IN THE MATTER OF:

An Arbitration Between:

THE TRANSCONASPRINGFIELD SCHOOL DIVISION NO. 12
(hereinafter referred to as "the Division")

and

MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as "the Association")

and

NED DERKACH
(hereinafter referred to as "the Grievor.)

ARBITRATION AWARD

BOARD

- GAVIN M. WOOD	Chairperson
- GERALD PARKINSON	Nominee for the Division
- GRANT RODGERS	Nominee for the Association

APPEARANCES

- ROB SIMPSON	For the Division
- PAUL MCKENNA	For the Association

AWARD

This arbitration proceeded on November 6, 1998. At the outset the parties acknowledged that the Board was properly constituted and had jurisdiction to determine the grievance. The Board consisted of Gavin Wood, who was appointed Chair; Gerry Parkinson, named as Nominee of the Division; and Grant Rogers, named as Nominee of the Association. The Division was represented by Rob Simpson and the Association by Paul McKenna.

By letter dated May 6, 1998 (Exhibit 3), the employment contract of Mr. Ned Derkach was terminated effective June 30, 1998, with him being placed on a leave of absence from May 5 to June 30, 1998. In a letter dated May 6, 1998 (Exhibit 4), Mr. Derkach requested reasons for the termination (as contemplated by s. 92(4) of the Public Schools Act). Those reasons were provided by letter dated May 7, 1998 (Exhibit 5). The Grievor, by letter dated May 11, 1998 sought arbitration: "Please be advised, in accordance with Section [92(4)] of the Public Schools Act, I wish the matter of the termination of my contract to be submitted to an arbitration board." (Exhibit 6)

EVIDENCE

At the outset of the hearing, a series of documents were filed by consent, including a report dated August 21, 1998, which had been submitted to the Board of Trustees of the Division (Exhibit 2). During the course of the hearing several additional documents were submitted.

Two witnesses testified: Dr. Jerry Saleski, former Superintendent of the Division, and Mr. Derkach.

FACTUAL CIRCUMSTANCES

The factual circumstances are not substantially in dispute. The testimony regarding disputed issues is highlighted.

Mr. Derkach is 54 years of age. He is married, with four children ranging in ages from 22 to 15, three of whom remain financially dependent on him to some extent. Mrs. Derkach is a full time homemaker.

Mr. Derkach's resume was submitted (Exhibit 11). It details that he graduated with a diploma in teaching from the University of Manitoba in 1963, when he was 19 years of age. He has taught almost continually since that time. He obtained his Bachelor of Arts Degree from the University of Manitoba in 1971 and his Bachelor of Education Degree from the University of Manitoba in 1974. He has worked most of his career teaching children who have had difficulties fitting into a normal school program.

Mr. Derkach had been employed as a teacher with the Division for 19 years. From September, 1994 to May, 1998, he worked at Transcona Collegiate. In those years he taught in "work education", which is a program involving both class work and work experience.

As well, for many years the Grievor has been involved on a parttime basis with Amway.

Dr. Saleski holds a Bachelor and Master of Education and a Doctorate in Counselling Psychology. He was employed with the Division for 16 years, serving in a number of capacities, beginning as one of the Division psychologists. In the latter years, he served as the acting Superintendent of the Division for one year, and then as the Superintendent for 4 years, resigning from that position in July, 1998.

Dr. Saleski and Mr. Derkach had worked together at Park Circle School in the years 1982 to 1987. In those years, as the school psychologist Dr. Saleski came into contact with Mr. Derkach with respect to students in his class. Their contacts had been solely professional.

Mr. Derkach had approached Dr. Saleski about the possibility of him becoming a salesman for Amway, but that opportunity had been declined.

In his various administrative capacities with the Division in the last ten years, Dr. Saleski had had a minimal level of contact with Mr. Derkach, although as the Superintendent for the Division, Dr. Saleski had been made aware of three separate incidents involving complaints about Mr. Derkach contacting parents of students and a substitute teacher about Amway. Mr. Derkach had volunteered to write letters of apology concerning the complaints and no disciplinary action had resulted. There was no reference to these incidents on Mr. Derkach's personnel file with the Division.

In his work history, Mr. Derkach had two instances of unauthorized absences from his teaching position.

On January 25, 1985, Mr. Derkach had called the Principal of his school and advised that he was unable to work that day due to illness. Later that day the Superintendent of the Division met Mr. Derkach at the Winnipeg airport. He was waiting to board a plane for Vancouver on a personal business trip. As a result, he received a letter of reprimand and was advised: "You are hereby given warning that should

such inappropriate conduct occur again, the Division will take further disciplinary action which may include suspension or termination of employment". (Exhibit 2)

On Thursday, March 5, 1987, Mr. Derkach contacted the Principal of his school late in the afternoon and advised that he needed a "rest and recuperation day", explaining that he had a headache and had had a rough time all week. The Principal called Mr. Derkach later in the evening and said that Mr. Derkach should call him in the morning if he still felt sick. At 5:30 a.m. on the Friday morning, Mr. Derkach contacted the Principal advising that he wasn't feeling well. Mr. Derkach did not attend school that day. In the afternoon the Principal attempted to reach Mr. Derkach at his home; he wasn't available. When Mr. Derkach returned to school on March 9, 1987, he advised that on the Friday he had gone south of the border". The Assistant Superintendent reported that in answer to a question, Mr. Derkach said that: "[he] and [his] wife had left early Friday morning and had gone to a place in Tennessee for a weekend of skiing and relaxation as [he] felt "high strung, tired and burnt out" and [he] had taken the day off to relieve tension." (Exhibit 9)

Mr. Derkach was asked to submit a written explanation concerning the events of March 5th and 6th. Mr. Derkach did submit a letter, which indicated that he was in "some form of seminar as opposed to a weekend of skiing as (he) previously (had) reported....at the meeting of March 9, 1987." (Exhibit 9) A report of the incident (Exhibit 9) was presented to the Board of Trustees. Mr. Derkach attended before the Board and addressed the Trustees. In his testimony he could not recall what he said to them. The Board of Trustees had a letter of reprimand issued to Mr. Derkach. He was suspended without pay for five working days, and given the following notices: "... should any inappropriate conduct occur again such as on January 25, 1985 and March 6, 1987 the Board of Trustees will be so informed and its only recourse may well be termination of your employment in this Division." (Exhibit 2)

The Division evaluation forms from Mr. Derkach's personnel file were filed (Exhibit 10). The evaluations indicate generally a satisfactory level of performance as a teacher**.** The last evaluation is shown for the period from February, 1995 to June, 1995, (which was signed by Jim Beveridge, the Principal of Transcona Collegiate, on April 1, 1996). In that evaluation, Mr. Beveridge commented:

> Ned is an experienced and competent teacher. His biggest challenges come from the make up of his classrooms and some of the personalities of the students his taught. The Work Ed student has changed over the years and initially Ned struggled with matching strategies/methodologies that would fit with the learning styles of his students. Ned's persistent positive attitude helped him overcome this difficulty and I have seen real growth in his classroom and in students that he teaches. Ned has a lot to offer our students and I think that we will benefit from this in the future." (Exhibit 10)

In the recommendation section Mr. Beveridge wrote: "I think Ned has now found his place in the Work Education program and I expect that the program and his students will benefit from his involvement at T. C. I." (Exhibit 10)

With respect to the current incident, on the morning of Thursday, March 26, 1998, Mr. Derkach spoke to Mr. Earl White, the VicePrincipal of Transcona Collegiate, advising that he needed to see his doctor regarding medical tests. The students that Mr. Derkach taught were on work experience (and had been for the last four weeks), and no substitute teacher was required. Mr. White gave Mr. Derkach permission to attend to the doctor's appointment. Later that day Mr. Derkach telephoned the Collegiate office (at approximately 3:30 p.m.). He indicated to a secretary that he was ill, had been to the doctor, and would not be in the following day but that there was no need for a substitute teacher to replace him. At the time, both Mr. White and Mr. Jim Beveridge, the Principal, were in the office but when the secretary asked if he wished to speak to either of them, Mr. Derkach declined.

On Thursday evening Mr. White attempted to reach Mr. Derkach at his home (at approximately 9:15 p.m.) to check on his condition. Mr. White was advised by someone that Mr. Derkach was not at home. Mr. White left a message asking Mr. Derkach to call him when he returned home. Mr. Derkach did not call that evening. On Friday morning, March 27, Mr. White telephoned at approximately 10:00 a.m. He left a message on Mr. Derkach's answering machine requesting that he telephone him. Mr. White called again at 12:00 p.m. and 2:15 p.m. and left messages with one of Mr. Derkach's sons asking that his father contact him. No telephone call was received. During the afternoon of March 27th, Dr. Saleski was consulted; he directed Mr. White to attend at Mr. Derkach's residence. Mr. White drove to Mr. Derkach's home and spoke with one of Mr. Derkach's sons, who informed him that his father was not at home. Again a message was left for Mr. Derkach to contact Mr. White before the end of the school day.

The spring break was during the week of March 30, 1998. On March 31st, Mr. White received a telephone call from Mr. Derkach, who indicated that he had not been home and therefore had not responded to the messages as requested. Dr. Saleski was advised of that call; he had Mr. White inform Mr. Derkach that a meeting concerning the incident would be held after the spring break. Mr. Derkach was informed that he should have a local representative of the Transcona Springfield Teachers' Association (T.S.T.A.) present at the meeting.

On Monday, April 6, 1998, Mr. Derkach originally met with Mr. Beveridge. He indicated that he had been "facing a family challenge" and that was why he had been away, as he needed some time alone with his wife. Mr. Beveridge explained that the Superintendent had been contacted on March 27th when Mr. White had been unable to reach Mr. Derkach. He said that the Superintendent was requiring Mr. Derkach and him to attend a meeting at the Division office.

That meeting was held on the afternoon of April 6, 1998. In attendance were Sue Cumming of the Manitoba Association of School Trustees, Paul Moreau, Assistant Superintendent-Personnel for the Division, Mr. Beveridge, Dr. Saleski, John Collins of the Manitoba Teachers' Society, and Mr. Derkach. Initially Dr. Saleski expressed concern about the absences and the fact that the Vice Principal had been unable to reach Mr. Derkach. Mr. Derkach was asked to explain.

Mr. Derkach indicated that he had wanted to make arrangements for medical tests, but had been unable to do so. He went on to explain that he faced challenges at home involving his wife and family and that he had needed to get away with his wife. He confirmed that he had contacted the school office on Thursday, had said that he was ill and that he would be away on Friday. He felt that if he had told the truth to the Principal or the Vice-Principal that he would not have received approval. He admitted that he had "screwed up". He explained, however, that he had asked for leaves in the past, citing a trip to Hawaii as an example, in which his requests had been turned down, and he was fearful that he'd be turned down again.

Dr. Saleski suggested that he actually had reason to be "cautiously optimistic" about such a request, but pointed out that there had been no request for leave. Dr. Saleski went on to remind Mr. Derkach of the incidents of 1985 and 1987 and that these incidents had as well involved unauthorized leaves. He asked Mr. Derkach to set out in writing the events that had occurred on March 27 and 28. Mr. Collins, while recognizing the Division's right to make the request for a written report, suggested that it seemed clear what the reason was for the unauthorized leave. While Dr. Saleski agreed with Mr. Collins, he nevertheless insisted that Mr. Derkach "write the matter up".

Mr. Collins also reminded that the 1985 and 1987 incidents were years ago. Dr. Saleski indicated that he knew Mr. Derkach was near the end of his career, but in a Division with 850 employees the element of trust was crucial. On that basis he insisted in a written report.

Mr. Collins then asked to see Mr. Derkach's personnel file before they left the Division office, and also asked Dr. Saleski how serious this incident was. Dr. Saleski responded that it was "very serious" in that he must have a high level of trust with Division employees. Mr. Collins asked if Dr. Saleski intended to recommend that Mr. Derkach's teaching contract be terminated. Dr. Saleski said that it was too early to say he needed to conduct a thorough review.

A review of Mr. Derkach's personnel file was then carried out. After that review, Dr. Saleski asked Mr. Derkach where he had gone. Mr. Derkach said to "the U.S.A. and back to Shoal Lake". He again re-iterated that the purpose of the trip had been for his wife and he to get to know each other better. Dr. Saleski then asked Mr. Derkach whether the trip was Amway related". Mr. Derkach replied "No".

Mr. Derkach testified that he had been scared going into the meeting on April 6. He realized he had done something wrong and was frightened about the consequences of giving a full account of what had taken place. He explained that during the meeting his "judgment was not the best". Mr. Derkach said that after that meeting, he had felt terrible in that he had not been truthful during the session. He said that, on reflection, he decided that in order to live with himself he had to tell the full truth. It was on that basis that he prepared the report requested by Dr. Saleski.

On the morning of April 9, Mr. Derkach contacted Dr. Saleski and requested a meeting.

They met at the Division office. Dr. Saleski confirmed that Mr. Derkach was very stressed and troubled during the meeting. Mr. Derkach began by speaking at length about the difficulties he had encountered leading up to and at the meeting of April 6th. Mr. Derkach also presented a letter dated April 8, 1998. Mr. Derkach began the letter by explaining that its writing had been "probably the hardest thing I've had to do in a long time". (Exhibit 2) After describing his emotions, he went on:

> "When I spoke to you, I did not tell you the complete story and I feel that I should have done that. I guess that emotion of fear played a major role in what I did. The reason that I was away was because I wanted to spend a weekend away with Yvonne, my wife. The whole weekend was centred around a leadership Conference a P.M.A. type of conference sponsored by some very successful leaders in the Amway business. I know that what I did or the approach to what I did, was not ethical and it was wrong. I am truly sorry for what I did and I can guarantee you that this will never occur in the future. I have learned my lesson."

Mr. Derkach asked Dr. Saleski to consider the following facts in reaching a decision on the incident:

1) I have spent the last 25 1/2 years of my teaching career in this division. I truly have enjoyed my time in this division and I feel that I have contributed substantially to the general education of the students that I have taught. I really enjoy working with the students, and feel that I still have a lot to contribute to the profession and to the students.

   a) I have some exciting programs in place for my students that I'd like to complete

      (i) started plant seedlings for the students and the school.

      (ii) have a lot of glass to cut for individual terrariums as well as to assemble them all so that the students will all be able to take them home for Mother's Day.

      These are just some of the neat things that we are doing.

I also feel that these students need a stable environment with as few disruptions as possible to help them continue on the successful road to better all round education.

b) We have teacher/parent visitations on April 16

2) In all my teaching years, I have never questioned authority, or disobeyed any of the administrators. I have done all and more than has been asked of me.

3) After 32 successful years in the teaching profession, I look forward to retiring in the next few years. I would surely appreciate being able to do this in the dignified manner that I feel I deserve. I've worked hard in this profession in this division and my dedication is exemplified by my early arrival to school each morning, as well as the special interest that I take in each student. I believe, that through my positive attitude, I bring enthusiasm and excitement to all who are around me, both students and staff alike.

4) The fourth matter has to deal with my present income. I'm in a position where two, possibly three of my children will be attending college this year and my youngest is in private school at this time. On top of this, my wife is a full time homemaker. As you can tell from this, my income from teaching becomes very important for the survival of my whole family. I truly need my teaching income just to try and stay afloat. (Exhibit 2)

In concluding his letter, Mr. Derkach expressed that he was "truly sorry that (he had) screwed up" and said: "I just made a poor judgement call, thinking with my heart and not my brain and then I let fear take over. I truly hope that you can forgive my human error. I can guarantee you personally that this will never happen again."

Dr. Saleski testified that he was surprised when, after reviewing the letter, he found that it was an Amway conference that Mr. Derkach had attended. Mr. Saleski also concluded that the attendance of the conference in Cincinnati had to have been premeditated, that is, planned some time in advance. Mr. Derkach, during the meeting, explained that the conference was not Amwaysponsored. The speakers were successful Amway business people. The conference was sponsored by those speakers. So while it was Amwayrelated, it was not Amwaysponsored.

During his testimony, Mr. Derkach said that the students under his supervision had been on their work experience program for the four weeks leading up to the spring break. By Thursday, March 26, 1998 he had visited with "99%" of the students and their work-experience employers. Therefore, he did not feel that he was letting those students down by being absent on March 26th and 27th.

Also during his testimony, Mr. Derkach described the decision to go to the conference in Cincinnati as "spur of the moment". He said that after he spoke to Mr. White on the morning of March 26th, he went home and it was at that point that he and his wife decided to go to Cincinnati. They checked for flights but determined to drive when they found that the costs of the airline tickets were prohibitively high (in

booking at the last moment) and that the available flights couldn't get them to Cincinnati for the Friday conference meeting.

Dr. Saleski, during the meeting on April 9, did ask Mr. Derkach why he had not flown to the conference and Mr. Derkach had explained that flights were not available. Dr. Saleski testified that he concluded from the response that by knowing that flights were not available, Mr. Derkach's decision to go to the conference was not a "spur of the moment" decision.

Dr. Saleski said that, after the meeting, over the next number of days he agonized as to what he should recommend to the Board of Trustees. He had Mr. Derkach's personnel file available to him, but confirmed during cross examination that while he would have gone through the file, the positive evaluations that Mr. Derkach had received didn't factor into his decisionmaking. During the course of Dr. Saleski's deliberations, he was approached by an individual (whose name was not given to the Board of Arbitration) and asked on behalf of Mr. Derkach to consider the available alternatives, including that of an extended suspension.

Ultimately, however, Dr. Saleski determined to recommend that Mr. Derkach's employment contract be terminated. Dr. Saleski said that in reaching that decision he considered the following factors: the 1985 and 1987 incidents, and the assurance of Mr. Derkach that nothing of such a nature would occur again; the effects of such an unauthorized absence on the students; the trust that had been placed in Mr. Derkach, which he had abused; his lying to the secretary on March 26, 1998; the misrepresentations to Mr. Beveridge at their meeting on April 6, 1998; the further misrepresentations in the meeting at the Division office on April 9, 1998, which included false responses to specific questions; and the letter of April 8, 1998, in which Mr. Derkach still maintained that the whole incident was "a poor judgment call" and involved "thinking with (his) heart and not (his) brain".

Dr. Saleski said that, in terms of all of these factors, the ultimate issue was whether or not the Division could have trust in Mr. Derkach any longer. He felt that it could not. Dr. Saleski explained that there must be trust for such an employment relationship to continue in regard to the relationship between Mr. Derkach, and the Division such trust no longer exists.

Dr. Saleski prepared a report to the Board of Trustees which contained copies of the letters setting out the discipline for the 1985 and 1987 incidents (letters of February 6, 1985 and March 18, 1987); the minutes from the meeting held on April 6, 1998 at the Division office; a sequence of events prepared with regards to the incident of March 26 and 27, 1998; and Mr. Derkach's letter of April 8, 1998. In the memorandum accompanying that material, Dr. Saleski recommended that Mr. Derkach be asked to attend a meeting of the Board of Trustees. His rationale was set out as follows:

> "Mr. Derkach, together with two other adults was responsible for providing job coaching support to 30 Senior 3 students out on Work Experience. Job coaching support is crucial to the students having successful work experiences. Mr. Derkach's absence resulted in some students not receiving this support from their teacher." (Exhibit 2)

Dr. Saleski was asked by the Board of Arbitration whether he, in reaching his recommendation, considered Mr. Derkach's length of service and his possible retirement date. Dr. Saleski responded that it would have been an easier decision for him to make if he had been dealing with a younger teacher. He went on to comment that one would not think that someone potentially so close to retirement would run such a risk. It later was clarified during the cross examination of Mr. Derkach that there is no official or compulsory retirement age, but rather that at age 55 under the pension plan a teacher has the option to retire.

After receipt of the Superintendent's report. the Board of Trustees asked Mr. Derkach to appear on April 28, 1998. Dr. Saleski, Mr. Collins and Mr. Derkach were present at that meeting. Dr. Saleski summarized his report (Exhibit 2) and recommended termination. Dr. Saleski, in cross examination, could not recall what he said about Mr. Derkach's teaching abilities. He confirmed that he did not criticize Mr. Derkach's competence.

Mr. Collins and Mr. Derkach both spoke at this meeting. Mr. Derkach testified that he spoke briefly, during which he appealed to the Board of Trustees, admitting that he "had screwed up" assuring that nothing of a similar nature would happen again, and reminding that he was in a position to retire in 15 or 16 months. He asked the opportunity to finish off his teaching career with the students at Transcona Collegiate.

The Board of Trustees considered the matter privately, then called the parties back into the meeting and announced that the Board had accepted the recommendation of the Superintendent.

In cross examination Dr. Saleski was unable to recall of a teacher who had been disciplined with a four month suspension during his tenure as Superintendent of the Division. Dr. Saleski said that spoke well of teachers in the Division. He also agreed that a four month suspension of a teacher was unusual, and a strong disciplinary action.

Mr. Derkach said that he was devastated by the decision of the Board. He said that he had always prided himself on being true to his word and that he felt he had "blown it".

By letter dated May 6, 1998, Mr. Derkach was informed by the Superintendent of the following motion passed by the Board of Trustees at its regular meeting held on May 5, 1998:

> "That the employment contract of Teacher # 1615 be terminated effective June 30, 1998, consistent with the Collective Agreement between Transcona-Springfield School Division and Transcona Springfield Teachers' Association, and further that Teacher # 1615 be placed on leave ofabsence effective May 5, 1998, until June 30, 1998." (Exhibit 3)

On that same date Mr. Derkach wrote requesting the reasons for the termination (Exhibit 4).

On May 7, 1998, Dr. Saleski in a letter to Mr. Derkach set out those reasons as follows:

> "1. There have been two previous incidents of unauthorized absences from your teaching duties (1985, 1987).
>
> In both cases, progressive discipline was applied by the Board of Trustees.
>
> After the 1987 incident, and following your appearance before the Board of Trustees, you were told in a letter from the Superintendent, that 'should any inappropriate conduct occur again such as on January 25th, 1985, and on March 6th, 1987 the Board of Trustees will be so informed and the only recourse may well be the termination of your employment with the Division'.
>
> There now is a third case of unauthorized leave (March 26th afternoon, and March 27th, 1998) which is compounded by your being untruthful in your explanation for the absence first to your school administration and

then to the Superintendent.

Trust and truthfulness are cornerstones of the Division's relationships with its employees. The Division has approximately 850 employees and it is imperative that there be a relationship based on trust and honesty between management and its' employees. Your actions on March 26th, March 27th, and subsequent, constituted a breach of that trust.

2. Your attendance at the Amway seminar on March 26th and 27th, 1998, indicates a certain degree of premeditation and planning. Specifically, attendance at the seminar was not a spur of the moment decision, but rather a deliberate action by you. All of which was contrary to the assertions you made during our subsequent discussions.

3. You, together with two other adults, were responsible for providing job coaching support to 30 Senior 3 students out on Work Experience. Job coaching support is crucial to the students having successful work experiences. Your absence resulted in some students not receiving this support from their teacher." (Exhibit 5)

Subsequently, in a letter of May 11, 1998 Mr. Derkach requested that the decision to terminate be submitted to an arbitration board pursuant to s. 92(4) of the Public Schools Act.

Arrangements were made for Mr. Derkach to attend at Transcona Collegiate in order to pack up and remove his personal belongings. He testified as to the strong emotions he experienced as a result of that attendance. He explained that those emotions arose from the lost opportunity to work with his students due to "an emotional decision" that he had made.

Mr. Derkach went on to describe the difficult feelings he had experienced when he was unable to return to teaching at the beginning of September.

He maintained that the decision should be reversed in that he was still in a position to contribute as a teacher. In response to the concerns expressed by Dr. Saleski during his testimony, Mr. Derkach maintained that he could be trusted. He said that he had learned a hard lesson about not abusing the trust placed in him. He appreciated that he had abused that trust, but that it would never happen again and that he wished to not end his career in this way.

In his testimony, Mr. Derkach gave undertakings that should the Board of Arbitration overturn the decision of the Board of Trustees and reinstate him: (1) he would not attempt to return to work until January 1, 1999; and (2) he would waive any rights that he might have to retroactive salary and benefits accruing to him prior to January 1, 1999. He said that he entered into those undertakings in order to prove himself to the Division.

SUBMISSIONS

On behalf of the Division, Mr. Simpson began by indicating that he did not intend to review the evidence in detail. He pointed out that the "story" of Mr. Derkach did tend to repeat itself. He reviewed the incident of 1985, and that of 1987, and compared them to what occurred in March, 1998. In

particular, the circumstances leading to the suspension in 1987 were remarkably similar to the present incident. Mr. Simpson characterized both earlier incidents as fraudulent and deceitful.

He then turned to a review of the sequence of events which took place in late March and early April, 1998. In doing so, he emphasized the ongoing aspects of deceit and premeditation as the events unfolded. The sequence of events had a compounding nature, with the Grievor having had opportunity during the various contacts with Division officials "to come clean". Instead, he continued to fabricate, even when answering a specific question from the Superintendent of the Division.

Mr. Simpson then turned specifically to the issue of premeditation involving the decision to attend the conference in Cincinnati. He reminded that the spring break began the week of March 30, 1998. Mr. Derkach had that week "to catch his breathe and address issues with his wife. The conference did relate to Amway. Mr. Simpson pointed out that all indicia was that the decision to attend the conference had been made prior to Thursday, March 26, 1998. In particular, on the morning of March 26, Mr. Derkach was requesting time off to attend a doctor's appointment, yet there was no doctor's appointment. It appeared that Mr. Derkach had checked earlier with regards to flying to the conference and had determined that it was too expensive, thereby deciding to drive.

Mr. Simpson maintained that this deceit was more than a mere "poor judgment call". It was the third incident, during Mr. Derkach's time with the Division, of taking time off through fraudulent means. Or, Mr. Simpson noted, it was at least the third time that he had been caught. In summary on the issue of premeditation, Mr. Simpson returned to the testimony of Dr. Saleski, who had disputed Mr. Derkach's comment in his letter of April 8, 1998 (Exhibit 2) that he was thinking "with his heart" rather than "his brain". Dr. Saleski believed that Mr. Derkach had been thinking with his brain, with premeditation and planning of the course pursued.

Mr. Simpson also pointed out that Dr. Saleski was an experienced administrator who assured the Board of Arbitration that he had considered his recommendation to the Trustees long and hard after his meeting with Mr. Derkach on April 9, 1998. Furthermore, Mr. Simpson reminded that at the meeting on April 28, 1998 the Board of Trustees heard not only from Dr. Saleski and Mr. Collins, but also from Mr. Derkach. At that meeting, Mr. Derkach gave certain assurances. Mr. Simpson said it was reasonable to assume that those were principally the same assurances that had been given in 1987, although Mr. Derkach in testimony could not recall what he had said on that occasion. Mr. Simpson reminded that Mr. Derkach had been warned and had been put on notice by the Board of Trustees as a result of the 1987 incident (Exhibit 2).

Mr. Simpson asked that due consideration be given to the position of the Board of Trustees in making its decision. Mr. Derkach had been advised to attend the meeting on April 6, 1998 with a representative from T.S.T.A. Instead, he attended with Mr. Collins of the Manitoba Teachers' Society. He was aware of the seriousness of the situation, yet as he had done with other individuals with the Division, he lied to Dr. Saleski and the others present. Faced with these circumstances, it was not a "kneejerk reaction" on the part of the Board of Trustees, but rather an understandable and reasonbased decision in finding cause for the canceling of the teaching contract.

Mr. Simpson also referenced the testimony of Mr. Derkach in which he apologized and expressed his extreme feelings of remorse over what had taken place. Mr. Simpson reminded that Mr. Derkach's feeling bad was the result of his having lost his job. It was understandable that he would express such concerns and remorse. However, from the Division's perspective, he had brought this all upon himself.

Counsel for the Division then turned to certain authorities. He began with a review of section 92(4) of the Public Schools Act, R. S. M. 1987, c. P250, pointing particularly to the wording of 92(4)(d):

> "Where an agreement between a teacher and a school board is terminated by one of the parties thereto, the party receiving the notice of the termination may within seven days of the receipt thereof request the party terminating the agreement to give reasons for the termination, in which case the party terminating the agreement shall, within seven days from the date of receipt of the request, comply therewith and where the school board terminates the agreement of a teacher who has been employed by the school board under an approved form of agreement for more than one full school year, as defined by the minister by regulation, the following clauses apply:
>
> (d) the issue before the arbitration board shall be whether or not the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement;"

Mr. Simpson stressed that the enabling legislative provision does not allow for the Board of Arbitration to substitute penalty. The Board's mandate, and obligation, is to determine whether the reasons given by the School Board constituted cause. Section 92(4)(e) of the Act provides:

> "(e) where, after the completion of hearings, the arbitration board finds that the reason given for terminating the agreement does not constitute cause for terminating the agreement it shall direct that the agreement be continued in force and effect and subject to appeal as provided in The Arbitration Act the decision and direction of the arbitration board is binding upon the parties;"

Therefore, the Board of Arbitration's only authority is to reinstate Mr. Derkach. The Board has no authority to substitute an alternate penalty, regardless of how appropriate, in the view of the Board, that alternate penalty might be.

Mr. Simpson acknowledged the undertakings given by Mr. Derkach. Those undertakings were given, he maintained, to allow the Board of Arbitration to overturn the termination (by s. 92(4)(e)), satisfied that Mr. Derkach would pay a penalty for his course of conduct.

Having acknowledged them, Mr. Simpson disputed the appropriateness of the Board of Arbitration giving any consideration to those undertakings. In effect, they were designed to allow the Board to indirectly substitute penalty, which was not provided for under the legislative scheme set out in s. 92(4).

Mr. Simpson referred to the Manitoba Court of Appeal decision of Greenaway v. Board of Education of Seven Oaks School No. 10 (1990), 70 Man. R. (2d) 2. In that decision the majority of the Board of Arbitration had allowed the grievance, finding that the reasons of the Division did not constitute cause. Justice Twaddle noted that a School Board hearing had been convened on whether the teacher should be permitted to resume her teaching duties. Psychiatric evidence was called. The School Board found cause and terminated based on the teacher's criminal conduct and "its effect on her status as a role model. Concerning the Board of Arbitration decision Justice Twaddle wrote:

> In our view, the majority went beyond the question of whether cause existed for termination and decided instead what they thought the School Board should have done. They found facts which, on any view of the matter, constituted cause for dismissal and then went on to say that, in their view, in particular circumstances the applicant should not have had her employment terminated. In our view, it is

not the function of an arbitration board under the Public Schools Act to decide the consequence: the arbitration board should have confined itself to the factual question of whether cause existed." (at p. 3)

It was the Board of Arbitration's function only to consider whether, on the basis of the reasons given, cause for Mr. Derkach's termination existed. Justice Twaddle wrote: "The question as to whether, there being cause, dismissal should follow is one for the School Board to make: not the arbitration board" (at p. 4).

For Mr. Simpson, the Greenaway decision was clear: mitigating factors could not be considered and assessed under s. 92(4) such consideration was solely for the Board of Trustees.

Mr. Simpson also presented several awards, but cautioned that they should only be reviewed in the context of whether there was cause under s. 92(4)(d). Generally the awards, due to the legislative regime, involved arbitrators considering not only the issue of whether there was cause, but also mitigating factors and the possible substitution of penalty. Again, that was not possible for a Board of Arbitration constituted under s. 92(4).

He asked the Board to consider the following cases as support of the Board of Trustees' determination that the conduct of Mr. Derkach constituted cause for termination:

(a) Re Province of Manitoba and M.G.E.U. (McNeice) (1996), 52 L.A.C. (4th) 186 in which the employer in its submission referred to the "doctrine of the culminating incident". Counsel for the Employer argued:

> "This doctrine indicates that where an employee commits an act of misconduct for which disciplinary sanction may be imposed it is proper for the employer to consider the record in determining the sanction. If the conduct is established and warrants penalty then the total record can be examined. Here there has been serious prior discipline resulting in a very lengthy suspension. The grievor's total record was poor." (at p. 190)

In his decision, Arbitrator Freeman wrote:

> "The culminating incident clearly entities the employer to take the disciplinary record into account and the dismissal letter properly referred to the previous incidents. Having regard to the nature of the current offence, and the character of the offence in 1991 that led to a sixmonth suspension, admitted by Mr. McNeice to be an offence of the same kind as this, it is difficult for me to think that the employer was not justified in deciding to dismiss Mr. McNeice." (at p. 196)

(b) Re Sasso Disposal Ltd. and Teamsters' Union. Local 880 (1975), 9 L.A.C. (2d) 152 in which the Grievor was discharged for misrepresenting his reasons for absence on two occasions. On the second occasion the Grievor was found by the majority of the Board to have deliberately attempted to mislead his employer. In upholding the termination, Arbitrator Gorsky wrote:

> "We find that even following the more liberal principles enunciated above there is little justification for modifying the penalty of discharge imposed

upon the grievor. First, the grievor was not treated in a discriminatory fashion. His offenses were more than mere absences without reasonable explanation. They had a cumulative impact. Not only did they indicate to the employer that the grievor was prone to taking unwarranted time off but also that the grievor suffered from a calculated disregard for the truth which made him untrustworthy. (at p. 159)

(c) Re Canada Safeway Ltd. and United Food & Commercial Workers Local 2000 (Allen) (1987), 29 L.A.C. (3d) 176 in which Arbitrator Hope reached the conclusion on the evidence that the grievor had knowingly purchased chicken from his employer at a price below the retail price (at page 185). Arbitrator Hope went on to state:

> "Those authorities acknowledge that dishonesty, by its very nature, usually results in an irreparable compromise of the employment relationship. In the retail food industry the opportunity and the temptation for employees to commit dishonest acts is great. Thus the relationship is generally acknowledged as having a fiduciary cast wherein all employees can be taken to understand that theft or other acts of dishonesty will invite dismissal.
>
> The imposition of dismissal for acts of dishonesty in that employment setting responds to two assumptions. The first is that employees can be taken to know that their employment is seriously at risk if they engage in such conduct. Hence, the willingness of an employee to engage in that conduct places the suitability of that employee in extreme doubt. The second factor is the high degree of deterrence that employers in the industry are entitled to extract when offenses in breach of the underlying trust relationship are committed. That is, the vulnerability of the employer makes it reasonable to impose relatively exacting standards and to put a heavy price tag on departures from the standards so as to blunt the temptation of other employees who are in a position to commit similar acts of misconduct." (at p.187)

(d) Re Kennedy House Youth Services Inc. and O. P. S. E. U., Local 585 (1996), 53 L.A.C. (4th) 54 involving the fraudulent misuse of sick leave, with the employee actually working at a different job. The employer stressed the special duty of trust (and example) which vests in a child care worker (at page 57). The majority of the Board concluded:

> The grievor is an employee of some four years' service with a less than spotless record. He engaged in a deliberately fraudulent act which, although now admitted, is still characterized by him as one which should not have merited him termination of his employment. While it is important for boards of arbitration to understand the place of compassion in deserving cases, there is something decidedly uncompelling about an employee who admittedly engages in a deliberate act of fraud, tantamount to theft, fails to repay the moneys wrongfully obtained, and then insists that he be given the benefit of the finer principles of progressive discipline. In the result, we are driven to the conclusion that there is no

basis upon which the decision of the employer should be disturbed." (at p. 62)

(e) Re Canada Safeway Ltd. And U.F.C.W. Local 200 (Falbo), (1998), 71 L.A.C. (4^{th}) 107 in which a false claim of disability on the part of an employee was viewed as a form of theft against her employer (at p. 126128).

In conclusion, Mr. Simpson cautioned the Board of Arbitration to carefully consider the evidence presented. The circumstances, he argued, clearly constituted cause. What was advanced by the Grievor were mitigating factors. He reiterated that this Board by its mandate did not have the jurisdiction to consider such factors. Once cause is shown (as set out in the reasons for the decision reached by the Board of Trustees), the Board's task is concluded.

Mr. McKenna began his submission by considering Greenaway v. Board of Education of Seven Oaks School, infra. By that decision, he argued, a Board of Arbitration, if not finding cause constituting grounds for termination, can reinstate. For him, the interpretation placed on Greenaway by Counsel for the Division could lead to absurd results, such as a teacher with 25 years service being dismissed for being late one day. He maintained that an arbitration board has the authority under s. 92(4)(d) to weigh the seriousness of events. That is, the reasons given must meet a threshold level for cause for termination to be found. A Board of Trustees cannot terminate for a lesser offence the jurisdiction bestowed by s. 92(4)(d) guarded against that.

Mr. McKenna went on to maintain that length of service was one factor to be taken into account in assessing whether the reasons stated by the Board of Trustees constituted cause for termination. He reminded that Mr. Derkach had been teaching for over 30 years and 19 of those years were with the Division. A second factor was competence. Mr. Derkach had been favourably viewed as a teacher throughout his career. He reviewed the 1995 evaluation carried out by Mr. Beveridge of Transcona Collegiate. In relation to those evaluations, he pointed out that there had been no incidents of recorded discipline since 1987. The evidence pointed to Mr. Derkach being a teacher who had provided "long service and good service" to the Division.

With these positive comments in mind, Mr. McKenna turned to the proposal which had been submitted through the testimony of Mr. Derkach. He reminded of the undertakings that had been given. Those undertakings constituted a significant penalty and were reflective of the wrongdoing recognized by Mr. Derkach. According to Mr. McKenna, given the jurisdiction to reinstate under s. 92(4)(e), the undertakings were provided in recognition that Mr. Derkach should bear a penalty for his conduct. That is, while his conduct did not constitute cause for termination, it did demand that he not "walk away scot-free".

Mr. McKenna went on to remind the Board of Arbitration of the extensive penalty that Mr. Derkach had already suffered, including removal from the work place, the stress of losing his job, the stress of the Arbitration process, the period of time that he had been effectively without work, and the loss of salary. In relation to that penalty, Mr. McKenna pointed out that Dr. Saleski had been unable to recall a four month suspension being imposed by the Division.

Mr. McKenna argued that the penalty Mr. Derkach had received would have a significant deterrent effect on other teachers, who were aware of Mr. Derkach's circumstances. Further, Mr. Derkach admitted that he had brought that penalty on himself.

In terms of the question of premeditation, Mr. McKenna pointed out that Mr. Derkach had testified that it was only on Thursday, March 26, 1998, that he and his wife determined to attend the conference. In that regard, Mr. Simpson on behalf of the Division had not cross examined him on that assertion. It would be unfair, Mr. McKenna asserted, for the Board to accept the argument of premeditation when Mr. Derkach had not been cross-examined on that testimony.

Mr. McKenna presented a set of authorities to assist the Board in its decision making. He urged the Board to contrast Mr. Derkach's termination to the twelve month suspension received by the teacher in Cowichan School Division 65 v. Peterson (1988), 22 B.C.L.R. (2d) 98. In that case, a teacher had been sexually intimate with an 18 year old woman, who had been one of his students, at a time that the student was no longer enrolled at the school where he taught. The teacher initially denied the incident to the School Board. The Board dismissed him from his employment. The Board of Reference upheld the dismissal; a Chambers Judge set the dismissal aside and substituted a twelve month suspension. The majority of the British Columbia Court of Appeal upheld that decision. Justice Lambert wrote:

> "In my opinion, the penalty of dismissal for misconduct should be reserved for those cases of misconduct where the act of misconduct is such that a substantial number of reasonable members of the community in which the teacher is employed would regard the act not only as constituting an incident of misconduct, but also as demonstrating a propensity or characteristic of the teacher which makes the teacher unsuitable to carry on with his or her occupation. If the propensity or characteristic is one that is likely to be cured by a suspension of appropriate length, then suspension is a preferable penalty to dismissal. The appropriate length for a suspension is determined by its likely effect as a punishment and as a deterrent for the person suspended, and as a deterrent to others." (at p. 4, Q/L decision)

He went on to find:

> I do not think that the evidence set out in the majority reasons of the board in support of the board's view that Mr. Peterson did not appreciate the abrogation of trust manifested by his misconduct is sufficient to justify that view. Mr. Peterson has now received a 12-month suspension and he has not himself appealed from that decision. There is no evidence that Mr. Peterson is sexually unbalanced or that he is unable to prevent himself from acting on his sexual impulses. In effect, the board of reference must be considered to have concluded that a 12 month suspension, coupled with the certainty of dismissal if further incidents should occur, will not deter Mr. Peterson from any further similar misconduct. In my opinion that conclusion has no adequate foundation on the evidence." (at p. 4, Q/L decision)

Mr. McKenna also asked the Board of Arbitration to consider the following awards on the applicable principles of discipline:

(a) Re Galco Food Products Ltd. And Amalgamated Meat Cutters & Butchers Workmen of North America, Local P1105 (1974), 7 L.A.C. (2d) 350 in which it was stated on the principle of the appropriate disciplinary action:

> The second reason for our modifying the disciplinary action taken by the company in this case stems from our view as to the fundamental purposes which support the invocation of discipline in the industrial environment. It is we think now generally accepted that the prevailing themes of modern

> punishment are rehabilitation, correction and individualization .... No longer do we invoke criminal or industrial sanctions as a matter of retribution, retaliation or as an instrument of terror. It is said therefore that for punishment to serve its ends, it must induce persons to observe the accepted norms of society and it must do so at a cost to the individual which is not excessive.
>
> …..
>
> Be that as it may, there is obviously much in such modern correctional theory which is directly applicable to the industrial setting. The thrust of the correctional and individualization themes is an attempt to acknowledge the existence of and "retain the usefulness of the person in the community after punishment has been imposed" .... That is the punishment is designed to bring home to the offender, and the rest of his or her community, the reprobation with which society views such conduct (the deterrent function) while at the same time securing for the benefit of that community the useful services that such person would, as deterred, have to offer." (at p. 356)

(b) Re Brunn and Treasury Board (Post Office Department) (1980), 29 L.A.C. (2d) 103 in which the Public Service Staff Relations Board recognized the following principle of "justice being tempered with mercy":

> "This board, therefore, has come to the conclusion that there are sufficient factors in the instant case which mitigate against the severe penalty of discharge imposed on this grievor by the company, and that this penalty should be reduced. The penalty substituted therefor, which while recognizing the seriousness of the offence committed by this grievor and while recognizing that it should be severe enough not only to teach this grievor a welldeserved lesson but also deter other employees from a similar course of conduct, still recognizes the principle that justice must be tempered with mercy." (at p. 110)

(c) Priske v. Treasury Board in which the Public Service Staff Relations Board accepted the following guideline:

> "Thus it would be appropriate to discharge employees as a last resort and only when it becomes apparent that corrective measures would not succeed ... or when the employee has demonstrated his incompatibility to continue the relationship of employer and employee." (at p. 25)

Drawing on those principles, Mr. McKenna acknowledged that he could not say that what Mr. Derkach had done was minor. But he maintained that given his years of service, it was incumbent on this Board of Arbitration not to throw such a teacher aside "like an old shoe" "we do not live in a perfect world, and people make mistakes". Mr. McKenna granted that people have to answer for their mistakes, but in a meaningful and constructive way.

Mr. McKenna maintained that Mr. Derkach's testimony showed that it had not been easy for him he clearly recognized that he made a mistake. The issue becomes what the proper penalty is for that mistake. Mr. McKenna maintained that the Board of Arbitration could impose a fit penalty on Mr.

Derkach without terminating his employment, particularly given the effect that such termination would have on the students. There is nothing to be gained by "throwing him out".

In conclusion, Mr. McKenna reminded of the years of service that Mr. Derkach had given to the Manitoba school system and, on that basis alone, submitted that the right decision was to reinstate him.

In response to the claim that termination was an inappropriate penalty, Mr. Simpson maintained that, under any test, the Board of Trustees' termination of Mr. Derkach's employment contract was warranted. Further, the factors considered by Mr. McKenna did not warrant substitution of penalty. Mr. Simpson reminded the Board of its restricted mandate under s. 92(4)(d) of the Public Schools Act. For Mr. Simpson, the undertakings given by Mr. Derkach were ultimately an attempt to amend that legislation, or to have the Board of Arbitration amend it, by indirectly substituting termination with the penalty contained in the undertakings.

Mr. Simpson maintained that s. 92(4)(d) did not result in a Board of Trustees having cause to terminate a teacher who was late for work. An Arbitrator had the authority pursuant to the Act to determine that being late for work did not constitute cause for termination. But the Board of Trustees' reasons set out in the letter of May 7, 1998 (Exhibit 5), according to Mr. Simpson, fell "well within" cause for termination.

In answer to a question from the Chair, Mr. Simpson maintained that such factors as the length of employment and the employee's quality as a teacher were not to be considered by a Board of Arbitration in determining whether there was cause for termination. For Mr. Simpson, Justice Twaddle in Greenaway was clear that the Board of Arbitration is to consider the reasons set out by the Board of Trustees in reaching a decision as to whether there was cause for termination. Mitigating factors such as length of service were not to be considered.

Ultimately, according to Mr. Simpson, it is not for an arbitration board to overturn the decision of the Board of Trustees on the basis that it would have imposed a different penalty. If the reasons cited by the Board of Trustees constitute cause for termination, then that termination of the employment contract must stand. In the Greenaway decision, he argued, once Justice Twaddle determined that the theft did constitute cause for termination, that ended the review jurisdiction provided for by section 92(4)(d). The Board of Trustees was left to determine whether it would terminate based on the theft in that case. It was not for an arbitration board to overturn that decision once it determined that theft could constitute a cause for termination.

In final response, Mr. McKenna maintained that it made no sense for the Board of Trustees to consider mitigating factors, without the Board of Arbitration being able to do so on the review provided for by section 92(4)(d). He urged the Board to consider cause in the context of the mitigating factors.

ANALYSIS

Review of the submissions points to a different perspective between Counsel as to the role of an arbitration board in a hearing under Section 92(4)(d). It is important to consider those different perspectives. The first section of this analysis considers the difference of Counsels' positions, thereby determining the extent of the review permissible pursuant to Section 92(4)(d). With that determination, a series of awards are reviewed dealing with what constitutes cause for termination. Thirdly, that analysis of the factors constituting cause are applied to the factual circumstances of this grievance.

With respect to Section 92(4)(d) of the Act. Mr. Simpson maintained that the Board of Arbitration's only function was to determine whether cause for termination existed in the reasons given by the Board of Trustees. Certainly Justice Twaddle in Greenaway, infra, wrote that an arbitration board had no authority to substitute penalties; its sole jurisdiction was to determine whether there was cause for

termination on the factual circumstances. Unlike arbitration involving termination, which is governed by the Labour Relations Act, by the Public Schools Act the school board alone had the authority to determine upon cause being shown whether dismissal would follow.

Mr. McKenna raised concern that this restricted view of the authority under Section 92(4)(d) could allow Trustees to dismiss a teacher with 25 years of service "on being late one day". With respect, it is precisely those type of circumstances that a Board of Arbitration has the authority to deal with. Specifically, a Board can determine that in such circumstances cause for termination does not exist; and, pursuant to Section 92(4)(e), a Board can then reinstate the teacher. A Board has the authority, and obligation, to consider the reasons in assessing whether there was cause for termination. What constitutes cause has been explained in a series of awards.

The difference of opinion as to s. 92(4)(d) raised two points. Mr. Simpson, in answer to a question from the Chair, was of the opinion that factors such as lengths of service could not be considered in determining whether there was cause for termination. He argued that the Board of Arbitration is restricted to review of the reasons presented by the Board of Trustees

In several of the awards presented by Counsel, length of service (as well as other factors such as competence) is viewed as a mitigation factor. I do not believe, however, that an arbitration board is necessarily tied solely to the consideration of the reasons offered for the termination. If a Board of Arbitration is of the view that unstated reasons were also considered, or if there are factors such as length of service that impacts on the issue of cause, it is appropriate by s. 92(4)(d) to consider those other factors in determining whether there the reasons constitute cause for termination. For example, a single incident of misrepresentation and deceit on the part of an employee who has been with the Division for 1 year may constitute cause whereas in the case of a 31 year employee, it may not.

The second issue raised in argument involves a series of factors that Mr. McKenna argued could be considered. He referred to such factors as the possibility of rehabilitation and the importance of not "throwing aside" a competent teacher with students yet to be served. Those and the other factors raised by Mr. McKenna in argument, however, go to the issue of mitigation, and the possible substitution of penalty. These factors do not go to cause. The reasoning of Mr. Justice Twaddle in Greenaway does not allow for the consideration of such factors.

As well, the undertakings given by Mr. Derkach are beyond the jurisdiction of the Board of Arbitration to consider. The offering of those undertakings was a skillful attempt to assuage the concerns of the Board over the need for a penalty to be imposed upon Mr. Derkach (given his conduct in question). However, if the Board finds cause on the reasons given, then the Grievor cannot be reinstated regardless of the penalty that he or she is prepared to bear. If there is no cause found on those reasons, then the Board, upon making this finding, is to reinstate the teacher, regardless of whether or not a penalty should be born.

What factors, if proven, constitute cause for termination?

The awards presented by Counsel repeatedly comment that the standard for cause does not involve the mere mechanical application of a set of rules. Each factual circumstance must be determined on its own merit. Yet from review of the awards presented, several factors are considered in determining whether there was cause; that is, justifiable grounds to warrant discharge as an appropriate penalty. These include:

(a) The termination is recognized as the most "severe nature of penalty" (Sasso, infra, p. 158; and Re: Cowichan School Division, infra, Q/L, p. 4). Thus, not any act of

misconduct can constitute just cause. Even serious offences by an employee do not automatically constitute legal cause for discharge (Re: Canada Safeway and UFCW, (Allen), INFRA, quoting from Re: W.M. Scott and Company and Canadian Food and Allied Workers Union. Local P 162, [1977] 1 Can. L.B.R. 1 (at p.186);

(b) A fundamental question in determining whether just cause exists is whether on the circumstances, and employing an objective standard, the employer was justified in concluding that the employment relationship had been irreparably and irretrievably breached (Re: The Province of Manitoba and MGEU (McNeice), infra, at p. 196). Re: Galco Food Products, infra, redefined that question as follows: "...discharge is appropriate when the employee has demonstrated his incapability to continue the relationship of employer and employee" (at p. 357).

Honesty is often recognized as critical to the employer/employee relationship. After referencing a number of awards dealing with cause, Arbitrator Hope in Re: Canada Safeway and UFCW, (Allen), infra, summarized: "Those authorities acknowledged that dishonesty, by its very nature, usually results in an irreparable compromise of the employment relationship." (at p. 187). Similarly, the consequences of theft on that relationship was recognized in Re: Brunn, infra, (p. 108-109) and the importance of the measure of trust and the effective loss of trust was considered by Arbitrator Sanderson by review of a number of authorities in Re: Canada Safeway and UFCW, (Falbo), infra, at p. 125128);

(c) An employee's conduct may demonstrate a lack of understanding of the job role and requirements. Such conduct may demonstrate an inability to appreciate what is intended to be accomplished through one's employment (Re: Manitoba and MGEU, McNeice, infra, at p. 196; Re: Sasso Disposal, infra, at p. 153154; Re: Cowichan, infra, at p. 4);

(d) The law of culminating incident does allow an employer to take into account the disciplinary record of an employee when considering dismissal for cause (Brown and Beatty, Canadian Labour Arbitration) (3rd ed.), page 7166 et seq.). This is particularly so in the case of a prior record for similar misconduct;

(e) Related to the consideration of whether the employer/employee relationship has been damaged, is the nature of the dishonesty. This factor divides into several subparts. First is whether the employer, to the knowledge of the employee, placed an emphasis on honesty. Importance placed on trust and honesty frequently arises if the nature of the job requires the employer to trust the employee (Re: Cowichan. infra, at p. 4 to 6; Re: Kennedy House Youth Services, infra, at p. 57 and p. 6061); Re: Canada Safeway and UFCW (Allen), infra, at p. 187, in which Arbitrator Hope noted that in the retail food industry the opportunity and temptation to commit dishonest acts casts a fiduciary obligation on employees with the understanding that theft or other acts of dishonesty will invite dismissal).

Second is whether the dishonest conduct was of a "uncharacteristic, spur of the-moment" nature (Re: Kennedy House Youth, infra, p. 60) or whether it was a deliberate and calculated scheme (Re: Canada Safeway and UFCW, (Falbo), infra, at p. 125 128);

Third is whether the employer has a justified need for deterrence, given the nature of the employment (Re: Brunn, infra, at p. 108109); Re: Canada Safeway and UFCW (Allen) infra, in which Arbitrator Hope referenced several awards on the particular need for deterrence against dishonest acts in certain jobs (at p. 188189); Re: Canada Safeway and UFCW (Feabo), infra, at p. 125.

(f) The employee's response upon being faced with the misconduct is also is a factor. In the awards, a candid admission of wrongdoing is contrasted with a refusal to admit any misconduct, (Kennedy House Youth, infra, p. 6061; and Canada Safeway and UFCW (Allen), infra, at p. 188: "For the grievor to insist that his conduct in this dispute was not wrong reflects a serious deficiency in his perception of his obligations as an employee"). (This factor seems frequently as well to be considered in terms of substitution of penalty (for example, Re: Canada Safeway and UFCW, (Allen), infra at page 187188); and

(g) The requirement that an employer consider corrective measures in determining whether there is cause for dismissal is tempered in the event of repeated similar misconduct. "Under modern correctional theory as applied to industrial discipline it is proper to discharge an employee who demonstrates the failure of correctional discipline by repeating the offence for which he was punished" (Sasso Disposal, infra, at p. 160).

As referenced by both Counsel in their submissions, there is, in many awards, blending of the grounds regarding the issue of cause, with factors regarding mitigation.

With these grounds in mind, the function of this Board of Arbitration is to consider whether the reasons identified by the Board of Trustees as cause for Mr. Derkach's termination constituted cause at law. Those reasons have been set out above (letter of May 7, 1998 Exhibit 8). In considering those reasons, one must bear in mind the admonition of the awards that there should be no automatic, mechanical application of the arbitral principles on cause. There must be consideration of the present factual circumstances.

In terms of the various grounds set out above, certainly the decision to terminate the employment contract was, as much as in any termination situation, very grave. Mr. Derkach was a longterm teacher with the Division.

The length of that relationship relates to the issue of whether the conduct of Mr. Derkach had irreparably severed the employer/employee relationship. In the letter of May 7, 1998, it is apparent that that question had been considered by the Division. The Board of Trustees indicated that it reached the view that Mr. Derkach's "demonstrated conduct is such that the employment relationship could not be continued" (Exhibit 5).

This determination apparently arose from a loss of trust between the Board of Trustees and Mr. Derkach. The letter referenced the importance of the relationship of trust and honesty in the context of the two earlier incidents of unauthorized leave, and the incident of March 26 and 27, 1998. Given the circumstances and the background history between Mr. Derkach and the Division, the determination reached by the Board of Trustees was not unreasonable. This Board of Arbitration is not in a position to challenge the Board of Trustees' determination in that regard.

A further factor is the consideration of the incident in the context of the job role and requirements. In a letter of May 7, 1998, the Trustees did lay out that Mr. Derkach had not been available to provide support for the work experience program on March 26th and 27th. Mr. Derkach did testify that in the preceding four weeks he had provided support. He did not believe that his absence at the end of the four week work experience program was detrimental. However, on the evidence it seems reasonable for the Board of Trustees to have concluded that Mr. Derkach's absence did result in some students not receiving his support. The fact is he missed two days of teaching.

The arbitral principles regarding cause for dismissal do recognize an employee's disciplinary history, particularly in the case of similar misconduct. Mr. Derkach's discipline record was considered by the Trustees in reaching their decision. Mr. Simpson stressed the similarity of the 1985, 1987 and 1998 incidents. The aforementioned awards do take into account the similarity of previous incidents in determining whether there is cause for termination. Frankly, the similarity here involves repeated dishonesty.

In part, the record goes to the consideration of corrective discipline. The letter of May 6, 1998 references the progressive nature of the discipline.

Mr. McKenna stressed what he viewed as the unusually severe nature of the penalty imposed by the Board of Trustees. Dr. Saleski, in cross-examination, concede that a four month suspension was highly unusual (in fact, unprecedented in Dr. Saleski's tenure as Superintendent of the Division). Also Mr. McKenna urged the Board of Arbitration to bear in mind that Mr. Derkach had had a "clean discipline record" since the 1987 incident.

Counsel's submissions are well taken, but they go to the issue of mitigation. It may well be that if this Board of Arbitration was asked in the first instance to discipline Mr. Derkach, a period of suspension rather than termination might have been imposed. But in light of s. 92(4)(d) of the Act (as interpreted by Justice Twaddle in Greenaway), it is not appropriate for the Arbitrators to reconsider the penalty imposed. The jurisdiction granted by s. 92(4)(d) does not extend to substitution of penalty.

In the Board of Trustees' letter setting out the reasons for Mr. Derkach's termination, there is further reference to the third case of unauthorized leave being "compounded by your being untruthful in your explanation for the absence first to your school administration and then to the Superintendent" (Exhibit 5). The awards referenced above view dishonesty towards an employer, be it in the original act of misconduct or in the refusal to admit fault, as a factor in determining whether there is cause for dismissal. On the present circumstances, Mr. Derkach lied to Division staff on March 26, 1998 and thereafter when being questioned on the incident. He did. on the other hand, ultimately admit the true circumstances (beginning with his letter of April 8, 1998). Nevertheless, it is consistent with arbitral principles for a Board of Trustees to have taken into account the untruthfulness in his explanation.

Mr. McKenna, in regard to both the nature of the unauthorized leave on March 26 and 27, and to the untruths told to Division staff, candidly said that these could not be considered as minor in nature. He emphasized the various positive factors that went to Mr. Derkach's credit. Again, however, those positive factors were for consideration by the Trustees rather than this Board.

The reasons of the Board of Trustees also included reference to the "cornerstones" of trust and truthfulness in the Division's relationships with its employees. The reason for that cornerstone is explained in the letter, and the evidence heard does confirm the need for truthfulness on the part of teachers employed by the Division. The need for truthfulness can be taken into account in a consideration of cause for dismissal.

An additional ground is the forthrightness of the employee upon being challenged concerning his conduct. In the Trustees' letter of May 6, 1998, reference is made to what is perceived to be "a certain degree of premediation and planning" concerning the attendance at the Amway seminar. Mr. Derkach maintained in his meeting with Dr. Saleski on April 9, 1998, in his attendance before the Board of Trustees on April 28, 1998, and at the grievance hearing that the decision to attend the conference was not premediated. On consideration of the testimony, it does appear that there was at least some planning involved in the attendance at the conference. On the morning of March 26, 1998, Mr. Derkach advised the VicePrincipal that he had to have certain medical tests. That was not true. That untruthfulness presumably came about as a result of Mr. Derkach having made a decision to attend the conference in Cincinnati. It may well be that the decision to attend the conference had been made shortly before Mr. Derkach mixrepresented the reason for being absent on the morning of March 26, 1998, but it was planned and not the spurofthemoment decision that was conveyed to Dr. Saleski, the Trustees, and this Board of Arbitration.

Arbitral awards allow for consideration of the degree of forthrightness concerning the misconduct on the part of the employee. Therefore, the Board of Trustees' reference to that whole issue of premeditation was appropriate.

The arbitral principles also recognize the appropriateness of the discharge of an employee who demonstrates an unresponsiveness to correctional discipline by repeating the offense Certainly the reasons of the Board of Trustees involved recognition that progressive discipline had failed.

Mr. McKenna's urging that the Board of Arbitration review the severity of the penalty must again be considered. The length of time since the 1987 incident could have lead the Trustees to reach an alternate penalty. However, based on arbitral law, the failure of correctional discipline manifested by the similarity of the 1998 incident to the 1985 and 1987 incidents was a ground to have been considered by the Trustees in determining whether there was just cause for dismissal.

On the basis of all of the above considerations, I conclude that the reasons given by the Board of Trustees constituted cause for terminating Mr. Derkach's employment contract. The reasons set out in the letter of May 7, 1998, were proven on the evidence presented to the Board of Arbitration. Those reasons, in their cumulative affect and based on arbitral principles, support the determination of the Board of Trustees to terminate.

DECISION

It follows that the grievance is dismissed.

Both Counsel are to be thanked for their presentation, particularly in their care in matching the evidence heard to the arbitral law. The Nominees were of considerable help in that regard as well.

Each of the parties are responsible for the co of their Nominee and will jointly share the costs of the Chairperson.

DATED at Winnipeg, Manitoba this 9th day of December, 1998.
Gavin M. Wood
Chairperson

I Dissent
DATED at Winnipeg, Manitoba this 30th, day of November, 1998.
Grant Rodgers
Nominee of the Association

I Concur
DATED at Winnipeg, Manitoba this 8 day of December, 1998.
Gerald Parkinson
Nominee of the Division

IN THE MATTER OF:

An Arbitration Between:

THE TRANSCONA SPRINGFIELD SCHOOL DIVISION NO. 12
(hereinafter referred to as "the Division")

and

MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as "the Association")

and

NED DERKACH
(hereinafter referred to as "the Grievor")

DISSENTING AWARD of Grant Rodgers, Nominee of the Association

This matter came before the Board pursuant to Section 92(4) of the Public Schools Act. The relevant provisions of that section are set forth at page 22 23 of the majority award. There was considerable debate at the hearing over the proper interpretation of Section 92(4), particularly subsections (d) and (e), in view of the 1990 Manitoba Court of Appeal decision in Greenaway vs. Seven Oaks School Division. Much of the debate centered around what factors an arbitration board could or could not consider in reaching a determination as to whether a school board had cause for terminating a teacher's contract of employment.

I see nothing in the Public Schools Act, nor the Court of Appeal decision which restricts the factors which may be considered by an Arbitration Board in determining the factual question as to whether cause for termination of the teaching contract existed. The Court of Appeal did not say in the Greenaway case that the arbitration board ought not to have considered the psychiatric evidence in that case because it went to the issue of "mitigation". In fact, the School Board itself had considered the psychiatric evidence in coming to its conclusion that cause existed to terminate the services of the teacher. The school board was not criticized by the court for considering such evidence.

In my view, the court held that the facts considered by the arbitration board, including information only arising subsequent to the suspension of the teacher, constituted cause for dismissal "on any view of the matter" (paragraph six (6) of the court of appeal decision). Mr. Justice Twaddle simply felt that the majority of the Arbitration Board was wrong to conclude otherwise. The court rejected the notion that the decision of the Arbitration Board had to be palpably wrong as not being the proper test under the Public Schools Act, even though that Act provides in Section 92(e) that the decision of the Arbitration Board is subject to appeal as provided in the Arbitration Act. It is therefore my opinion that the standard for judicial review should be exactly the same for a teacher's arbitration than as for any other arbitration decision which is appealed pursuant to the Arbitration Act.

In any event, it is my opinion that an Arbitration Board, constituted pursuant to Section 92(4) of the Public Schools Act is entitled to consider any and all relevant factors in determining "whether the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement". It is too fine a splitting of a legal hair for an arbitration board to try to determine with precision which factors go to "mitigation" and which factors go to "cause". I therefore must respectfully disagree with the conclusion at the bottom of page 38 of the majority award, which interprets the Greenaway case as preventing an arbitration board from considering factors, which may arguably go to "mitigation", such as teacher's length of competent service. If, as in this case, twelve year old discipline is a relevant factor to be considered, then evidence pertaining to a teacher's entire record, including his/her relationship with the students can and should also be considered by the Arbitration Board in determining whether cause for termination exists.

The narrow interpretation of Greenaway that was urged on this Board by the Division would render a teacher's right to arbitration virtually meaningless.

The restriction on the powers of an arbitration board which appears to exist in the legislative scheme applicable to teachers in Manitoba is with regard to remedial authority, not what type of evidence an arbitration board may consider in reaching a determination as to cause. Unlike the Labour Relations Act, Public Schools Act does not provide that an Arbitration board could fashion a remedy other than termination where it makes a finding that cause for termination existed when the Division made its decision. It's an all or nothing proposition. The Arbitration Board can, therefore, only do one of two things:

1) Find cause for termination and uphold the dismissal.
2) Find that sufficient cause for termination didn't exist and direct that the teacher's agreement with the division be continued in force and effect.

A finding that cause for termination did not exist would entitle a teacher to claim back pay pursuant to Section 92 (6) of the Act. Presumably a teacher could decline to claim all or part of the back pay to which he/she would be entitled. Such an undertaking was given by the grievor at the hearing, but I agree with the statement at page 39 of the majority award that such an undertaking would be beyond the jurisdiction of the Board of Arbitration to consider.

Boards of Arbitration should not, however, be intimidated by this peculiar legislative scheme. The issue to be determined is still whether, given the particular facts of the case, the punishment of termination fits the crime. The Board need not concern itself with whether some lesser punishment does fit the crime.

In some respects this is unfortunate for the employer because if the Arbitration Board finds that cause for termination did not exist, the Division may be faced with further litigation if it then imposed a more suitable penalty, short of termination of the teacher's agreement, or it may incur the expensive process of appeal per the Arbitration Act.

Did the punishment fit the crime in this case? I must respectfully disagree with the conclusions of the majority of this Board in that regard. While Mr. Derkach engaged in serious misconduct resulting from poor judgement (including, evidently, being less than forthright with his association representative), I cannot conclude, on the facts of this case, that cause for termination of his teaching contract existed.

The Division has a right to expect honesty from its employees but I do not accept that misuse of sick time is qualitatively the same as theft of property from the employer, clients or coworkers (as was the case in Greenaway). The employer, in a sick leave case, has the ability to obtain restitution, which it may not have in the case of property theft. There was no evidence that Mr. Derkach's conduct had any adverse impact on the students. Even though Mr. Derkach had been disciplined many years before for somewhat similar conduct, Mr. Saleski, when put to him directly, was unable to say that Mr. Derkach had "let the students down" at any time during his thirtytwo (32) year tenure as teacher. To make a long story short, I am simply unable to conclude, as Mr. Justice Twaddle did in the Greenaway case, that, "on any view of the matter", cause for dismissal of a teacher existed.

My view of the matter tends to be more in line with the learned judge in the Abbotsford School District case [26 DLR (4th) 54] cited at page 9 of the Cowichan School District case, which was tabled with the Board. Therein the learned judge states:

"In my view the dismissal of a professional person should only be imposed in the most serious of cases."

In the Cowichan case, the B.C. Court of Appeal elaborated further by stating:

"In my opinion, the penalty of dismissal for misconduct should be reserved for those cases of misconduct where the act of misconduct is such that a substantial number of reasonable members of the community in which the teacher is employed would regard the act not only as constituting an incident of misconduct, but also as demonstrating a propensity or characteristic of the teacher which makes the teacher unsuitable to carry on with his or her occupation".

I find the above comments particularly appropriate, given the apparent "all or nothing" provisions of the Public Schools Act of Manitoba. Given the nature of that legislation, the benefit of a close call must be given to the teacher. Having said that, I sincerely doubt that a substantial number of reasonable members of the community in which Mr. Derkach was employed would regard his conduct (even with the old prior discipline) as such that it would render him unsuitable to carry on with his occupation.

For all of the foregoing reasons, I would have directed, pursuant to Section 92(4) (e) of the Public Schools Act that the teaching contract of Mr. Derkach be continued in force and effect.

Respectfully submitted,
Grant Rodgers, Arbitration Board Member.