IN THE MATTER OF AN ARBITRATION:

B E T W E E N :

THE WESTERN SCHOOL DIVISION NO. 47,
(hereinafter referred to as the *"Division"*)

- and -

THE WESTERN TEACHERS' ASSOCIATION NO. 47,
(hereinafter referred to as the *"Association"*)

Re: Grievance of Bela Payne

BOARD OF ARBITRATION	P.S. Teskey, Chairperson G.D. Parkinson, Nominee for the Division D.M. Shrom, Nominee for the Association
DATES OF ARBITRATION:	January 14th, 15th, and 25th, February 8th March 18th, June 10th, 11th, 12th and 21st, 2002
LOCATION OF ARBITRATION:	Winnipeg, Manitoba
APPEARANCES:	R.A. Simpson, Counsel for the Division G. Smorang, Q.C. counsel for the Association B. Payne, Grievor

A W A R D

This matter concerns two grievances, one from the Association and one on behalf of Ms. B. Payne, which deal with essentially the same issues. The central issue is the decision of the Division not to reappoint Ms. Payne as the Principal of Maple Leaf School in the Division (which is in Morden, Manitoba) for the School year 2001/2002. The grievances raise issues of both impropriety in terms of that decision and, in addition, claims of defamation concerning Ms. Payne.

For the sake of convenience, we reproduce the individual grievance of Ms. Payne (the Association's grievance is substantially the same) as follows:

"BELA PAYNE submits that there is a dispute between herself and the WESTERN SCHOOL DIVISION NO. 47 (hereinafter referred to as "the Division") about the meaning, and/or application and/or violation of the Collective Agreement between the Association and the Division and in particular Articles 5 and 10 thereof, the Division's Evaluation Policy entitled "Guidelines for Administrative Evaluation Committees", The Public Schools Act, The Education Administration Act and Section 80 of The Labour Relations Act.

BELA PAYNE further submits there is a dispute between the parties due to the actions of the Division in defaming her contrary to The Defamation Act and defamation jurisprudence.

BELA PAYNE grieves that her demotion from the position of Principal within the Division is in violation of the Collective Agreement and the relevant legislation and is unfair, unreasonable and/or was made in bad faith for the following reasons:

1. The Division has inconsistently applied and administered its evaluation policies and procedures among the Principals in the Division;

2. The Division, through its Superintendent, Ted Fransen, conducted an evaluation of her in or about January and February 2001 in a manner that was inconsistent with the evaluation policies and procedures of the Division.
3. The Division requested the Superintendent to prepare a Principal Evaluation Report, which he did in or about February 2001, which Report the Division accepted, and further which Report is defamatory of her. The particulars of the Report that are alleged to be defamatory are as follows:
    (a) "They reflected a profound and growing concern at the school about Ms. Payne's leadership"
    (b) "Some staff reported that Ms. Payne had represented what her previous job had been, leading some to believe that she had been the Coordinator of Student Services in her previous Division"
    (c) "There were several incidents in my own dealings with Ms. Payne where I came to question her integrity".
    (d) "Last winter she applied for a particular one day medical leave." "I have discovered on the day of her absence that she was in fact in court that afternoon."
    (e) "Misleading the Division Office regarding sick days is unprofessional and does little to promote a sense of trust between colleagues."
    (f) "She told me that one of the Senior Administrators in that Division had contacted her and asked her to apply. I subsequently discovered that this was not true." "She did not need to justify her motives by falsely implicating others."
    (g) "Ms. Payne has asked staff to keep the light in her office on so that it appears as if she is there on days that she arrives

late or leaves early. This does little to build trust within her staff."

(h) "Maple Leaf parents have told me that they have trouble trusting her."

(i) "She did not show up for work on Thursday and gave no notice to the school or the Division office. I grew concerned and called her home number. When I was unable to reach her at the home number that she gave the Division office I managed to reach her on her cell phone."

The foregoing statements are defamatory in the following sense:

3(a) Suggests and implies a lack of leadership skills

3(b) Implies lack of integrity and falsification of previous job experience

3(c) Questions integrity and honesty

3(d) Lack of integrity; Lying to her employer

3(e) Lack of integrity; Misleading her employer

3(f) Lying to her employer

3(g) Involving her staff in inappropriate conduct; Lying to her employer

3(h) Untrustworthy

3(i) Misuse of sick leave; Lying to her employer

4. On the basis of this Report, the Division has demoted her from her position of Principal to the position of classroom teacher effective the first day of the school year 2001 – 2002.

5. The decision to demote her and reassign her to classroom duties will have the effect of depriving her of administrative allowances properly due to her as a Principal employed by the Division.

BELA PAYNE requests:

1. A Declaration that the Division has misapplied, misinterpreted and/or violated the Collective Agreement between it and the Association and in particular Articles 5 and 10 thereof, The Public Schools Act, The Education Administration Act, The Labour Relations Act and The Defamation Act and the jurisprudence related thereto.

2. A Declaration that the Division has applied and administered its evaluation policies and procedures in an unfair and unreasonable manner.

3. An Order that the Division rescind the provisions of the Guidelines for Administrative Evaluation Committees Policy to the extent that such Policy and the administration thereof are unreasonable and do not comply with the Collective Agreement and the legislation.

4. An Order that the Division reinstate BELA PAYNE to the position of Principal of Maple Leaf School.

5. An Order that the Division provide full compensation to her for all lost salary, benefits, accumulated sick time, pension and any other losses she has incurred or may incur as a result of the Division's

actions, including interest on such compensation.

6. General damages for defamation and interest on such damages.
7. Such other remedies as may be fair and reasonable in the circumstances.

At the commencement of the hearing, Mr. Simpson raised certain objections as to our jurisdiction to hear and determine this matter. However, it was agreed that we would hear the evidence and rule later as to the original jurisdictional issue and, accordingly, that will be discussed later in this Award.

As can be noted from the dates of the hearing set forth on the cover page, this matter was protracted and considerable evidence and argument was received. We shall attempt to summarize our findings whenever possible although, to some extent, it is necessary to canvass in some detail what was before us.

The grievor's direct, cross-examinations, and re-examination extended over a number of days.

The grievor's resume (sent to the Division when she applied for the position in 1999) was tendered as Ex. 3. She received her Bachelor of Arts Degree from York University in 1984 and her Bachelor of Education Degree from Western in 1985. Additionally, she has a certification (Part 1 in Special Education from York University in 1987) and is working towards her Masters in School Administration at the University of Manitoba. She commenced her teaching career as a Grade Three teacher in Toronto and also taught Grade Two there, then went to Nova Scotia as a Resource Teacher and taught Grades Five, Eight, and Nine in Halifax prior to coming to Manitoba in 1995. From that time her primary employment was at Whyte Ridge School in Winnipeg (although she was also involved in I.R.T. at several other schools) and ultimately became "Head Teacher" at Whyte Ridge School in 1998. She testified that her interest has always been to achieve an administrative position within the school system (either a Principalship or a Vice-Principalship or above). She has also taken the required courses for certification as a Principal and achieved the first level in June, 1998. The second portion of that certification involves practical experience.

She described Special Education as being her particular "passion" (although the later evidence indicated that she is not accredited for that in Manitoba). All of the various courses or seminars that she has taken or attended have been voluntary, not mandatory.

A number of letters of commendation were provided to us but it is not necessary to reproduce those in their entirety. Suffice it to say that they are all very complimentary.

She is currently forty-one years old and has two daughters aged twelve and ten. She has been separated from her husband since June, 1999 (part of her motivation for taking the position at the Division was as a result of the financial pressures resulting from same) and, throughout her tenure with the Division, has lived in Winnipeg were she still resides. While it has been suggested to her at various times that it would be helpful for her to move to Morden (where her School and the Division office are), it has been her

view that disrupting her children's normal educational and social activities would be detrimental to them. Her custody arrangement with her husband also involves alternate weeks of actual physical custody which further complicate matters.

While she was at Whyte Ridge School, it became an "early years" school (Kindergarten to Grade Four).

Her resume also shows that she has been involved in various professional development activities or pursuits on her own initiative. It was not raised by the Division, nor do we find, that there are any deficiencies in her educational background and we would agree with Ms. Payne that it was tailored towards a school administration position. That, however, is not the issue here.

In the Spring of 1999, she saw an advertisement in the Winnipeg Free Press for two positions at the Western School Division. Both involved Principalships but one was only a part-time position (it included teaching hours) and she applied for the full-time position at Maple Leaf School. She had no previous exposure to the Division and had simply called the Superintendent's office to ask some questions and then sent in her resume. She then went to Morden to look at the School, the Division office, and the community. The then Superintendent, Mr. Jamieson, had telephoned her to advise that she was short-listed and she was then interviewed. The interview was lengthy but she was successful and was offered the position. She had indicated to the Division that she was living in Winnipeg and intended to continue staying there for the time being. Her home is relatively close to the Perimeter Highway allowing for quick access to the road to Morden.

She testified that she had gone to some extraordinary lengths with respect to accepting the position. Her brother had died in Ontario shortly before the interview and she had gone from the interview to the airport to attend his funeral. She had left her telephone number in Ontario with Mr. Jamieson and he called several days later. She was requested to e-mail her acceptance back and did so (Ex.6). She then resigned from her teaching position in Fort Garry School Division.

Ms. Payne testified that there were never any discussions with her at any time concerning either performing other duties within the Division except those of being a Principal, nor had it ever been brought to her attention that the position of Principal was appointed annually by the Board of Trustees. Her expectation was that she would be acting in the capacity of Principal alone and that it was a permanent appointment.

Her salary at the Fort Garry School Division was $50,450.00 annually whereas the new salary at Western (with the administrative allowance) was $58,489.00. The increase was slightly more than eight thousand dollars and played a large role in her decision.

Over the Summer of 1999, she visited the new School, met the staff, and spent in total some three and one half days in June doing that. During that time she also

"shadowed" the incumbent Principal and met with Mr. Jamieson. She also visited the School at various times over the summer.

During that time the structure of the Division was changing in that they were moving to the "early years" and "middle school" model. Previously, Maple Leaf School had been Kindergarten to Grades Five and Six.

Her commute from Winnipeg to Morden was approximately one hour and fifteen minutes each way.

To summarize her evidence, clearly her relationship with Mr. Jamieson when he was Superintendent was a good one. She felt he was a mentor and very helpful. She had relatively constant contact with him either formally or informally. Mr. Jamieson decided to retire at the end of December, 1999. As well, her then secretary took a leave of absence and she was required to hire a new secretary at the beginning of the school term.

Maple Leaf School itself was also undergoing major structural renovations when she began.

There are five schools in the Division but only four Principals although there are two Vice-Principals. Monthly administration meetings were held and conducted by Mr. Jamieson (that practice continued when the new Superintendent, Mr. T. Fransen, arrived).

At the monthly meetings new developments would be discussed as well as issues of professional development or other related issues.

Maple Leaf School is located very close to the Division office (including the Superintendent's office) and, in fact, the windows of each face one another.

Ms. Payne described Mr. Jamieson as being both a mentor and a "father figure" who was very experienced and knowledgeable as well as being a "pioneer" within the Division. The Division in her view (and as a result of his efforts) was as progressive as the Fort Garry School Division. He often would attend informally at the School to speak to her, the other members of the staff, or the students. She would likewise go to his office. Mr. Jamieson had been particularly skilled at "shadowing" but that practice did not continue with Mr. Fransen.

In her first term at Maple Leaf, Mr. Jamieson would visit the School at least once a week or she would call and ask him to come. She also had a computer in her office which was connected to the Division e-mail system and Mr. Jamieson was in the practice of utilizing that means of communication quite often.

The Division has Guidelines (Ex.7) for the evaluation of administrative personnel including Principals. Ex. 7 reads as follows:

"GUIDELINES FOR ADMINISTRATIVE EVALUATION COMMITTEES

Once the evaluation committee has been formed, the committee should meet with the superintendent to discuss the evaluation procedure. A meeting between the committee and the principal should follow to discuss the evaluation criteria, timeline, and other areas relevant to the process.

After selecting or preparing the feedback instrument, the committee should review this with the principal. The administration and collation of the feedback instrument should then occur and be followed by verbal and written summary reports to the principal and the superintendent at separate meetings.

The results of teacher feedback become a part of the superintendent's summative report as well as being direct feedback from staff members to their principal.

PRINCIPAL EVALUATION

A. INTRODUCTION

Western School Division views the evaluation process as an important means of assisting the schools to achieve excellence. The Board recognizes that the principal has a major responsibility in the initiation and maintenance of quality education. To assist the principal with this responsibility, the evaluation process will provide the principal with an assessment of his/her leadership and administrative practices.

B. GOALS

The goals of the evaluation of principals are:

1. to develop and maintain the best possible learning environment in the school in relation to the educational goals and philosophies of Western School Division;
2. to promote professional growth and to enhance educational leadership and administrative skills;
3. to review performance for the purposes of making decisions regarding personnel.

C. PROCESS

1. Frequency

   a. During the first year of appointment, evaluation will be formative.

   b. During the second year of appointment, evaluation will be summative.

   c. Commencing with the third year, the pattern will be two years of formative evaluation followed by a year of summative evaluation.

   A principal, however, may be retained at or advanced to a specific step as a result of a request by the individual principal or a

requirement by the Superintendent. In such cases, principals retained at or advanced to specific steps in the evaluation pattern will be advised in writing of the reasons for the change. Principals will be advised of any such change for the next school year prior to June 30 of the current school year.

2. Formative Evaluation

Formative evaluations shall be principal-directed and based on annually developed school level goals, divisionally-identified objectives, areas of personal/administrative development and/or a follow-up of previous summative evaluations.

3. Summative Evaluation

The formal summative evaluation process shall include formal visitation by and discussions with the superintendent who shall act as the chief evaluator, and feedback from the staff in cooperation with an evaluation committee composed of three staff members.

The summative evaluation shall focus on the degree to which the principal has:

a. carried out the duties identified in policy CFA-R;
b. implemented divisional policies and directives; and
c. met school level objectives that have been identified.

By mutual agreement of the principal and the superintendent, the evaluation may focus on more specific criteria.

D. PROCEDURES

1. PRE CONFERENCE

A pre-conference will be held prior to formative and summative assessments. The purpose of such a pre-conference is to discuss and adopt the criteria and procedures to be used.

2. FORMATIVE EVALUATION

In a formative evaluation year, the principal shall identify the means and procedure and communicate this information to the superintendent at the pre-conference. Principals are encouraged to discuss the results of the formative evaluation with the superintendent and to file such reports with the Division Office.

3. SUMMATIVE EVALUATION

a. During a summative evaluation, the superintendent shall assess the administrator's performance in each of the criteria areas by means of the agreed upon procedures which must include feedback from the staff.

b. A committee composed of three staff members chosen by the staff shall assist the superintendent. The Principal reserves the right to appeal the committee composition to the Superintendent who shall make the final decision. The Superintendent, principal and staff committee shall jointly develop the procedure and instrument for receiving feedback

from the staff. The staff committee shall be responsible for distributing the survey instrument and tabulating the results and comments. These results will then be given to the Superintendent for analysis and to the principal as part of his/her report. The completed surveys shall be kept by the staff committee until June 30 of the current school year.

c. A post-conference will be held following the completion of the procedures to review the criteria, share the information and data, share the observations of the Superintendent, and to communicate conclusions drawn by the Superintendent. The discussion may include ideas for development, a plan for improvement with time lines, and/or the identification of professional development priorities.

d. A written summative evaluation report is required and may include a summary of the observations, a description of strengths and areas for improvement, specific suggestions for changes and/or improvements and proposals for assistance and/or suggestions for professional development.

e. Such summative reports will be signed by the superintendent and principal to indicate the receipt of the report. The evaluates may comment on the report and have such comments appended.

f. The summative evaluation process is to completed by April 30th.

E. APPEAL

An appeal of any summative report may be made by the principal to the school board. Should the Board accept the appeal, a re-evaluation procedure shall be agreed upon by the principal and the Board. At any time during the evaluation process, any of the participants shall have the right and the opportunity to seek assistance from their professional organization or its officers.

F. PROCESS OF PRINCIPALS EXPERIENCING DIFFICULTY

When, as a result of a summative evaluation, a principal's performance is deemed to be unsatisfactory, the Board may place the principal on formal probation. Should this occur, the steps identified in policy GCG will apply.

Note: The term "staff" used throughout this policy denotes the professional teaching staff supervised by the principal.

April 23, 1990" (sic)

Exhibit 7 basically speaks for itself and we will touch upon only a few points of the grievor's testimony with respect to same. The basic issue was the application of the Policy to the grievor's individual circumstances and no challenge was taken to the fairness or appropriateness of the Policy itself.

Pursuant to the Policy, the grievor received a formative evaluation in the first year. She had originally discussed that with Mr. Jamieson and it was agreed that she would conduct it herself. She was given numerous options as to methodology but chose to perform a survey of staff and parents. When Mr. Jamieson retired, he had indicated to her that the new Superintendent would be discussing the evaluation with her.

It is also the practice of the Division to have various conferences each year in or about the month of October. One conference is with the Superintendent, the Principal, and the individual teacher and the second is between the Superintendent and the Principal.

The teacher conference is approximately one half hour in length and commences with a form filled out by the teacher stating their goals, professional development aspirations, and any other concerns. The conference with the Principal is conducted in essentially the same way albeit with a different written form.

In the Fall of 1999, she and Mr. Jamieson met with each teacher in early October and, although we received considerable evidence as to the specifics, the feedback from the teachers was generally positive in terms of the grievor's performance as Principal. Ms. Payne characterized the feedback from Mr. Jamieson as being valid and informative and also generally positive. She characterized herself as being a "lifelong learner" and was also open to suggestions from Mr. Jamieson or any of the other staff. That was particularly important in terms of being new to the job and she saw the role of Superintendent as being her "partner and part of her team" and felt that she had to keep him informed.

She received no other formal or informal feedback until Christmas.

Mr. Fransen assumed his duties in January, 2000. To the grievor's knowledge, he had come from Altona where he had been Principal of a High School but had no previous experience as a Superintendent. In her view, the level and frequency of communication between him and herself was much less than with Mr. Jamieson. She would occasionally call Mr. Fransen to ask about some specific issue or problem but, basically, he would encourage her to go forward with what she had already decided. Mr. Jamieson had been more active in terms of being ready to "step in" and provide suggestions. Neither did Mr. Fransen visit the School as often as Mr. Jamieson although she also felt that, basically, everything was going well.

She had invited Mr. Fransen many times to come to the School at recess to meet her, the staff, or students. She wanted to give him a tour of the entire School since she was very proud of it. In late January he did come and she took him to each class and introduced him to everyone.

The monthly administrative meetings continued but were different and she felt that he was not as helpful as Mr. Jamieson in terms of knowledge and/or suggestions. Mr. Fransen had relied heavily upon the advice of the one and only Principal who had been in the Division the previous year – all the other Principals were new hires.

There was no "shadowing" preformed that term with Mr. Fransen and there was a different level of feedback in that it was less in terms of suggestions and questions and, how she looked at any particular issue were not asked of her.

With respect to the evaluation process, no pre-conference meeting had occurred. She and Mr. Fransen had only met when she presented her survey from the teachers and the parents as part of the formative evaluation. She had given Mr. Fransen a draft of the proposed surveys and he had made some suggestions and changes which she followed. He had indicated to her that the surveys were "very good". The parent's survey was tendered as Ex. 9 and had been sent out in March, 2000 with each student (approximately one hundred and twenty-five families). It was the grievor's opinion that she had created approximately ninety percent of the survey form herself. At the end of each form was an offer for her to meet personally with any parent who wished to. That had been a suggestion from Mr. Fransen and she thought it was a good one.

The return rate of the surveys was approximately ninety percent which was quite high. The following month she had reported to the Board of Trustees on the results and at the April 10, 2000, Board meeting had provided them with approximately sixty sample surveys to look at. The results had been collated by a School Committee and were sent to the parents by way of the School Newsletter. Again, the parent responses were predominately positive.

Four parents had asked to meet with her and she had also set up a Staff Committee to meet with her regarding any areas in which it was suggested that she needed improvement. Those areas included the Kindergarten play area (including the Play Structure about which more will said later), the parking needs and safety issues with respect to same, and the desire of the parents for more involvement in professional development opportunities for themselves.

With respect to the third issue, she had discussed same with the PAC (Parental Advisory Committee) and notices were put up on the bulletin board about such opportunities. One Trustee and the President of the PAC had attended a conference in Winnipeg. She also began to set up a library in the School with relevant information for parents. She felt that the parents were partners in the educational process and that the parents in Morden were particularly supportive. She had discussed all of her plans at the monthly staff meetings and had also discussed this with Mr. Fransen.

Ms. Payne testified that Mr. Fransen had been "proud" to see that the community was committed and he created a restructuring survey which was sent to all of the students at the various Schools. Her impression at that time was that Mr. Fransen was pleased with what she was doing.

It was the understanding of the grievor that her use of a staff survey was new and that the previous Principal had not conducted such a survey. That survey (Ex.10) was completed by all staff – and signed by each of them – and they had been aware that this would be a part of the grievor's personal growth and formative evaluation.

We received all of the responses but, as a whole, Ms. Payne testified that she had been left with two impressions. The first was that she was a supportive and friendly Principal and had created a good climate and environment. The second was that some five or six individuals had indicated certain areas for her to improve. She had then called Mr. Fransen and he met with her to discuss those. Mr. Fransen had not read all of the responses nor had he asked for copies. She had indicated to him that she did not feel that some of the comments pertained to her professional duties but that she would pick three areas for improvement as that was a workable and realistic goal. The first was that some teachers had asked for book studies to be conducted at lunch hour, the second was that there would be more professional literature and journals provided at the School and discussion concerning them, and the last was that she would keep the teachers better informed of everything that was going on. However, basically she felt she was doing a very good job but was looking for ways to improve. Mr. Fransen had been very supportive of her approach and made no further suggestions to her. She had presented the staff survey results at the April staff meeting (as well as two other memos concerning academic journals) and none of the staff had "protested or questioned her" and seemed to be happy about the survey. She felt she was being "courageous" in presenting the results to the staff and wanted to indicate that she had "nothing to hide from them".

On June 14, 2000 (just prior to the end of the term) she met with Mr. Fransen. She had arranged the meeting as she wanted to know what she needed to continue to do over the summer and wished for "reflective dialogue" as that was part of what she had been taught as "best practice" (which she had been taught in her Principals' course) and which was a method of achieving obtainable goals and a clear vision of what was needed as an administrator. It required a large amount of collaboration, team work and reflection. Basically, the philosophy behind it was that "students come first".

She had taken notes (Ex. 12) of the meeting but suffice it to say that the meeting was basically positive and the feedback was good. There was agreement that she would continue to do the parent surveys each year and had planned to set up a Kindergarten registration meeting which had not been done previously. However, there were some staff that were unhappy including one who was attempting to intrude into her personal life and there was some gossip about her private life which she found offensive. We do not think it is necessary to go into those details but Ms. Payne had called an "emergency" staff meeting held behind closed doors in the library and indicated to the staff that if they

required any information about herself, they should approach her directly. Mr. Fransen had not gone to the meeting but had felt that she could handle the issue herself. She had told him what she had done.

At the June meeting he had indicated that the position of Principal was not always a popular one amongst the staff. However, he had stressed the need to move to, and live in, Morden and to become involved in the community but, as indicated earlier, she did not agree with that. He had told her that there was some impression among the staff that there was a benefit for her to live in Winnipeg while being a Principal in Morden as, occasionally, there would be workshops or seminars elsewhere and she would not return to the school whereas the other staff had to. The grievor had asked the other Principals what their practice was and had been told that they did not return to their own Schools either. Accordingly, she found Mr. Fransen's advice "confusing".

There was also some discussion about the "parking loop" and Mr. Fransen had said that they would consult the Operations person in the fall to see what could be done. He also told her to continue to do what she was doing on a day to day basis.

Ms. Payne was also involved in a "Restitution Plan" for the Division (which dealt with students who had gone through certain difficulties) and Mr. Fransen had approved of that. She also wished for more mentoring with other Principals and visitations to other "early year" schools, both of which Mr. Fransen thought were good ideas. Ultimately, it was her impression that the Superintendent thought that she had completed some goals, had some areas upon which to improve, but also had plans for the following year. She felt that she had successfully completed her formative evaluation.

Ms. Payne was reappointed as Principal for the following year although she remained unaware that such appointments were on an annual basis. The first indication she had of that process was when she saw the Board of Trustee minutes of May which indicated her reappointment but she had never received any type of correspondence or other direct communication concerning it.

Again, to make a long story short, she had put considerable efforts toward working on a new "School Plan" (Ex. 13) which is an important document and required to be sent to the Superintendent and ultimately to the Minister of Education for funding purposes. There had been no significant criticism as to that for either the years 1999/2000 or 2000/2001. The second Plan was very different in format and was an attempt upon her part to modernize the form and make it more similar to those used within other school divisions in Winnipeg. Although Mr. Fransen had questioned certain parts or formats of the Plan, again there was no significant criticism.

Despite some inconsequential e-mails (Ex. 16), Ms. Payne testified that she received no further informal feedback or criticism from Mr. Fransen until the third week in October, 2000, although she did contact him by telephone from time to time. One issue that did arise to some extent was the Play Structure as the PAC had gone to the Board for funding and he was critical of her involvement in that issue as he felt that the

PAC had asked for more funding than was necessary and that she had not advised the Trustees as to that although she had been at the original meeting of PAC when the motion was passed. In any event, more will be heard about that issue later.

Also in October, she had conducted the annual meetings with the teachers (and Mr. Fransen) albeit a different form (Ex. 16) was used. However, in her view, the responses were generally positive and a number of examples were discussed throughout her testimony. She had discussed that with Mr. Fransen and was proud of the fact that she was meeting all of her goals and felt that she had received a "wonderful assessment" by the teachers and that there was no negative feedback from Mr. Fransen.

She also attended the Principal Conference with him and he had seemed very pleased with her performance and did not challenge her "responses, visions or goals". There was nothing negative mentioned in that meeting at all.

In terms of her summative evaluation (as referred to in Ex. 7) while it was to include discussions with the Superintendent and formal visitations, they had not taken place. However, Mr. Fransen had indicated to her that the survey would be conducted by anonymous surveys of all of the staff in this School and that, if she wished, parents would be included in the survey. There was no "shadowing" at staff meetings and no meetings were held to discuss or go through samples of her work or records. She had sent him the minutes of each of the staff meetings held monthly although he never attended any, nor had he questioned any of the minutes.

After her Principal meeting with Mr. Fransen in October, she thought that the data would be collected and that Mr. Fransen would then sit down with her to go through her strengths and areas for improvement and they would together draw up a "strategic plan" which would involve monitoring and deadlines for her to meet.

There was also some discussion about who would be on the Staff Committee. She had been originally told that, as Principal, she was required to pick three of the staff members herself and was then later advised that, after Mr. Fransen had reviewed the Policy, it was clear that the staff had to choose those members themselves. She had advised the staff of that and they choose the three same teachers that she had already chosen. The staff members then conducted the survey in early January (both from the teachers and the teaching assistants), the information was returned to the Committee to collate and to meet with Mr. Fransen. She received a copy of the information furnished to him. At her request (Ex. 21 – an e-mail of February 16, 2001), they met on February 19, 2001. Mr. Fransen had prepared a written evaluation prior to the meeting (Ex. 22). Although lengthy, it is necessary to reproduce this evaluation as it forms a very material part of the events that then occurred including the decision that she not be reappointed:

> "This report is based on my observations of Ms. Bela Payne since I assumed my position of Superintendent of Schools in January, 2000 as well as the comprehensive reports filed by the teaching and support staff at Maple Leaf School in January, 2001 as part of our school division principal evaluation procedure. The Canadian School Leadership Profile (as adapted by Western

School Division) was the instrument that was used. Students Services personnel, including clinicians, were also given a voice in this process.

Ms. Payne came to Western School Division as a first-time principal in September, 1999. She had been an itinerant resource teacher in the Fort Garry School Division (Winnipeg) prior to that. Maple Leaf School is an Early Years school (K-4) of approximately 300 students.

Ms. Payne very quickly established herself as a friendly and welcoming principal. When I visited the school it was evident that she took pride in the school, and that she considered it important to know every student. She made a point of greeting students by name.

Ms. Payne takes pride in her school. She reinforces its positive public image by promoting the students and programs. At public concerts she makes a point of affirming the students for their hard work and commitment. Parents are also affirmed for their involvement. Ms. Payne's pride in Maple Leaf can also be seen in the new landscaping at the front entrance and the appearance of school halls and bulletin boards.

Student safety and well-being are important to Ms. Payne. Whether it is advocating for improvements to playground structures or for more accessible doorways for handicapped students, Ms. Payne champions the cause of her students. She clearly has compassion for her students.

Ms. Payne has sought ways to assist in school and divisional initiatives. She was instrumental in re-introducing a Kindergarten Open House for prospective parents. She offered to chair a sub-committee of the P.D. committee to plan a division-wide *Restitution* workshop. I affirm Ms. Payne in making these contributions in Western School Division.

Ms. Payne's colleagues completed the Canadian School Leadership Profile on her performance as principal. The major categories in this profile include principal as manager, instructional leader, school-community facilitator, visionary, and problem-solver. Most of Ms. Payne's colleagues reported that they considered her to be at the minimum standard level of administration. In our follow-up conversations we reviewed the premise that as a second-year school principal this should not have surprised her.

The staff's evaluation included a large number of anecdotal comments. They reflected a profound and growing concern at the school about Ms. Payne's leadership. While the concerns were significant and diverse I have summarized them into the following major categories:

- Leadership/Vision – Ms. Payne needs to play a more significant role in encouraging teachers to take education seriously as a profession. That is, teachers asked to be stretched and challenged in areas of educational research, instructional practice, and intervention strategies. Earlier in the school year the school division purchased a costly video and book series (*The First Days of School*) by the renowned Harry Wong. The Maple Leaf School staff has yet to see these videos. Staff meetings essentially deal primarily with administrivia. Little time is devoted to engaging in philosophical discussion. The Wong videos would be an excellent opportunity to do this. I encourage Ms. Payne

to pursue such opportunities for educational leadership.

Some teachers reported that it was their sense that the reason staff meetings were void of such things was that Ms. Payne was anxious to get on the road. (Parents have reported to me that they too felt rushed at Advisory Council meetings because Ms. Payne wanted to get on the road.)

Some teachers commented that they felt that the 'hold' button was on at Maple Leaf. They encourage Ms. Payne to move them forward.

Ms. Payne needs to find ways to demonstrate to her staff that she is in fact knowledgeable in areas of Building Bridges, Early Years Literacy Project, Restitution, Differentiated Instruction, and Cognitive Coaching. I know from my own conversations with Ms. Payne that she has some experience in these areas. Her staff is waiting to see evidence and to be challenged to grow professionally.

- Trust and respect – Ms. Payne arrives late to school from time to time and occasiona lly leaves early. Staff are wondering where she is. Teachers commented that Ms. Payne's reports to the board and in the newsletter give the impression that she has visited every class, yet one teacher indicated that Ms. Payne had not once been in her class to observe what was happening in the class. Some staff reported that Ms. Payne had misrepresented what her previous job had been, leading some to believe that she had been the Coordinator of Student Services in her previous division.

  There were several incidents in my own dealings with Ms. Payne where I came to question her integrity. Last winter she had applied for a particular one-day medical leave. I discovered on the day of her absence that she was in fact in court that afternoon. During this episode I discovered that Ms. Payne had not been submitting the record of her absences to the division office as required. It was necessary for me to instruct her secretary to gather that data and forward it to the payroll clerk. Misleading the division office regarding sick days is unprofessional and does little to promote a sense of trust between colleagues.

  The second incident involved the Maple Leaf School Parent Advisory Council presentation to the Western School Division Board of Trustees. In their report they used inaccurate information in a request for special funding for a playground structure. Ms. Payne remained quiet and did not inform me of the misinformation. She was the only person in the room who knew that the representative of the school's PAC (who had missed the PAC meeting where this decision was made) was using inaccurate information. The board went ahead and made a decision based on erroneous information. I approached Ms. Payne on this matter afterwards. I informed her that my expectation of her was that was that she keep me informed of significant information when it comes to board decision. I later learned from the PAC that she had blamed them for the misunderstanding, not accepting her responsibility.

A third situation was the composition of the Maple Leaf principal evaluation committee. I reminded Ms. Payne that the policy stated that the committee should be selected by the staff and that the policy had a provision for the principal to voice a concern about the committee composition to the Supt. Ms. Payne informed me that she would bring this matter to the staff. I discovered near the end of the process that she had not given the staff any say as to who would be on the committee, rather selecting the three teachers herself.

A fourth incident occurred last year when Ms. Payne informed me that she had been invited to apply for a principalship in another school division. She told me that one of the senior administrators in that division had contacted her and asked her to apply. I subsequently discovered this was not true. I realized that she was under a great deal of strain with the long daily commute as well as some personal situations. I understood that working closer to Winnipeg would have helped her with those situations. She did not need to justify her motives by falsely implicating others.

Ms. Payne has asked staff to keep the light in her office on so that it appears as if she is there on days that she arrives late or leaves early. This does little to build trust within her staff.

Maple Leaf parents have told me that they have trouble trusting her. She seems more interested in appearances than substance to them.

- Management – This is a concern with respect to time, technology, initiatives, and planning. Colleagues reported that Ms. Payne was unable to look after the day to day aspects of running a school. The staff had come to rely on other staff to get those kinds of things done.

  One specific point in this area was that staff needs to remind Ms. Payne frequently to get their own evaluation reports completed.

  Sensing myself that Ms. Payne needed to develop in this area I encouraged her to register in a six-day Leadership Workshop offered by the Town of Morden in Fall, 2000. I was pleased that she agreed to do this. Unfortunately she was only able to participate in approximately half of the sessions.

  Education is in the whirlwind of being changed by technology. As a school principal Ms. Payne cannot excuse herself from playing a leading role in this change. To do this effectively she needs to become better acquainted with the technological implications with curriculum as well as the technology that the division uses as a method of daily communication.

  Recently when Ms. Payne was ill she informed me that she would be off for the balance of the week. When we spoke on the phone on Wednesday of that week she told me that she would be in for a half-day on Thursday and all day on Friday. She did not show up for work on Thursday and gave no notice to the school or the division office. I grew concerned and called her home number. When I was unable to reach her at the home number that she gave the division office I managed to reach her on her cell phone. She told me that she simply

> did not feel up to coming in that day. Good management would have included calling either the school or the division office to inform us of this decision.
>
> As per school division policy, Ms. Payne conducted a formative evaluation of her performance last year. Its purpose was to provide early feedback from staff on how Ms. Payne was doing in her new role. Ms. Payne shared with me that teachers did express some concerns about the way things were going, but that she would address them. Clearly, the summative evaluation conducted this year indicates that in the opinion of many of the Maple Leaf teachers Ms. Payne did not take those concerns seriously.
>
> The concerns raised above are serious and with significant implication for Ms. Payne's future in her position as principal. After reading the leadership profile and accompanying comments as well as my own observations I am forced to conclude that Ms. Payne's effectiveness as principal at Maple Leaf School is seriously compromised. I believe that she has lost the confidence of her colleagues. Furthermore I believe that the points raised above are strong indicators of a principal in trouble. Ms. Payne needs to put a plan in place that can help her regain a sense of optimism and efficacy. In order for Ms. Payne to embark on a plan where she can address the points raised in her evaluation she needs a new work setting. I believe that she needs to step back for a time, perhaps in a classroom or resource setting, to address the concerns raised above. Some of the concerns are specific about school leadership. Others, such as the concern about integrity, apply to all teachers. It is my opinion that Ms. Payne is not in a position to continue as a principal in this school division.
>
> At this point it is my position that I will recommend to the school board that Ms. Payne be reassigned for the upcoming year (Fall, 2001) to a classroom teaching position."

Ms. Payne had met with the Staff Committee on February 1 and received the collated data. She testified that she was "extremely shocked" both at the number of type written pages and comments, and the additional information (beyond what had been originally asked) that was provided.

She was pleased with the positive comments but found certain of the comments to be contradictory. It had been her intention to prioritize the areas of improvement necessary and to set up a plan with Mr. Fransen towards that.

It might also be noted that the meeting with Mr. Fransen did not occur until February 19 because the grievor had been ill and absent from work for some nine days.

She was very surprised when, prior to any discussion, Mr. Fransen presented her with the completed written evaluation and asked her to read it. At some point during that process she became quite confused about certain of the comments and asked where they "came from" but received little response. She was also "absolutely shocked" at the final recommendation that she not be reappointed as Principal.

Initially she had refused to sign the form but Mr. Fransen pointed out to her that acknowledgement of receipt was deemed not to be acceptance of the contents.

She asked specifically about the difficulties indicated with the parents and who they were and why she was not informed of the concerns at the time. Mr. Fransen did not provide her with the names of the parents but told her that he had instructed them to speak to her directly and to bring forward the issues.

She also asked the same types of questions about the difficulties with the teachers but received no answer.

She then asked to see her personnel file as well as asking about other specific issues including the "Harry Wong" video but was provided with no answers. She felt that it was a "fait accompli" and there was no intention of meaningful dialogue.

She was very upset as she realized she was about to be demoted. There was no discussion or a proposed planning process. There was no opportunity for reflection, or details given of the incidents in question. Previously, she always believed that Mr. Fransen respected her as an individual and administrator and his approach came as "a shock" to her.

Ms. Payne wished to see her personnel file to determine whether it contained both good and bad documentation but Mr. Fransen advised her that the evaluation had nothing to do with her file. She vehemently disagreed with that as she felt her file should show all of the particulars of any meetings with parents or staff, the Superintendent's observations of her performance and, generally, anything of relevance. Mr. Fransen was still reluctant to provide her with her file but she felt that, as a member of the Association, she was entitled to see it.

She indicated to him that she would be contacting an MTS Representative and he appeared quite worried at her approach (her view was based upon her impressions at the time). They went upstairs to the Superintendent's office and pulled her file from the filing cabinet. The only thing that was contained in the file was an e-mail to her from Mr. Fransen regarding the Play Structure and PAC issue – there was nothing else.

Accordingly, Ms. Payne contacted Ms. C. Basarab, a Staff Officer with MTS who wrote to Mr. Fransen on February 20, 2001 (Ex. 23) requesting an opportunity for herself and Ms. Payne to met with him to discuss the process and content of her evaluation prior to any recommendation being made to the Board of Trustees, the opportunity to address the Board of Trustees before any decision was made, a delay of the meeting in order for that to happen, and copies of the "primary source documents" upon which the collated staff response was based. Mr. Fransen responded by e-mail the following day (Ex. 24) and indicated his willingness to meet with them prior to the Board of Trustees meeting. He also pointed out the appeal procedure that was available to her but also noted that his recommendation as to reappointment was not to be considered as a disciplinary action since it was a reassignment of duties based upon a performance evaluation. The Division

was also prepared to honor its contract with the grievor in terms of maintaining her employment as a teacher.

Mr. Fransen also indicated that he did not have copies of the primary source documents but that Ms. Payne did have the transcribed version. Ex. 24 also contains the following comment:

> "As to the recommendation that I intend to make to the trustees on Monday, Feb. 26th it is not a discipline action, rather it is a reassignment of duties based on a performance evaluation. Western will of course honor its contract with Bela. This reassignment is consistent with the outcome of the evaluation process as well as Bela's wishes as stated to me in a telephone conversation on Monday, February 12th.
>
> Bela told me during that telephone conversation, which she initiated, that she thought it would be best if she stepped aside to give the board a chance to appoint a new principal at Maple Leaf School. She even provided me with a short list of candidates. It was evident to me during that conversation that she and I were coming to the same conclusion after reading the feedback from her colleagues.
>
> I realize that this reassignment of teaching duties within Western School Division will initially be difficult for Bela. If there is anything that we can do to assist her we will endeavor to do so."

In late June, the grievor and Ms. Basarab attended at the Division office to get a full copy of the file which included a number of other documents. The only document that had previously been presented was the e-mail of October 16, 2000.

We might note that the reference to an appeal of the evaluation is referenced in Ex. 7 and has already been reproduced. Ms. Payne indicated that the possibility of probation was never discussed with her.

Ms. Payne went through Ex. 22 in terms of the points she disagreed with in great detail – we do not find it necessary to canvas all of that at this time and will only comment further as necessary. It was clear that she disputed basically all of the critical comments as not being based upon fact and concerns not having been raised with her in any timely manner. While she felt herself open to suggestions for improvement, she did not feel that the seriousness of the concerns raised were warranted. Neither had any particular or special assistance been offered to her.

During direct examination, she provided examples of specific teacher request forms with respect to attendance at external meetings or learning opportunities (Ex. 29) and it was her view that her teachers had been granted a "great amount" of professional development time.

With respect to the "Harry Wong video" issue, Ms. Payne felt that it was not a valid criticism. The video (and accompanying book) had been purchased for the entire Division. There had not been any mandatory time limit as to when individuals were to watch it. She had offered to make copies of the videotape for security purposes. It was only to be used for resource purposes and any concerns had never been discussed with her.

The reference to "administrivia" was also considered unfair by the grievor. Mr. Fransen had not attended any of the meetings although he did receive the minutes on a monthly basis. As Ms. Payne had expected him to read them and felt that, if there was a concern, he should have raised it with her prior to the evaluation. Neither did she feel that the matters discussed at the staff meetings were of "no importance".

She also felt that the criticism that she was anxious to leave meetings early in order to return to Winnipeg was unfair. She had no prior feedback from the staff, Mr. Fransen, or the parents concerning that. The meetings were always scheduled to start at approximately 6 p.m. When the weather was particularly bad, she occasionally received comments from parents that she should leave because the driving would be difficult.

She also felt that, given her involvement in various programs within the Division (including bringing a new co-writer computer program to the School), the criticisms concerning her knowledge were not valid and, again, Mr. Fransen had never spoken to her about any such concerns. He was also aware of the professional development forms that the staff would put in and which she would approve or deny depending upon the relevance and the budget.

Ms. Payne took particular exception to comments concerning her "arriving late or leaving early" or that she was difficult to find during the day. We received copies of the "Morning Express" sheets (Ex. 29) which would list her activities for the day and which would be delivered to each classroom. If she was coming in late, she would advise her secretary of that but she usually arrived between 8-8:15 a.m. and the students started at 8:55 a.m.

If she was delayed by road conditions, she would call either her secretary or another individual at the Division office.

The time of her leaving varied but was generally sometime between 4:30 to 5:00 p.m. but she would stay to attend meetings if necessary. When she was required to attend meetings out of the School, her whereabouts would be known.

Besides the activities listed on the "Morning Express" there were a number of informal meetings with staff during the school day. She maintained an "open door" policy.

The grievor also testified that she did attend all classrooms on a regular basis and could not respond to an individual criticism concerning that without knowing the name of the teacher. As with the other issues, nobody had ever discussed any concerns with her prior to the evaluation.

The Principals went to the Board of Trustees monthly meetings and were part of the discussions if asked. It was always her view that she wanted the Trustees to know what was going on at her school and she attempted to share as much information with them as possible.

She had never misrepresented her previous experience or positions and we were provided with Ex.32, a letter sent to the parents on June 25, 1999 which indicates:

> "I come to the position with a varied range of teaching positions and leadership in the Early Years. This has included the positions of classroom teacher of grades 2, 3, and 4 students, Resource, Special Education Consultant and Head Teacher. This experience has afforded me an extensive repertoire of opportunities to establish the links between the curriculum, instruction and assessment procedures and practices that are essential in supporting the diverse learning outcomes of students in the early years. I believe that effective schools provide students with the knowledge, skill, desire and opportunities to achieve personal excellence. Learning is an authentic partnership between the school and home characterized by mutual trust and shared decision making."

She also felt that the School Psychologist's comments (referred to in the evaluation and apparently relied upon by the Board) were misleading. She never had the conversation alleged with Ms. Doerkson but, if there was a problem, she should have been directly approached about any concern. She never had any intention to mislead anybody.

Neither did she mislead the Division about the use of medical leave because of going to Court as referred to in Ex. 22. She had requested medical leave from the Superintendent (Ex. 33) and had, in fact, gone to see a specialist that day in Winnipeg at approximately 11 a.m. She did not go to Court that day but did meet with her lawyer later although she had been given authorization to miss the entire day. Again, nothing about this had been discussed with her.

She also discussed the issue concerning the "Play Ground Structure". There had been a meeting with PAC in terms of raising money but there was some shortfall. The parents had indicated that they wished to proceed to the Trustees for the shortfall. The then President had gone to the meeting of the Trustees and requested the monies and did ask for $3,000.00, rather than $2,000.00 as the original Motion proposed. However, the request was only allowed to the extent of $2,000.00 and the rest was left to private fundraising.

She had discussed that issue with Mr. Fransen as he had sent a memo to her and they also had telephone conversations concerning same. He had only asked why $3,000.00 was requested instead of $2,000.00 but Ms. Payne indicated that the amount was somewhat non-specific as it was an approximation. He had also asked her why she had not stood up at the Trustees' meeting indicating that the request should only be $2,000.00 and she had responded that she was hopeful that it could be done within that amount. The issue was also not raised at her administrator's conference or prior to the evaluation.

Neither had she taken initiative in terms of applying for another position in another Division. She had seen an advertisement in the Free Press for a Principal's position at St. Boniface School Division and had called the Superintendent's office there and forwarded an application. However, she had also told Mr. Fransen that she had wanted to apply and asked if he would be a reference which he was prepared to do. She was interviewed for the position (she did not receive it) but that issue was never raised with her prior to the evaluation.

She also indicated that she was not in the practice of leaving her lights on in her office to make people think she was there when she was not. Her office is used by other staff members and, in particular, for use of her own computer. She had never instructed her secretary whether or not to keep the lights on when she was not there.

With respect to the meeting Mr. Fransen had with the members of PAC on February 1, 2001, again no concern had been raised with her except for a concern about her reading the Bible to the students without her eyes being shut. The teachers did not wish to do that because it was not part of their contractual duties although she, herself, thought it was appropriate and did hold such meetings with the students. If a student was unruly repeatedly, they would be excluded from that process. She had also asked for parents to volunteer to supervise during those morning meetings because she felt that she needed the support as it was difficult to supervise by herself. It was also impossible to supervise with her "eyes shut". One of the members of the PAC Executive had taken her son out of the bible readings but had later raised the issue and talked to Ms. Payne and the matter was resolved between them. She had never known Mr. Fransen was involved in that issue at all other than a casual question that was asked. She had responded to his question but that was the end of the matter.

There had been no concerns about her "management style" in terms of her day to day running of the School. Her style of leadership was different than the previous Principal in that she was more collaborative in her approach and believed in "shared responsibility".

A number of memos she had sent out with respect to day to day operations of the classrooms were provided to us but we need not deal with those in detail.

Ms. Payne also felt that she had brought a number of new ideas or initiatives to the School including use of student's art work in the School and the Board office, as well as addressing the necessary staff evaluations. She had done eight staff evaluations in her first year and seven in her second. After the first year, Mr. Fransen had expressed his pleasure at her work, signed all of the evaluations, and had indicated to her that she had done a good job. She also received positive feedback from the teachers involved. As with the other issues, that had not been raised with her previous to the evaluation.

With respect to her attendance at the six day Leadership Workshop, she agreed that she had only attended half of those days. Mr. Fransen had called her in August asking her (as a volunteer) to attend on behalf of the Division. She had told him that she had some other commitments and had advised him of the dates that she could not attend (approximately half) and he did not object. She had also reported as to her attendance (Ex. 36) and no problem was raised with her prior to the evaluation.

On the fifth day of the hearings Ms. Payne finished her direct examination and cross-examination. Exhibit 22 was further canvassed with her as to the specific concerns indicated therein and further documentary exhibits were filed.

More specifically, there was further discussion of any concerns about her involvement or her knowledge in technology and, perhaps more importantly, there was some considerable time spent addressing the issues of illness and proper notification to the Division.

She noted that everyone at the School and the Division had her cellular telephone number. At her home, her only installed telephone was in the living room and, if she was sleeping or in her bedroom, would not hear it ring which was the reason for using the "cell phone" in her bedroom as it was the moveable telephone in her apartment.

The employee file which she and Ms. Basarab found in attending at the School in June of 2001, was marked as Ex. 42 (previously, it had been marked for identification). She also went through all of the documents in that file in some detail.

The essence of her evidence was that she never suggested that she resign although she certainly was upset about the substance of her evaluation and the process which lead to it. Basically, she maintained her position that what criticisms that appeared were unfair but, perhaps equally important, had not been addressed with her individually and specifically.

Again, and particularly for the purpose of brevity, we do not intend to canvass each and every item that was referenced as we do intend to discuss matters in a broader sense later in this Award.

Simply put, she had advised the teacher who was replacing her (Ms. Lowen) while she was gone in February that she would attempt to be back but, if she was not, to carry on with her duties in her absence. She had made efforts to telephone the School

when it became clear that her absence would be longer but was not able to contact anyone until she finally reached Ms. Lowen at approximately noon. She had spoken to Mr. Fransen when he had called her at home about the incident and he had questioned why she had not called him directly. However, she felt that she had tried to reach him and that calling Ms. Lowen was sufficient. Previously, she had told him that she would attempt to return to work the following day (Friday) and had provided him with her doctor's note at the earliest possible opportunity.

The grievor stressed her concern that there had been no formal follow-up after her first year formative evaluation. She had felt that she had provided all and any information that was requested and had never been provided with any specifics of Mr. Fransen's discontent at any of her responses.

As indicated previously, she continued to take strong exception to any allegations concerning her personal integrity.

In terms of her proposed movement from Principal to Teacher, Ms. Payne testified that she had never seen such a thing done in all of her years as a teacher, nor had it ever been indicated as a possibility in her training. To return to teaching (after being hired as a Principal and a leader) was both not what she originally agreed to and would also negatively impact her future career.

In direct examination, she then turned to the topic of her Appeal of Mr. Fransen's recommendation to the Trustees. That Appeal was heard on March 5, 2001 and she was attended by Mr. Smorang and Ms. Basarab. On March 6, 2001, she received Ex. 38, basically a letter indicating that her Appeal had been denied and directing Mr. Fransen to consult with her regarding other possible assignments within the Division. As indicated previously, she had not actually seen her entire personnel file until the end of June, 2001, when she attended with Ms. Basarab – all she had seen was the one document referred to previously. The other documentation (and, in our respectful view, some of which may have been material to the decision of the Trustees) had not been made available to her prior to that time. We will discuss the implications of that (if any) later in this Award.

She further stressed that she had never been approached by either Mr. Fransen or the other members of the School staff about creating any "false impression", nor about the other serious concerns that are recorded in the file (which documents she agreed would create a very negative and significant impact upon her continuation in her position).

Ms. Payne also commented at some length upon the deficiencies she saw in terms of following the process set out in Ex. 7. In essence, she felt that it had not been followed in many significant and material ways which were of great concern to her. Again, we will have further comments concerning that later in this Award.

With respect to her grievance (Ex. 2(b)), she did feel that certain of the comments in the evaluation and recommendation were defamatory and she went through all of the

particulars quoted previously in detail. Basically, she was definitely of the view that many of the comments in her evaluation were either dishonest or inaccurate and were injurious both to the retention of her position and to her reputation generally within the community and, for her future career purposes. This is also an area about which we will comment further.

The last day she had been paid for by the Division was March 8, 2001 (although she later acknowledged that she had received the summer portion of her previous earnings later). She had applied for Employment Insurance benefits and had received them for some twelve weeks. She had also been eligible for Long Term Disability benefits through the Plan administered by the Manitoba Teachers' Society (it was her testimony that the Division did not pay any of those premiums) and she was still receiving benefits from that Plan as at the time of the hearing.

She also testified to the physical and mental effects upon her from the decision of the Division. In that respect, we received a number of medical reports (Exs. 43 through 46) including one from Dr. D. J. Globerman dated April 17, 2001 (Ex. 34 - which apparently was sufficient for the grievor to obtain LTD benefits) and the others (Exs. 44, 45, and 46) from Dr. D. Rosin (a Clinical Psychologist) respectively dated April 20, 2001, September 22, 2001 and a further undated report apparently received on January 24, 2002.

Dr. Globerman had only seen the grievor on one occasion (April 3, 2001, for ½ hour for the purpose of preparing a clinical assessment at the request of Ms. Basarab) but Dr. Rosin had treated her at various times. For the sake of brevity, we do not intend to reproduce all of the contents of those reports but will refer to certain portions of same which we do believe are necessary.

From Ex. 43 (Dr. Globerman) we note the following comments:

> "…Ms. Payne indicated that she became depressed after having received an evaluation report from her superintendent on February 19, 2001. Ms. Payne described that this report was "extremely negative;" the report indicated that she would be demoted to a teacher effective September, 2001. Ms. Payne stated when she initially read the report she was "shocked, angry, confused' as she had previously not received any negative feedback from the superintendent or School Board. Ms. Payne did recall that she had been "reprimanded" on one occasion when she was informed that it had been noted that she did not have her eyes closed during daily school prayer. Ms. Payne informed me that she told the superintendent when this issue was brought to her attention that she kept her eyes open as she was the only adult present during prayer, and that it was necessary for her to keep her eyes open in order to adequately supervise the children.
>
> …Ms. Payne expressed concern that a proper evaluation process was not followed, in that it was her perception that she was supposed to "sit down with my superintendent and review my evaluation" so that any concerns could be corrected. Mr. Payne also voiced concern that the evaluation tool utilized by

her superintendent was apparently an "anonymous one" in which individuals who had concerns about her performance would not be identified making it difficult for Ms. Payne to address their particular issues. Ms. Payne indicated that the most difficult and painful part of the evaluation was that it apparently questioned her integrity. Ms. Payne tearfully recounted that comments were made (in the report) that the "children of Morden were more deserving to have someone living in their community and attending church and community affairs" and that it was "wrong" for a mother of 2 to be spending 3 hours per day commuting. Ms. Payne was also apparently informed by the superintendent that a number of parents didn't "trust" her although apparently no specifics were provided.

…A review of Ms. Payne's past psychiatric history revealed a previous depressive episode in 1999 that appears to have been precipitated by the unexpected death of her brother and her marital separation. Ms. Payne was hospitalized briefly at the PsycHealth Centre, treated with antidepressants, indicating that she made a full recovery…

…Clinically Ms. Payne appears to have initially developed symptoms consistent with a diagnosis of an adjustment disorder with depressed mood, with the precipitant to this constellation of depressive symptomatology being the negative evaluation, and evaluation process she recently underwent. Ms. Payne's depressed mood, anhedonia, and prominent neurovegetative symptomatology are currently consistent with a major depressive episode that warrants aggressive treatment with a combined psychotherapeutic and pharmacological approach.

Treatment recommendations would include increasing the current dose of Zoloft, i.e., 150 mg. to 200mg. daily. Ongoing supportive therapy from Mr. Rosin should also be maintained to assist Ms. Payne in working though the issues of low self confidence and self esteem that have recently arisen.

Ms. Payne is not currently capable of working, although it is hoped that with the above mentioned treatment recommendations Ms. Payne will improve over the next 2 to 3 months and be in a position to return to work as a school administrator. This will, however, be largely dependent upon the status of Ms. Payne's self confidence and self esteem as she is currently vulnerable and fragile with prominent concerns about her ability to trust her employers in the future. Rapid resolution of the grievance/arbitration process would also be beneficial for Ms. Payne as closure of this issue would help facilitate her clinical improvement."

In Ex. 44 Dr. Rosin indicated:

"Psychiatric assessment has been done by Dr. D. Globerman.

When I first saw Bela Payne she was extremely distraught and psychologically fragile. She felt extremely victimized by a "bully of a superintendent" who was supported by the Board and a few of the teachers in her school. The reason for her being dismissed as principal of the school did not match her understanding of the job that she was actually doing. She was very hurt,

frustrated and angry. Her staff officer is Carole Basarab and The Manitoba Teachers' Society is grieving this whole fiasco.

Bela has a few sick days left and has to live on UI. She was very scared about her financial and occupational future. She was very afraid and embarrassed to tell her kids about the dismissal, but has done that successfully. She talked about why she thought this had happened and we focused on her accomplishments while a principal.

Treatment Plan: To move this traumatic event from a life and death issue (in her eyes) to a difficult situation that can be resolved and will allow her to move on in her life. We decided that this certainly was not a pleasant time in her life, but she will not die and she does not see harming herself as an option. I have encouraged her to write a therapeutic letter looking at what was good, what was bad, and what could have been in that situation in Morden.

As we moved into other sessions, Bela began to move away from her obsession in finding out why this happened to her and needing to convince herself that she has done nothing wrong. She has moved from that to being angry at being treated so poorly and I find that very healthy, and I support her anger. She has moved from being totally devastated to checking the career section of the newspaper.

Her feelings of optimism are not permanent. She needs a lot of support and some resolve in terms of the grievance."

The most material portions of Ex. 45 (September 22, 2001) are as follows:

"Ongoing treatment: continued support until the Grievance issue is settled. Ms. Payne is getting stronger but she still has some extremely low days. I will continue to work with her anger, the self-esteem issues, and support her through the days prior to and following the Grievance meeting dates. We will shortly begin to work on a progressive back-to-work plan, beginning with volunteering outside the school workplace and eventually back into school.

Ms. Payne is still not emotionally stable enough to return to work. She is angry one minute and teary the next. She needs to be heard on the issue of her superintendent's lack of process and insensitive treatment of her. She has "another side" to the story and needs to tell it, to bring closure to this incident in her life. The Grievance process will do much to assist her to be able to move on."

The final report (Ex. 46) reiterates the history but also notes:

"The final months of 2001 (Sept. –Dec.) saw Ms. Payne getting stronger. However, please don't confuse "getting stronger" with "being stronger" and not needing a great deal of support. During these months we discussed many of her concerns including the possibility of a second Grievance. Despite many high and low periods, she grew in strength and spirit throughout the fall. I saw

her begin to "unthaw" from only feelings of anger and hurt to again feeling deeply about poetry, books, and music. She went through a nostalgic-renaissance period going back to her old favorites, which helped her to feel more secure, comfortable and something to care about besides the court case. At times she came into our sessions quite animated and excited. Sometimes talking about life after the Arbitration – I saw this as progress.

A concern I had during the fall period was that her new found strength and bravado were tied directly to being successful in court and that she would be devastated if things did not go well. I wasn't convinced she was as strong as she portrayed. There were many bouts of uncontrolled tears and references to good and bad days. The medication Zoloft that had been prescribed triggered a negative reaction causing numbness and tingling in extremities, she could hardly walk. Her doctor changed medications.

…Since Christmas I have seen a difference in Ms. Payne. She is now initiating things in her life, doing more with friends and family, leaving the apt. during the day, being less afraid to be seen or talked to. In her words, "I (previously) felt knocked around, I became disabled but now I am finding the passion in life again. I am stronger and I feel that I am a valuable person again."

I see her as having made progress, she is taking better care of herself but I still feel that if things don't go well, she could become less well. I see her as "calm, cool and loosely holding together" She cries easily and often. She remains embarrassed and is fearful of what people will think when she goes looking for work. At times she feels confident and at other times she can't see herself dealing with all the issues of returning to life which includes work.

I see Ms. Payne weekly. Therapy continues to include (see Sept. 22 report) listening and support for her decisions to "Get A Life"; I challenge her to stretch her thoughts and behaviors and to think and visualize herself in various situations. There is more to life than just getting through the day (survival).

The next 6-7 months are crucial to Ms. Paynes recovery. If there are no more crises or significant letdowns I am sure she will begin making decisions concerning work. I believe that any "Return to Work Plan" to be successful with this person needs to have her input on design and pace. She has been through a devastating experience that has left her feeling quite powerless, if she is to get permanently well she will need to feel in control over her plan to return to work."

Dr. Rosin's testimony at the hearing will be discussed further as necessary.

Ms. Payne testified that she had been hospitalized in the spring of 1999 while working at Whyte Ridge School. She had no other previous experience with any mental health professionals. She had been directed to take a number of different medications for that condition (which is distinct from her asthma condition) and followed her treatment plan and is still on certain of those medications although there was no evidence indicating that such treatment would interfere with her capacity as a teacher or an administrator.

She first saw Dr. Rosin on February 26, 2001 and has seen him since that time on a periodic basis.

At the time of the Trustees' decision, she was in considerable mental distress and felt "confused" and "shocked", particularly she did not feel that she had done anything wrong. She had trouble performing her normal day-to-day routine and could not drive her car for some time.

She had difficulty "processing information" and had been frightened to go outside. She also had feelings of shame and embarrassment, particularly for her daughters as the situation was confusing to them, and found it difficult to see other people as well.

She described herself as feeling "completely dislocated as a member of society". She had worked from the time she was a young girl and always had a job. She had put herself through University. The stress of this situation (which involved a considerable reduction in her financial resources) was emotionally difficult (her income had decreased by several thousand dollars a month).

She testified that she still saw Dr. Rosin for an hour each week (there had been some lapse due to Christmas and these hearings themselves). She also sees Dr. Kroft (a Psychiatrist) for the purpose of adjusting her medication.

In terms of her more present emotional state, she felt that she was now ready to "return back to the world" and her involvement in it. Her self esteem had been restored and she saw herself as a "good person" although she did intend to continue to see Dr. Rosin and Dr. Kroft.

She had also seen a Vocational Rehabilitative Specialist suggested by the LTD Plan whose role was to help her re-enter the world of her work as an administrator. They were in the process of building a plan for that purpose.

In terms of her feelings about returning to work in the Division, she testified that it would be difficult to do so if her integrity was questioned and, if she was to return, she had to come back as a "leader and a visionary".

The cross-examination of the grievor also extended over several days.

Her credentials as set forth in Ex. 3 were examined with great scrutiny. Again, we do not intend to comment on all of that evidence but we do note that in 1998 (when she described herself as the Head Teacher at Whyte Ridge) she was still a Resource Teacher there and there was a Principal and Vice-Principal within the School. She only took over their responsibilities if both were absent. She received a small additional stipend ($20-25.00 per incident) for that but it was not an allowance covered by the Collective Agreement.

She also agreed with Mr. Simpson that she had not previously held an equivalent position to that preformed by Mr. Krouch, who was responsible for curriculum and support services and basically operated at the same level of position as Assistant Superintendents in larger Divisions. Mr. Krouch was also responsible for special needs students.

Western School Division also did have a Psychologist, Ms. C. Doerkson on staff. The grievor could not recall any "one-on-one" meetings with her but did recall group meetings with herself and others. There were also resource teachers available within the Division.

She specifically did not recall asking Ms. Doerkson about "problem students" or requesting specific psychological tests (although it was possible) and could not recall her indicating to Ms. Doerkson that she had asked parents and students about that. Neither did she recall telling Ms. Doerkson that she was like Mr. Krouch in terms of her other previous positions.

Her level one of the Principal Certificate was not a mandatory criteria but it was her view that most other Schools and other Divisions did use it as a basic qualification. She had applied for other administrative positions at St. Boniface, Morris-MacDonald, and Fort Garry School Divisions but was unsuccessful.

In Winnipeg it would be common to apply for a Vice-Principal position prior to applying for Principal but that was not what she had done at Western Division. She also required a full-time Principal position although her original application (Ex. 47) had been drafted in terms of both positions. The resume she had actually sent at the time did have certain differences from Ex. 3 (it showed the "Head Teacher" position as starting in 1997 rather than 1998 as in Ex. 3). Both Ex. 3 and Ex. 47 had been prepared in 1999 or later although Ex. 3 did postdate Ex. 47. There were certain other differences identified as well.

There was another issue raised about one of her references and her having a personal relationship with that individual. However, we do not need to delve into that further for the purposes of this Award other than to notice that it did not enter her resume until Ex. 3. The topic of any such previous relationship had not been discussed when she assumed her position at the Division.

Her original interview at the Division had been on a Saturday. She disputed that the interviews had been set on that date to convenience her because of the unfortunate circumstances of her brother's death.

She also could not recall any discussion with the Board of Trustees (or any individual Trustee) about the possibility of her relocating to Morden. Neither did she recall any mention of the possibility of her husband (he is a high school teacher) possibly going to the Division as well. She did recall some discussion of a Gymnastics Program

for her daughter but only recalled mentioning that her daughter did gymnastics and it was mentioned that there was such a program. There had been no specific discussion of possible relocation at the interview. At the time of the interview, she and her husband had not made their final decision to separate.

She agreed that she had left a tenured position in Fort Garry Division due to her desire to become an Administrator.

She also agreed that, despite the additional money she received from the position, there was additional expense for commuting between Winnipeg and Morden.

She did not recall ever knowing that Mr. Jamieson would be leaving at the end of her first term until considerably after she had assumed the new position, and she did not have access to the minutes of the Trustees' meetings prior to arriving at the School. It was her recollection that he had not mentioned that to her and she had not been told that at the interview. Neither had she heard about that over the summer.

Ms. Payne had also made no inquires about how Principals were appointed at the Division (whether or not it was annual) and neither did she question it when she saw the minutes of the Trustees after her first year.

During her first year, there were three new Principals (including a Vice-Principal) appointed within the Division.

She also confirmed her original Form 2 contract with the Division (Ex. 48). That Exhibit indicates that the commencement of her employment was as at the August 30, 1999 with payment to begin on September 25, 1999 (any salary payable during the months of both July and August to be paid on the last pay period of June – which apparently was done).

Paragraph six of the Agreement (signed by the grievor) says that the Agreement shall be deemed to continue in force, and to be renewed from year to year (with appropriate variations as to salary etc.) unless and until terminated by either mutual consent, or by written notice prior to December 31 or June 30 of each year, or by one month's previous notice in case of emergency or subject to any other material change in the contract.

In paragraph two of Ex. 48, it also states that the contract shall continue "in each year during the continuance of this contract". It does not refer to Ms. Payne's holding a Principal's Certificate although her Teacher's Certificate number is listed and her employment is indicated as a "Teacher" and there is no other specific reference to her being a Principal.

Ms. Payne had received the appropriate orientation (along with the other new administrative staff) when she began in the Division. She also reconfirmed that the normal administrative meetings were held. However, with respect to the Trustees'

meetings, she did not recall that she had been allowed any special accommodation in terms of attending only the first meeting of each month rather than both twice monthly meetings. The other Principals had also attended on that basis and the decision as to that had nothing to do with her personal circumstances. She did have access to all of the Board minutes and had looked at each (at least those while she was employed at the Division – she did not have minutes prior to that time). If those minutes had been available at the School, she had not seen them but we were reminded that renovations were taking place at the School when she began.

She also discussed her participation in the various committees.

The topic of a different manner of evaluation of staff had been discussed and she had participated in those discussions. She was familiar with the procedures and was also familiar with the provisions of the various regulations or motions of the Board referred to in the Policy (those were provided as exhibits).

She also agreed that, in her second year, Mr. Fransen had attended the evaluation conferences between herself and the other teachers over the course of four days (which was noted in her diary). It also appeared that her diary revealed that there had been other occasions or meetings at which she and Mr. Fransen were both present which would have given some opportunities for observation but she did not feel that satisfied the requirements of the evaluation process.

At the recommencement of her cross-examination on February 8, the grievor was questioned at considerable length concerning the resume provided to the Division when she first applied and her credentials to date. While we have considered various discrepancies between the qualifications that Ms. Payne considers that she holds and what is on record at the Department of Education, we do not intend to canvass all of that information. In our respectful view, we believe that the substance of this case to be more an issue of performance, rather than misrepresentation and whether or not the discretion of the Board of Trustees was exercised properly in terms of not renewing her appointment as a Principal. We also remember that we have not yet dealt with the jurisdictional issue. Suffice it to say that certain discrepancies were established but we also accept that the actual experience of the grievor may have exceeded what is officially on record. Nonetheless, and when it becomes possible, undoubtedly completion of the formal requirements of certain of the credentials would be beneficial to Ms. Payne no matter what the outcome of this Award.

She also discussed in considerable detail the formative evaluation of her first year as Principal and the summative evaluation in her second.

With respect to the first evaluation, she agreed that it was "self-directed" and that she had chosen to use staff and parent surveys. The Superintendent had participated in that process and had made certain suggestions as to changes that might be useful. Mr. Fransen had also discussed the results with her at the end of the process and she was aware that a number of staff were unhappy (she felt that was somewhere between 4 – 6

teachers and there was also a teaching assistant who felt the same way). It was not her perception that a large percentage of her staff were dissatisfied with her performance.

However, the incident in April, 2000, had been of concern to her as she felt that staff were inappropriately gossiping about her (that had been reported to her by two of the staff members) and Mr. Fransen had contacted her at her request as she was quite upset about that. He had also come to see her at the School about it since the situation had caused some consternation for all concerned. There was some debate as to how many copies of the Manitoba Teachers Society Code of Ethics were to be posted throughout the School. Eventually, only a limited number were posted.

The possibility of her leaving the Division and applying for other jobs had not been discussed with Mr. Fransen except for the applications as to other positions. There was some debate during cross-examination as to the substance of that. Ms. Payne felt that Mr. Fransen had been supportive but did not agree that he did not go so far as to agree to be a reference (although she noted, that she would not have asked anybody to be a negative reference). She continued to deny that she had ever made any comments about "moving on" because of difficulties at Maple Leaf School with her staff. She had still felt that everything was going well but the applications to other Divisions (which were not successful) were simply as a result of the normal pattern of career movement and improvement.

It was her view throughout that there had never been any clear indication given to her that she was in difficulty – rather, she felt that what would ultimately take place was a meeting with Mr. Fransen and a "plan" to improve whatever was necessary (we appreciate we are condensing the evidence with respect to this). It had been her impression that Mr. Fransen would discuss the "raw data" with her prior to making a recommendation. However, she did acknowledge that some staff (not all) had indicated that they were not satisfied with her performance although she did not feel that criticism was fair.

Again she felt that Mr. Fransen had not assisted her in terms of maintaining "professionalism" pursuant to the MTS Code of Ethics in term of her perceptions of how her staff were reacting to her although she did acknowledge that Mr. Fransen was, when acting as a Superintendent, not a member of MTS but that he had suggested that she speak to the appropriate MTS Representative.

She confirmed that, in the fall of 2000, she had gone through the teacher evaluation process and that Mr. Fransen had participated with her throughout that. However, she was not prepared to agree that she had spent a considerable period of time with Mr. Fransen during that process although it does appear that a number of days were spent. However, she did acknowledge that there were a limited number of days in each School term, and that she had attended the evaluation meetings, Board meetings, and other committee meetings with Mr. Fransen present.

She had also met with Mr. Fransen concerning her own Principal conference in October but did not feel that had taken a whole day. Basically, she felt that he should have been spending more time with her although she did acknowledge that he had the opportunity to observe her during the course of various committee or Board meetings or otherwise.

She also agreed that the process of the evaluation of Principals had been discussed through the Advisory Committee and with the Principals. The staff survey was only to be one part of the evaluation process which had been conducted pursuant to those discussions and in accordance with Ex. 57, a guide across the country as to how such evaluations were to take place. However, she still felt that there would be a further review of the evaluation and the information of the evaluative process prior to Mr. Fransen providing his recommendation to the Board of Trustees and that she would be involved in that process and given an opportunity to make improvement where it was necessary.

Also through cross-examination, she agreed that the composition of the staff committee was not really an issue in this instance. There had also been a mistake made by her appointing a committee initially but the committee she had selected was ultimately also selected by the staff themselves. The results of that Committee had been provided to her and the Policy required the Superintendent to analyze and report based upon that information. However, she also felt that some discussion would take place before that happened.

Later, she did agree that Mr. Fransen had allowed for that opportunity but she had chosen to pursue her avenue of appeal instead of that further discussion. She indicated that was upon the advice of her MTS Representative.

It was of importance that she had not received all of the information prior to her Appeal being heard before the Board of Trustees. Neither had Mr. Fransen indicated to her that all of the information concerning her might be in different files other than only her own personnel file. However, he had provided her with what was readily available at their initial meeting.

Although she was reluctant to some extent to admit to this, she eventually did agree that she was upset at the original meeting and that she was somewhat angry. She also agreed that Mr. Fransen had provided her with the opportunity to meet earlier but that she had been off due to sick leave until the actual meeting. A number of details were discussed but had been canvassed previously sufficiently in our view with respect to that period of time.

In essence, basically what she wanted to do was to sit down with Mr. Fransen and build a plan to overcome any shortcomings. What had happened to her at the evaluation meeting was “quite a blow” and she was upset.

Mr. Fransen had agreed not to make public his recommendation to the Board of Trustees until the actual date of the Appeal on March 5. Exhibit 42 was the essence of the information he presented at that meeting. She had also been represented by Mr. Smorang and by MTS at that meeting. Until that time, the comments or information had not been otherwise presented in public.

Ms. Payne was also questioned at some length as to what she considered to be defamatory in terms of the specific allegations alleged in her grievance but we will leave that portion of her evidence (and her opinions as to same) to the decision portion of this Award.

She did agree that Mr. Fransen was required to present his evaluation and recommendation to the Board of Trustees pursuant to the terms of the Policy (Ex. 7). The Board ultimately denied the Appeal.

There had been no discussions between her and Mr. Fransen concerning possible reassignment for the following year as she had never returned to work after March 6, 2001.

She also felt that Mr. Fransen should have mentioned her more positive contributions in her report as well as any negative concerns.

The details of the actual presentation to the Board were discussed at length but we feel that we can (since we have already reproduced it in its entirety) deal with that later in our decision. It is sufficient to say that she obviously did not agree with his conclusions. However, she did acknowledge that Mr. Fransen had been accurate in terms of reporting the comments that had been made by the staff (whether those comments were accurate or not is another issue).

She also specifically denied coming to work late between 9:00 a.m. and 9:30 a.m. except for once when she came at 8:50 a.m. Again, we do not feel that this is the substance of the issue involved although it is one detail.

Ms. Payne testified that she did not understand either the substance of the comments from the "professionals" or from whom they came. Accordingly, she could not respond properly to same. She had always felt that her availability, and her expression of where she was if absent, was appropriate.

With respect to Ex. 22 (the basis of the misrepresentation of her previous position) she denied having had any conversations at all with the Division's Psychologist.

A number of the other allegations were also canvassed in detail but, again, we do not intend to deal with those at length. Clearly, she disagreed with the perceptions of the other individuals involved as to what had actually transpired.

She had known that the Superintendent would meet with the parents through the Advisory Committee but had not previously known that there were any concerns arising from same. She also had difficulty accepting that those concerns were actually real even after the meeting with Mr. Fransen.

Ms. Payne also felt that her management style was "shared leadership" and that had not been entirely understood or appreciated (although it was by some, it was not by others). It was her impression that the same individuals would make the same complaints several times. However, other members of her staff did agree with her style and her decisions.

The grievor also felt that any criticism concerning the conduct of her evaluations of teachers was unfair. She had no first year teachers in her own first year and felt that she had completed the evaluations appropriately.

Neither did she agree with any criticisms as to her knowledge of technology, nor of her communication of absences (this topic has been covered previously to some extent but we accept that Mr. Fransen did, in fact, contact her).

Ms. Payne testified that she did take the concerns that had been raised by the staff seriously and, as well, that she was prepared to deal with those concerns but never received the opportunity to do so.

During cross-examination, she also agreed that she was aware of the Policy and was questioned closely as to how it was followed. However, while she did agree that certain of the steps were followed, she did not agree that it was followed appropriately.

She was also questioned as to the grounds of defamation but as indicated earlier, we will deal with that later in this Award.

She had only seen Dr. Globerman once (his report is Ex. 43). There were some discrepancies in terms of the facts between his report and what we heard but we do not think that it is substantial or material in terms of our deliberations. She still continues to see Dr. Rosin.

Basically, she felt that she required a "nurturing environment" but was not yet prepared to return to the Division in any other capacity other than Principal.

Her "depressive" episodes in April of 1999 had taken place before either her brother had unfortunately died or she had been separated from her husband. However, the marital separation had been in discussion before that.

Presently, she performs volunteer work at a senior citizens home and wished to continue to "heal" and to "get better". The results of this hearing were very important to her in terms of that process but her goal was to return back to work as a Principal.

At the commencement of the fifth day of the hearings, Mr. Simpson indicated that he had been provided with records from HSC only in the last week and asked that he be allowed to cross-examine Ms. Payne further. Mr. Smorang objected but the Board determined that since re-examination had not commenced and that the information might well be material to our determinations, such further cross-examination would be allowed. The Board also ruled that if there was any prejudice to Mr. Smorang, an adjournment would be granted but that proved to be unnecessary.

The HSC chart (noting discharge on April 23, 1999) was entered as Ex. 60.

Those records, and the subsequent cross-examination that followed upon them, are very personal to the grievor and we do not intend to dwell upon the exact details. Suffice it to say that Ms. Payne was hospitalized from April 13, 1999 through April 23, 1999, as a result of a number of factors. She had previously seen a counselor at MTS (Ms. L. St. Pierre who did not testify) before that.

The stressors indicated that she was having an extra-marital affair, having difficulties with correspondence that had been sent anonymously to her Superintendent, and generally feeling overwhelmed.

Her relationship with the Principal at her previous school ended absolutely in June, 2001 (some three months after she went on disability) although she had also stopped seeing him in January, 2001, with the exception of one week in February. She had seen him previously for some time until January, 2001. There had been many telephone calls from her school back to his. Although not all of those were personal conversations, nor calls to him, but some were.

As well, the fact that the grievor had applied for, but did not receive, an appointment to be Vice-Principal at his school was also stressful.

It appears to be common sense to this Board that such a relationship (which went further and was more extended than she had previously testified to) in combination with the decaying of her marriage plus all the other stressors in her work environment (whether warranted or not) placed a burden upon her that she simply could not bear. We also believe that her recollection of events and her judgment during that time were clouded as a result of those circumstances.

It was also inappropriate in our respectful view for her to have used the Principal as a reference in terms of her initial dealings with the Division when she originally applied whether or not the affair was actually consummated at that point.

That factor had also apparently not been discussed with Dr. Globerman and we might note that some of the timing of certain events does not jive with the grievor's account. That is not to say that we do not understand that she was under extreme emotional pressure at the time but it is to say that certain of her difficulties certainly did not arise as a result of the actions of the Division.

She had been less than forthcoming with Dr. Globerman as to the circumstances surrounding her stay at HSC as set forth in Ex. 60.

In any event, the evidence before us was that the relationship referred to above no longer exists.

In re-examination, the grievor clarified her position as to achieving the Level I, School Administrator's Certificate. She had received a letter from the Department on February 26, 2002, indicating that she was eight hours short of achieving the one hundred and twenty hours required. However, she had honestly been under the impression that she had already achieved that level due to telephone conversations with the Department concerning a course worth twenty-five hours which she had already completed, and which she thought would be recognized, but which ultimately was not. We do not find her to be dishonest in her belief but the reality is that she had not met the qualifications she thought she had.

Her actual separation from her husband occurred on June 30, 1999, although there clearly had been a marital breakdown prior to that.

Dr. D. Rosin then testified. He has a Doctorate in Education Psychology received from the University of Alberta in 1981. Subsequent to that time, he had worked from 1984 through August, 2000 for MTS as a Therapist and Workshop Facilitator. He left that position to become a Therapist in private practice and took some of his former clients with him although he also has independent clients. He had previous contact with the grievor concerning her family difficulties but could not remember the times or details of same.

His reports which have been previously entered as exhibits (Exs. 43, 44, and 45) were canvassed with him.

Dr. Rosin, at least with respect to the present difficulties, had commenced seeing the grievor on February 24, 2001, and has seen her (with a few minor variations) weekly since. Each session was approximately one hour.

His first two reports had been written for purposes of the LTD program at MTS (the program had previously been administered by Great West Life but had been taken over by MTS in the mid 1990's).

Initially, the grievor had presented as being extremely upset and very confused as to how she was being treated. She was "wondering why" and that stage lasted for several months and it was difficult to move her from that stage to "where to go from there". She was definitely not functional although not suicidal. By the time of his second report, she had made progress and some changes were starting to happen. She was starting to "let go and move on" but was still very angry and upset. Not unlike many other people she had focused upon the grievance procedure and the arbitration process and it was the Doctor's

opinion that not much further progress would happen until that process had been completed. Unfortunately, the initial hearings were adjourned due to circumstances beyond anybody's control.

His focus was more on how she was presently rather than exploring the past events. As at the time of his last report, she was still disabled and unable to teach.

The issues of her "demotion" and the people she worked with were still of importance and she spoke about them with great passion. It was his view that anybody in the educational field would see the movement from Principal to a Teacher position as a demotion showing lack of confidence. Ms. Payne had been very hurt as a result of that decision.

As at the time of his testimony, he also indicated that she was not yet ready to return to work although progress had been made. She had stopped being "frozen" on the past and was now able to talk about possibilities. However, the hearings being delayed had stopped his therapy to some extent.

After the January dates of this hearing, she had also shown some considerable progress and was beginning to look further to the possibility of placement in a school. A vocational rehabilitation officer was also involved as to deciding what might be possible in the fall of 2002.

He testified that the proper steps towards getting back into a school were a progression of various steps and he was clear that she was not yet ready to return as a Principal. It had never entered his mind that she would be able to do so but he hoped that she would be able to return as a "volunteer" or in some other capacity. It was also possible that she might be able to start on a part-time basis and then work towards full-time.

In his experience, he had dealt with many teachers but few principals. She had indicated to him that she was not able to return to the Division and that was still a strong thought in her mind. The possibility of returning to the Division had not been dealt with at all in his therapy.

Most of his cross-examination has already been covered but it might be noted that he was not aware of all of the details concerning her hospitalization at HSC which would be in keeping with his view as to looking forward, not behind. Neither did he particularly delve into her previous depressive incident as he felt that would ultimately be discussed. He acknowledged that it might have been helpful to have known all of that information at the beginning.

He had never been aware of the factors of losing the competition for the Vice-Principalship, nor of some of the other details. As at February, 2001, he had thought that she had never been hospitalized.

It was not unusual for a teacher to have seen a counselor from MTS before coming to him.

He had made no external or objective checks as to what she told him. Basically, he was dealing with her reality as she expressed it.

No back to work plan had been developed in the fall of 2001 as the arbitration hearings had been cancelled.

He could not recall who had coined the term "fiasco" describing what had happened to the grievor in his report as set forth in Ex. 44. Exhibit 46 had been prepared for the arbitration hearing.

Upon the questions of the Board, he could not really comment upon whether the manner of the demotion or the fact of the demotion was more damaging. Both were and the combination was "devastating".

He was still seeing the grievor weekly and felt that she had a number of steps to go before returning to work as a Principal.

The last witness presented by Mr. Smorang was Ms. C. Basarab. She has been a Staff Officer with Manitoba Teachers Society for fourteen years and, prior to that time, worked as a Teacher for eight years in the Winnipeg 1 School Division, two years as a Principal Assistant, and eight years as a Principal in various sized elementary schools.

There was considerable debate between Counsel concerning her evidence as to whether it was to be considered as "expert" (Mr. Smorang took the position that it was not expert testimony) and, if only opinion evidence, should it be considered as relevant or admissible.

She also had some direct involvement in the events surrounding the grievance but not until February.

In any event, we intend to briefly recite the essence of her testimony and we will deal with the evidentiary or weight issues later in this Award.

Ms. Basarab is obviously an experienced educator (as well as being involved generally in the education field through the Society). Through her was tendered Ex. 66, the 2001 "Policy Handbook" of the Society which contains the Society's Code of Professional Practice section III.A.(7) of same reads as follows:

> "A teacher directs any criticism of the professional activity of a colleague to that colleague and only then, after informing the colleague of the intent to do so, may direct in confidence the criticism to appropriate officials. It shall not be considered a breach of this clause to report reasonable grounds for suspecting child abuse to proper authorities according to legal requirements."

The topic of evaluation is covered extensively in section XI and we quote certain portions of same.

> "Divisional policies and procedures governing growth models must be kept clearly separate and distinct from evaluation policies and procedures.
>
> A. Definitions
>
> 1. Evaluation: a formal process in which a teacher's performance is assessed against a set of performance standards.
>
> 2. Performance Standards: a set of pre-determined and clearly defined expectations.
>
> 3. Professional Growth: a process designed to facilitate the ongoing, self-directed learning of teachers as professionals.
>
> B. Evaluation
>
> 1. Purpose
>
> The primary purpose of evaluation is to promote the best possible learning for students, by assessing teaching performance against a set of clearly defined performance standards.
>
> 2. Principals
>
> a) All evaluation procedures shall be fair, reasonable and reflect the principles of fundamental justice.
>
> b) There shall be a written evaluation policy in each school division/district.
>
> d) The process of evaluation provides for active involvement of members in all phases of evaluation including the identification of objectives, the determination of the extent and manner of data collection, the selection of data collecting instruments, the analysis of data, reporting results and making recommendations.
>
> f) Evaluations should be based on objective measurable data and stated in those terms.
>
> m) Evaluation shall not be used as a disciplinary measure."

During the course of Ms. Basarab's testimony, Mr. Smorang clarified that the position of the grievor and the Association was not been a challenge of the jointly developed Policy (Ex. 7) but, rather, the issue was the application of that Policy in this instance.

There was also debate as to whether MTS itself was an interested party. We do not intend to deal with that issue at length as the substance of the matter before us remains the same no matter what our finding might be as to that issue. For the purposes of our decision here, it is not necessary to determine that question.

In reviewing her evidence in totality, Ms. Basarab was clearly of the view that the process followed with respect to Ms. Payne was deficient and one of the main concerns was that the ultimate result – Ms. Payne being placed back into a teaching position – was disciplinary in nature given certain of Superintendent Fransen's comments in the actual evaluation (Ex. 22). It was also her view that, if a problem had been established, the Policy (Ex. 7) would have allowed for placement of Ms. Payne as a Vice-Principal or placing her as a Principal on formal probation.

She also had great concerns about the use of anonymous surveys since, in her view, they were not reliable and did not address the professional issue of "accountability".

Her comments about the actual process have to be considered in light of the fact that she was relying entirely upon what the grievor had told her until she became involved in February.

Superintendent Fransen had extended the invitation for a meeting after her first communication to him (after the February 19 meeting between Ms. Payne and him) but it was felt at that time that he had made up his mind about the recommendation going forward to the Trustees and that their energy and efforts could be better spent in terms of the submission to the Board meeting. It was also of concern to her that the decision of the Trustees was made in March since she felt that it would have been possible to have delayed that decision until May or June and to have attempted remedial efforts prior to the determination.

She canvassed the various aspects of Ex. 7 in detail but we do not find it necessary to repeat all of that evidence as we agree with Mr. Simpson that, ultimately, it will be our task later in this Award to review the alleged deficiencies and to make our determinations based upon that.

In cross-examination, she agreed that it was not uncommon to have different evaluation policies for Principals/Vice-Principals and teachers since the jobs were different. There were some parallels in the process but the criteria could reflect the difference in the jobs.

If an evaluation process was in place, there should be a corresponding documentation process as well. She felt the documentation was deficient in this instance.

She agreed that the jointly developed Policy did contemplate the use of surveys and that Ms. Payne had also used surveys in her formative evaluation.

During cross-examination, a letter of April 6, 2001 (Ex. 67) from Mr. J. Collins, a former Staff Officer of the Society, to Mr. Fransen was tendered. It reads:

> "I would like to review the circumstances of the grievance of Ms Bela Payne
> in relation to Shirley Reimer, Debbie Derkatz and George Lundquist.

> In accordance with the Western School Division policies GCN-R and GCNA on administrative/principal evaluation, Ms Reimer, Ms Derkatz and Mr. Lundquist comprised a committee to prepare a feedback instrument and administer it in accordance with the policies. Ms Reimer, Ms Derkatz and Mr. Lindquist acted as required by the policies with the exception of the Principal's, Ms Payne, refusal to meet with them for a verbal report.
>
> The lawyer representing Ms Payne has requested that he be provided with the actual completed survey instruments remitted to the Committee by the school staff. In accordance with the aforementioned policies, the survey instruments in question are in the possession of the Committee. In further accordance with the policies, the teachers surveyed completed the instruments on the understanding that their anonymity would be guaranteed. This guarantee would be jeopardized if Ms Payne were to have access to the actual completed survey instruments. In that eventuality, the Committee and the teachers would feel that their good faith cooperation with the School Division policies had been compromised.
>
> As matters stand, the documents in question cannot be voluntarily released by the Committee members, nor even by the Superintendent, without being in breach of the School Board policies. No such voluntary release could be contemplated unless the School Board, by motion, rescinded the policies in question.
>
> The School Division's position, as expressed by yourself, is that the School Division will protect the integrity of the policies in question and will not compromise the good faith action of either the Committee members or the school staff.
>
> The Committee members are appreciative of the School Division's position and request that they be informed and involved in any circumstances related to the grievance in which they may be directly concerned."

Mr. Collins had been acting on behalf of the teachers who might be affected by internal disciplinary processes within the Society. Ms. Basarab described the approach as being an "accommodation". Perhaps the most important item in our view is that the parties had agreed to this type of anonymous survey in terms of the Division policy although we do appreciate Ms. Basarab's concerns and we ultimately note that the names of the individuals involved were released during the course of the hearing although neither party found it necessary to call any of the individuals as witnesses.

Mr. Fransen had stressed throughout the communications with her that the action taken was not to be considered as disciplinary in nature although, ultimately, she felt that it was.

Her first contact with the grievor had been by telephone on February 19. At that point Ms. Payne had been very upset and was absent from work due to illness. Ms. Payne had acknowledged that there had been some concerns expressed but thought that she was addressing them.

The Division had also agreed to extend the time limit for the destruction of raw data to accommodate the Society.

That concluded the case for the grievor and the Association.

Mr. Fransen was the only witness called by the Division. His evidence occupied some two and half days and we do intend to summarize it as much as is possible. Much of the substance of his evidence has already been discussed in this recital and we shall focus only upon what was different than the earlier testimony.

Mr. Fransen's resume was tendered as Ex. 68. He had begun his teaching career in Winnipeg in 1982 at an independent (not public) school, Mennonite Brethren Collegiate Institute. He was head of the Science Department from 1986 to 1988 and served as Vice-Principal from 1988 to 1996. In 1996 he applied for and became Principal of W.C. Miller Collegiate in the Rhineland School Division No. 18. As indicated previously, he assumed his duties as Superintendent in Western as at January, 2000. It is fair to say that his previous experience did not directly involve elementary schools although he certainly does have some administrative experience.

Mr. Fransen testified as to the many Trustee or committee meetings during the course of which he has the opportunity to observe the Principals. As was the case in Rhineland School Division (as with other Divisions), it is his responsibility to recommend to the Trustees whether or not Principals should be reappointed upon an annual basis.

Mr. Jamison, the previous Superintendent, had retired at the end of December, 1999, but was available for consultation as required. He had met with Mr. Jamison several times in December, 1999, as well as in January, 2000.

Interesting, Mr. Fransen (at least initially) had lived in Altona and commuted to Morden although he eventually moved within the Division.

Mr. Fransen testified that the trustees met twice monthly. Previously, Principals had been expected to attend both meetings but to accommodate Ms. Payne, the rules altered such that they only had to attend one although some of them continued to attend both.

As well, there were many other committee or other work related meetings that take place and he felt that he had adequate opportunity to observe the Grievor prior to preparing his evaluation and recommendation.

There were also staff planning retreats annually which the Principals attended. He attended those retreats (as did the Grievor) in 1999 and 2000.

When he first commenced his duties in January, 2000, he had contacted Ms. Payne and was "warmly accepted" by her. She took him to each class for introductions and it was the first school that he attended. On an informal basis, he attended at the school many times.

There were three new Principals within the Division (including Ms. Payne) and a new Vice-Principal at the time. Ms. Payne was the only first time administrator.

Mr. Fransen had also attended a Parent Advisory Committee meeting at the school. There were also a number of specific situations arising at the school during which he had to work closely with her including allegations of a teacher mistreating a student, the fall teacher-administration meetings, and other matters.

The evaluation policy (Ex. 7) was developed jointly by all concerned and then was adopted by the Board. There was a standing committee titled "Supervision For Growth" including Trustees, Administrators, and Teachers. The policies were discussed and modified if necessary annually. Basically, Ex. 7 had been in effect since 1990 but was reviewed annually. Ms. Payne sat on that committee.

The survey tool used within the Division was based on the Canadian Leadership Profile (Ex. 57) which was a well recognized and accepted methodology.

His understanding of the formative evaluation in the first year was that it was self directed. There was no requirement for the Principals to report back to him in a formal way although they could if they wanted to. He had several discussions in the spring of 2000 with the Grievor about her formative evaluation. She had chosen to do a survey of teachers, parents and support staff.

In the spring of 2000, he was also approached by three teachers who expressed concerns about the Grievor's leadership. While at a meeting in Pilot Mound in April, he received a telephone call from Ms. Payne who was very distraught about an incident in which she felt that certain of her teachers had acted inappropriately towards her and her private life. She had posted some dozen copies of the MTS Code Of Practice on the staff room walls. Mr. Fransen met with her (she was very upset at the time) and it was agreed that only one copy of the Code was necessary to remain posted. He had told the three teachers to speak directly with her and he had advised the Grievor that a number of teachers had approached him with concerns

When the surveys came back during the formative evaluation, Ms. Payne had told him quite openly that they were not "all good" but that she wanted to share the findings with the Trustees and staff. He advised her that was her choice.

The concerns that had been expressed were that she was arriving at work late, leaving early, and that there was not enough leadership. However, there were also many positive aspects of her performance referred to.

Only three of the fourteen teachers within the school had approached him with concerns prior to the anonymous survey.

Shortly after the April incident in question, Ms. Payne was appointed as Principal for the 2000-2001 school year at the May 23, 2000 meeting (Ex. 42).

Shortly after that, Ms. Payne contacted Mr. Fransen and told him that she was applying to St. Boniface School Division and asked him if he would be a reference for her. He had felt that she ought to apply as she was having difficulties obtaining the trust and support of her colleagues and she didn't seem happy. Because of that he agreed to be a reference but did not send a letter. It was his feeling that she was aware that there was a problem within the school but had felt that, although he was taking a chance he should recommend reappointment for the second year. She later applied to Oak Bluff School. He had been advised by his contacts in St. Boniface that she had not been approached by the Division to apply. However, she was "struggling" and he was aware that she wanted to work closer to home.

Basically, she thought the relationship between them was "good, cordial and respectful", although he was aware of the problems in her first year. He was optimistic that things would improve.

The teachers that did have concerns had not gone directly to her. She thought there was only one or two although he had expressed that there were more although he did not disclose their identity as he had promised them that he would not. However, he thought that she had a reasonable plan in place for improvement in the following year and expected that would work.

He had expressed to her that the perception was that living in Winnipeg created an unfair advantage to her although she had also raised the possibility of moving to Morden.

In June, 2000 the issue of usage of sick leave came up. As it turned out, she had been in Court (or at a lawyer) for part of the day but previously had seen her doctor. The records were amended accordingly but he did not consider that to be a major incident. He had prepared a memo but, as was his usual practice, kept it on his hard drive in his computer without sharing it with her. Mr. Fransen did that quite often although he indicated that he would bring his files up to date after term ended in July. Record keeping was one of the areas which he acknowledged required some improvement on his part. This Board agrees with his perception.

In the fall when Ms. Payne returned, Mr. Fransen had continued the teacher conferencing process which had been set up by Mr. Jamieson. He felt that was of great value.

He and Ms. Payne met with each of the teachers in the school in October (some two days in total) and upon the basis of that, he agreed that the Grievor would have felt that things were improving. Little criticism was provided during the conference meetings although he also felt that was partially as a result of fear of reprisal against the individual

teachers. The teachers had told him that they had tried to talk to her but nothing had happened with respect to their concerns. The three teachers came to him again to express their concerns and again, he told them to talk to her directly. They did not do so.

During the September term in 2000, the incident with the Parent Advisory Committee and the funding for the playground structure occurred. Mr. Fransen's view upon direct examination was that Ms. Payne had mislead the Board of Trustees in terms of the money that was involved. However upon examination of all of the facts, we did not find this to be a significant incident particularly since the Board reinforced its decision to grant the three thousand dollars requested. We were never made aware of what the actual cost was.

Also in the fall of 2000, Mr. Fransen testified that he had the impression that Ms. Payne was finding the PAC meetings lengthy which delayed her from getting to home. The President of the Association had contacted him and he told her to discuss it with Ms. Payne but there was no follow up as to that and neither did he formally warn the Grievor that this was a serious concern. However, he did raise the concern with her.

All three of the new Principals were being evaluated in terms of a summative evaluation at that time. He had reminded all of the Principals of the process at the August meeting. In October, he had indicated to them that he was starting the formal aspect of the process.

He frankly admitted that he had erred with respect to the original composition of the three teacher committee but that was later corrected. The teacher committee at Maple Leaf remained of the same composition but that had not been the Grievor's fault (the staff chose to maintain the same individuals). He had met with the three committees in November and had provided them with the policy and the job description and asked them to have the teachers complete the survey. He had stressed that the process was significant. However, we might note that his understanding at the time was that the teachers had not ultimately selected the three staff committee at Maple Leaf although the evidence indicates that they did.

The committees were to receive data, tabulate them, and meet with Mr. Fransen. However, before that was done, he had received a telephone call from the Chair Person of the Maple Leaf Committee as to not having available the option of putting a number below the minimum standard in terms of the evaluation. He had advised her to use the scaling set forth in the survey but that they could add comments as necessary.

The survey document was only part of the evaluation process as his own observations were also of importance. His observations coincided with the concerns expressed by the survey.

At various times, both in direct and cross examination, he stressed that it was his view that anonymity was of great importance to receive "honest feedback" and that, prior to the arbitration hearing, the issue of the "Code Of Conduct" had never been seriously

raised prior to the hearing although it is our view that Mr. Collins' letter (as referred to previously) obviously was concerned with that issue.

He had met with the three person committee and received the results of the survey. It was his testimony that they were "somber and looked troubled". He had made some comment to the effect that this was "pretty tough stuff". The Committee had also met with Ms. Payne.

He confirmed that he had told the teachers who had concerns that they should be meeting with the Grievor but that he had not told them that they must do so.

The post conference after the survey was conducted by telephone. He had asked to meet with the Grievor but she then went on sick leave as detailed earlier. The meetings (and the dates they took place on) have been detailed previously.

At the October meeting he had advised the Principals going through summative evaluations that only the professional teaching staff would be involved unless they chose otherwise. Mr. Fransen understood that Ms. Payne did so and included the support staff and the Clinicians. One Principal had actually involved a survey of students.

He was not surprised by the survey results but was surprised that there were so many negative comments. His impression of her performance raised concerns in his mind as to her leadership ability, her educational knowledge, and her administrative ability. He was also concerned about her ability to utilize technology properly although, upon the basis of the evidence in its entirety, we did not find much basis for that belief. The concerns in the summative evaluation were basically the same as those that had been raised in the formative evaluation.

In the fall of 2000 he had mentioned several concerns to the Grievor but they were expressed informally.

He had spoken to Ms. Payne on February 2 after she had seen the survey results. On February 3 he had told her that they should meet as quickly as possible and Ms. Payne had indicated that she had never before in her teaching career seen colleagues treat somebody in such a "mean" way. She was extremely upset. Mr. Fransen tried to set up a meeting for the following Monday, but, as indicated, Ms. Payne was absent for medical reasons until February 16.

On Monday, February 12, Ms. Payne had telephoned him at home in the early morning and expressed deep concern about being maligned by her colleagues. She had indicated that she took no pleasure in her present job and offered to resign (as well as indicating that there were three other candidates in her view to become Principal of Maple Leaf School). The conversation was approximately one half hour long and included discussion about the staff concerns. It was Mr. Fransen's perception that her main concern was the "pointedness" of the comments which were profoundly disturbing to her. It was left that they would meet when she returned to work (which ultimately

resulted in the February 19 meeting). It does appear to us that Mr. Fransen was left, at that point in time, with the impression that Ms. Payne would resign, but, equally clearly, he knew that was not the case prior to making his recommendation to the Trustees.

Mr. Fransen had also kept a computer note on his hard drive about the February 12 conversation but that was not on the personnel file, nor provided to the Grievor, until the Society formally requested the particulars.

Ms. Payne had chosen not to include parents in her summative evaluation survey. Mr. Fransen had met with each of the Parent Advisory Committees to explain the evaluation process. Specifically he had met with Ms. A. Penner, the President of the Maple Leaf Committee and two other members as they wanted to express their concerns. That meeting was held late January or early February and was also recorded on his computer and formed part of Ex. 42 although, again, it was not shared with Ms. Payne. He had told the parents to contact the Grievor directly but that had not happened.

Mr. Fransen also commented at some length upon the situation on February 15 when Ms. Payne was originally scheduled to return to the school but he could not contact her until he managed to reach her on her cell phone. That was of considerable concern to him as it was important for a Principal to always be available. He did not question her right to take the time off but did question the fact that she had not called and give directions as to who should be acting as Principal. She was to return the following day and the meeting was scheduled for February 19 at the Division office.

Initially, he had intended to hold the meeting in his office but Ms. Payne was concerned about people overhearing the discussion. Accordingly, they went to the board room and he provided her a copy of his summative report. From the evidence in its totality, it is clear that he had made up his mind at that point as to the recommendation he was going to make. She had "scanned" the report but looked quickly to the back page and again became upset and distraught (we do not find that surprising). However, it had been his intention to go through the entire report as it contained both positive and negative comments.

In his mind, leadership was the critical element and trust and respect were extremely important factors. Those concerns had been raised before with the Grievor but the situation had not improved.

In his testimony, he commented that his original intention was to originally review and discuss his conclusions and recommendations with the Grievor but that, due to her absence, a recommendation had to go forward as if a new Principal was to be sought, that process had to commence quickly. The legislation and the individual contract provides that a Principal has to provide notice to the Division of resignation by the end of May in any teaching year but the reality of the situation in terms of attracting a Principal to a rural situation required that efforts towards that be made earlier.

In direct examination, Mr. Fransen testified that, what he felt to be a "multitude of observations", the problem was that leadership was about building confidence in the teaching staff, the support staff, the students, and the parents and there had to be trust and respect. That was lacking.

He was concerned that Ms. Payne was not getting her day to day administrative duties completed. He had sent her to a conference as she had acknowledged the need for further training but she was not able to attend to the entirety of it. It was his view that she struggled with technology and had difficulty responding to e-mail (we did not find much evidence that was a significant problem as she did respond to her e-mail in a timely manner).

Basically, her performance had not measured up to what was required to be a Principal in the Division and he felt that the process in terms of evaluation had been fair and reasonable. The conclusion was that the contract with her should be honored but that she should be reassigned to classroom duties although it was open to her to perhaps return to a higher position sometime in the future.

At the February 19 meeting, Ms. Payne had indicated that she wanted representation from the Society and that had been done. The ultimate documentation that was provided to the Society was a compellation of a number of different files which he did not have together or handy on February 19. However, all documentation had been produced and provided afterwards as it was only fair to do so. It would have been produced in early July in any event but the request from the Society made matters more urgent.

He had also agreed to delay making his recommendation to the Board following Ms. Basarab's first letter. He had suggested a meeting but did agree in cross examination that the meeting would not have changed the recommendation in any event.

He felt that the reassignment to classroom duties was in the best interest of the Division, the students, and Ms. Payne herself.

The Board of Trustees met on March 5 and he had stressed that this was not a disciplinary matter but was only a Principal evaluation and part of the reappointment process. The Trustees had denied the Appeal but he was to consult with Ms. Payne concerning her reassignment (that has still never taken place and the Grievor has expressed no particular interest in such a possibility). Ms. Loewen (one of the three teachers that complained) was appointed as interim Principal subsequent to the notification that Ms. Payne would not be returning for the balance of the school year.

He had applied the evaluation process consistently in terms of all three Principals undergoing this summative process and the process had been similar to that used in previous years. He had considered placing her on probation but did not consider her performance to merit such an approach.

He had prepared Ex. 22 in accordance with the provisions of Ex. 7. That was the subject matter of her grievance and Appeal and had been supplied to the Board of Trustees according to policy by both himself and by Mr. Smorang at the hearing of the Appeal. He had not provided the report to anybody else and, to his knowledge, the report had not been made public. The actual hearing of the Appeal had been held in camera.

Mr. Fransen canvassed all of the allegations concerning defamation but, basically, took the position that the statements were true and based upon concerns that had been expressed to him as well as his own observations. All of that was part of his professional responsibility as Superintendent.

He maintained that he did question her integrity in the sense of her withholding information or providing inaccurate or incorrect or untruthful comments or explanations. He had honestly believed that she had been misleading the Division about the use of sick leave as well as with respect to her application to St. Boniface.

However, he felt no malice towards her and his evaluation recommendation was not based upon that type of feeling.

According to the contractual commitment, she was to remain Principal at the school until the end of June but that did not happen. Plans for staffing for the following year generally occurred during March and April but he had expected her to remain on the teaching staff.

The Division provides an incentive for early notification of resignation ($750.00 if notice given by the end of March and $250.00 if by the end of April).

Mr. Fransen's cross-examination was lengthy and, again, we will try to summarize the salient portions of what has not previously been stated.

Although the Grievance was dated March 20, 2001 (after the Appeal) the Board Of Trustees had not actually considered the merits of same until late May or early June as they had been awaiting clarification of certain of the issues. He had requested particulars from the Association to same. The issue of the action taken being disciplinary had first been raised in Ms. Basarab's letter of April 9, 2001.

He was questioned at some length about his previous background but we have discussed that earlier. We would only repeat that his first exposure to the public school system began when he became a Principal in Altona. He agreed that it was fair for a Principal to expect that a Superintendent would be involved in a positive and corrective way to deal with any deficiencies in performance. As well, he further agreed that a Superintendent had the power of "effective recommendation" to the Board of Trustees although they, ultimately, would make up their own minds.

When he was a Principal, he would not have expected his Superintendent to deal with performance issues "behind his back" and would have expected him to offer help if possible or offer to assist in resolving any complaints. That was part of being "treated fairly" as a Principal.

When he had met with Mr. Jamieson in December prior to assuming his new responsibilities, Mr. Jamieson had not identified any concerns with Ms. Payne although he had prepared files for Mr. Fransen. He was also aware that the previous Principal at Maple Leaf School was very experienced and did consider the differences between a new Principal verses a long term Principal in the sense that he was aware there could be staff issues in that type of circumstance.

Mr. Fransen was also aware that Ms. Payne had expressed her intention to be that she wished to develop positive relatio nships with the students and the staff, wanted to maintain an "open door policy", and wanted to set communication strategies.

He further agreed that he was also on what could be described as a "learning curve" from January to June in his new position as Superintendent but felt that he was a "quick study" although he was still in the process of learning continuousl . He felt that he had been available as a "mentor" but not as efficiently as he was after experience in the position.

In the course of his new position, he had to deal with some ninety teachers and six administrators as well as the Board Of Trustees.

Although he was aware that Maple Leaf School had recently been restructured in terms of grades, he did not feel that would create more difficulties. His recollection was that he had seen Ms. Payne at least upon a weekly basis but had not considered asking her or directing any type of formal mentorship with a seasoned Principal although he had suggested some relationship with a more experienced individual.

While there were many informal contacts, he agreed that there were relatively few formal ones with the Grievor.

Many of the concerns that had been expressed to him had been raised in the context of meetings that were not about Ms. Payne primarily. However, it was his perception that the school appeared to be "on hold" and that staff meetings were not being taken seriously. There was a leadership "malaise".

Some of these discussions had not been recorded on his computer notes and he could not explain why.

It remained his view that he did not wish to disclose the identity of the teachers who made complaints to Ms. Payne (although those names did become available at the hearing) because of their fear that there would be some form of reprisal in the evaluation process although there does not appear to have been any substantive basis for that

perception. Neither did he intervene by way of going directly to a staff meeting to discuss the perceived problems or call a meeting of the individuals concerned. In retrospect, he felt he could have spoken more directly to the Grievor although, in a general matter, he had raised the concerns expressed to him.

He agreed that if an individual was required to change performance, it was necessary to tell them what they were doing wrong. He had not followed up with any of the individuals who had expressed concerns to see if they had spoken to Ms. Payne, nor had he told any of the teachers that he would protect them against any retribution. He had felt that the formative evaluation would be sufficient to dispel those concerns.

Ms. Loewen had expressed concerns about the Building Bridges Program not being supported by the Principal and also about her concern with educational knowledge. As indicated previously, Ms. Loewen did not testify at the hearing. However, it was Mr. Fransen's view that Ms. Payne was to be a Resource Person to the teachers although there was a formal Resource Person involved in the school. He had also told her to talk to Ms. Payne. He had taken no steps in the interim to address the situation and had no notes on his hard drive memos.

He had met with Ms. P. Sloan (she also did not testify) and recalled that she had concerns about the Grievor's leadership but he could not remember the specifics. Again, no notes, were kept and he had told her to speak to Ms. Payne.

He agreed that a Principal was not always popular with all staff but could not say if the situation would be more difficult if it concerned a new Principal with established staff although it was logical that some people would simply not like any change.

He had told Ms. Payne that some of the staff might talk to her but it was difficult to say if he expected that would really happen.

He and the Grievor had met on April 17, 2000 to discuss the formative evaluation and had reviewed the survey results. Most of the comments were positive although, as indicated previously, Ms. Payne told him that there were some critical comments. She had three goals that she intended to pursue which were to initiate book study groups for the staff, to have more professional literature available, and to deal with communication issues with the staff. He did not disagree that those were the appropriate issues to deal with but also raised the general leadership concerns with her. He had thought those three initiatives would address the concerns that existed.

He had not indicated to her at the April 2000 meeting that there was any serious possibility of her losing her Principalship but had indicated that it was an annual appointment based on performance.

He felt that other than the three initiatives set forth above, her performance had been otherwise reasonably good.

When the hearing recommenced on June 12, Mr. Fransen was further cross-examined as to the complaints of Ms. Loewen. He acknowledged that Ms. Loewen was the Resource Teacher at the school and that it would be appropriate for teachers to come to her for assistance. He had not asked her for specifics as to her concerns and did not set a meeting between herself and Ms. Payne with him attending.

Ms. Payne had also sent a memo to all of the teachers on April 6, 2000 with respect to magazines and educational journals (Ex. 26) as well as a further journal on April 12, 2000 regarding setting up study groups. He agreed that she was attempting to deal with two of the three goals identified.

On May 2, 2000 she had put out a further memo to the teachers regarding "School Goals" for the following year. He agreed that while that was a requirement for all Principals, it was evidence of leadership. He further agreed that her daily morning express bulletins (although he did not always read them) were a very effective communication tool although it was his impression that her secretary had prepared them. However, he acknowledged that her secretary would have reported to the Grievor and he could not comment upon whether she specifically saw them each day. It was his understanding from conversations with the secretary that they often went out without her involvement. Putting Ms. Payne's schedule for each day on the bulletin was a good communication tool.

Mr. Fransen was questioned closely as to all of the documentary evidence and we do not intend to repeat all of that discussion although we have certainly considered it. We note that she had participated (Ex. 35) in setting the budget and following up on the "Building Bridges" program.

At the April 17, 2000 meeting, he had been provided with all of the staff survey results although had not read them all. He agreed that most of those results were positive but he had not shared the specific concerns from the three teachers with her. He agreed that it was not beneficial to "foster gossip" or "behind the back discussions". Ms. Payne had shared the surveys with the Board Of Trustees although he had not checked to see if all of the negative comments had been included or if she had "cherry picked".

He agreed that when she had called him on April 20, 2000, she was going to him for help and was extremely distraught about other staff discussing her personal life but he did not offer to speak to the other teachers. He believed that he had discussed utilization of the Employee Assistance Program but it was not recorded in his notes. He felt he had "calmed her down" but his notes also did not indicate that she was going to contact the Society to complain and he had suggested working the problem through in a non-confrontational way.

They had discussed and agreed to deal with this at a staff meeting but it was also not referenced in his notes. There was nothing to prevent the Superintendent from dealing directly with teachers although it was preferable to have the Principal do that directly. He had followed up on the issue and Ms. Payne had advised him that she had

dealt with it at a staff meeting but, again, that conversation was not included in his hard drive notes.

During cross-examination, he agreed that Ms. Payne had been open with him about her applications for other positions with St. Boniface or Oak Bluff and not attempted to hide that from him. The fact that she was not prepared to move to Morden was not a "big issue" although she had indicated at times that she would be prepared to.

He could not recall if he was aware of the details of her separation and custody agreement providing her children as she was very private about those matters but she had said that she wanted a job closer to home.

In October of 2000, she had been very positive about remaining with the Division (Ex. 18) but he also felt that her three point plan after the formative evaluation would solve most of the problems.

He had informed her in May or June that she was re-appointed as Principal and felt that he would have advised her of that by e-mail but did not have that on his file as it must have been deleted. However, Principals did receive copies of the Board minutes and he had put the extract from the relevant meeting of June, 2000, into her file. Her file did not have a copy of her original appointment as Principal but that was on the payroll file.

The benefit of her not having to return to Morden after meetings in Winnipeg or elsewhere (if Winnipeg was closer) happened less that ten times per year.

Ms. Payne was to evaluate eight of her teachers in her first year as Principal. He had signed the evaluation and two of the three complaining teachers had been under evaluations although they received very good ones.

Ms. Payne had expressed the concern that Ms. Loewen was "out to get her" although she was not aware of the identity of all three of the teachers.

In the fall of 2000, he had attended the annual teacher conferences but had not told the Principals that was a significant factor for their summative evaluations. However, it was reasonable Ms. Payne would have thought that things were improving. The surveys conducted there did not show concerns although there was the opportunity to provide them. A number of examples of positive comments were canvassed with Mr. Fransen and he acknowledged them.

After the October conferences with the teachers, the three teachers had again approached Mr. Fransen and indicated their continuing concerns but their reluctance to relate them directly to Ms. Payne. He had told them that they would have a chance to express such concerns in the anonymous survey during the summative evaluation.

During the October teacher conferences it was normal that the teachers were more likely to give compliments than criticism although he agreed that Ms. Payne had done a number of positive things at Maple Leaf School and he wanted her to do a good job as well as for her to know what she had to do to improve. He agreed that it would have made sense for him to have spoken to Ms. Payne about the "dark side" at that time and was aware that the teachers were not going directly to her to discuss their concerns.

Although all three had requested that he not tell Ms. Payne about their discussions, they had not indicated specifically what they were afraid of but, again, he did not offer to become involved in a three way meeting with him offering to protect them if it was warranted.

He had not attended any staff meetings in the fall of 2000 although he did review the staff meeting minutes. He acknowledged that he had seen some issues being dealt with but could not recall specifically which. However, there had been nothing in the minutes which was strong enough to convince him to attend a staff meeting.

Mr. Fransen was also cross-examined closely as to the details of the evaluation process but, again, we do not intend to repeat all of that testimony. However, we do note that he agreed that it was possible that Ms. Payne had raised some concern about the use of anonymous surveys. He was expecting negative comments from the surveys and was not surprised to receive them.

Parents were also concerned about being identified in terms of specific complaints in terms of reprisal against their children if they made a complaint against a teacher. Mr. Fransen agreed that the best way to deal with any of these type of concerns was for the parties to get together but that "fear was irrational" despite the fact that this was an issue involving professionals.

While he felt that anonymity was essential, he also agreed that there was a risk in terms of utilizing such information. If just compiling the number of negative comments without identifying how many came from only one individual, that could skewer the perception.

He agreed that Ex. 7 (the Evaluation Policy) did allow for variations in process between the different schools. It would have been possible for him to have dictated that at Maple Leaf School, anonymous comments would not have been accepted because he was already aware that there were concerns and that direct discussions were not taking place.

Mr. Fransen testified that he had told the three teacher committee that he was not entirely surprised at the results of the survey. His view was that the Committee was to provide the results to the Principal, not himself, although he might have been able to do that directly. It was the role of the Committee to gather and compile information, not to evaluate it.

It was possible that the Committee might have shared his comments with other individuals.

He admitted that, when Ms. Payne was absent in February due to illness, there was also an element of her wanting to avoid meeting with him. It was his view that people had choices to come to work even if ill and could disagree with their own doctor's instructions (as Ms. Payne had by returning on the Friday).

It was agreed that the Policy did not include involvement of parents or support staff or clinicians (unless the support staff or clinicians were directly supervised by the Principal). He had not directly told her that he would be seeking input from other people such as the Coordinator of Curriculum and Support Services. However, he had been informed by that individual, Mr. W. Crouch, that was the normal practice. Mr. Crouch had provided him with certain notes after his meeting with the Clinicians and with his own comments (Ex. 59) but those were not shared with the Grievor and Mr. Fransen had not met with the individuals. That information was referenced in Ex. 22 but was not provided to Ms. Payne until the Appeal process.

Mr. Fransen was certain that he had sent a package of documents to the Trustees prior to March 5 but was not entirely certain as to what was contained. He did not think that he sent all of his hard drive notes (Ex. 42) to the Board prior to the meeting.

In cross-examination he testified that it was his feeling that the Board Of Trustees wanted a recommendation as quickly as possible in order to advertise for a vacant position if Ms. Payne was to be removed. He had told the Board in February that he was contemplating negative consequences and he felt that, in essence, they had told him to "put an eye to the calendar". He could not recall if he had told them that Ms. Payne had no chance to respond prior to preparation of his evaluation and recommendation.

He also agreed that the evaluation did not have to be performed until the end of April in any year but, again, he had been under some pressure from the Trustees as to making recommendations for re-appointments. He had provided his recommendation with full knowledge that Ms. Payne had the right to appeal.

Ultimately, Mr. Fransen felt that he had heard Ms. Payne's side of the story and felt that he had heard "enough".

Her offer on February 12 to resign was one of the factors in terms of his recommendation and he had indicated that to the Board.

Mr. Smorang questioned him as to if Ms. Payne had been kept on until the end of the term, would there have been time for a plan of improvement to be put in place but he felt that was unnecessary and had not discussed that with her.

He had never asked for the raw data from the Committee but only received the collated results. Accordingly, it was impossible to tell if the negative comments all came from one or two teachers or from the group as a whole and he did not take any steps to explore that because of the promise of anonymity. That, to him, was more important that Ms. Payne retaining her Principalship.

He acknowledged that he had never specifically told the Grievor that she had to improve or could lose her job; nor had he told her what specific areas in which she had to improve.

The concerns from Ms. Penner on behalf of the Parents Advisory Committee had not been discussed specifically at the February 19 meeting with the Grievor.

He had met with Ms. Doerksen again after the Appeal hearing on March 6 because he simply wanted to confirm the information that had been received and ensure that it was right although he acknowledged that it would have been better to have had such a meeting before the evaluation report.

He agreed that simply taking someone's word without following up to verify it was not a good practice.

He had never considered setting up a Consultation Committee to assist the Grievor more in this process.

Mr. Fransen did agree that for Ms. Payne to return to classroom teaching would create the perception of a demotion to herself and other staff but maintained that this was not disciplinary. Discipline was only meted out for conduct that was blameworthy and not conduct that was "not on purpose" and might be remedied.

The impact upon the Grievor's income of the removal from her Principalship was approximately seven thousand dollars per year (11.5%) and also it involved her not being in the same type of leadership role and that her decision making would be drastically reduced. However, he did not think that this would necessarily be an embarrassment to her. He was unaware if any other Principal in the Division had ever been put back into a classroom setting before. Simply putting her back in the classroom would not necessarily help Ms. Payne in terms of professional development but that could come later although there had been no plan set.

In Ex. 22, he had indicated that Ms. Payne was to put a plan in place for herself which he agreed put the onus upon herself.

At the February 19 meeting, he had never considered giving her the evaluation and asking her to return sometime later to discuss it.

In the survey of the staff, only twenty four % of those surveyed had given her a low rating and seventy six % had rated her higher than that.

He did not dispute the Grievor's list of attendance at meetings as set forth in Ex. 30 (we do not intend to reproduce all of that but it does indicate that she did attend a great number of meetings).

Mr. Fransen had not received the Grievor's daily schedule which was sent on the back of the "Morning Express" but did agree that would be a useful communication tool.

The allegation concerning her "integrity" was obviously of serious import to the Board. He had been told by the payroll clerk that there were other instances when she did not adequately record her absences but there was no documentation available as to that and we have not taken that allegation into account.

At the March Board meeting, when his recommendation was considered by the Trustees, there had not been enough information to justify immediate intervention which is why the Grievor was allowed to stay until the end of the year.

Ultimately, Mr. Fransen's opinion was that she was responsible (and perhaps blameworthy) for her conduct but he did not feel that it rose to the level of discipline. It was conduct "short of the mark".

He did not disagree that the comments as to defamation listed in the grievance procedure had been made but, as indicated earlier, he felt they were true and based on the information he had in his possession.

There was no rebuttal evidence and that concluded the testimony.

The final submissions of the parties occupied an entire day.

Mr. Simpson commenced by discussing the jurisdictional issue raised at the commencement of the hearing (see p. 3 herein) but also canvassed the other issues concerned as well.

He pointed out that there was a difference between "positions" taken by the parties and evidence. Ms. Basarab had a very limited involvement in the actual matters in question although her testimony certainly put forward the "position" of the Association and the Society. However, the anticipated evidence upon which that "position" was based was not supported by the actual evidence that had ultimately been presented.

Firstly, there was no basis to determine that this was a disciplinary demotion and, if the Board of Arbitration were to have jurisdiction, there had to be a finding of discipline since there was nothing else in the Collective Agreement to support that the grievance was arbitrable.

At no time had the word "discipline" been brought up by the grievor in her evidence and neither was it referred to at all in the evidence other than in Mr. Fransen's memo of February 21, 2001 re Reassignment. Despite that, his memo of March 5 (Ex. 42), specifically had told the Trustees that it was not disciplinary.

The fact that the grievor's conduct "might" be blameworthy did not mean that the response to that conduct was disciplinary and it was not appropriate to assume that, despite the fact that the Employer might have reacted in a disciplinary fashion, that discipline was the only possible response. That would be injurious to proper labour relations.

There was no reference in the grievances to disciplinary action and demotion did not necessarily equate with discipline.

The Collective Agreement, itself, was silent as to the issue of discipline although section 79 of the *Act* would apply but, significantly, the Agreement was silent on the issues of evaluation.

In the absence of disciplinary action, there was no case for this Board to deal with as a grievance based purely on policy was not sufficient. Section 80 of the *Act* could not provide us with jurisdiction not contained within the Collective Agreement.

We were referred to the decision of arbitrator Brown in Re Long Manufacturing Ltd. and Canadian Auto Workers, Local 1285 (1995), 48 L.A.C. (4^{th}) 208, which concerned a grievance concerning overtime distribution which, at p. 214 states that a practice which does not form part of the collective agreement is not arbitrable although if a specific article in question had been breached, that would have a different result. It is noted that an arbitrator must find jurisdiction within the framework of the collective agreement.

We were also provided with the decision of the Court of Appeal in Assiniboine South Teachers' Association of The Manitoba Teachers' Society v. Board of Education of Assiniboine South School Division No. 3 (2000), 148 Man. R. (2d) 1; 224 W.A.C. 1. The facts in that case were notably different but the arbitrator in that instance had found the matter to be not arbitrable.

In paragraphs 26 and 27 of the decision, the Court makes the following statement:

> "This corresponds to the practice in the case of an appeal from a court order or judgment. The order or judgment will be confirmed if found to be correct even if originally granted for wrong reasons. The appeal is from the order or judgment, not the reasons. It would be strange indeed if a different rule applied to arbitration awards. Then an award might be set aside on account of patently unreasonable reasons even if the award could pass a test of correctness. The matter would then have to be referred to another board resulting in further delay. This is contrary to the policy of labour law which requires that labour grievances be resolved as quickly as possible.

> These observations are necessary as I find some of the board majority's comments (such as the comment that "the Division's policy of nondisclosure must be viewed as the setting of a core component of the curriculum") to be nonsensical. The comments which may be so described were not, however, essential to the decision that the grievance was inarbitrable. To be arbitrable, the policy objected to would have to have involved a misinterpretation, misapplication or violation of the collective agreement. The motions judge did not find the majority's decision that the policy involved none of those things to be patently unreasonable. Nor do I."

The Court also reviews the KVP rules but notes that it would be applicable only to a unilaterally imposed workplace rule – in the case before us, the policy had been agreed upon between the parties.

A disciplinary action could be grieved pursuant to the statutory requirements but the action with respect to Ms. Payne here was not disciplinary.

That same type of approach was taken by the Court of Appeal in Billinkoff et al v. Board of Education of Winnipeg School Division No. 1 et al (1999), 134 Man. R. (2d) 99; 193 W.A.C. 99. In paragraphs 21 and 22 the Court states:

> "In my opinion, the issue raised by the applicants is not an appropriate subject for grievance and arbitration under the various collective agreements.
>
> Section 131.3(1) of the Public Schools Act, C.C.S.M., c. P-250, requires that every collective agreement contain a provision for the final settlement of all differences "between the parties to, or persons bound by, the agreement . . . concerning its contents, meaning, application, or violation". The issue raised by the applicants is not about what is in the collective agreement, but rather, what has been left out. Indeed, as has been noted, the collective agreements involving Assiniboine South No. 3 and Fort Garry No. 5 have no provisions whatever concerning time off for the observance of religious holy days, with or without pay. With respect to the two remaining collective agreements, with Winnipeg No. 1 and Seven Oaks No. 10, which do contain provisions concerning observance of religious holy days, no one questions the meaning of the existing terms. When the collective agreement with respect to permission from the superintendent, a teacher is entitled to be absent with pay to observe a maximum of two religious holy days, but must bear the cost of a substitute for any further observance, there is no dispute as to the meaning or application of the provisions. The school divisions have not violated the terms of the collective agreements and no one makes that assertion. The issue is not one that concerns the "contents, meaning, application, or violation" of the collective agreement."

Of some importance, the Court also deals with Assiniboine South Division and states at paragraph 37:

> "The case of Assiniboine South Teachers Association of the Manitoba Teachers Society v. Board of Education of Assiniboine South School Division No. 3 (1998), 128 Man. R. (2d) 231 (Q.B.), is noteworthy because, like the present case, it deals with a grievance in relation to administrative policy rather than the terms of a collective agreement. The decision was by Wright, J., of the Manitoba Court of Queen's Bench. In his reasons, Wright, J., underlines the importance of relating a Charter issue or a human rights issue with the interpretation of the collective agreement. By the way of background, a teacher lodged a grievance because, as a matter of policy, the school division had denied her request to reveal to her class of students her lesbian sexual orientation. She claimed that the policy violated both her Charter rights and her rights under the Manitoba Human Rights Code. The arbitration board held that it did not have jurisdiction to deal with these issues in the abstract, there being no provision in the collective agreement in conflict with those statutes. On judicial review, Wright, J., agreed with the position of the arbitration board (although he quashed the award for a completely different reason). Wright, J., held that there must be a "proper linkage between the grievance and the collective agreement". He made reference to s. 56(1) of the Human Rights Code. That provision specifies that a contract, including the collective agreement in the matter before Wright, J., and the collective agreements involved in the present litigation, is deemed to contain a stipulation that no party to the contract shall contravene the Human Rights Code in carrying out any term of the contract. This provision, however, can be of no consequence if there is no term of the contract in dispute."

At paragraphs 41 through 43 the Court discussed the impact of Weber v. Ontario Hydro:

> "In Weber v. Ontario Hydro, McLachlin, J., makes it clear that a dispute will be held to arise out of the collective agreement if it falls under the collective agreement either expressly or by inference. In my view, the present dispute does not emerge out of any of the collective agreements, even inferentially.
>
> Even if the applicants did have an arbitrable issue, it is not one which The Manitoba Teachers' Society could take up on their behalf as a grievance. Having negotiated the terms of the collective agreement, it would be unconscionable for The Manitoba Teachers' Society to raise a grievance concerning the adequacy of those very terms. Moreover, it is highly unlikely that the applicants could successfully raise a complaint of an unfair labour practice under s. 20 of the Labour Relations Act against the bargaining agents for failing to proceed with a grievance. Given the circumstances, it could hardly be asserted that the refusal to proceed with a grievance would be "arbitrary, discriminatory or in bad faith".
>
> The reasons for decision of McLachlin, J., in Weber v. Ontario Hydro emphasize that where the arbitration board under a grievance proceeding has jurisdiction, there is no room for concurrent jurisdiction in the courts. But that

> case has no application. This is not a case of concurrent jurisdiction, but one where the only jurisdiction is other than the arbitration process under the collective agreement."

We were also referred to Sachdev et al v. University of Manitoba et al (2001), 156 Man. R. (2d) 315; 246 W.A.C. 315, and particularly paragraphs 12 and 18 of the Court of Appeal's decision which read as follows:

> "The grievance procedure in the collective agreement is ill-suited to resolve the kind of issue raised by Murray against the University. He is not claiming a "violation, misinterpretation or improper application of the terms and conditions" of the collective agreement, which is essential for what might be called the normal grievance.
>
> In the case of Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; 183 N.R. 241; 82 O.A.C. 321; 125 D.L.R. (4th) 583, the Supreme Court of Canada, in reasons by McLachlin, J. (as she then was), stated that jurisdictional issues of this kind are to be determined by asking whether the dispute, in its essential character, arises from the interpretation, application, administration, or violation of the collective agreement. In this case, in my opinion, the issue falls outside the collective agreement. Merely because it is a dispute between a former member of the Faculty Association and the University does not bring it within the framework of the collective agreement. As McLachlin, J., noted at para. 54:
>
> > "Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: Elliot v. De Havilland Aircraft Co. of Canada Ltd. (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, per Osler, J.; Butt v. United Steelworkers of America, [(1993), 106 Nfld. & P.E.I.R. 181 (Nfld. T.D.)]; Bourne v. Otis Elevator Co., [(1984), 45 O/R/ (2d) 321 (H.C.)], at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey, J., in St. Anne Nackawic, [[1986] 1 S.C.R. 704]."

Reference was also made to the decision of the Court of Appeal for British Columbia in Re Elkview Coal Corp. and United Steelworkers of America, Local Union No. 9346, Labour Relations Board of British Columbia and Dalton Larson, (2001) BCCA 488, which involved an arbitration award as to whether medical insurance benefits were available to the grievor. At paragraph 22 of the decision, the Court notes:

> > "Nothing in the allegations advanced by the Union, nor in the remedy sought, relate to the Collective Agreement, or to a breach of its terms. The definition of common law spouse is a term of the insurance policy, a term agreed to be "standard" in the industry, and expressed in the language of the insurer's choosing. The application of that definition to the circumstances of this case was made by the insurer. It declined to provide coverage to the employee's same-sex partner, based on its interpretation of the language of the insurance policy. The insurer's decision does not relate in any way to the Collective Agreement, or to any breach of its provisions."

Mr. Simpson suggested that even if there was a perception of unfairness – as well as a perception that there was no remedy – that was not within our jurisdiction. He also noted that teachers were hired as teachers and only designated as principals. Ms. Payne's Form 2 contract only referred to her being a teacher and section 92 of *The Public Schools Act* did not provide a specific remedy for the question of being reassigned from the position of Principal. It had been the Trustees' intention to maintain her in employment and honour the contract but that was not presently possible.

The following cases were also referred to by the Division and will be discussed as necessary later:

> Re International Nickel Co. of Canada Ltd. and United Steelworkers (1975), 8 L.A.C. (2d) 290 (Hinnegan)
>
> Re Government of Saskatchewan and Saskatchewan Government Employees' Union (Pollock) (1988), 2 L.A.C. (4th) 423 (Ish)
>
> Baird v. Workers' Compensation Board (1998), 128 Man. R. (2d) 222
>
> Re Toronto East General & Orthopaedic Hospital Inc. and Association of Allied Health Professionals Ontario (1989), 8 L.A.C. (4th) 391 (Springate)
>
> Re Canadian Forest Products Ltd. and Industrial Wood & Allied Workers of Canada, Local 1-424 (2000), 89 L.A.C. (4th) 367 (Larson)

We were also referred to Regulation 468/88 under *The Education Administration Act* and, in particular, section 27 of same which provides that "a school board shall designate a principal for every school …". It was required of the Board of Trustees to designate a Principal but that was a different matter than the Form 2 contract and the practice in this Division had clearly been to appoint upon an annual basis. Previous statutory protection for teachers and principals had been repealed in the year 2000 and there was no longer any right to grieve unless otherwise negotiated by the Association. Section 80 of *The Labour Relations Act* would only apply to matters contained within the Collective Agreement.

It was also of importance that Ms. Payne and the Association had conceded that it was not feasible for her to return to the Division in any capacity.

The last issue canvassed by Mr. Simpson in his initial presentation was that of the allegations of defamation. It was strongly submitted that the required elements did not exist to justify such a claim and that the defences of truth and qualified privilege would be applicable here. In any event, it was not a Collective Agreement issue and it was not open to this Board to simply hear a defamation issue as our authority was limited to breaches of Collective Agreement.

We were referred to a number of authorities with respect to this issue. Mr. Simpson referred us to several extracts from Brown, The Law of Defamation in Canada (Second Edition) Carswell, at pp. 13-137 to 13-138:

> "Character, Qualifications, Behavior and Performance of School Personnel. The administrative officers and staff and the faculty members of educational institutions enjoy a qualified privilege in the exchange of information concerning the character, qualifications, behavior and performance of each other or applicants for these positions. This privilege extends to communications among officers and staff, and any records and files recording such information. Thus, a chairman of a department is privileged to comment on the qualifications of a member of his department applying for a promotion in a report to the academic vice-president. Communications between a departmental chairman and a personnel committee, or a vice-principal or principal and a superintendent of schools, regarding a teacher's performance are protected by a qualified privilege. The chairman of a secondary school committee acting on behalf of the committee may send a recommendation to the Secretary of Public Education that the vice principal of the school be removed."

We were also provided with the decision of the Manitoba Court of Appeal in Hall v. Puchniak et al (1995), 107 Man R. (2d) 88; 109 W.A.C. 88. That situation involved a provincial employee being provided with a written reprimand and reassigned to another position. The matter had been grieved but the grievor had started an independent civil action besides arbitration.

While the end result was that the defamation claim was allowed to proceed independent of the arbitration, we were referred to the Court's comments at paragraphs 14 and 15 as follows:

> "The trial judge held that the defamation action was clearly "a transparent device to obtain the remedy which he did not obtain on arbitration". With respect, that simply is not so. The remedy for defamation is an award of damages to compensate for loss of reputation. The arbitration board had no jurisdiction to compensate for such a loss. It could only reinstate him or award him compensation for his lost earnings. This difference in remedy distinguishes a defamation action from one for conspiracy to terminate an employment contract wrongfully or one for inducing breach of contract. The remedy in those latter actions is the same as in an action for wrongful dismissal.
>
> It should also be noted that the defendant supervisor is sued for defamation. This suit is not an indirect attempt to litigate the wrongful dismissal claim by accusing a co-worker of interference in the contractual relations between the plaintiff and Her Majesty. Although the wrongful conduct alleged occurred in the course of the supervisor's employment, it is conduct which does not involve infringement of the plaintiff's rights under the collective agreement: it is conduct which involves an infringement of the plaintiff's rights given to him

> by the general law. The final settlement provision of the collective agreement does not limit an employee's right to sue a co-worker for a wrong independent of the employment contract."

Mr. Simpson argued that a claim of defamation was better suited to the specialized area of civil litigation rather than to be left for arbitrators.

We were also referred to Fording Coal Ltd. v. United Steelworkers of America, Local 7884; Labour Relations Board, Intervener (1999) 169 D.L.R. (4th) 468 (B.C.C.A.) and the comments at p. 476-477 of same:

> "Reviewing some of the criteria stated in Weber, the fact that the parties are Company and Union is not determinative, and all actions at law between these parties are not excluded. The same may be said about the location of the dispute, which in this case was off the workplace which gives an edge, but not a conclusive edge, to the Company. The timing of the complaint seems neutral in this case.
>
> With these questions in mind, as stated in Weber and O'Leary, what has to be decided is whether this dispute, in its essential character, arises from the interpretation, application, administration or violation of the Collective Agreement.
>
> Rather, I believe this dispute falls well outside the normal scope of employer-employee relations, and the context of the Collective Agreement is not broad enough to exclude the Company's right of recourse to the regular courts for this action of defamation. In other words, I do not think the Collective Agreement contemplates adjudicating upon the freedom of speech rights of Mr. Takala which are, of course, subject to the law of defamation.
>
> Having said that, it may be unnecessary to mention the residual jurisdiction of the regular courts, which was specifically excerpted from the general rule in both Weber and O'Leary. It is significant, however, that parties to defamation actions have an absolute right to trial by jury, and there are very special pleading and evidentiary requirements for libel actions that cannot conveniently be managed by an arbitrator. If necessary, therefore, I would also hold that this is a case where the residual jurisdiction of the regular courts should be available to the parties."

In conclusion Mr. Simpson submitted that the defamation claim was not related to the Collective Agreement and the evidence disclosed that the grievance in its entirety ought properly to be dismissed.

Mr. Smorang on behalf of the Association and the grievor divided his submission into three basic areas in dispute. The first was the evaluation itself, the second was the remedy requested, and the third was the issue of defamation.

He provided us with a number of authorities, extracts from texts and statutory provisions which will be discussed as necessary in the following recital but which we list now for the sake of convenience:

The Labour Relations Act, R.S.M. 1987, c. L10 - Sections 78(1) - 81(1), 120(2) – 122

The Public Schools Act, R.S.M. 1987, c. P250 – Section 98(2)

Brown & Beatty, Canadian Labour Arbitration, (Third Edition) pp. 7-156 to 7-159

Re Goodyear Canada Inc. and United Rubber Workers, Local 232 (1977), 14 L.A.C. (2d) 340 (Burkett)

Re Collegiate/Arlington Sports, A Division of Imasco Retail Inc. and Retail, Commercial and Industrial Union, Local 206 (1984), 15 L.A.C. (3d) 220 (Beck)

Re British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6 (1988), 1 L.A.C. (4th) 72 (Hope, Q.C.)

Shilton, Education Labour and Employment Law in Ontario, Canada Law Book Inc., pp. 8-9 to 8-11

Re Board of Education for the Borough of Scarborough and Ontario Secondary School Teachers' Federation, District 16 (1980), 26 L.A.C. (2d) 160 (Picher)

Re The Elgin County Roman Catholic Separate School Board and The Elgin Branch Affiliate of the Ontario English Catholic Teachers' Association/Grievance of R. Bird (November 15, 1988, unreported, Whitehead)

Re The Durham Board of Education and The Ontario Secondary School Teachers' Federation/Grievance of P. Murray (February 21, 1996, unreported, Barrett)

Re The Essex County Roman Catholic Separate School Board and The Essex County Separate School Teachers' Association, Members of the Ontario English Catholic School Teachers' Association and A.E.F.O./Grievance of R. Laforet (November 8, 1977, unreported, Hinnegan)

Re St. Clair Catholic District School Board and Ontario English

Catholic Teachers Association (1999), 86 L.A.C. (4th) 251 (Picher)

Re Keyano College and Keyano College Faculty Association (1993), 34 L.A.C. (4th) 182 (Beattie)

Re Calgary Housing Authority and Alberta Union of Provincial Employees (1990), 10 L.A.C. (4th) 129 (Moreau)

Re Domtar Gypsum and United Steelworkers of America, Local 14994 (1996), 56 L.A.C. (4th) 266 (Beck)

The Assiniboine South Teachers' Association of the Manitoba Teachers' Society v. The Assiniboine South School Division No. 3 (2000) MBCA 9

Shilton, Education Labour and Employment Law in Ontario, Canada Law Book Inc., pp. 8-32 to 8-35

Ratych v. Bloomer [1990] 1 S.C.R. 940

Weber v. Ontario Hydro (1995), 125 D.L.R. (4th) 583 (SCC)

Bhaduria v. Toronto Board of Education et al (1999), 173 D.L.R. (4th) 382 (Ont. C.A.)

Sloan v. York Region District School Board [2000] O.J. No. 2754

Phillips v. Harrison (2000), 196 D.L.R. (4th) 69 (MB. C.A.)

Haight-Smith v. Neden et al (2002) BCCA 132

CED Western, pp. 57-61

Brown, The Law of Defamation in Canada, (Second Edition, Vol. 2), Carswell, pp. 16-37 to16-40.2

Hiltz and Seamone Co. v. Nova Scotia (Attorney General) [1997] N.S.J. NO. 530

Dhillon v. Brar [1991] M.J. No. 453

Cronk v. Cundall [1993] M.J. No. 379

With respect to the issue of the evaluation itself, he confirmed that the policy per se was not being challenged although the application of it was. The outcome of the process had been a demotion with a loss of status, position, and compensation which created damage to the grievor's career presently and for future purposes. It had also affected the grievor's health and that had been shown through the medical evidence although it was conceded that reinstatement was no longer viable.

One of the central issues was whether the action taken was to be considered as disciplinary or not. If disciplinary, just cause had to be shown as well as a reasonable application. This had been disciplinary and, therefore, the Board had jurisdiction to intervene. Even if the action was considered not to be disciplinary, the issue still remained as to whether there was a connection to the Collective Agreement and s. 80 of the *Act* should apply.

The excerpt referred to us from Brown & Beatty, Canadian Labour Arbitration at pp. 7-156 to 7-157 reads as follows:

> "Disciplinary demotion. A second technique by which employees who persist in inadequate and unacceptable work habits may be induced to adhere to the norms of the plant is to assign them to lower rated and less critical jobs until they have demonstrated a willingness and ability to adequately discharge the assigned duties in their former positions. Initially, some arbitrators were of the view that unless the collective agreement specifically referred to such powers, demoting an employee was not a proper form of discipline because it was said to abridge seniority rights, and because of its indefinite effect. However, in more recent awards, where the employee has shown his unsuitability, incompetence, or inability to do the job in question, the vast majority of arbitrators have come to accept the demotion or transfer of an employee as a legitimate form of discipline, unless the employer's right to demote is specifically circumscribed either by the seniority provisions of the agreement dealing with promotions, transfers and the like, or by provisions which mandate specific sets of penalties for particular offences, or unless there was no culminating incident justifying the employer's action. The general idea now seems to be that demotion or transfer is an appropriate disciplinary response where blameworthy, *viz.*, willful conduct undermines the competence of the employee to perform his job and is amenable to a corrective response. It has also been said that a disciplinary demotion or transfer is appropriate where the misconduct is job related. And at least one arbitrator has dealt with the issue of the extent of demotion warranted in a particular case…
>
> Acts of misconduct which arbitrators have found to be so co-extensive with ability or competence as to merit demotion include negligence, poor work attitudes and effort, sexual harassment of an employee the grievor supervised, neglect of duty, breach of trust, the authorship of a letter disparaging of management, lateness and absenteeism, failure to work safely, falsification of company records, theft, aggravated assault, and unsatisfactory work performance. Further, although disciplinary demotions have been determined to be inappropriate in cases where a minor altercation, single error in

> judgment, or an isolated act of insubordination, or careless and inattentive attitude, could not be said to reflect on the grievor's ability to do the job in question, at least one arbitrator has commented that since the concept of ability, which embraces both physical competence and mental attitude, has been construed broadly by arbitrators in the past, disciplinary demotions may be proper for almost all forms of disciplinable behaviour. Of course, if the collective agreement expressly empowers the employer to resort to demotion as part of its general powers to discipline, then it seems clear that such a sanction may be invoked even where the culpable conduct in no way reflects on the employee's ability or competence to perform his work even in the broadest sense."

The portion of Re Goodyear Canada Inc. referred to at p. 4 of that Award is as follows:

> "The arbitral jurisprudence holds that demotion is not a permissible form of discipline except where the misconduct undermines the competence (broadly interpreted) of the employee to perform the job which he holds; see Re International Assco. of Machinists and Gabriel of Canada Ltd. (1968), 19 L.A.C. 22 (Christie); and Re Brockville Chemical Industries Ltd. and Int'l Chemical Workers, Local 721 (1971), 23 L.A.C. 336 (Shime); and see Re Steel Co. of Canada and U.S.W., Local 1005, supra, for a review of the authorities. Disciplinary demotion is held not to be permissible in other than this limited context because it abridges seniority rights and because it is in effect a penalty of an indefinite length. When it can be shown, however, that blameworthy conduct undermines an employee's competence to perform his assigned job, as distinct [page 345] from his general competence as an employee, arbitrators have upheld demotion as a reasonable employer response but have stipulated that the demotion, although indefinite, is not permanent in the sense that it forever precludes an employee from exercising his seniority rights and thereby returning himself to his former position or one of equal rank; see Re International Chemical Workers, Local 721 and Brockville Chemical Industries, supra, and Re Consumers Glass Co. Ltd. and United Glass & Ceramic Workers Local 200 (1976), 12 L.A.C. (2d) 40 (Abbott).
>
> In cases of disciplinary demotion as in any discipline the employer must first establish its right to impose discipline by proving on the balance of probabilities that the employee has engaged in some form of blameworthy conduct. Having established its right to discipline the employer must also satisfy a board of arbitration as to the appropriateness of the penalty. In the case of a disciplinary demotion the appropriateness of the penalty is determined not only by the gravity of the offence, taking into account prior warnings and the disciplinary record etc., but it is also determined by the nature of the offence; it must be job related. The decision of the company with respect to the job relatedness of the offence and the consequent effect upon the ability or suitability of the employee(s) is subject to arbitral review. The standard of review flows from the discretion given an employer under the collective agreement to determine qualifications and ability; see Canadian Food and Allied Workers Union, Local 175 and The Great Atlantic and Pacific Co. of Canada Ltd. etc. 76 C.L.L.C. 14,056 and, as in all discipline cases, the employer's right to discipline is circumscribed by the requirement for equality

> of treatment. The employer cannot pick and choose from amongst those whom he ought to know share an equal involvement and neither can he make an example of certain employees and spare others whom he ought to know share an equal involvement. If an employer acts in a manner he will have acted in a discriminatory fashion and his decision will be overturned. This requirement of just cause, which is particularly relevant in this case, has been articulated in the unlawful strike cases; see Re Julius Resnick Canada Ltd. and International Leather-goods, Plastics & Novelty Workers, Local 9 (1973), 3 L.A.C. (2d) 247 (Carter); Re United Textile Workers and Long Sault Yarns Ltd. (1968), 19 L.A.C. 257 (Curtis); Re Iron Ore Co. of Canada and U.S.W., Local 5795 (1975), 11 L.A.C. (2d) 16 (Harris), at p. 25. The requirement is equally applicable in a demotion situation where one employee is singed out in preference to others; see Re Union of Canadian Retail Employees and Loblaw Groceterias Ltd. (1972), 24 L.A.C. 246 (O'Shea)."

Re Collegiate/Arlington Sports essentially states the same premises.

Counsel argued that the demotion here was not limited in duration and that was of significance as shown in Re British Columbia Railway and certain of the other authorities referred to us.

Ms. Stilton, in her text, Education Labour and Employment Law in Ontario, states as follows at p. 8-10 as to the criteria to be examined:

> "Where the employer response to culpable teacher conduct is dismissal, arbitrators have normally had no difficulty characterizing that response as disciplinary. When the employer action falls short of dismissal, arbitrators, in determining whether or not such action is disciplinary, have been attracted to a focus not just on the nature of the employee's conduct, but also to some degree on the purpose or intent of the school board in developing its response. This approach is particularly evident in cases in which the branch affiliate attempts to characterize a teacher transfer as a disciplinary measure. In these cases, arbitrators have had to balance employer and employee rights within the context of collective agreements which normally recognize a broad employer right to assign and transfer teachers in the best interests of the system. In Hamilton-Wentworth Roman Catholic Separate School Board and O.E.C.T.A./A.E.F.O. (Re), for example, the issue involved was whether the transfer of a teacher from a Kindergarten class to a grade 3 class was disciplinary. The arbitration board commented that "none of the objective elements of a disciplinary procedure are to be found", and it itemized these "objective elements" as follows:
>
> (1) No representative of the school board indicated that the transfer was disciplinary.
> (2) The board did not follow its disciplinary procedures.
> (3) There was no notation of discipline in the grievor's file.
> (4) The board's response to the grievance and subsequent correspondence specifically indicated that the transfer was not disciplinary.
> (5) There was no monetary loss and no change in classification.

> (6) There was no threat of further action.
> (7) The transfer was not implemented to correct any problems the grievor was having with her Kindergarten class."

She also refers to the decision of arbitrator Picher in Re Board of Education for the Borough of Scarborough which turned on a determination as to whether action taken by the Board in terms of evaluation of a probationary teacher was disciplinary or not. At p. 9 of the award, the following comment is made:

> "The weight of all of the foregoing authorities, the jurisprudence against which collective agreements are generally negotiated, is that a non-disciplinary employer response follows upon innocent or non-culpable employee conduct. When an employer reacts to conduct that is willful or blameworthy its response is generally understood as disciplinary. If the actions or omissions of an employee are caused by some fundamental incapacity which prevent the individual from doing his job, any resulting transfer, demotion or termination of that employee is non-disciplinary. An employer takes disciplinary action when it reacts whether by warning, suspension, demotion, transfer, discharge or otherwise, as a result of employee conduct that is willful and controllable."

The Board, in that instance, found that the dismissal was disciplinary in nature and reinstated the probationary teacher for a second year.

Basically, Mr. Smorang's position was that section 98(2) of *The Public Schools Act* deemed principals or vice-principals to be employees and, therefore, all of the just cause and fairness provisions applied. Ms. Payne had been unfairly treated, no just cause had been established, and the Division had alternative reasonable measures to take in lieu of a permanent or indefinite demotion (see Re Elgin County Roman Catholic Separate School Board at pp. 29 and following – we do not find it necessary to quote the entire extract referred to). However, we do note that there are certain similarities in the fact situations between that and this case and that reinstatement of the grievor there to the position of principal was ordered by the majority of the Board.

Re Durham Board of Education sets the following tests at p. 35 of that award:

> 1) Did the employer indicate that the action was disciplinary?
> 2) Did the employer follow the usual disciplinary procedures?
> 3) Did the employer make a notation on the grievor's record which could be used in subsequent disciplinary proceedings?
> 4) Did the grievor suffer a monetary or other loss in position?
> 5) Were special instructions or supervision imposed?
> 6) Were there threats of further action?
> 7) Was the action taken as a measure of seeking correction of problem behaviour?"

Re Essex County Roman Catholic Separate School Board finds that since several references to the position of principal were made in the collective agreement, a board of arbitration had jurisdiction to deal with issues relating to a teacher in his or her capacity as principal. The grievor in that instance was reinstated to the principal position as well.

Re St. Clair Catholic District School concerned what was described as an administrative transfer of a teacher because of complaints and concerns but the transfer was ruled as being disciplinary in nature and also adopts the seven criteria listed above. The comment at p. 7 of the award was referred to us:

> "These cases demonstrate that meetings with employees are normally considered administrative performance reviews if management highlights areas where performance needs to be improved and sets specific goals and standards for the employees to meet. Accordingly, transfers that result from such meetings may well be found to be administrative. In contrast, the St. Clair School Board never met with Ms. Odrcich about the problems it perceived in her performance before it imposed the transfer. After it received the multiple complaints by more than a dozen parents refusing to have their children placed in Ms. Odrcich's classroom, the School Board reacted abruptly by imposing the transfer. There appears to have been no attempt by the School Board to express disapproval of the grievor's performance or to identify areas where performance needed to be improved in a manner similar to a performance review."

Re Keyano College involved a demotion from the position of department chairman. The Board there found that demotion had to be for just cause including the requirement that the grievor be advised of the consequences of continued inadequate performance. Accordingly, the demotion was viewed to be premature. We were referred to the comments of the Board at pp. 11-12:

> "We adopt the criteria set out by the board chaired by arbitrator Hope I the Edith Cavell award (above, at p. 233) as being equally applicable to a demotion (whether based on culpability or non-culpability) as to a dismissal (based on non-culpability):
>
> > It is not open to an employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An employer who seeks to dismiss an employee for a non-culpable deficiency in job performance must meet certain criteria:
> >
> > (a) The employer must define the level of job performance required.
> >
> > (b) The employer must establish that the standard expected was communicated to the employee.
> >
> > (c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
> >
> > (d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her

> incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.
>
> (e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal."

The comment is further made by the Board that a demotion in this type of situation should not be permanent.

Re Calgary Housing Authority basically stands for the same type of principles concerning disciplinary action and evaluation as does Re Domtar Gypsum.

Mr. Smorang placed particular emphasis on the dissent of Mr. Justice Kroft in Re Assiniboine South Teachers' Association. In that instance, the learned Justice relied upon the "Purpose" and the "Discipline" provisions of the collective agreement as incorporating jurisdiction. However, he does make the finding that arbitrators must find "implied or implicit authority within the four corners of the collective agreement" prior to having jurisdiction. However, the intent of the Purpose clause was sufficiently broad in his view to confer jurisdiction.

The second extract from Ms. Shilton's text simply indicates that, even if a demotion is warranted, demotions of indefinite length or permanent nature are not appropriate and that generally, arbitrators in the area of education have been reluctant to allow such demotions (even when justified) to remain indefinite.

Mr. Smorang provided us with a full review of the facts as well as a detailed examination of each of the comments or inaccuracies suggested to exist in Ex. 22. We were reminded that Ms. Payne had been hired as a Principal and had responded to an advertisement (Ex. 6) for that position – it was not just a temporary assignment. Pursuant to section 98(2) of the *Act*, she was an employee in that capacity. It would have been a reasonable expectation that, upon being evaluated as a Principal, she might have been placed on probation if the results were unsatisfactory but demotion was disciplinary. In her first year as Principal, Mr. Jamieson had given her positive feedback, and Mr. Fransen during the second term (and after) had given her little guidance or mentorship. From January to June formal contact was infrequent and feedback was "sparse".

At the June 14th meeting, she had set the three goals which were identified for improvement (Ex. 12) and had essentially met those goals as shown through the later evidence. She had been "left in the dark" as to proper performance.

That situation did not change in the fall term as the feedback from the teacher conferences was essentially positive. That was the second time that Mr. Fransen had been approached by the group of unhappy teachers but had simply told them to deal with the matter during the anonymous survey process. That was a dereliction of his duty which was to become involved in a more open and direct way.

The use of the anonymous survey practice in itself was challenged as nothing in Ex. 7 spoke to that type of process which was also unreliable as had been shown by Mr. Fransen's inability to identify the number of teachers who actually had concerns other than those who met with him.

Ms. Payne was to meet with Mr. Fransen on February 5th but could not attend because of illness. It was not reasonable for Mr. Fransen to have prepared and finalized the evaluation and recommendation by February 19th – he could have waited. We were reminded that Ms. Payne herself was not actually hired until May 31st and there was no real basis for Mr. Fransen's belief that he had to act immediately.

It was also submitted that Mr. Fransen, himself, had consistently "off-loaded" his responsibilities in that the direct communication necessary was placed upon the teachers, the parents, and even the plan envisioned in Ex. 22 was to be the responsibility of Ms. Payne. Counsel suggested that this was a clear case of discipline without just cause and without previous progressive discipline. We do not find it necessary to deal with his detailed summary of Ex. 22 as the major elements of same will be shortly dealt with in the decision portion of this Award.

It was also of concern that the grievor's personnel file had gone from one document when she originally requested to see it to some twenty-five or thirty as set forth in Ex. 42.

Even if this was not discipline, it was a clear breach of s. 80 of the *Act* as the evaluation involved management discretion.

Article 1 of the Collective Agreement (which referenced the Form 2 contract) was sufficient to provide jurisdiction. As well, Articles 5 which referred to "Principals" and Article 10 which referred to "Application" buttressed that position.

Mr. Smorang then turned to the issue of remedy and conceded that Ms. Payne was not ready or able to go back to the Division at this time but that was as a result of the Division's actions. It was likely to have a permanent effect upon her personally and professionally.

The Board was invited to fashion a remedy under s. 121 of the *Act* that did not involve reinstatement but that would include monetary loss, damages, interest, and rescission and rectification of her file. It would be appropriate for her to resign from the Division as of June 30, 2002, and to provide a letter of reference to be agreed upon between Counsel (or brought back to this Board) as well as a letter of apology.

The calculation of compensation should not include reduction for the benefits she had received in this particular circumstance and she should be compensated from March 8, 2001.

We were referred to the decision of the Supreme Court of Canada in Ratych v. Bloomer as the authority for the principle of double recovery.

With respect to the defamation issue, we were referred by Mr. Smorang to a number of the authorities already listed and we will deal with them as necessary later.

The request for damages for defamation was $5,000.00 inclusive.

In his Reply, Mr. Simpson argued strenuously that Article 1 (which is very general in nature) did not provide us with the jurisdiction to consider the grievance. If it was important (as Mr. Justice Kroft indicated it was in Re Assiniboine South to consider the intent between the parties), the clear intent was that Principal evaluations were not included within the Collective Agreement and not intended to be grievable. The reference to administrative allowances and the reference to Principals and Vice-Principals in Article 5 also did not confer such jurisdiction, nor did it contemplate anything other than the practice of the Division to reappoint on an annual basis. It was not Mr. Fransen's fault that Ms. Payne was unable to succeed and he was not blame for her deficiencies. Rather, he had only collated the data according to the agreed upon policy which had been followed for many years.

Neither the Division, nor Mr. Fransen had acted recklessly. The policy had been reviewed and renewed by the Joint Standing Committee (of which Ms. Payne was part) and it had been determined that the raw data should not be returned. The Policy had been followed and applied.

Although it might be possible to say that Mr. Fransen could have done things differently, he was under no legal obligation to have done so.

Between February 5th and 19th, Mr. Fransen had received another visit from the Parent Advisory Committee and had several conversations with Ms. Payne including the one in which she said she would resign. He had not "jumped" at that offer but it was a factor to consider and that was not part of any disciplinary process, nor was it even raised in the original grievance.

Mr. Fransen had also taken into account all of the positive things about Ms. Payne as was expressed in Ex. 22.

In terms of remedy, Mr. Simpson suggested that this Board of Arbitration should not retain jurisdiction and it was necessary to deal with the medical evidence as it existed at the present time. Dr. Globerman's report (Ex. 43) was based only on one visit and certain misinformation was provided by the grievor as to her earlier hospitalization (Mr. Smorang later disputed that evidence but we will deal with that as necessary).

In any event, Dr. Globerman's opinion had been that she was able to return to work by the fall of 2000. Dr. Rosen's evidence was based upon more observations but also had to be considered in light that he had only heard her side of the story and,

apparently, had also received some misinformation and had attempted no independent investigation. His evidence had also been that any damage created had been by the reassignment itself, not by any actions of Mr. Fransen or the Board of Trustees.

It was reasonable to assume in this particular instance, and based upon the evidence, that part of Ms. Payne's difficulties were entirely unrelated to her employment.

If there was a remedy, the basic issue was really the $7,000.00 administrative allowance. It was submitted that we could not ignore the fact that she had been receiving LTD benefits as set forth in the Collective Agreement and it would be inappropriate to "double dip" in this situation.

There had been no disciplinary process followed here.

Mr. Simpson also reviewed the authorities furnished by the Association in some detail but we do not find it necessary to canvass all of those comments.

Mr. Fransen had testified at length during the hearing and it was clear that he bore the grievor no personal ill will – that was critical to the intention of the Employer. The real issue was the inability of the grievor to perform properly as Principal and she had demonstrated that she did not have the aptitude to be the leader of a school at either the time the evaluation was performed or even at the arbitration hearing itself. She had provided unsatisfactory answers to direct questions and either avoided the truth or did not recognize it. She had also shown distinct errors in judgment and, in fact, had been the author of her own misfortune to a great degree.

With respect to the defamation issue, it was submitted that the evaluation was "not published" in the sense that it was only provided to the grievor and then only provided to the Trustees upon the basis of the appeal procedure. That disclosure was required and the defenses of truth and qualified privilege applied.

Some statements in Ex. 22 may have been inaccurate but the balance and the substance of the evaluation was true. The comments were not defamatory if taken into context.

We were referred to a number of other authorities by Mr. Simpson (which we will only deal with as necessary later) which included:

Korach v. Moore et al (1991), 76 D.L.R. (4^{th}) 506 (Ont C.A.)

MacArthur v. Meuser [1997] O.J. No. 1377 (affirmed by the Ontario Court of Appeal in [2000] O.J. No. 1235

In short, there was no ill will or malice shown and there was no cause for defamation. Even if there was, that should be left to civil litigation.

Mr. Fransen might not have communicated all of his concerns entirely but the concerns were there and he had expressed concerns to Ms. Payne although not specifics.

There was no disciplinary demotion here and no jurisdiction to review the decision. Even if there was jurisdiction, the Board of Arbitration should be slow to intervene and the grievance ought to be dismissed.

Mr. Smorang noted that there was a bona fide disability to date. It was inappropriate to put too much weight on the prior hospital stay. Ms. Payne had also rebounded well after that and had shown (as disclosed in the positive comments in Exs. 10 and 17) that she did have the aptitude to be a leader.

That concluded the evidence and the arguments.

DECISION:

As can be seen from the duration of the hearing, and the length of this Award itself, this is not an easy matter to determine. There are a number of issues and a number of different "fairness's" involved. This is an instance where we must look to the substance of the matter in dispute.

As we have detailed all of the evidence and the arguments previously, it is not our intention here to repeat all of what has been said before. Rather, we shall attempt to summarize our findings as to the various issues although we have certainly taken into account all of the evidence and authorities before us.

The first issue to be dealt with is that of the preliminary objection to our jurisdiction raised by the Division although, to a large extent, that is inextricably tied to our determination as to whether or not the action taken (the removal of Ms. Payne from her position as Principal) was disciplinary in nature.

It is clearly our view that, if the action taken is to be considered disciplinary, then the provisions of *The Labour Relations Act* should apply and require a demonstration of just cause and all of the usual considerations that attach to that. Alternatively, it is possible that, even if we do not consider the action taken to be a disciplinary demotion, it is possible that section 80 of *The Labour Relations Act* applies and the allegation with respect to that is precisely that such discretion as there may have been within the Division (under the terms of the Collective Agreement) was exercised improperly. In short, there are two potential grounds upon which this matter might be arbitrable but each carries with it different considerations and consequences.

The interplay (in this context) of the statutory Form 2 agreement when viewed in conjunction with the Collective Agreement also creates certain difficulties.

The Association relies upon Articles 1 and 5 of the Collective Agreement in terms of importing enough "linkage" (as referred to in various of the authorities previously

discussed) to render this matter arbitrable even upon the second ground. Even if this matter involved only the administration of the Collective Agreement – not discipline – that would be sufficient to confer jurisdiction upon us as to at least that extent. However, the primary ground was that the action taken was disciplinary.

The Division argues that, at least with respect to this particular Collective Agreement (which differentiates this Agreement from certain of the other authorities referred to us), the appointment of Principals and Vice-Principals have not been negotiated into the Agreement itself and, given that, it is difficult to say that such provisions should be included "inferentially". It was suggested that the parties did not include the normal types of seniority or posting clauses as with other workplaces and it was intended that considerable discretion should be left to the Trustees (in short, it is suggested that the Association by failing to negotiate such terms were content with that situation). Each year, hundreds or thousands of such appointments are made annually. Accordingly, there would be no remedy available as to such exercise of discretion in terms of placing Ms. Payne back into a Principal's position although, equally clearly, certain of the cases discussed earlier indicate that if the action taken is ultimately characterized as being disciplinary (which is a matter of fact for this Board of Arbitration to determine), such a remedy can be ordered.

The Association argues strenuously that the action taken was disciplinary in nature and notes that the evaluation (which ought properly to be considered as incorrect and inaccurate) was highly critical and resulted in the Trustees' decision to deprive the grievor of her position as Principal which attracted both status and financial penalties. The evaluation dealt with issues that could properly be characterized as culpable, blameworthy, and subject to correction by the grievor. The grounds alleged by Mr. Fransen involved malfeasance, not mere or sheer inability to perform at the Principal level. Mr. Fransen had testified that he felt that the grievor could improve her performance but also chose to question her integrity itself. Ultimately, the argument is that there was culpable misconduct which ought properly to be dealt with in a disciplinary manner and that was what actually occurred. The Division's position (which has some basis in both common sense and what actually happens in the reality of a workplace) is that not all conduct that might be considered as disciplinary is treated in that fashion by the employer and it is unfair to penalize the Division solely upon the basis that it acted more leniently than it might have otherwise done.

The Division argues equally strenuously that this is an issue of management rights and the Superintendent and Trustees "got it right" in terms of the total picture. The grievor is not capable of returning in any capacity to the Division and was not capable of performing at the Principal level within the time of her employment and that had been adequately demonstrated.

The position was that the procedure by which such evaluations were to be performed had been agreed to between the parties and should not be disturbed. Even Mr. Collins (in his letter as referred to previously in this Award) had recognized the importance of anonymity when conducting surveys as well as the Right of the Teachers'

Committees to collate the initial documents and to provide them then to the Superintendent and ultimately to the Trustees. It was the function of the Teachers' Committee to distill that information and it was not necessary for either Mr. Fransen, or the Trustees, to go back to the original documentation.

Oddly, there are certain similarities between the situations of Ms. Payne and Mr. Fransen. Both were involved in their initial appointments at their own particular levels of responsibility – this was the first time that Ms. Payne had been a Principal and it was the first time that Mr. Fransen had been a Superintendent. In that sense, they were both "babes in the wood" to at least some extent in their new positions. It is our view that what should properly be expected of any individual in these types of positions is dependent upon experience as well as capability and we keep in mind the concept that a "learning curve" often consists of making mistakes but correcting them once that is known.

The Division clearly feels that it did not handle the situation in a disciplinary manner and it was not forwarded to the Trustees upon that basis. The argument of the Association is that, in substance, it was disciplinary in that the types of allegations were such as would normally attract discipline, and there was a clear monetary penalty in removal of her position as Principal as well as the impact upon her status within the School and the profession generally. Given the entire situation, it would be reasonable (and necessary) for express warnings to have been given to her and for alternate measures other than simply removal to have been considered (such as the procedure in the Policy for Principals in Distress). The demotion was permanent, not temporary, which factor is indicated as being a significant concern in various of the authorities previously discussed.

In summary, on the jurisdictional issue, we believe that we do have jurisdiction. We are sensitive to (and reluctant to) disturb a general system of appointment in the absence of clear collective bargaining towards that end. However, we are prepared to allow that this matter is arbitrable since there was an aspect of discipline (although it may not have been originally intended) and that confers jurisdiction in itself.

We are also concerned with the reasonableness and fairness of what took place which is a s. 80 principle in appropriate and limited circumstances.

However, the application of s. 80 must be exercised very cautiously given the context of administrative positions (and we suggest that the parties should clarify this through collective bargaining) and the broad discretion of the Trustees within that area. However, in certain limited circumstances, the possibility of s. 80 jurisdiction does exist albeit a Board of Arbitration would likely only consider such an approach based upon the particular fact situation before it and if it was felt that the parameters of reasonableness that we have referred to were significantly breached.

We say this for various reasons.

Firstly, Ms. Payne responded to an advertisement for the position of Principal and accepted the position upon that basis. While we appreciate that the Form 2 contract only refers to a teaching appointment, removal from the position of Principal or Vice-Principal (albeit there is broad discretion in terms of what factors may be considered) can be subject to review by a board of arbitration. The Collective Agreement, in our respectful view, does acknowledge the position of Principal in Article 5 and the removal of the stipend detailed therein should be subject to certain limitations. We also note that Article 1 of the Collective Agreement is broadly worded but does include a requirement to establish a salary schedule and also refers to the individual Statutory Contract "and other conditions of employment resulting from the operation of said contract" (emphasis added) which leads us to the conclusion that this matter is arbitrable within certain limits.

It is our respectful view that the action taken was intended to be administrative (rather than disciplinary) but an action which became disciplinary within the confines of the Collective Agreement. In this instance, since there was what we consider to be a "rush to judgment" which we believe to have been inappropriate, we are prepared to provide relief. Whether or not Section 80 of *The Labour Relations Act* applies is not really the issue as this is a situation of a mixed purpose and we do not believe that either the Superintendent or the Division acted appropriately in this instance. We do not believe that the ultimate determination, at the time it was made, was within the parameters of reasonableness although we keep in mind the deference to be accorded to the discretionary powers and authority of the Trustees.

Ms. Stilton (see pp. 102-103 herein) refers to the seven objective elements in terms of characterization of whether disciplinary or non-disciplinary action is being taken. Certain of those "objective" elements lead to the conclusion that this was not intended to be disciplinary and certain might lead to a different result. Some of the conduct being referred to in Mr. Fransen's recommendation to the Trustees could be characterized as "willful and controllable" as discussed by Arbitrator Picher in Re Board of Education for the Bureau of Scarborough (see p. 103 herein) but a great deal of the conduct being complained of does not really fall into that category and, rather, reflects a lack of confidence by the staff in Ms. Payne's basic abilities. On balance, we do not find the action taken to be intended primarily to be disciplinary but we do find that it did have disciplinary aspects.

We have noted previously that the actual evaluation process (Ex. 7) was agreed to between the parties (and being reviewed annually by their joint committee) and, while this case has illustrated that there may be some corrections that would improve the process, we do not find that the process in its written form is unreasonable or unfair. Certainly, there were some discrepancies in following the actual process. The Teachers Committee was initially improperly appointed but it appears to us that error was rectified and that, ultimately, no damage was created as a result of that error.

We are more concerned with the fact that there appears to have been little discussion or consideration of alternatives other than simply removal of Ms. Payne from her Principalship and placement into a classroom setting. There were other avenues available within the process itself such as a set period of probation. We are also concerned to some extent that the timelines for the decision appear to have been rushed. While we appreciate that the Division would wish to have a Principal in place as quickly as possible if necessary, that also has to be balanced against the appropriate treatment to be provided to the Grievor. Some latitude of time could have existed with respect to the ultimate decision.

It is also of concern to us (and Mr. Fransen admitted that this was one of his shortcomings) that the appropriate documentation was not on file at the time of the Appeal to the Trustees and, in fact, was not available until Ms. Basarab attended at the Division office in June (that also ties into our concern about the timeliness of the initial decision and in terms of the appropriate information being available to all concerned at the time of the Appeal). There was also a lack of what could be considered as "formal" visitations pursuant to the Policy and pre or post conferences were not conducted in what we consider to be a full or reasonable manner although we do appreciate that there were various informal contacts taking place but those were not clearly directed towards what we would consider to be a fair and reasonable level of frank discussion. There was also very little direct involvement by Mr. Fransen in terms of making suggestions for improvement to be attempted by Ms. Payne, nor were there direct warnings as to the consequences of such lack of improvement.

Exhibit 22 (the Principal Evaluation Report) prepared by Mr. Fransen in February, 2001) while making certain positive comments, is inaccurate or unfair in certain respects. We do not intend to repeat Mr. Smorang's analysis as set forth in his final submission but we have taken it into account and agree with a number of the points raised. We also believe that many of the issues specified in the document could have been dealt with productively if the Grievor had been spoken to directly at the time the events occurred or if there had been more direct intervention in terms of the Superintendent either attending or convening a Staff (or Parent Advisory Committee) meeting to deal with those concerns. That reinforces our view that this action was partially disciplinary and, accordingly, ought to be dealt with on that basis.

Our basic concern is truly the lack of communication that took place although we also accept that, clearly, there was a considerable level of dissatisfaction with, or lack of confidence in, Ms. Payne's performance from some (not all) of the teachers and support staff as well as the parents.

We also accept that Ms. Payne's own conduct in certain instances contributed to the problem (and the perception of the problem) although we also find that she was making genuine efforts to accomplish the task as she saw it. However, her own contribution to the problem we find to be a mixture of misjudgments on her part, her own emotional state, and some elements of performance which she could have chosen to

perform better, and the lack of communication given to her in order to provide her with the opportunity to have at least have attempted to overcome all of those obstacles.

The basic problem was that the "task" as she saw it was not necessarily the same as seen by Mr. Fransen or other members of the staff but it appears to us that there was almost no meaningful communication given to her as to that difference and neither was she provided with a reasonable opportunity to correct what was deficient. That is the crux of our problem here.

Ultimately, upon the evidence in its entirety, we do not feel that the Grievor was treated fairly and reasonably within the parameters of those terms. Neither do we believe that the ultimate report (Ex. 22) which was forwarded by Mr. Fransen to the Trustees was sufficiently accurate or fair to provide an appropriate basis to determine that the evaluation process, the recommendation, and the ultimate decision were within the limits we have referred to earlier. What we are left with is that there are sufficient deficiencies established to indicate on the balance of probabilities that they were outside those parameters.

We are left in the position that we are not able to say whether or not Ms. Payne does have the necessary leadership qualities and other aptitudes to function properly as a Principal but we are also left in the position that we cannot say that she does not or that a proper assessment and assessment and process was followed in this particular case.

Accordingly, we must find that the Grievances should be allowed, at least to the extent of there having been a breach of the Collective Agreement but the equally difficult question of remedy (plus the entwined issue of defamation) still remain to be discussed. The essential backdrop to that discussion is that parties have agreed that Ms. Payne is not in a position to return to her employment with the Division in any capacity at the present time and does not wish to do so. Mr. Smorang invited this Board to fashion a remedy to fit the circumstances and we have attempted to do so (although we have not adopted all of his suggestions as to same).

We do agree, and we so order, that the Grievor's file or record be amended (and expunged otherwise) to reflect a resignation effective at the end of June, 2002. We suggest that Ms. Payne provide a letter to the Division in that form as quickly as possible and that, for the purpose of her record, she shall be deemed to have continued as Principal until that time. We do not find it appropriate in this instance to order the Division to either prepare a letter of reference or a letter of apology. This Award is a public document indicating our findings and rulings and we doubt that some forced indication of contrition would be either useful or sincere.

We turn now to the claim for damages as to defamation. We appreciate that Counsel has made only a nominal claim in this respect ($ 5,000.00) but we agree with Mr. Simpson's submission that such a claim should not be allowed in this instance. We do not find the requisite element of recklessness to warrant such an award and we also note that Mr. Fransen was required to produce Ex. 22 pursuant to the policy and the

appeal procedure. We also do not believe that he acted out of malice but we do believe that he and the Division acted improperly.

However, and despite that we do not find defamation to be appropriate in this instance, we do believe that the actions of the Superintendent and Division did have financial (and emotional) consequences upon the Grievor – as well as resulting in the reality that she was not appointed again as Principal - and we have attempted to take that into account in terms of the last portion of the remedy we are prepared to order as a result of the breach we have found.

The issue of compensation has various facets. The Association has taken the position that the Grievor's receipt of LTD Benefits should not be deducted in these circumstances. The Division takes the position that should be taken into account. Accordingly, we must deal with that issue as well as what the medical evidence did or did not establish. We also have our general jurisdiction under the Labour Relations Act and the Collective Agreement to determine what is fair and reasonable and best suits this situation. We now embark on that analysis.

The evidence was that Ms. Payne's last date of salary from the Division was March 8, 2001. She then received E.I. benefits and ultimately was accepted by the LTD plan with benefits beginning (although paid retroactively) in June of 2001.

Article 6 "Insurance" of the Collective Agreement provides that the Division administers the Manitoba Teachers' Society Long Term Disability Plan but that the premium for the plan is paid by each employee and is deducted monthly from salary. Ms. Payne, in her evidence, confirmed that was what happened in her case.

It is necessary to consider the decision of the Supreme Court of Canada in Ratych v. Bloomer (cited previously) as to whether or not the LTD benefits should be taken into consideration in a damage award. It is reasonably clear as to what likely will happen with the E.I. benefits received but we leave that to the parties and that tribunal to determine.

In any event, Ratych stands for the proposition that benefits such as LTD when totally paid for by the employee should not be deducted from compensatory relief unless the tribunal is satisfied that the employer or fund which paid such benefits was entitled to be reimbursed for them on the principle of subrogation. That decision involved the loss of accumulated sick credits. The employee sued for loss of wages (and was successful) but the issue was whether payments made by a third party during the period when the employee could not work should be brought into account in assessing his damages for loss of earnings. The Court was split, four to three, on that issue. With respect, the situation here is considerably different than what was considered in Ratych and we also note that there was a finding of tortious misconduct there.

The majority of the Court notes at paragraph 76:

> The foregoing comments rest primarily on evidentiary considerations. Approaching the problem from a substantive point of view, it may be that there is a valid distinction between cases where a person has prudently obtained and paid for personal insurance and cases where the benefits flow from the employer/employee relationship. The law has long recognized that in the first situation an exception should be made to the usual rule against double recovery. The existence of such an exception does not mean it should be extended to situations where personal prudence and deprivation are not demonstrated. In the latter case there is little to be weighed in the balance against the general policy of the law against double compensation."

In this instance, Article 6 of the Collective Agreement (and we have taken into consideration the "give and take" of bargaining concerning same) has provided that each employee pays for the premium to obtain LTD benefits although the Division administers the plan. This is not really a situation of personal prudence since it was achieved through collective bargaining and neither is it a case of deprivation.

It is clear that Ms. Payne suffered a disability which was accepted by the LTD plan and which we must consider, therefore, to be bona fide since there was no evidence to the contrary. However, we must also consider the medical evidence generally as to the linkage between the conduct of the Division and her inability to work beyond March 8, 2001. It must be remembered that the Division was prepared to maintain the Form 2 contractual obligation with respect to maintaining her salary as a teacher – she was unable to do so but did receive LTD benefits subsequent to June, 2001 and her entitlement to same has never been questioned.

However, we also find the medical evidence inconclusive to some extent as to that linkage (and for our purposes that is a different issue than the LTD benefits). Dr. Globerman's medical report is not really of great assistance. He only saw her on one occasion and he did not have all of the information that we would consider to be required to provide a full report which would be of much assistance, or reliable enough, to be of assistance to us.

Dr. Rosin's viva voce evidence (and given his qualifications as set out at p 55 herein, we consider him as an expert witness albeit he does not have a medical degree) is of some significance. However, he was not aware at the time of his written report (or at the hearing) of her previous hospitalization with respect to the depressive incident as well as some of the other details of certain of her problems. His evidence was based on "her reality as she expressed it" (see p 57 herein) although it seems that she did not express that "reality" fully to him. Both were damaging to her and the result was "devastating".

Despite taking all of that into account, after hearing the evidence in its totality over the many days of hearings, and perhaps being the first entity or tribunal to actually receive all of the information, we are not convinced that the actions of the Division (or Mr. Fransen) were entirely to blame for the Grievor's inability to continue to working or her condition which we accept as being bona fide and deserving of LTD benefits. There were other factors in her own personal life and previous medical history that dictate the

conclusion that she was more fragile than the Superintendent or the Trustees might normally expect in this type of situation but we are not convinced that her medical inability to continue work was entirely based upon their actions although, clearly, those actions did play some role as previously indicated in this award. We are not prepared to extend the "thin skull" rule to this context in these circumstances.

We have given careful consideration to the possibility of returning this matter to the parties to give them the opportunity to discuss compensatory relief but, ultimately, we do not feel that would be productive and might well cause more damage than avoid it.

Given that Ms. Payne is not to return, we feel it best to simply set an appropriate level of relief and compensation in consideration of all of the factors we have discussed previously and to let the parties move on.

Towards that end, we find that we do not need to make a decision whether or not LTD benefits should be deducted from the global award and neither do we need to make intricate decisions as to the Grievor's medical conditions although we have taken all of those factors into account. Rather, we are setting a lump sum of damages which we believe to be reasonable, just, and fair given all of the circumstances.

We have based this amount both on the clear loss of the administrative stipend attached to being Principal and all of the other factors we have already discussed. In terms of compensation, we order that Ms. Payne receive an amount equivalent to six months of salary at the rate of pay of the Principal (to be clear, by this we mean her rate as a teacher plus the administrative stipend as a Principal). Nothing is to be deducted from that other than she must abide by the normal E.I. and income tax or other deductions rules or conditions. However, given that she is resigning, this should be characterized as a retirement allowance.

Our other declaratory rulings (as set forth at pp. 121-122 herein) remain.

The Grievances are allowed to the extent indicated above.

We also appreciate that this has been a most difficult case for all concerned. It is our hope that this Award will provide "closure". As is usually the case, our ruling is a combination of the conduct of both parties, which ultimately, gives rise to our decision.

We also wish to thank Mr. Simpson and Mr. Smorang for their usual able presentations as well as their patience (and we also thank the parties for their patience), all of which were of great assistance to us.

Each party shall bear the expense of its own nominee and shall share equally in the expense of the Chairperson.

DATED this 9th of August, 2002

P.S. Teskey, Chairperson

I do/**do not** concur and **am/**am not providing separate reasons.
G.D. Parkinson, Nominee for the Division

I do/**do not** concur and **am**/am not providing separate reasons.
D.M. Shrom, Nominee for the Association

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE WESTERN SCHOOL DIVISION NO. 47
(hereinafter referred to as the "Division")

- and –

THE WESTERN TEACHERS' ASSOCIATION NO. 47,
(hereinafter referred to as the "Association)

Re: Grievance of Bela Payne

BOARD OF ARBITRATION	P.S. Teskey, Chairperson G.D. Parkinson, Nominee for the Division D.M. Shrom, Nominee for the Association
DATES OF ARBITRATION:	January 14th, 15th, and 25th, February 8th March 18th, June 10th, 11th, 12th and 21st, 2002
LOCATION OF ARBITRATION:	Winnipeg, Manitoba
APPEARANCES:	R.A. Simpson, Counsel for the Division G. Smorang, Q.C. counsel for the Association B. Payne, Grievor

PARTIAL DISSENT

I have had the opportunity of reviewing the Chairman's Award in this matter and I must dissent in part.

I concur that the claim by Ms Payne that she has been defamed should be dismissed.

I agree with the decision of the Chairman to leave a decision and discussion on whether section 80 of the *Labour Relations Act* would apply to this circumstance and what the limitation on the application would be for another time. Since the majority has decided that discipline took place (a decision with which I do not agree) I concur that it is not necessary to determine the extent (if any) of the application of section 80 of the Labour Relations Act to the removal of the appointment of a principal.

I disagree with the decision that the actions taken had an element of discipline and I disagree with the remedy awarded.

I agree that Mr. Franzen's report raised grounds which could generate a disciplinary consequence. I agree that the report identified behavior which was culpable and blameworthy. However, it is a well established right of an employer to not discipline in the face of blameworthy conduct and to rather elect to take administrative action falling short of discipline that clearly happened in this case and we would have no business interfering simply because another employer might have exercised its right to discipline.

If it was a correct decision that the actions taken had a disciplinary element then it is impossible and unreasonable to conclude that no just cause for discipline was established before us. If this was a disciplinary case (and Ms Payne emphasized through counsel that in her view it was at all times) she did not have to testify and could have left the Division to establish just cause through its own evidence. However, having chosen to testify, she certainly provided more than enough evidence to confirm that just cause for discipline existed in at least some if not all of the concerns raised by Mr. Franzen.

Ms Payne's testimony was convoluted, irrational, off the point, intentionally evasive and so entirely unreliable that a finder of fact would be remiss to prefer her evidence over Mr. Franzen whenever there is a conflict. However, even though Mr. Frazen may not have been able to prove the elements of the areas of dissatisfaction he had through direct personal knowledge, having heard Ms Payne's evidence and admissions, I am more than satisfied that just cause existed with respect to time keeping, a request for medical leave when it was really for a personal appointment with a lawyer, a failure to give accurate information to the trustees with respect to a funding request when it was her duty to do so, the composition of the principal evaluation committee, the fabrication of the invitation to apply for a principalship in another school division and the difficulty parents and staff had in trusting her. I could not agree more with Mr. Frazen that ms Payne's inaccurate and irresponsible treatment of her obligation to keep the Division advised as to when she would and would not be at work was a serious matter. Ms Payne more than confirmed in her testimony that she had serious shortcomings in this area.

Issues have been identified with respect to the procedure on the principal's evaluation. It should be clear that Ms Payne raised no objection to the procedure – ie. pre-conferences and the sufficiency thereof etc. until after she found out that staff members were critical of her and Mr. Franzen had come to a negative conclusion. If she had any concerns about the procedure up to that point, she certainly was fully aware of the facts and waived any right to object.

The complaint about documentation on Ms Payne's personnel file was diverting but not relevant. The fact that the material was retained in a computer hard drive and not yet printed out placed in a manila file in hard copy form does not mean that the information was any less sincere or any less available upon request.

I turn now to remedy.

We all agree that at any time of which we are aware, Ms Payne should not have been functioning as a principal in the school division. Ms Payne attributes this to illness. We

as arbitrators would be obliged to conclude, given Ms Payne's performance while on the witness stand that the trustees and Mr. Franzen were 100% correct in concluding that she ought not to be a principal in their school division. It would be impossible to conclude otherwise and in the absence of a conclusion on that topic one way or the other, I do not see how a remedy could be considered.

I do not see the logic of awarding damages for a loss which has not occurred. Ms Payne is adamant that due to illness she has been unable to work as a teacher, whether as a principal or otherwise since the spring of 2001. It has not been established that the Division is responsible for that illness. It is clear under the Collective Agreement and the Public Schools Act that if Ms Payne is unable to work due to illness, her employer does not owe her any wage for that period of time beyond her accumulated sick days. She received pay for her accumulated sick days.

Therefore, a decision to revoke Ms Payne's principalship (or indeed a decision to remove her from teaching), could not have caused her any financial loss. Any financial loss she has incurred is due solely to her illness. In short, no compensation has been denied her by any activity of the Division and none should be awarded.

In short, I would have dismissed the grievance in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of August 2002.

G.D. Parkinson
Nominee of the Division

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE WESTERN SCHOOL DIVISION NO. 47
(hereinafter referred to as the "Division")

-and –

THE WESTERN TEACHERS' ASSOCIATION NO. 47
(hereinafter referred to as the "Association")

RE: Grievance of Bela Payne

Concurring Additional Comments of Association Nominee

I concur in the main Award, but wish to provide brief additional comments.

As noted by the Chairperson, at page 113, "…there are two potential grounds upon which this matter might be arbitrable …". I am of the view that they are separate and distinct grounds, each of which exists in this case.

First, I concur with the Chairperson that Articles 1, 5 and Section 80 of *The Labour Relations Act* provide a sufficient basis upon which to found jurisdiction. The dispute concerning Ms. Payne's demotion arose, at least inferentially, from these provisions of the collective agreement, and therefore the grievance is arbitrable. I specifically adopt and agree with the Chairperson's finding, at page 117, that the removal from the position of principal or vice-principal can be subject to review by a board of arbitration.

I am also of the view that in this case, and as a separate and distinct basis for finding jurisdiction, what occurred was a disciplinary demotion. As such, the matter is reviewable against a standard of just cause by virtue of Section 79 of *The Labour Relations Act.*

The fact that the Division asserted that the actions taken against Ms. Payne were not disciplinary does not answer the question. The characterization of something as disciplinary or not is not simply up to the Employer. As stated in Education, Labour and Employment Law in Ontario, at page 8-9,

> "Rights as important as just cause rights cannot turn on whether or not the Employer acknowledges their application…".

A board of arbitration has to make an objective assessment of the evidence and determine whether or not the Employer's actions are disciplinary.

In this case, the highly critical evaluation and removal of Ms Payne as Principal is on her record, has a financial impact on the Grievor, and is damaging to her reputation. More importantly, the evaluation and demotion are in response to and deal, in large part, with blameworthy and correctable conduct. This was not just an evaluation of a principal finding her incapable because of illness or mental incapacity from doing a job. This was not a case of finding involuntary malfeasance. There were some concerns regarding Ms. Payne's performance as a principal and the response was a damming report which focused on blameworthy conduct. The Superintendent asserted that he raised certain concerns with Ms. Payne (in a general way) to let her improve and correct her behavior. He was of the view, therefore that she was capable, but that she was not acting properly. This, therefore, had little to do with her inherent capacity to perform as a principal; rather, it had more to do with alleged improper and intentional misconduct. Ms. Payne was demoted so she could reflect and improve on her behaviour. The Superintendent confirmed that he felt she could try again in the future (see Chair's Award, page 73). Accordingly, the actions of the Division must be viewed as disciplinary demotion.

Three cases filed before our Board dealt with this issue. The case of Elgin Country Roman Catholic Separate School Board involved an indefinite demotion of a principal to a teaching position. At page 28-29, the board of arbitration, in discussing whether a demotion constituted discipline or not, said,

> "…the Board finds that any problems the Employer might have had with the Grievor's performance or conduct were due to culpable or willful behaviour by the Grievor, which is within his power to correct, rather than involuntary malfeasance, and, therefore, that the Grievor's demotion was disciplinary".

In the *St. Clair Catholic District School Board and Ontario English Catholic Teachers' Association* case, the arbitration board said at page 8,

> "…The Board of Arbitration is satisfied that the School board's transfer of Ms. Odrcich was disciplinary. The evidence persuades the Board of Arbitration that the School board viewed as culpable the work performance from Ms. Odrcich that caused the transfer. It imposed a transfer to correct the Grievor's alleged blameworthy behaviour".

Arbitrator Hope, in the *In Re British Columbia Railway Company and Canadian Union of Transportation Employees*, Local 6, stated it as follows:

> "A disciplinary demotion occurs when an employer removes an employee from a position as an act of discipline where the employee fails to perform the duties of his position to a satisfactory standard, and it is presumed that the employee's failure is within the employee's control and hence has the potential to be redressed through the imposition of discipline."

Applying the tests and principles to this case, it is clear that the Employer was responding to conduct that it felt was within the control of Ms. Payne. The Superintendent's solution was to point out the concerns, set out the standards expected, and then remove Ms. Payne from her position. The Superintendent wanted the Grievor to improve, and to correct her behaviour, which, as noted earlier, implicitly suggests that the Division felt that the Grievor was capable of performing to the standard required. In my view, and in accordance with the caselaw, the actions of the Division therefore were disciplinary, and as a result, the grievance is arbitrable on that basis as well.

On the issue of remedy, although I concur in the ultimate main Award, I would have provided the Grievor with her full salary as Principal from March 8th, 2001 through to June 30th, 2002, without regard to any long term disability benefits she received.

In my view, there was ample evidence before the Board to link the Grievor's inability to work past March 2001, to the Division's conduct.

First, the Grievor herself testified and explained that she was unable to work because of the devastation and humiliation she felt concerning the evaluation, and the decision to remove her as Principal. As well, Dr. Rosin, a Clinical Psychologist, testified and confirmed what the Grievor said; that is, that she was not able to work after March 2001, because of the evaluation and removal as Principal. Dr. Rosin specifically advised the Board of Arbitration (as noted in the main Award at page 58) that it was not just the fact of the demotion that so affected ms. Payne, but it was also the manner in which she was demoted. The combination of these factors was devastating to Ms. Payne. Dr. Rosin indicated that the precipitating event, and therefore the cause of her inability to work, was the demotion and the treatment of her by the Division. This evidence confirmed the opinion provided by Dr. Globerman: "the precipitant … being the negative evaluation, and evaluation process she recently underwent". (Exhibit #43)

There was no other evidence as to why the Grievor was unable to work following March 2001. But for the Employer's conduct in unfairly evaluating then removing the Grievor as Principal, the Grievor would have been able to continue working. Therefore she should be made whole as a Principal all the way through to June 30th, 2002.

Dated this 9th day of August 2002.

David M. Shrom
Nominee of the Association