous assignment or placed in a comparable position in breach of the Collective Agreement and those Acts.

It is acknowledged by the Association that a returning teacher must provide some notice to the Division and to the substituting teacher. It is further recognized that the returning teacher for various reasons may not be placed back in his/her original teaching assignment.

Paragraph 5 sets policy which does not automatically provide the teacher returning from sick leave with a position. The placement is within the discretion of the Division.

Counsel for the Division at the outset and during the course of the presenting of evidence noted that the first two sentences of paragraph 5 were not grieved. This was acknowledged by the Association. It was not requested that the grievance be amended. The first two sentences specify that the assignment of a returning teacher is at the Division's discretion and that leave without pay or fringe benefits continues until a vacancy occurs "for which the teacher is fit and able." By the first two sentences, then, the Division can assign at its discretion and leave continues, but without pay, until an assignment occurs.

The grievance, as the Board understands it, is that the assignment of a teacher resuming from sick leave does not necessarily occur immediately upon his/her being available for work. Thereby, it is argued by the Association, the returning teacher, if unassigned, is effectively suspended.

Is the Division in breach by the latter three sentences in paragraph 5? The Act and the Collective Agreement provide for sick leave. Neither the Act or the Agreement provides for the eventuality of a teacher being fit to return to work without a position available. Is it implied by the Act or the Collective Agreement that a position will be immediately available? On consideration, the Board is of the opinion that there is no such implication. Given the nature of teaching positions, a teacher on sick leave must be replaced. Under some circumstances, a returning teacher may not be placed in his/her original class. This was acknowledged by the Association. It does not follow then that the provisions for sick leave implicitly provide that the returning teacher has the contractual right of immediate placement.

Nor is the policy set in the last three sentences of paragraph 5 unreasonable. They comprise a balance between the needs of the Division and the interests of the returning teacher. Paragraph 5 provides the returning teacher with a preference for substitute opportunities and to the return to his/her previous assignment if not adverse to the student's interests. The returning teacher is also guaranteed an assignment to a comparable position in the next school year. In exercising this management right, a balance is set between the concerns of the resuming teacher, the interests of the students and the requirements of the Division. In so setting the policy, the Division is not in breach of either the Act or the Collective Agreement.

Nor does paragraph 5 of the policy breach the provisions of the Code to accommodate a person with a physical disability. Specifically, the Board understands the complaint to be that the policy breaches the Code by not providing for immediate placement upon the teacher on sick leave being able to return to work. The Code, in the Board's opinion, does not impose that onerous an obligation to accommodate. Rather the policy, with the preferences and the guarantee, specifically provides for accommodation of the teacher.

**Decision**

The grievance therefore is decided as set out above. Paragraph 2 of the long-term sick leave policy, insofar as it requires the teacher to apply for sick leave, is inconsistent with the Act and the Collective Agreement. To that extent, it is inoperable. The balance of the grievance is dismissed.

Counsel are to be commended for their thoughtful presentations.

The parties will pay the costs of their respective Nominee and the costs of the Chair will be split equally between the parties.

DATED at Winnipeg, Manitoba this 18th day of August, 2000

GAVIN WOOD, ARBITRATOR