

**IN THE MATTER OF: AN ARBITRATION**

**AND IN THE MATTER OF: GRIEVANCES FILED ON BEHALF OF**

**JIM TRELLER DATED DECEMBER 1, 1998**

**BETWEEN:**

**JIM TRELLER, THE SEVEN OAKS TEACHERS' ASSOCIATION NO. 10 and THE MANITOBA TEACHERS' SOCIETY**  
**(hereinafter referred to as the "Grievors")**

**- and -**

**THE SEVEN OAKS SCHOOL DIVISION NO. 10**  
**(hereinafter referred to as the "Division")**

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**AWARD**

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**MEMBERS OF THE BOARD**

A. Blair Graham, Q.C.	Chairperson
William Sumerlus	Nominee of the Grievors
Gerald Parkinson	Nominee of the Division

**APPEARANCES**

Garth Smorang on behalf of the Grievors  
Randolph McNicol on behalf of the Division

**AWARD**

**INTRODUCTION**

This matter was heard on January 4, 5 and 7, and February 2 and 3, 2000.

The parties confirmed at the outset of the hearing that the Arbitration Board had been properly appointed and constituted, and had jurisdiction to determine the matters at issue.

On December 1, 1998 the individual Grievor, JIM TRELLER (the "Grievor") and the Seven Oaks Teachers' Association and the "Manitoba Teachers' Society" each filed two grievances against the Seven Oaks School Division No. 10 (the "Division"). The grievances of the Teachers' Association and the Grievor are identical in all material respects. The two grievances of the Grievor are expressed in the following terms :

"JIM TRELLER grieves that the School Division has misinterpreted and/or misapplied and/or violated article 16 of the Collective Agreement by issuing a written warning to

him, dated September 2, 1998, without just cause. JIM TRELLE requests that the School Division:

1. acknowledge that it has misinterpreted and/or misapplied and/or violated article 16 of the Collective Agreement, by issuing the above mentioned written warning to him without just cause;
2. rescind the written warning issued to him dated September 2, 1998.”

This grievance will hereinafter be referred to as the discipline grievance. The reference to Article “16” is a typographical error; the reference should be to Article “17” .

“JIM TRELLE” grieves that the School Division has misinterpreted and/or misapplied and/or violated Article 10.02 of the Collective Agreement by unreasonably and unfairly transferring him on or about June 29, 1998 and/or June 30, 1998 from the Maples Collegiate to the Garden City Collegiate, without consulting with him in respect of this transfer, the details of the intended assignment and in respect of the changes of his teaching assignment.

JIM TRELLE requests that the School Division:

1. acknowledge that it has misinterpreted and/or misapplied and/or violated Article 10.02 of the Collective Agreement in respect of the above mentioned transfer as described above;
2. rescind the above mentioned transfer.”

This grievance will hereinafter be referred to as the transfer grievance.

The applicable Collective Agreement between the Teachers’ Association and the Division was in effect from January 1, 1997 to June 30, 1998.

Article 10 is entitled Transfer/reassignment. Article 10.02 provides as follows:

“10.02 The Association recognizes the right of the Division to assign teachers employed by the Division to schools under its jurisdiction.

The Division shall provide to any teacher being considered for transfer an opportunity for consultation with respect to the transfer and the details of the intended assignment.

The most reasonable notice possible given the circumstances shall be provided to the teacher.

The right to transfer shall be exercised fairly and reasonably, having due regard to the educational needs of the Division, and the interests of the teacher involved.”

### **THE EVIDENCE**

The evidence in this case consists of the testimony of ten witnesses (eight called by the Division and two by the Grievors) and 33 exhibits. In some respects the evidence is inconsistent and conflicting. Indeed on some important issues, the evidence of the Division, and Grievor is directly contradictory.

However many of the facts in this case are undisputed. Some other facts are disputed, but the disputes are minor or immaterial. A summary of the events giving rise to the two grievances is outlined below.

### THE WRITTEN WARNING

1. **On June 9, 1998 Grade 12 mathematic students throughout Manitoba wrote standard provincial examinations, either the 40S, or 40G examination, depending on which of the two courses they were studying.**
2. **A week prior to the examination, examination booklets had been sent by School Divisions throughout the province to the principals of schools with students who would be taking the examination.**
3. **The Department of Education of the Province of Manitoba had prepared an Administrative Manual with respect to the 40S mathematics examination, an excerpt from which is Exhibit 22 in these proceedings.**
4. **The heading on Exhibit 22 is “RECEIPT OF EXAMINATIONS BY SCHOOL PRINCIPALS”. It contains directions with respect to the handling of the examinations from the time the examination booklets are delivered to the school until the students commence writing the examination. Relevant portions of Exhibit 22 are set forth below:**

*“The Principal is to keep materials secure at some location in the school. The shrink-wrapped examination bundles are **not** to be opened when they are received. However, upon receipt of the bundles, the Principal should *count the booklets in the unopened shrink -wrapped packages to ensure that the number requested has been supplied and that sufficient papers have been shipped for the number of students registered to write the examination.* If there is a discrepancy, please contact Manitoba Education and Training immediately to obtain additional copies. . . .”*

“On the morning of the examination, the Principal will give the Supervising Teacher(s):

- ? the examination booklets with the enclosed Attendance Form(s)
- ? the answer sheets (pink) in colour
- ? extra examination booklets (with enclosed blank Attendance Form)
- ? the REGISTRATION FORM - PART B
- ? the Supervising Teacher’s Report
- ? the Examination Feedback Form
- ? the list of provincial student numbers (if available) for all students writing the examination.

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SUPERVISING TEACHERS MAY OPEN THE SEALED PLASTIC EXAMINATION BUNDLES AT THIS TIME.”

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5. **In June of 1998 Brian O’Leary (“O’Leary”) was the principal of Maples Collegiate, one of the schools in the Division. He received the examination booklets relating to the 40S mathematics examination during the week prior to June 9, 1998, along with the directions as set forth in Exhibit 22. O’Leary was familiar with those directions, having previously received substantially similar or identical directions in relation to other provincial examinations.**
6. **In June 1998, the Grievor was a teacher at Maples Colligate, who during that semester was teaching the 40S mathematics course. He had been a teacher employed by the Division for over 30 years, 18 of which had been spent at Maples Collegiate. Throughout the Grievor’s career with the Division, he had taught mathematics, and some other courses including physics and business computing. In the 12 years preceding the events of June 1998, he had taught primarily mathematics and some computing courses.**

7. The Grievor had acted as the mathematics department head at Maples Collegiate, from January to June inclusive, in one year in the early or mid 1990s. For two years thereafter he had acted as the mathematics curriculum leader at Maples Collegiate. He was familiar with the directions as to the handling of examination materials set forth in Exhibit 22, and with the requirements for completing a Supervising Teacher's Report in relation to provincial examinations, because he had been previously involved in the conduct of such examinations, and had previously read directions and seen such reports.

8. On the morning of June 8, 1998, the day before the sitting of the 40S mathematics examination, another experienced mathematics teacher at Maples Collegiate, Ed Kuhr ("Kuhr") went to O'Leary's office and asked O'Leary to give him a copy of the 40S mathematics examination. In a casual conversation with the Grievor earlier that morning, Kuhr had told the Grievor that he was going to ask O'Leary for a copy of the examination.

9. Kuhr had regularly taught the 40S mathematics course. He had taught the course in the previous semester, and expected he would be teaching it again in the upcoming fall semester. However he was not teaching 40S mathematics during that particular semester, and therefore no students he was then teaching would be taking that particular examination.

10. Kuhr's reasons for asking for a copy of the examination, as outlined by him in his direct examination, were curiosity, and a desire to analyze the examination to create a predictor model with respect to the results that would be achieved by the Maples Collegiate students.

11. O'Leary was initially reluctant to provide Kuhr with a copy of the examination, but nonetheless did so. O'Leary testified that he instructed Kuhr to keep the exam secure and not to show it to anyone. O'Leary and Kuhr both testified that O'Leary told Kuhr to tell the Grievor that he (Kuhr) had the examination. O'Leary explained that he told Kuhr to do so because he believed that the Grievor was the supervising teacher in charge in relation to the 40S examination and O'Leary therefore wanted the Grievor to know that Kuhr had a copy of the examination. The Grievor denies that he had ever been told that he would be the supervising teacher in charge.

12. There is conflicting evidence as to what contact, if any, Kuhr had with the Grievor on the morning of June 8, 1998, after Kuhr had received a copy of the examination from O'Leary. There is no dispute that during the lunch hour, Kuhr proceeded to the lunch room and played bridge with three teachers, namely the Grievor, and two other teachers who were not mathematics teachers. The table at which they were seated was in relatively close proximity to another table at which four other teachers were playing bridge. There were a few other teachers or former teachers watching one or other of the bridge games, and there were other teachers in the room eating their lunches or engaged in other activities. Estimates from the various witnesses vary, but there were at least twelve people in the lunch room, and perhaps as many as twenty.

13. While playing bridge, Kuhr good naturedly, and in a teasing tone told the Grievor that he had a copy of the 40S examination and that he hoped the Grievor's students were "ready" because the examination "was a toughie". Kuhr's recollection was that there was some additional conversation about the examination in which he probably indicated to the Grievor that various topics were being cross referenced as had occurred on previous examinations. Kuhr was adamant in his testimony that he did not disclose any of the specific contents of the examination to the Grievor either in the lunch room, or in other discussions with the Grievor later that afternoon.

14. No one who testified who was present in the lunch room at the material time on June 8, 1998 was able to definitively state how many teachers, other than the four playing bridge at Kuhr's table would have heard Kuhr's comments about the examination. It is possible that several additional teachers would have heard Kuhr's comments and would therefore have known that he had a copy of the 40S examination. At least one teacher who was in the lunch room, Loris Barsanti ("Barsanti"), who was not playing bridge with Kuhr and the Grievor, but who was in the vicinity of their bridge table heard Kuhr's remarks about the 40S examination. Barsanti described Kuhr's mood at that time as being "boisterous and happy".

15. On the afternoon of June 8, 1998, both the Grievor and Kuhr had a preparation period at the same time. They were together in the same room. Kuhr was reviewing and analysing the 40S examination, with a view to predicting how the students at Maples Collegiate would do on the examination. Kuhr made some additional comments to the Grievor indicating that there were some interesting questions and some difficult questions. There was no doubt in Kuhr's mind that the Grievor would have known that he (Kuhr) was reviewing the 40S examination. However Kuhr did not disclose the specific contents of the examination to the Grievor. The Grievor was aware that after Kuhr finished his review of the examination, he put it in a drawer in his desk where he (Kuhr) kept certain of his private

documents. It is not disputed that Kuhr had an expectation of privacy with respect to the contents of that drawer in his desk.

16. The Grievor did not indicate to Kuhr at any time on June 8, 1998 that he was uncomfortable or displeased with Kuhr having a copy of the examination.

17. Shortly after 3:30 p.m. on June 8, 1998, Allison McDonald (“McDonald”) was on her way to her classroom, where some students were waiting for her, in order to receive some tutoring relating to the 40S examination which they were to take the next day. McDonald had been a teacher employed by the Division since 1994. She was teaching 40S mathematics that semester, and she would be one of the teachers supervising the examination the next day.

18. The Grievor was in an open area in the vicinity of McDonald’s classroom. He testified that he was unaware that there were 40S examination students waiting for McDonald in her classroom. He saw McDonald approaching, and called her over to him, and he moved inside the preparation room which he shared with others, including Kuhr.

19. At some point, in the brief exchange that followed, the Grievor held the 40S examination in his hand (having gotten it from Kuhr’s desk) and showed the examination booklet to McDonald. She was sceptical that the examination that the Grievor was showing her was the 40S examination for the next day, but the Grievor specifically showed her the date, namely June 9, 1998. McDonald, who was shocked that a copy of the examination was “out”, asked where the examination came from and who had copies of it. The Grievor told her that Kuhr had a copy of it, having obtained it from O’Leary. McDonald then quickly terminated the encounter, and proceeded to meet with the students who were waiting for her in her classroom. Both McDonald and the Grievor are consistent in their testimony that:

(a) McDonald did not see the contents of the examination;

(b) McDonald clearly did not want to see the contents, and accordingly made no attempt to look at the contents of the examination; and

(c) the Grievor made no attempt to show her the contents, nor did he encourage her to look at the contents of the examination.

20. The Grievor had no further communication with either McDonald or Kuhr on June 8, 1998, nor did he communicate with O’Leary.

21. On June 9, 1998, the Grievor arrived at Maples Collegiate at approximately 7:30 a.m. He arrived earlier than usual because the examination was being written that day, and the area in which the students would write the examination was to be set up that morning, well in advance of 9:00 a.m., the examination start time. McDonald arrived in the parking lot at the same time as the Grievor. There was no discussion between them about a copy of the examination “being out”.

22. The Grievor located the Building Manager, in order to gain access to O’Leary’s office where the bundles of examination booklets were being kept. The Grievor examined the bundles, and noted that the shrink wrap on one of the bundles had been opened and an examination booklet removed.

23. Shortly thereafter, and before 9:00 a.m., i.e. before the students had begun writing the examination, the Grievor substantially completed, and signed the Supervising Teacher’s Report (Exhibit 31). A portion of the form requires the supervising teacher to note “unusual circumstances that occurred or special accommodations that were made during the examination”. In that portion of the form, the Grievor wrote:

“The material was taken from the Principal’s office at 8:11 a.m. on June 9. The box with the 40S material was opened + 1 booklet No. \*11481 was missing”.

The Grievor testified that he inserted the examination end time, and the number of examinations submitted for marking, once all of the students had finished writing the examination. Otherwise the report had been completed and signed prior to the students beginning to write the examination.

24. On the morning of June 9, 1998, the Grievor had two contacts with O'Leary. The first was early in the morning, prior to the commencement of the examination. O'Leary attended on the Grievor and other teachers who were setting up the examination area, and inquired if everything was all right, and if the supervising teachers required anything. The Grievor responded by telling O'Leary that the box containing the examination bundles was wet because of a radiator leak in O'Leary's office, but otherwise, all was well. The Grievor did not raise any issue with O'Leary relating to Kuhr having received a copy of the examination the previous day, nor did he tell O'Leary that he would be submitting the Supervising Teacher's Report to the Department of Education completed as described above. The Grievor's second contact with O'Leary that morning occurred at approximately 10:00 a.m. and was with respect to a need for more supervising teachers as students completed and began handing in their examinations. O'Leary made arrangements for additional supervising teachers. Again the Grievor did not raise with O'Leary any issue relating to a copy of the examination having been given to Kuhr, or relating to the Supervising Teacher's Report.

25. &ne p Later, in the afternoon of June 9, 1998, the Grievor returned a call from a Mr. Stein ("Stein") of the Department of Education. Stein was calling as a result of receiving Exhibit 31 and was attempting to obtain further particulars about the Grievor's statement on Exhibit 31, that Examination Booklet No. 11481 was missing. The Grievor told Stein about attending in O'Leary's office early on June 9, 1998 and observing that one of the shrink wrapped bundles was open, and that one examination booklet had been removed. The Grievor did not tell Stein that Kuhr had been, and was in possession of the examination booklet, nor did the Grievor advise Stein of his (the Grievor's) understanding that Kuhr had received the examination booklet from O'Leary.

26. In the days immediately following the examination, another representative of the Department of Education, Norm Mayer ("Mayer"), had telephone conversations with both O'Leary and Kuhr.

27. Mayer was the Director of the Assessment and Testing Branch of the Department of Education, and had been instructed by the then Deputy Minister of Education to contact O'Leary. After exchanging messages on June 10, 1998, Mayer contacted O'Leary on June 11, 1998 to inquire of him as to the circumstances relating to the examination booklet referred to in Exhibit 31. O'Leary advised Mayer that he had given the examination booklet to a teacher on June 8, 1998. He advised Mayer that he had done so between 3:00 p.m. - 3:30 p.m., when in fact he had done so in the morning. O'Leary also advised Mayer that the teacher had taught 40S mathematics the previous semester, but was not teaching the course that semester, and therefore had no students taking the examination. O'Leary also advised Mayer that the teacher had kept the examination secure overnight.

28. Mayer reported accordingly to the Assistant Deputy Minister, who instructed him to speak to the teacher who received the examination. Mayer accordingly called O'Leary, obtained Kuhr's name, and placed calls to Kuhr.

29. Kuhr and Mayer exchanged calls but ultimately talked by telephone. Kuhr could not recall the day that their telephone conversation occurred, but thought it was within a few days of June 9<sup>th</sup>. Mayer believed the call occurred on Monday, June 15, 1998. Kuhr recounted the circumstances of receiving the examination from O'Leary, and advised Mayer that he was certain that no student had seen it, because it had only been in his possession or in the drawer of his desk. After this discussion, Mayer noted the discrepancy between the time O'Leary said he had given the examination to Kuhr (between 3:00 p.m. - 3:30 p.m.) and the time Kuhr recalled receiving the examination from O'Leary (in the morning). Shortly thereafter Mayer drafted a briefing note, in which he recommended that a letter be sent to the Superintendent of the Division directing the Superintendent to speak to O'Leary about the importance of adhering to the security provisions relating to Provincial Examinations.

30. Between mid-morning on June 9 and the morning of June 15, 1998, there was no contact between O'Leary and the Grievor; neither chose to initiate contact with the other.

31. On the morning of June 15, 1998, the Grievor had two telephone conversations, one with John Collins of the Manitoba Teachers' Society and another with Stein of the Department of Education. Both Collins and Stein advised the Grievor to speak to O'Leary, and accordingly the Grievor did so on the morning of June 15, 1998.

32. The following topics, and perhaps others were discussed at that meeting:

**(a)** the Grievor told O’Leary that he had been speaking to Stein who had advised the Grievor to advise O’Leary of the contents of the Supervising Teacher’s Report, and that the Grievor was concerned about a breach of security relating to the examination. O’Leary challenged the Grievor as to whether a breach had actually occurred because, as he pointed out, no teacher teaching the course, and no student taking the examination had seen the contents of the examination. The Grievor responded by saying that in any event he had felt obliged to report the situation;

**(b)** the Grievor advised O’Leary that he had heard rumours that the media had obtained details about the story, and that if O’Leary had not already reported the situation to the Division, he should do so now.

33. On the evening of June 15, 1998, CBC Television on its news program “24 Hours” reported on the incident, referring to an investigation being conducted by the Department of Education, and the possibility that students at Maples Collegiate might have to write another 40S mathematics examination. Thereafter “24 Hours” and other media outlets contacted O’Leary seeking further information. At that time no other media outlets chose to report on the incident, and within a few days “24 Hours” announced that they were in error when they reported that the Maples Collegiate students might have to take another 40S mathematics examination.

34. On June 16, 1998, the day after the initial “24 Hours” story, O’Leary summoned the Grievor to his office and asked him directly if he had spoken to “24 Hours” or other media outlets and provided them with details on which to run a story. The Grievor said no. O’Leary inquired as to the source of the rumour the Grievor had heard about the media. The Grievor initially answered that he could not remember, but when pressed by O’Leary, answered that he had heard the rumour in the Science Department. When pressed further by O’Leary as to the names of the teachers who had been present, the Grievor gave only one name, Loris Barsanti.

35. O’Leary then sought out Barsanti who reported that the Grievor had come into the science area the previous afternoon (June 15, 1998) and had raised the issue relating to the “breach of security” of the 40S mathematics examination. Barsanti also recalled one other teacher being present, Steven Pawlyshyn, but recalled no mention of the media whatsoever by anyone. Subsequently as part of her inquiries into this matter, the acting Superintendent of the Division, Coralie Bryant (“Bryant”) interviewed several teachers, including Barsanti and Pawlyshyn. Pawlyshyn’s recollection of the discussion of the mathematics examination on June 15th was identical to that of Barsanti. Both O’Leary and Bryant found it significant that the discussion in the science area, which the Grievor alleged was when he first heard rumours of media interest, occurred after the Grievor’s meeting with O’Leary on the morning of June 15, 1998, when the Grievor advised O’Leary of possible media interest in the incident.

36. O’Leary’s concerns relating to the Grievor’s involvement in this matter were further heightened on the afternoon of June 16, 1998, when at approximately 2:00 p.m., he received a report from Gwen Birse (“Birse”), the curriculum leader of the mathematics department, advising him that the Grievor had shown McDonald a copy of the 40S examination. O’Leary spoke to McDonald, likely on June 17, 1998, and had her record her recollections of her contact with the Grievor on the afternoon of June 8, 1998. McDonald did so (Exhibit 5). Shortly thereafter O’Leary spoke to Bryant who asked him to provide a written report (a copy of which, revised as at June 22, 1998 is Exhibit 4, and an earlier version is Exhibit 29), and to obtain written summaries from Kuhr and Birse, which he did (Exhibits 6 and 7 respectively).

37. O’Leary also spoke with the Grievor on June 19, 1998, and advised him that he had concerns with the Grievor’s conduct and would be providing a report to the Superintendent. The Grievor understood that O’Leary would be recommending that some form of discipline be imposed upon him.

38. By the third week of June, 1998, Bryant was concerned about the situation, and particularly the Grievor’s conduct. She reviewed O’Leary’s reports and the summaries provided by Kuhr, Birse and McDonald, and conducted her own interviews of various of the individuals involved.

39. She interviewed the Grievor on June 24, 1998, in the presence of a Manitoba Teachers’ Society representative, Alf Brooks. Also present with Bryant was Ken Burron, an Assistant Superintendent of the Division, who was there primarily to take notes, while Bryant conducted the interview. Bryant had provided the Grievor in advance with a letter dated June 23, 1998 (Exhibit 8) listing five concerns relating to his conduct. Those concerns, or most of them, were discussed at the meeting, and the Grievor was afforded an opportunity to provide further factual information, and to respond to the concerns raised by Bryant.

40. In response to Bryant's questioning as to why he had not notified O'Leary of his concerns relating to the examination given to Kuhr, on either June 8 or June 9 before submitting the Supervising Teacher's Report to the Department, the Grievor stated that he was concerned that O'Leary would direct him not to submit the report, which would have created a difficult situation for him (the Grievor). The Grievor's reasoning was that if he felt he must submit the report, he would be in a position of having to disobey a direct instruction from his Principal. Bryant stated that if the Grievor was concerned about O'Leary's reaction, the Grievor could have contacted the Superintendent's Department, rather than O'Leary.

41. When asked about his knowledge of the media's source of information, the Grievor again stated that his only knowledge was the rumour of media interest he had heard in the science area on June 15, 1998.

42. At the conclusion of Bryant's meeting with the Grievor on June 24, 1998, she was dissatisfied with his explanations of his conduct and she remained suspicious as to how the media had been contacted.

43. Accordingly, on the same day, June 24, 1998, she interviewed both Loris Barsanti and Steve Pawlyshyn, with the results described in paragraph 35 of this summary.

44. As part of her own inquiries, Bryant also interviewed Kuhr and McDonald.

45. Bryant had completed her interviews by June 25, 1998. She remained very concerned about the Grievor's conduct and decided to provide a report to the Board of Trustees of the Division at its next regular meeting, which was scheduled for August 24, 1998. By letter dated June 29, 1998 (Exhibit 13) Bryant advised the Grievor she would be doing so.

46. Bryant met with the Grievor and delivered the letter of June 29, 1998 to him at that meeting. There is a direct conflict between the evidence of Bryant and the Grievor as to the date when that meeting occurred. Bryant says it was on June 29, 1998; the Grievor asserts it was on June 30, 1998.

47. The meeting, whenever it occurred, covered several topics including, but not limited to, the Grievor's allegations that there had been past discrepancies relating to the examinations at Maples Collegiate and that he considered it likely he would be having further discussions with the Department of Education in which both the 40S mathematics examination of June of 1998 and previous incidents involving examinations might be raised. The Grievor also asked if he could be present at the August 24, 1998 meeting; Bryant told him that would be for the Board of Trustees to decide.

48. The Deputy Minister of Education wrote to Bryant with respect to these matters by letter dated June 30, 1998 (Exhibit 28). The letter was received by the Division on July 7, 1998. The letter read in part:

"As you may know, the Assessment and Evaluation Branch of Manitoba Education and Training recently conducted an investigation into a potential breach of security in your Division related to the June 1998 Senior 4 Mathematics Provincial Examination.

This investigation was initiated after the Branch received information indicating that one of the examination booklets that had been sent to Maples Collegiate was unaccounted for prior to the administration of the examination on June 9, 1998. It was subsequently determined that the Principal at Maples Collegiate, Mr. Brian O'Leary, had provided a copy of the examination to a teacher at the school on June 8, 1998, one day before the administration of the exam. Although Mr. O'Leary has assured the Branch that the unauthorized release of the examination booklet did not extend beyond the one teacher, this incident represents a serious violation of the guidelines that are expected to be followed in connection with the administration of provincial examinations. Coverage of this incident by the local media further jeopardized the credibility of the provincial examination process.

As you can appreciate, the integrity of the provincial examinations is highly dependent on the cooperation of school divisions and schools throughout the examination administration process. In particular, it is essential that all parties involved in the process strictly adhere to the security provisions that have been established by the Assessment and Evaluation Branch. Security provisions ensure that the administration of the



examinations provide for equitable conditions under which all students write the examinations. This is in keeping with the practices for fair assessment.

With the goal of preventing such incidents from reoccurring, I am requesting that you meet with Mr. O'Leary to review the responsibilities of Principals with respect to the security of provincial examinations, and to reiterate the importance of fulfilling those responsibilities. . . “

Bryant responded by a letter to the Deputy Minister of Education dated July 14, 1998 (Exhibit 27). Her response read in part:

“I have fully investigated the incident myself, have reviewed with Mr. O'Leary the responsibilities of the Principal and their importance and am satisfied that such an incident will not recur.”

**49. Bryant prepared a report “with respect to events surrounding an administration of Provincial 40S Mathematics Examination June 1998 at Maples Collegiate” (Exhibit 16), and presented it to the Board of the Division on August 24, 1998. The Grievor was not present.**

**50. Following Bryant’s presentation, the Board did not make a specific decision as to what discipline, if any, might be appropriate in the circumstances and instead instructed Bryant to deal with the matter administratively.**

**51. She decided to do so by way of a letter to the Grievor dated September 2, 1998 (Exhibit 17) (reproduced in its entirety elsewhere in these reasons), in which she stated her conclusion that the Grievor’s actions represented insubordination and unprofessional conduct and warned him that such conduct must not occur again, and that if it did, more serious disciplinary action would “clearly be indicated” .**

#### **THE TRANSFER**

**52. In or about the middle of June, 1998, as a result of the “open boundaries policy”, Bryant received and approved an application on behalf of thirty students outside the Garden City Collegiate’s catchment area to attend that school in the upcoming year .**

**53. At or around the same time, O’Leary and Bryant attended together in the office of Ken Burron, who was then an Assistant Superintendent of the Division responsible, inter alia, for personnel and human resource issues in the division. O’Leary put forward a request that the Grievor be transferred from Maples Collegiate. Burron testified that O’Leary explained his request by using words, which were to the effect that students and teachers had become alienated from the Grievor .**

**54. Shortly after his discussions with O’Leary and Bryant, Burron received a telephone call from Alfred Wiebe (“Wiebe”), the Principal of Garden City Collegiate who required a teacher as a result of the thirty new students who would be attending Garden City Collegiate in the fall of 1998. Wiebe had designed a course load for that teacher. In the first semester the course load was to consist of one section of mathematics 20S (Grade 10), a half section of Grade 9 remedial science, one and a half sections of Grade 9 keyboarding and a technology resource component. The course load in the second semester consisted of two sections of mathematics 20S, one section of computer applications and technology 20S, one half section of keyboarding and the technology resource component.**

**55. Burron concluded that the Grievor might be suitable for the position that Wiebe was seeking to fill, although the Grievor had not taught any type of science for approximately twenty years. Thereafter a series of events occurred. Although there is a significant dispute between the evidence of the Grievor and the evidence of the Division as to the date or dates of those events, and the overall length of time over which they occurred, the evidence as to what actually occurred is less contentious.**

**56. The Grievor had an initial telephone conversation with Burron, in which Burron told him to contact Wiebe. The Grievor called Wiebe and arranged to meet with him. They met at Garden City Collegiate and discussed the teaching assignment, and the Grievor expressed reservations about the assignment, particularly the keyboarding course, which he had never previously taught. Wiebe advised the Grievor that the keyboarding course was a well**

established existing program and that he did not think that a teacher of the Grievor's experience would have any problems teaching it. Wiebe also advised the Grievor that the teaching assignment could not be changed.

57. The Grievor then had a second telephone conversation with Burron in which he expressed his reservations about the proposed teaching assignment. Burron understood the Grievor's reluctance related primarily to the keyboarding course, and so he (Burron) called Wiebe to discuss the Grievor's concerns. Wiebe indicated to Burron that he was confident the Grievor could teach the keyboarding course and stated that the teaching assignment could not be changed.

58. Burron called the Grievor back to advise him that the teaching assignment could not be changed but that he (Burron) did not think that the course load would represent a problem for the Grievor.

59. The Grievor then had a second meeting with Wiebe at Garden City Collegiate, which occurred at least one day after his first meeting with Wiebe. In the second meeting, the Grievor picked up some books and course materials, was given his room assignment, and was shown the computer lab by Wiebe.

60. During these series of meetings and discussions with Wiebe and Burron, the Grievor says that he asked Burron, if he was being transferred, and if he (the Grievor) had any choice in the matter. The Grievor alleges that in either his second or third telephone conversation with Burron, he told Burron that he would like to finish his teaching career at the Maples Collegiate, and that there was a need for a math teacher at the Maples Collegiate. The Grievor says that in response Burron said to him that effective September 1998, he (the Grievor) would be teaching at Garden City Collegiate. Burron's recollection is that in their third telephone conversation, the Grievor asked where he would be teaching in the upcoming fall, and Burron responded that "it would likely be at Garden City Collegiate".

61. By Interoffice Memorandum (Exhibit 15), dated June 29, 1998, Burron advised the Grievor "that effective August 28, 1998, your teaching assignment will be (1.00) time factor at Garden City Collegiate".

62. Bryant testified that it was her understanding that the Division had not told the Grievor that he would be obliged to take the job at Garden City Collegiate. Each of Bryant, Burron and Wiebe gave evidence that the Grievor never objected to the transfer to Garden City Collegiate, and that it was their understanding that he was voluntarily accepting the transfer. Both Burron and Wiebe acknowledge, however, that the Grievor had expressed reservations about the keyboarding component of the teaching assignment at Garden City Collegiate. Burron testified that the Grievor did not seem "entirely committed" to the transfer. For his part, the Grievor was adamant in his testimony that the transfer was not voluntary.

63. The Grievor taught at Garden City Collegiate commencing in the fall semester of 1998. He immediately encountered difficulties because the computer lab had been moved from where it had been located the previous semester (where he had seen it in June), and the computers that were available to him and his students were subject to frequent and repeated breakdown. On the first day of classes he was only able to get two of over twenty terminals to operate. By the end of the first week he managed to have six or eight of the terminals operational. Throughout the balance of the first semester it was usually the case that approximately half of the terminals would not be functioning. The Grievor spent much of his time repairing equipment and was very frustrated that his teaching efforts were being seriously undermined by equipment that would not operate properly. This unsatisfactory situation improved subsequently when the Division hired a computer technician.

64. The Grievor made two presentations to the Board of the Division, with respect to the letter of discipline and his transfer to Garden City Collegiate, on October 19, 1998 and in January of 1999. The Grievor was advised by a letter from the Division dated January 22, 1999, sent to a staff officer at the Manitoba Teachers' Society (Exhibit 33) that the "... transfer was both appropriate and reasonable as was the process employed", and "... that the acting Superintendent acted responsibly in issuing the written warning dated September 2, 1998 to Mr. Treller".

## FACTUAL DISPUTES

As stated at the outset of this section of the award, some of the evidence in this case is inconsistent and contradictory.

In order to determine some of the important issues in this case, it will be necessary to make factual determinations which will require this Board to accept the evidence of one party over another, and to make credibility assessments of several of the individuals who testified. I will specifically comment on the testimony of four individuals .

**1. The Grievor, Jim Treller.**

Mr. McNicol, counsel for the Division commenced his argument in this case by describing the Grievor as a “petty, mean spirited, troublemaker” who set out on a deliberate course of action to embarrass his principal and his employer, not caring whether he put grade 12 students at Maples Collegiate at risk, and causing upset and embarrassment to some of his teaching colleagues .

Does the evidence support such a stark conclusion?

There were many aspects of the Grievor’s testimony that I found both troubling and inexplicable .

For example if he was concerned about O’Leary having given an examination booklet to Kuhr on June 8<sup>th</sup>, why did the Grievor not outline his concerns to either O’Leary or Kuhr on June 8<sup>th</sup>?

His stated explanation, namely that he was not particularly upset when he first became aware that Kuhr had a copy of the examination, but became increasingly upset as the day progressed does not satisfy me .

I am sympathetic to the Grievor’s reluctance to speak to O’Leary on June 8<sup>th</sup>, because O’Leary was the person who had acted contrary to the directions in the administrative manual (Exhibit 22) and therefore the Grievor might have expected O’Leary to pressure him to disregard the whole matter. However I am entirely perplexed by the Grievor’s decision not to discuss the matter with Kuhr. He apparently had a good relationship with Kuhr, and on at least two occasions on June 8<sup>th</sup> had an opportunity to discuss the matter with him, namely during the lunch hour, and during the spare period that afternoon when the two of them were alone together and Kuhr was reviewing the exam .

Furthermore, the Grievor alleges that he approached Birse in the afternoon of June 8<sup>th</sup>, because he thought that in her capacity as curriculum leader she should be advised of the situation. Interestingly, in cross-examination, Birse firmly denied having any communication with the Grievor on June 8<sup>th</sup>. When I review Birse’s evidence in its entirety, and particularly her description of how and when she learned of a 40S examination being out, I prefer Birse’s evidence on that point. However, the Grievor cannot have it both ways; he cannot say he was sufficiently concerned about the situation by the afternoon of June 8<sup>th</sup> to contact, or to attempt to contact Birse, and at the same time use his lack of concern until late in the afternoon as an excuse for not raising the issue with either O’Leary or Kuhr .

Indeed, even if one accepts the Grievor’s statement that he was not overly concerned about the matter until late in the afternoon, after his alleged conversation with Birse, and one also assumes that by then, Kuhr and O’Leary may have left for the day, the Grievor could still have attempted to contact one or other of them by telephone that evening .

The Grievor’s contact with Allison McDonald on June 8<sup>th</sup> is also bothersome. The Division asserts that there is only one logical explanation for him showing McDonald the examination booklet, namely that he was attempting to manufacture a serious breach of security relating to the examination by tempting her, a teacher of 40S mathematics, to look at the contents of the examination. The Division alleges this was part of his scheme to embarrass O’Leary .

I cannot accept the Division’s assertions on that point. Firstly, they are directly contrary to the evidence of both McDonald and the Grievor that he never attempted to show her the contents of the examination, nor did he do or say anything that could be construed as an invitation to look at the examination. Secondly, an attempt by the Grievor to manufacture such a breach of security would be immensely stupid on his part, because he would then be directly implicated in such a breach and his misconduct would be far more serious than anything O’Leary had done .

However, having expressed my doubts about the Division’s theory as to the Grievor’s communication with McDonald, I am unable to accept the explanation offered by the Grievor. He says that by then, approximately 3:30 p.m., he realized he might have to deal with the problem, and was not sure what to do, so he approached McDonald when he saw her, because she too would be supervising the examination the next day. He showed her the examination booklet to convince her that there was a real problem, namely that a copy of the examination had been removed from the shrink wrapped bundles .

Having heard that explanation, I must again ask why, if the Grievor's concern by then was such that he considered it necessary to communicate with McDonald, he would not also attempt to speak that day or evening to O'Leary or Kuhr who were the source of the problem and who could take steps to remedy the problem. Indeed at that time if his concerns were acute he could have attempted to speak to Mr. Pisichko, a more experienced mathematics teacher than McDonald, who would also be supervising the examination the next day, or someone in authority at the Division office.

I also note the Grievor testified that when McDonald promptly terminated their discussion on June 8<sup>th</sup>, they both agreed they would discuss what to do the next day. However the Grievor did not initiate any discussion with McDonald on June 9<sup>th</sup> before completing the Supervising Teacher's Report (Exhibit 31).

On June 9<sup>th</sup>, the Grievor attended at the school in the early morning and signed the Supervising Teacher's Report before 9:00 a.m. This early morning initiative seems inconsistent with the Grievor's description of himself, as of the late afternoon of June 8<sup>th</sup>, as being concerned and uncertain as to his responsibilities.

It also represented a breach of the directions with respect to the handling of the examinations issued by the Department of Education (Exhibit 22), which stipulated that on the morning of the examination, the Principal was to give the Supervising Teacher (s) the examination booklets. The Grievor was familiar with those directions and knowingly breached them that morning by accessing the examination booklets without O'Leary being present.

The Grievor does say that he did consult with Pisichko that morning with respect to completing the report prior to doing so. Pisichko was not called as a witness to corroborate that assertion. In any event, it is not clear what Pisichko would have known about the background facts and the dilemma supposedly faced by the Grievor, and any consultation could not have been lengthy given the other things that the Grievor did that morning before 9:00 a.m., including getting the examination booklets from O'Leary's office, and assisting in setting up the examination room.

By completing the Supervising Teacher's Report prior to the students commencing the examination, the Grievor clearly completed the report prematurely. That is obvious from a review of the form itself, and was confirmed by Mr. Mayer, the Director of Assessment and Testing from the Department of Education. The Division says that the Grievor's haste that morning is consistent with, and proof of, their theory that he deliberately set out to take advantage of the situation and to "cause mischief". The Division alleges he completed the form early without discussing it with anyone, so that he could be sure it would be embarrassing to O'Leary.

The Division also contends that the Grievor's use of the word "missing" was deliberately misleading (i.e. the examination was not missing because each of the Grievor, O'Leary, and Kuhr knew where it was). The Division says that the Grievor's use of that word was calculated to alarm the readers of the report, namely representatives of the Department of Education.

It is not useful or necessary to engage in an analysis of the various dictionary definitions of the word "missing". The Grievor has acknowledged that "missing" was not an appropriate word in the circumstances.

I have difficulty with the manner in which the Grievor completed the report not merely by reason of his use of the word "missing", but also because the report as submitted was incomplete, and did not provide the Department with a correct summary of the Grievor's knowledge as to the "unusual circumstances that occurred" in relation to the examination. The fact that the report was incomplete gives credence to the Division's argument that the Grievor deliberately intended to make the matter appear more serious to the Department than was actually warranted.

The Division is also highly critical of the Grievor for not communicating with O'Leary on June 9<sup>th</sup>. I am not.

I can understand that if a teacher feels strongly that a report should be submitted as to a breach of examination guidelines, such a teacher could be reluctant to discuss the report beforehand, with the person who was directly responsible for the breach. Such reluctance is particularly understandable, when the person responsible for the breach is the teacher's principal, and the teacher is concerned, as the Grievor stated he was, that the principal might direct him not to report the breach. The teacher would then be in a compromising and unenviable position.

I therefore do not condemn the Grievor for not speaking to O'Leary on June 9<sup>th</sup>. I am nonetheless left to ponder why the Grievor would not have contacted the Division, as a matter of both common sense and courtesy since the Division, as well as the Department should also have been made aware of a situation relating to a breach of the guidelines with respect to the handling of the examination. Any concern the Grievor might have had about violating the Teachers' Society's Code of Professional Practice, which contains a prohibition against criticizing a colleague without first informing the colleague of an intent to do, seems misplaced in these circumstances in view of the report being sent to the Department.

Another aspect of the Grievor's conduct on June 9<sup>th</sup> is very troubling to me. The Grievor spoke to Stein, from the Department of Education, on the afternoon of June 9<sup>th</sup>. The specific topic discussed was the Grievor's report to the Department, and the reference therein that an examination booklet was "missing". The Grievor advised Stein of going to O'Leary's office that morning, and noting the shrink wrap had been opened and a booklet removed. The Grievor chose not to tell Stein any or all of the following facts, namely that:

- (i) he (the Grievor) had accessed the examination booklets very early that morning when O'Leary was not present;**
- (ii) he knew where the examination booklet was;**
- (iii) he knew that O'Leary had given the exam to Kuhr;**
- (iv) Kuhr was not teaching students who were to take the 40S examination;**
- (v) to the Grievor's knowledge no student taking the examination, nor any teacher teaching the course had seen the contents of the examination.**

The Grievor has offered two explanations for his less than forthcoming conversation with Stein. Firstly, that he simply responded to questions put to him by Stein, and secondly that he did not tell Stein that O'Leary had given the examination booklet to a teacher, because the (the Grievor) did not actually "know that as a fact".

I find both explanations entirely disingenuous. Firstly, if the Grievor was motivated by a legitimate purpose i.e. a genuine concern for proper adherence to the guidelines relating to the handling of the examination, he should have been anxious to provide the Department with full particulars of all of his knowledge so that the Department would be aware of the relevant facts as quickly as possible. Secondly, I am mindful that one of the excuses offered by the Grievor for not advising O'Leary of the matter was that O'Leary already knew about Kuhr having the examination booklet because O'Leary had given it to him. Such an excuse is entirely inconsistent with his explanation for not advising Stein of that, because the Grievor did not actually "know that as a fact".

Given all of the foregoing, I have concluded that when the Grievor forwarded an incomplete report to the Department, and when on the same day he chose to withhold relevant facts from Stein, he did so deliberately, intending to present the situation to the Department in a way that exaggerated the seriousness of what had occurred.

The events of June 15<sup>th</sup> and 16<sup>th</sup> also need to be scrutinized in assessing the Grievor's credibility.

On June 15<sup>th</sup> the Grievor advised O'Leary that he had heard a rumour of media interest in the 40S examination situation. When O'Leary pressed him the next day as to the source of the rumour, he ultimately indicated he had heard the rumour in the science area. He acknowledged in his testimony that his statement to O'Leary was incorrect, explaining that he had actually heard the rumour elsewhere. The Grievor had little choice but to make that acknowledgement in his testimony because the teacher he had identified, Loris Barsanti, and the other teacher, Steve Pawlyshyn (referred to by Barsanti), both advised Bryant, that their only discussion at any relevant time with the Grievor, occurred after the Grievor's meeting of June 15<sup>th</sup> with O'Leary, and that the media was not mentioned in that discussion.

The Grievor's stated reason for giving incorrect information to O'Leary was that he was in a "dither", and upset and agitated because he, along with other teachers were being summoned, and interviewed by O'Leary.

I note however that the Grievor provided substantially the same information about hearing the rumour in the science area, to Bryant on June 24<sup>th</sup>. Prior to that meeting, the Grievor had been provided with a letter by Bryant in advance (Exhibit 8) in which she advised him of her concerns, one of which related to the manner in which the media had

obtained details of the story. The Grievor cannot plausibly claim that he was in a “dither” when meeting with Bryant, having had over a week to reflect on what he had told O’Leary, and knowing in advance that the topic of media interest would almost certainly be raised by Bryant.

Assessing the evidence relating to the media rumours, I have concluded that the Grievor gave false information to both O’Leary and Bryant. He either had not heard a rumour about media interest at all, or he provided false information about the source of the rumour. Both O’Leary and Bryant were making inquiries about a matter with potentially serious consequences for the Division and its students. They were entitled to receive candid and truthful information from the Grievor; he did not give it to them.

In addition to the specific aspects of the evidence noted above which raise very serious questions about the Grievor’s credibility, I would make a final, more general observation. Reviewing the evidence as a whole, it is notable that there is a lack of a consistent explanation from the Grievor for his actions. The Grievor did not attempt to explain his conduct on the basis that he was sincerely worried about what he perceived as a serious disregard for the applicable guidelines relating to examination security. Had he expressed, and proven such a genuine concern, and established on the evidence that he did not speak to O’Leary and the Division before filing Exhibit 31, because he believed they would attempt to minimize the situation and portray him as an officious troublemaker, his behaviour could be seen in a more favourable light.

Instead however, the Grievor has offered piece-meal explanations for specific incidents, some of which, as outlined above, are illogical and inconsistent. In that regard, I was struck by the inherent contradictions between his insistence that he did not regard the breach as being particularly serious, his assertion that he nonetheless felt obliged to report the matter to the Department, and his action in withholding facts that would have provided the Department with a more accurate account of what had occurred.

## **2. Ed Kuhr**

I found Mr. Kuhr to be a candid witness. I believe that throughout his evidence he was forthright, and attempted to provide an accurate and complete summary of his recollection of events.

He gave his evidence in a relaxed, almost carefree manner. Unhappily, the same relaxed and carefree attitude characterized his actions on June 8<sup>th</sup>, and contributed to the unfortunate sequence of events that occurred thereafter.

Mr. Kuhr had no business asking for the examination on June 8<sup>th</sup>. His curiosity, and his desire to predict exam results, could have, and should have waited one more day.

O’Leary told Kuhr to advise the Grievor that he (Kuhr) had the examination. O’Leary’s purpose in so directing Kuhr was serious, i.e. to advise the Grievor that Kuhr had the examination with O’Leary’s permission, so that the Grievor would know that responsible parties knew the whereabouts of all of the examination booklets.

O’Leary did not intend Kuhr to head to the lunchroom, “boisterous and happy” as described by Barsanti to tease the Grievor (however good naturedly) in front of many other teachers about having the exam and the exam being a “toughie”. The evidence establishes that at least one other teacher not at the bridge table, namely Barsanti heard Kuhr’s remarks. It is possible, indeed likely, that in a room where there may have been as many as 20 people, that other teachers beyond the bridge table also heard Kuhr’s remarks. The evidence (Exhibit 7) establishes that at least one other teacher, Barb Dicurzio, knew that Kuhr had the examination; she must have either heard Kuhr’s lunchroom banter, or obtained the information from someone who had.

It is trite to observe that the more people who knew that Kuhr had the examination, the greater the risk of a serious breach of examination security actually occurring.

I have commented on Kuhr’s conduct and behaviour, not to be critical of him, (indeed I recognize that in his memo of June 18<sup>th</sup>, 1998, he admitted his error and humbly apologized), but for two other reasons:

1. His offhand attitude towards the examination may have legitimately alarmed and offended any teacher who was concerned about the integrity of the provincial examination process. The Grievor says he was upset

about the way the examination was being handled and discussed, and I accept the Grievor's evidence on that point.

2. The manner in which Kuhr advised the Grievor that he had the examination, talked about it openly during the lunch break, and reviewed and analyzed the examination in the presence of the Grievor during a spare period in the afternoon of June 8<sup>th</sup> was at least as inappropriate, and perhaps more so, than the Grievor's exchange with McDonald that same afternoon. Yet O'Leary's and Bryant's subsequent inquiries into the matter essentially focused on the Grievor's actions, and not on the actions of O'Leary or Kuhr. This speaks to the fairness of the Division's actions in this matter which I will comment on elsewhere in these reasons.

## **2. Brian O'Leary.**

O'Leary, as principal of Maples Collegiate was responsible for adhering to the directions contained in the administrative manual (Exhibit 22). He was familiar with those directions. Regardless of his attitude toward the legitimacy of provincial examinations as an assessment technique, it was his duty and responsibility to comply with the Department's directions. He did not.

By acceding to Kuhr's request for a copy of the examination, by failing to sufficiently emphasize to Kuhr the importance of preserving the security of the exam and of minimizing the number of people who were aware that Kuhr had the examination, and by failing to personally advise the Grievor, whom he believed to be the Supervising Teacher, that he (O'Leary) had given Kuhr an examination booklet, O'Leary exhibited a disrespect for the guidelines that bordered on contemptuous.

On one level, I can understand O'Leary's laxity. He was undoubtedly busy at that time of year, he had respect for the abilities and integrity of Kuhr, and he did not anticipate that Kuhr would be so cavalier about having a copy of an examination booklet. I also acknowledge that O'Leary has admitted in these proceedings, and elsewhere, that he made a mistake when he gave the booklet to Kuhr.

However O'Leary's mistake had a consequence that he has failed to recognize. O'Leary was the person responsible for the breach of the guidelines relating to the handling of the examination. As such, he was hardly in a position to objectively assess the conduct of the Grievor as it related to the reporting of that breach to the Department of Education.

Moreover, some of O'Leary's previous dealings with the Grievor had been strained. In cross-examination, O'Leary referred to previous incidents in which he felt that the Grievor had put the school in "an embarrassing situation". Also in cross-examination, O'Leary was asked if he was "angry" with the Grievor about the Grievor's report of this incident to the Department. O'Leary responded that he was "not happy" with the Grievor, and acknowledged that in part he felt that way because the report as filed would embarrass him (O'Leary), and also because he thought that the report was not true.

I do not fault O'Leary for his feelings towards the Grievor. However he had a responsibility as a principal and a leader in the Division to make sure that his ill will toward the Grievor did not interfere with his ability to fairly assess the Grievor's actions, and the actions of everyone else, involved in this incident, including himself. It is significant that it was O'Leary's own mistake in giving an examination booklet to Kuhr, that was the genesis of this problem.

In my opinion, after the Grievor had approached O'Leary on June 15<sup>th</sup>, and after the broadcast of the story on "24 Hours" that evening, O'Leary should have withdrawn from active participation in consideration of this matter, and recommended that a vice-principal or a senior and experienced person in the Division or Bryant herself, conduct all further inquiries. By then, O'Leary's general unhappiness with the Grievor, his suspicions that the Grievor was involved with the media leak, and O'Leary's personal stake in the outcome of this matter would all seriously undermine O'Leary's objectivity and judgment in evaluating this entire affair.

There is evidence that O'Leary's subsequent involvement in this matter lacked objectivity and exhibited bias towards the Grievor.

For example on page 3 and 4 of Exhibit 4, being O'Leary's summary of the relevant events, which he ultimately provided to Bryant, O'Leary describes the contact between the Grievor and McDonald on June 8<sup>th</sup> as follows;

“She followed Jim into a prep area shared by Jim and Ed Kuhr, where Treller showed her the 40S provincial exam. She let him know that it would be wrong for her to look at it”.

Those words clearly conveyed the meaning that the Grievor was trying to induce McDonald to look at the contents of the examination and that she firmly resisted. Indeed even in cross-examination at this hearing, O’Leary asserted that he recalled McDonald telling him in June 1998 that the Grievor had used words to the effect, “go on, take a look” and that the Grievor might have said that twice.

However, there is no reference to such a statement in O’Leary’s own report. Moreover McDonald’s written report dated June 18, 1998 made it very clear that the Grievor only showed her the cover of the exam and that both she and the Grievor agreed that they should not look at its contents.

McDonald, who was a very credible and straightforward witness was very clear and emphatic in her testimony that the Grievor had not showed her the contents of the exam nor said anything to encourage her to look at the contents .

O’Leary’s summary on that point in Exhibit 4 is unfairly slanted against the Grievor.

Another example of a lack of objectivity on O’Leary’s part relates to the manner in which he attributes statements to Norman Mayer of the Department of Education in Exhibit 4. O’Leary states in Exhibit 4 that Mayer advised him in a telephone conversation on June 10<sup>th</sup> that he (Mayer) was satisfied with O’Leary’s explanation, and that he (Mayer) “considered the matter concluded”.

In his testimony in these proceedings, Mayer denied making that statement. He was cross-examined on the point and maintained his denial. He also pointed out that it would have been illogical for him to make that statement, because he had not yet completed his inquiries .

Even in the absence of Mayer’s testimony, it is clear from Exhibit 4 that O’Leary knew that the Department could not have considered the matter concluded, because Mayer had called him back, asking for Kuhr’s name and had asked O’Leary to leave a message for Kuhr that Mayer wanted to talk to him.

In his cross-examination of O’Leary, Mr. Smorang pointed out the words in Exhibit 4, “that he considered the matter concluded” do not appear in Exhibit 29, an earlier version of O’Leary’s report.

Mr. Smorang also pointed out that there were other examples of words and phrases appearing in Exhibit 4 and not in Exhibit 29. Those would include two paragraphs referring to conversations that O’Leary had with media representatives in which those representatives indicated their disinterest in running further stories and in which the CBC representative advised O’Leary that the Department of Education had advised them that they were not concerned with the examination being compromised.

An inference therefore arises that O’Leary reviewed his report before submitting it to Bryant, and inserted self-serving statements that were intended to convey the impression that his own mistake in providing the exam to Kuhr had had no serious consequences .

One other feature of O’Leary’s testimony warrants specific comment. In cross-examination, O’Leary was asked whether he had had anything to do with the Grievor’s transfer from Maples Collegiate. He replied “no”.

Dr. Burron, testified that O’Leary had appeared with Bryant in his office and had requested that the Grievor be transferred, and that O’Leary had explained the request by indicating that the Grievor had alienated both students and teachers at Maples Collegiate .

Burron’s evidence on the point is credible, and directly contradicts that of O’Leary. Although it is possible that O’Leary misunderstood Mr. Smorang’s question, and answered “no” in the sense that he had nothing to do with the process of the Grievor’s transfer, I was very uncomfortable with O’Leary’s evidence on that point.



Coralie Bryant

In June 1998, and in the months following, Ms Bryant was the Acting Superintendent of the Division. She first became aware of the issues that are the subject matter of these grievances when she received a telephone call from O'Leary on June 11, 1998. O'Leary was calling to advise her that the Department had called him as a result of the report (Exhibit 31) the Grievor had submitted to the Department. O'Leary gave Bryant a background briefing.

O'Leary called Bryant again on June 15<sup>th</sup> at approximately 5:00 p.m., prior to Bryant attending a Board of Trustees meeting that evening. O'Leary was calling as a result of his discussion with the Grievor that day, and to alert Bryant prior to the board meeting of possible media interest in the incident.

Bryant reasonably concluded that she required a further, more detailed report as to the background facts. She directed O'Leary to prepare that report, and to obtain statements from the people knowledgeable of the incident.

As previously indicated, I think the decision to have O'Leary conduct the inquiries and prepare a report was an error. Ideally O'Leary would have raised the issue of his own potential lack of objectivity with Bryant, or Bryant would have thought to consider that issue. Unfortunately neither of those things happened.

In the result, I believe that Bryant's inquiries, and her assessment of the background facts, were flawed to some extent.

I previously referred to two examples of a lack of objectivity in O'Leary's report to Bryant. I will refer to one other portion of the evidence which I believe demonstrates a similar lack of objectivity that likely tainted Bryant's inquiries.

In Bryant's letter to the Grievor dated June 23 (Exhibit 8), and in her report to the Board considered at the August 24<sup>th</sup> meeting (Exhibit 16), and in her letter to the Grievor dated September 2<sup>nd</sup> (Exhibit 17), Bryant referred to the fact that, relatively early on in this matter, the Department of Education had declared that no breach of examination security had occurred. She did so in the context of criticizing the Grievor for keeping the issue alive. We now know that the Department denies ever making such a declaration. I appreciate that O'Leary had advised Bryant that they had.

However, at some point, prior to reporting to the Board, particularly when it was clear to Bryant that discipline against the Grievor was likely, based, in part, on the belief that the Grievor was keeping the issue alive after the Department had considered it closed, Bryant should have made direct inquiries of the Department. If she had made direct inquiries, she may have been able to determine and confirm what the Department's position with respect to this incident actually was during the period between June 9<sup>th</sup> and the end of June, and to determine what information the Department had received, and whether or not that information was consistent with the information that had she had received.

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## **ANALYSIS**

### **THE WRITTEN WARNING**

The parties are agreed on the general proposition that the Division bears the onus of proving that the Grievor's conduct in relation to the June 1998 40S mathematics examination provided the Division with cause to discipline him, and that the discipline imposed, namely the written warning contained in Ms Bryant's letter dated September 2, 1998, was appropriate in the circumstances.

The Grievor asserts that the specific onus on the Division is to prove that each of the four matters referred to in the September 2, 1998 letter are factually correct, and that the first matter constitutes insubordination (as stated in the letter), and that the other three matters constitute unprofessional conduct (as specified by Ms Bryant in her testimony).

In his closing submission, Mr. Smorang reviewed the September 2, 1998 letter in detail and argued strenuously that with respect to each of the four matters referred to in the letter, they either did not occur as alleged, or they did not constitute insubordination or misconduct.

The Division on the other hand says that the onus does not require that all of the specifics and particulars referred to in the September 2, 1998 letter be proven, but only that the discipline imposed, was warranted and reasonable on the basis of Mr. Treller's conduct. Mr. McNicol vigorously argued that based on that standard, the written warning was entirely warranted and reasonable and that indeed the Grievor ". . . is lucky that is all he got."

In the context of this argument about the nature and extent of the onus that the Division must discharge, the contents of Ms Bryant's letter dated September 2, 1998 are important. Accordingly that letter is reproduced here, in extenso:

"Dear Mr. Treller:

Further to my letter to you of June 29, 1998, I reported to the Board at its regular meeting on August 24, 1998, concerning my investigation of the incident surrounding the administration of the Provincial 40S Mathematics exam at Maples Collegiate on June 9, 1998. The Board has instructed me to deal with this matter administratively.

Accordingly, I am writing to advise you that my investigation of the matter has caused me to conclude that you have engaged in insubordinate and unprofessional conduct. Specifically, my concerns, which I believe I outlined to you in our discussions on June 24, 1998, remain:

1. You were informed on Monday, June 8<sup>th</sup>, that your colleague was in possession of the exam. If you believed this was a serious breach of security, you should have notified the principal and taken measures to secure the exam. At the very least, it is expected that you would notify the principal that you intended to report a breach to Manitoba Education. Your stated reason for withholding this information - that you anticipated Mr. O'Leary would prevent you from making a report of the violation - is unacceptable, and constitutes insubordination.
2. Your actions in taking the exam from Mr. Kuhr's desk drawer and showing it to a teacher who was in the process of preparing students for the exam is inexplicable unless you intended to breach the confidentiality of the exam or wished to compromise the other teacher and thereby place the exam at risk for all of her students.
3. As Manitoba Education had already investigated the report and declared that no breach had occurred, the fact that you went out of your way to inform others of the "breach" served no useful purpose except unnecessarily to make an issue of the incident and to cause needless embarrassment for the school and your colleagues.
4. Your version regarding the source of your information to Brian O'Leary that the media "had got hold of the story" is inconsistent with the recollection of each of the members of the science department, who have no recollection of the media being mentioned during your discussion with them. They recall this interchange taking place a full two hours after you report informing Mr. O'Leary of the same interchange.

As it transpired, this unfortunate incident became a publicly embarrassing matter for the school. I have concluded that there is sufficient evidence to satisfy me that you are implicated in having made problematic a situation which otherwise would have had no adverse consequences for the students or the school.

I have concluded that your actions in relation to this incident represent insubordination and unprofessional conduct. I hereby give notice of a written warning that this kind of action must not occur again. If it does, more serious disciplinary action will clearly be indicated.

If you have further questions, please do not hesitate to contact me.

Sincerely,

Coralie Bryant  
Acting Superintendent.”

Many of Mr. Smorang’s criticisms of the letter are well founded.

Item No. 1 in the letter criticizes the Grievor for failing to notify O’Leary of his intention to file a report of the breach with the Department of Education. It also characterizes the Grievor’s failure to notify O’Leary and/or his stated reason for doing so as insubordination.

I have already indicated that I do not find fault with the Grievor for not speaking to Mr. O’Leary, prior to submitting the Supervising Teacher’s Report to the Department of Education.

The arbitral jurisprudence establishes that if an employee is to be disciplined for insubordination, the employer must prove that a clear order or instruction was given, that it was clearly communicated to the employee by someone in authority, and that the employee refused to comply. Absent a specific order or instruction, an employer will normally be required to establish that an employee clearly understood his or her responsibilities and obligations in a particular situation, and acted contrary to those obligations, in order to justify the imposition of discipline for insubordination.

None of the above noted factors are present in this case. There was no instruction or direction from the Division relating to these matters that the Grievor disobeyed or disregarded. Indeed, to the extent that the Grievor undertook the role of the Supervising Teacher in relation to the examination, he was obliged to complete a report to be submitted to the Department, and to note any “unusual circumstances”.

Indeed both Bryant and O’Leary, in their testimony before the Board of Arbitration essentially acknowledged that the submission by the Grievor of a report to the Department was not in and of itself blameworthy.

Accordingly I have concluded that the Grievor’s actions in not communicating with O’Leary prior to submitting the report, and his stated reasons for not doing so, do not constitute insubordination.

I also disagree with some of Bryant’s other comments in the letter of September 2, 1998. For example, I have already stated that I believe she reached conclusions as to the Grievor’s intention in showing the examination to Allison McDonald, that were not supported by the facts, and that she placed undue reliance on the Department of Education’s purported declaration that no breach had occurred, without confirming the Department’s position for herself.

Although I accept the argument of the Grievors that the letter of September 2, 1998 is incorrect in some important respects, I do not accept that all of the specifics referred to in the letter must be conclusively established in order for discipline to be properly imposed.

The evidence in this case clearly establishes wrongful and inappropriate conduct on the part of the Grievor. I will not review all of my earlier comments with respect to areas in which the Grievor’s actions failed to meet an acceptable standard, but I will refer to specific aspects of his behaviour that I consider egregious and which warrant discipline. They include:

1. The manner in which he completed the Supervising Teacher's Report. He failed to provide an accurate or complete summary of his knowledge of the "unusual circumstances", surrounding the examination.
2. His conversation with Mr. Stein on June 9<sup>th</sup>, wherein he withheld important and relevant information from Mr. Stein.

As previously indicated, I am satisfied that when communicating with the Department on June 9<sup>th</sup>, the Grievor deliberately did so in a way that was misleading and exaggerated the seriousness of what had occurred.

3. His false statements to O'Leary on June 15<sup>th</sup> and to Bryant on June 24<sup>th</sup> about the circumstances in which he had allegedly heard rumours about possible media interest in the story.

With respect to the issue of the media's source of information, I noted with interest Mr. McNicol's statement in argument that as part of the Grievor's efforts to embarrass O'Leary, the Grievor, or someone on his behalf contacted the media and provided them with the details that were broadcast on "24 Hours" on June 15<sup>th</sup>.

Mr. Smorang pointed out in his argument that the Division did not allege in their letter of September 2, 1998 that the Grievor provided details of the events of June 8<sup>th</sup> and 9<sup>th</sup> to the media.

The Division undoubtedly believes that the Grievor, or someone acting in concert with him, provided the media with details of these matters. I must say, there is a basis for that belief. However, that belief aside, the Division is unable to prove, according to any standard of proof, that the Grievor, or someone on his behalf, provided information to the media. Accordingly in my consideration of all of the issues raised by these grievances I have disregarded any suggestion that the Grievor provided information to the media.

I would pause to observe however, that if it had been proven that the Grievor had gone to the media, and had done so in order to embarrass O'Leary and/or the Division, very severe discipline would have been warranted.

I am therefore left to decide what discipline, if any, ought to be imposed upon the Grievor.

Mr. Smorang argues that none should be imposed because the basis for the discipline as outlined in the letter of September 2, 1998 has not been established, and the Division has failed to prove that it had "just cause" for any discipline as required by Article 17 of the Collective Agreement.

Mr. McNicol argues that this Board should not interfere with the decision of the Division because the evidence as a whole clearly establishes misconduct on the part of the Grievor which warranted the discipline that was imposed by the Division.

I was referred by both counsel to the case of South East Kootenay School District No. 5 v. Fernie District Teachers' Association [1999] B.C.C.A.A.A. No. 193, Award No. A-100/99.

Paragraph 134 of that decision states :

"That principal is that an employer cannot impose discipline for misconduct unless the standard of conduct required is self-evident, (eg. theft, insubordination, etc.) or has been communicated to employees and they have been cautioned that a failure to meet and maintain an acceptable standard will result in discipline. In terms of the classroom conduct of teachers, where the evidence establishes that the misconduct alleged against the teacher offends against a standard of professionalism that all teachers can be expected to know, the conduct will support discipline without the employer having to establish that the conduct was in breach of some defined policy or standard. However, where the conduct in question does not support a finding that the teacher knew or ought to have known that it was improper, the employer will be required to establish that it was in

breach of some defined standard which had been communicated to teachers generally and/or the teacher in question.”

Mr. Smorang, seized upon Ms Bryant’s use of the term “unprofessional conduct” in the letter of September 2, 1998, and argued that in the absence of any evidence establishing the professional standards that would apply in the circumstances, it would not be open to this Board to conclude that the Grievor’s conduct constituted unprofessional conduct.

Using the phrase set forth in the venerable case of in Re: A Solicitor, Mr. Smorang also asserted that there was nothing in the Grievor’s conduct described in items 2 to 4 of Ms Bryant’s letter of September 2, 1998 that would be regarded as “disgraceful or dishonourable by his professional brethren”, and it was therefore not appropriate for the Division to conclude that he had engaged in unprofessional conduct, and to impose discipline accordingly.

In my opinion, references to unprofessional conduct are not helpful, and in some respects are misleading, in an analysis in this case. I am aware of the Manitoba Teachers’ Society Code of Professional Practice, and the provisions of that Code. A breach of that Code by a teacher will normally mean that the teacher has engaged in unprofessional conduct.

However it is certainly possible for a teacher to engage in conduct that is inappropriate in the employment context, i.e. to misconduct himself or herself in a way that may justify the imposition of discipline by the employer, without having committed an act of professional misconduct i.e. a breach of the Society’s Code of Professional Practice.

It is noteworthy that the South East Kootenay School District case does not refer to unprofessional conduct, but rather to misconduct generally, and discusses the type of misconduct that will warrant discipline.

Therefore I find that the lack of evidence in these proceedings as to the applicable standard of professional conduct is not fatal to the Division’s attempts to impose discipline on the Grievor.

Mr. Smorang also argues on the basis of paragraph 134 of the South East Kootenay School District decision quoted above that in the circumstances of this case, the Grievor did not breach any standard of conduct that was self-evident, nor any standard of professionalism that all teachers could be expected to know.

Mr. McNicol argues in response that in fact there were many aspects of the Grievor’s conduct that fell below a self-evident standard of conduct that all responsible teachers would recognize and understand.

I have previously referred to at least three aspects of the Grievor’s behaviour that warrant discipline, namely his failure to provide an accurate and complete summary of his knowledge of the background facts when completing the Supervising Teacher’s Report, the withholding of relevant information from Mr. Stein, and his false statements to O’Leary and Bryant about his knowledge of the rumours of media interest in the story.

I find that it is self-evident that when a teacher is submitting a report to the Department of Education about a breach of the Department’s directions to principals with respect to the handling of examinations, and when discussing that report with a representative of the Department of Education, that the teacher is bound to provide a complete and accurate report to the Department outlining all of the material facts that are within the teacher’s knowledge.

I also find that it is self-evident that a teacher is bound to provide truthful answers to a principal and an acting superintendent, when those individuals are making inquiries with respect to a matter of importance to the Division.

The Division has certainly discharged the onus of establishing that the Grievor failed to adhere to those self-evident standards of conduct, and that the Grievor’s behaviour constituted misconduct which warranted discipline.

In the result, with respect to the grievances relating to the written warning, I have concluded that:

1. The Division had just cause to discipline the Grievor;

2. A written warning was an appropriate and reasonable form of discipline in the circumstances.

Article 17 of the Collective Agreement provides the Board of Arbitration with the power to “vary or modify the discipline”. This is an appropriate case for varying or modifying the written warning, because the letter of September 2, 1998 incorrectly states that the Grievor was insubordinate and had engaged in “unprofessional conduct”. The letter also contains other errors referred to elsewhere in these reasons.

Accordingly, although the grievances of both Treller, and the Association with respect to the written warning will be dismissed because they seek a rescission of the written warning, I nonetheless direct the Division to remove the letter dated September 2, 1998 from the Grievor’s file and to replace it with another written warning:

(i) **omitting any references to insubordination;**

(ii) **omitting the references to “unprofessional conduct” and replacing them with references to “misconduct”;**

(iii) **omitting numbered paragraphs 1 to 3 inclusive, and replacing them with paragraphs that reflect the findings of this Award as set forth on pages 17 to 22 inclusive, and particularly the matters which this Board has found to constitute misconduct warranting discipline, as summarized on page 32 hereof. I note that numbered paragraph 4 in the letter of September 2, 1998 is accurate and could form part of any replacement letter.**

This Board of Arbitration will retain jurisdiction for the purposes of assisting the parties if any dispute arises as to the form of the written warning to be placed on the Grievor’s file .

## **THE TRANSFER**

Article 10.02 in the Collective Agreement deals with transfers and contains four essential elements:

1. A recognition by The Teachers’ Association of the right of the Division to assign teachers to schools within the Division;
2. A requirement that the Division consult with a teacher being considered for a transfer with respect to the transfer and the intended assignment;
3. A requirement that the most reasonable notice possible in the circumstances be given to the teacher;
4. A requirement that the right to transfer shall be exercised fairly and reasonably by the Division with consideration for the educational needs of the Division and the interests of the teacher involved.

Although these elements are inter-related each of them exists independently of the others. The Division must consult even though it has a right to assign teachers to schools. Similarly, the Division must exercise the right of transfer, fairly and reasonably, which means that it must do more than simply consult with, and give reasonable notice to, teachers who may be transferred.

## **THE POSITION OF THE GRIEVORS**

The Grievors assert that Treller was transferred from the Maples Collegiate to the Garden City Collegiate in late June, 1998 as punishment for his misconduct in relation to the 40S examination. The two transfer grievances do not specifically allege that the transfer was punishment. They do allege that the Division acted unreasonably and unfairly in transferring Treller without consulting with him.

However the Grievors say that the evidence establishes that O'Leary initiated the transfer for an improper purpose, namely punishment, and that there is no proof of O'Leary's justification of the transfer, namely that Treller had become alienated from many of his colleagues at Maples Collegiate.

The Grievors also argue that no meaningful consultation took place, and what discussions occurred, were inadequate because of the abbreviated time period within which they allegedly occurred, and because there was no bona fide consideration by the Division of Treller's views with respect to the transfer.

The Grievors also argue that the transfer was not exercised fairly and reasonably. They allege that there was no serious consideration of either the educational needs of the Division, nor the interests of Treller, because the teaching assignment at Garden City Collegiate was poorly suited to Treller, given his particular teaching experience. The Grievors request that the transfer be rescinded, and that Treller resume teaching at Maples Collegiate effective September 2000.

## **THE POSITION OF THE DIVISION**

The Division argues strenuously that the transfer grievances as filed only raise the issue of a lack of consultation, and the Grievors should not be permitted to raise other complaints about the transfer.

With respect to consultation, the Division submits that the requirement for consultation in Article 10.02 is not a requirement to obtain the teacher's consent. The Division argues that Article 10.02 is very clear in establishing that the Division alone has a right to assign teachers to schools within the Division.

The Division argues that the consultation which occurred in this case was adequate given the circumstances that prevailed at the time, namely, the need to fill a position at Garden City Collegiate on short notice once the Division became aware in June 1998 that additional students would be attending that school in the fall of 1998.

The Division says that there was as much consultation, or more, in relation to this transfer, relative to many others that occur near the end of a school year.

With respect to the Grievor's complaints about a lack of consultation, the Division's response is twofold:

- i) discussions between Treller and representatives of the Division took place over a much greater time period than is alleged by Treller;
- ii) during the course of the discussions, Treller's views were elicited and considered.

The Division also maintains that the educational needs of the Division and the interests of Treller were both considered because the transfer removed him from a poisoned environment at Maples Collegiate and put him into a position at another school for which he was suited by virtue of his past background and teaching experience.

Finally, the Division rejects the argument that the transfer was a form of punishment, and relies on Dr. Burron's evidence that the Division never transfers a teacher to punish that teacher, because such a transfer would also constitute punishment of the students to be taught by the teacher.

## **Consultation and Notice**

In terms of construing Article 10.02, this Board was referred by Mr. Smorang to two arbitration awards involving the Transcona-Springfield School Division, the first being an award issued in November 1995 (Chairperson Chapman, nominees, Parkinson and Sumerlus) and the second being an award issued in June 1996 (Chairperson Wood,

nominees Parkinson and Sumerlus). The Transcona collective agreement provision was somewhat similar to the provisions in the collective agreement in this case, but also different in several respects. The Transcona provision contained an acknowledgement by the Teachers Association of the right of the Division to assign teachers to schools under the jurisdiction of the Division. The Transcona provision also contained requirements that teachers be given reasonable written notice of any proposed transfers, that the reasons for the transfers be included in the written notice, and that the Division's right to initiate transfers be exercised fairly and reasonably, with the educational needs of the Division being a paramount consideration, and the interests of the teacher involved being a secondary consideration.

There are two important differences between the Transcona provision and Article 10.02. The Transcona provision does not impose a requirement on the Division to consult with any teacher being considered for transfer, whereas Article 10.02 does contain a requirement for consultation. The Transcona provision however does require that a teacher who is to be transferred shall be given reasonable written notice of the transfer, and that the reason for the transfer shall be included in the written notice. Article 10.02 does not contain a requirement for written notice of the transfer and does not stipulate that the reasons for the transfer must be given to the teacher.

Although both of the Transcona Awards are interesting, and are of some value in analyzing the concept of fairness and reasonableness in the context of a Collective Agreement provision dealing with the transfer of teachers, neither Award is directly applicable to this case because of the differences between the provisions in the respective Collective Agreements.

With respect to the issue of consultation, there is a clear difference between the evidence adduced by the Grievors and the evidence adduced by the Division as to the dates, and the overall length of time in which the various conversations between Treller, Burron and Wiebe occurred. However it is clear that Treller had at least three conversations with Burron, and two meetings with Wiebe and that those two meetings took place on different days.

Although it is not possible to precisely reconstruct what was said in each of those conversations and meetings, I am satisfied that:

- (i) Dr. Burron advised Treller that it was the position of the Division that he (Treller) should not stay at Maples Collegiate because the working relationships between Treller and various of his colleagues had deteriorated. Treller disagreed with that position and so advised Burron;**
- (ii) Treller was advised of the details of his proposed teaching assignment by Wiebe ;**
- (iii) Treller expressed serious reservations about the teaching assignment, particularly the keyboarding component, to both Wiebe and Burron;**
- (iv) Burron and Wiebe discussed Treller's concerns between themselves;**
- (v) Treller advised Burron that he wanted to finish his teaching career at Maples Collegiate.**

In view of the series of discussions that took place, and the content of those discussions, I find that consultation, to the extent required by Article 10.02 of the Collective Agreement, did in fact occur. Discussions with Treller were initiated by representatives of the Division, in which Treller was advised of the intended teaching assignment and given an opportunity to express his views. The views which he expressed were considered by the Division, and notwithstanding those views the Division decided to proceed with the transfer. The requirement for consultation contained in Article 10.02 was thereby fulfilled.

I agree with the Division's submission that consultation does not mean that at the end of the process, the teacher must agree with the transfer. The Division has the right, which is expressly acknowledged by the Association in Article 10.02 to assign employed teachers to particular schools, even if after consulting with the affected teachers, they do not agree with the intended assignments.

I also find that in the circumstances that existed in mid June 1998, with the Division only then becoming aware that more than the anticipated number of students would be attending at Garden City Collegiate in the upcoming fall term, that the Division did provide the most reasonable notice possible of the transfer.



## **Fairness and Reasonableness**

In addition to consultation, and notice, Article 10.02 also requires that the right to transfer be exercised fairly and reasonably by the Division.

The Grievors allege that the transfer was not exercised fairly and reasonably because the transfer was punishment for Treller's conduct in relation to the 40S examination.

The Grievors point to the following factors in support of the argument that the transfer was actually punishment:

- (i) the evidence referred to earlier in this award which establishes some hostility on the part of O'Leary towards Treller;**
- (ii) the evidence of Burrton that it was O'Leary who initiated the transfer, and that Bryant and O'Leary personally came to his office to discuss the transfer. This meeting occurred at or around the time that O'Leary's and Bryant's unhappiness with, and suspicions relating to Treller, were very high;**
- (iii) details of Treller's teaching assignment at Garden City Collegiate, which included a keyboarding component (referred to by Treller as "typing") and a remedial science component and no "40S" courses. Implicit in this position on the part of the Grievors is that the teaching assignment at Garden City was a demotion (a position which was categorically rejected by Bryant on behalf of the Division).**

There is also evidence to indicate that there were bona fide reasons for the transfers. In that regard it is worthwhile noting that the Grievors bear the onus of proving that the transfer was a form of punishment. Factors indicating that there were other reasons for the transfer include:

- (i) a strained relationship between Treller and O'Leary, and O'Leary's conclusion that Treller had not been forthcoming with him as to the source of the rumour of media interest in the story. (Mr. Smorang acknowledged during argument that a strained relationship between a principal and a teacher could justify a transfer);**
- (ii) Bryant's belief, based on her own independent inquiries, that Treller's relationships with other teachers at Maples Collegiate were strained;**
- (iii) the need for a teacher at Garden City Collegiate with experience in mathematics and science, and a familiarity with computers;**
- (iv) the fact that the Division only became aware of that specific need in June of 1998;**
- (v) the assertions of Bryant and Burrton that the Division would never transfer a teacher as a form of punishment and did not do so in this case.**

Therefore, although I am satisfied that O'Leary initiated the transfer because of misgivings which he had with respect to Treller, I am unable to conclude that the Grievors have discharged the onus of proving that the Division's actions in transferring Treller were intended to punish him for his actions in relation to the 40S examination.

However there are other issues with respect to fairness and reasonableness in relation to the transfer which require analysis and comment.

I found one aspect of the testimony of all of the Division's witnesses with respect to the transfer quite puzzling, namely that Treller was never advised whether he could refuse the transfer or not.

I have made it clear that the Collective Agreement confers upon the Division, the right to transfer a teacher even if the teacher disagrees with the transfer, provided consultation with the teacher has occurred.

However in this case, Bryant testified in cross-examination (after making it clear that she had not been directly involved in the process of the transfer) that she had not stipulated to Burrton that Treller must accept the transfer. She also testified that she had assumed Treller would have had the choice of refusing the transfer and staying at Maples Collegiate.

Mr. Wiebe, testified that Burrton had expressly told him that under no circumstances should he (Wiebe) tell Treller that the transfer was mandatory.

Burrton himself said that he never explicitly told Treller that the transfer was mandatory, but rather spoke in terms of the transfer “being for the best” and that it “was very likely” that Treller would be teaching at Garden City Collegiate in the upcoming fall. It is also significant that Treller testified in these proceedings that he asked Burrton if he (Treller) was being transferred, and if he (Treller) had any choice in the matter.

It is clear that neither Burrton nor Wiebe told Treller that he could refuse the transfer if he wished.

I have referred to these matters in the context of the issue of fairness and reasonableness, because I consider open and candid communication with the teacher to be transferred to be an important element of fairness and reasonableness. Open and candid communication would include advising the teacher as to whether or not the teacher is entitled to refuse the transfer. In view of the provisions of the Collective Agreement requiring the Division to consult, but also enabling the Division to transfer without the teacher’s consent, it is surely reasonable to expect the Division to advise an affected teacher, either during the consultation process, or at its conclusion, whether the transfer is mandatory or not, and what consequences, if any, may result if the transfer is refused.

Rather than being explicit with Treller about whether he could refuse the transfer, the Division suggests in these proceedings that Treller accepted the transfer voluntarily, because he did not expressly object to the transfer or refuse the transfer in any of the June discussions. I am certainly not prepared to find that his non-refusal means that he voluntarily accepted the transfer. It was obvious to the Division that he had serious reservations about it, and in the words of Burrton did not “seem entirely committed” to the transfer.

His actions in not refusing the transfer are understandable given that he had not been told whether the transfer could be refused, or what consequences could result if the transfer was refused. This is particularly true given his conversations with O’Leary on June 19<sup>th</sup>, and his belief that O’Leary had provided a report to Bryant recommending discipline against him.

The final issue on which I will comment with respect to the fairness and reasonableness of the transfer relates to whether the Division properly considered the educational needs of the Division, and the interests of Treller when implementing the transfer. In considering that issue the following matters are noteworthy:

**(i) Treller describes himself as an excellent mathematics teacher. Allison McDonald, Ed Kuhr, Dr. Burrton and Coralie Bryant all commented favourably on his skills as a mathematics teacher;**

**(ii) he is a teacher with over 30 years experience. His last teaching assignment at Maples Collegiate consisted entirely of “40S” courses in mathematics and computer science. He was happy with that assignment because he essentially considered himself a senior level mathematics teacher, and wanted to complete his teaching career at Maples Collegiate;**

**(iii) in contrast his teaching assignment at Garden City Collegiate in 1998/1999 consisted of some applied “20S” mathematics courses, a one-half section of remedial grade nine science in the first semester, keyboarding in both semesters, technology resource in both semesters and a section of computer application and technology in semester two.**

**(iv) Dr. Burrton described the teaching assignment at Garden City Collegiate as a “nice fit” for Treller because the assignment involved some mathematics, science and computer instruction, all of which**

**were areas in which Treller had had some experience. It is difficult to accept Dr. Burron's characterization given that Treller had never taught keyboarding, and had not taught any science courses for many years;**

**(v) Mr. Wiebe provided a more blunt assessment that the assignment at Garden City Collegiate was one which he regarded as suitable for a first year teacher.**

The Division essentially argues that it gave due regard to the educational needs of the Division because although the grade level of the students, and the specific courses to be taught at Garden City Collegiate were significantly different from Treller's last assignment at Maples Collegiate, they nonetheless were within the realm of his experience and abilities. The Division also asserts that he was therefore assigned to a teaching position where he could make a positive contribution to the educational experience of his Garden City Collegiate students.

In addition, because of the situation that had developed at the Maples, the Division submits that Mr. Teller needed to be recharged and given a new professional challenge, and the Garden City assignment would therefore be a positive one for him.

It is clear that Treller greatly preferred his teaching assignment at Maples Collegiate and that he found his experience, at least in the first semester (and perhaps beyond) at Garden City Collegiate to be frustrating and stressful.

I do not place great weight on Mr. Treller's personal preferences because the Division should make their teaching assignment decisions based on their assessment of the best interest of their students, which will sometimes conflict with the personal preferences of individual teachers. I also recognize that the frustration and stress experienced by Treller at Garden City Collegiate probably had a great deal to do with the computer breakdowns that occurred with frustrating frequency. I am sure the Division was also frustrated by the computer breakdowns, and the Division did take steps to address those problems by hiring a computer technician in the second semester of 1998-1999 year.

However I cannot accept the Division's arguments that the educational needs of the students of the Division, and the interests of Treller (as distinct from his personal preferences) were given proper consideration in the context of this transfer. The transfer resulted in Treller, a teacher with 30 years experience, who had established himself in the eyes of his colleagues as a capable senior mathematics teacher being assigned to a position described by the principal of Garden City Collegiate as being suitable for a first year teacher. Moreover in the position at Garden City Collegiate, Treller was only able to teach one "30S" mathematics course in two years while teaching a preponderance of 20S computer application and technology courses, and some keyboarding courses which he had never previously taught.

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.

Therefore, on the basis of my misgivings as to the lack of clarity in the communication by the Division to Treller relating to whether he could refuse the transfer, and my finding that the Division failed to properly consider the educational needs of students to be taught by Treller at Garden City Collegiate, and Treller's particular skills and experience, I have concluded that the Division did not exercise the right of transfer in this case fairly and reasonably.

In view of my conclusion that the transfer of Treller to Garden City Collegiate effective August 28, 1998 was not exercised fairly and reasonably, I hereby rescind the transfer and order Treller to be reassigned to Maples Collegiate effective September 2000 with assignments and duties substantially similar to those which he had performed in the years immediately prior to his transfer to Garden City Collegiate.

## **DECISION**

In summary, it is my decision that:

1. The grievances of the Grievors with respect to the written warning are hereby dismissed, but the discipline imposed by the Division upon Treller will be varied, by modifying the written warning as more specifically directed in this Award.

2. The grievances of the Grievors with respect to the transfer of Treller to Garden City Collegiate effective August 1998 are allowed, and the said transfer is hereby rescinded, and the Division ordered to reassign Teller to Maples Collegiate effective September 2000.

DATED the                    day of May, 2000.

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A. BLAIR GRAHAM, CHAIR

I concur with the above award:

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WILLIAM SUMERLUS

I dissent in part with the above award, and I am attaching my reasons:

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GERALD PARKINSON