

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF A GRIEVANCE FILED BY
THE LAKESHORE TEACHERS' ASSOCIATION OF
THE MANITOBA TEACHERS, SOCIETY

DATED SEPTEMBER 2, 2003

AND IN THE MATTER OF A GRIEVANCE FILED BY THE
LAKESHORE TEACHERS' ASSOCIATION ON BEHALF
OF NEIL MACNEIL ALSO DATED SEPTEMBER 2, 2003

BETWEEN:

THE LAKESHORE TEACHERS' ASSOCIATION (hereinafter referred to as the "Association"), and
NEIL MACNEIL (hereinafter referred to as the "Grievor"),

- and -

THE LAKESHORE SCHOOL DIVISION (hereinafter referred to as the "Division").

AWARD OF ARBITRATION

Board of Arbitration

A. Blair Graham, Q.C. - Chairperson

Mel Myers, Q.C. - Nominee of the Association and the Grievor

Gerald Parkinson - Nominee of the Division

Appearances

Garth Smorang, Q.C. - on behalf of the Association and the Grievor

Robert Simpson - on behalf of the Division

Date of Award – June 30, 2004

AWARD

INTRODUCTION

This matter involves two grievances, both dated September 3, 2003, one filed by the Association on its own behalf, the other by the Association on behalf of the Grievor.

The hearing of this grievances took place on June 15 and 16, 2004.

The parties confirmed at the outset of the hearing that this Board of Arbitration had been properly appointed and had jurisdiction to determine the matters at issue in the two grievances.

The complaint underlying both grievances is the same. The Grievor is employed as a teacher by the Division. For the last 15 years (approximately), the Grievor has taught at the Ashern Central School, in Ashern, Manitoba. At a meeting held on May 15, 2003, the Grievor was advised by the superintendent of the Division that he would be reassigned to another school in the Division, in the fall of 2004, following his completion of a Special Leave which he was scheduled to take during the 2003-2004 school year. By letter dated May 16, 2004, from the superintendent of the Division, the Grievor was informed that he had been transferred to Lundar School for the 2004/05 school year.

The Grievor and the Association object to the transfer, and seek to have the Division assign the Grievor to Ashern Central School for the 2004/05 school year.

The grievances raise interesting and important issues, including the relationship between the relevant provisions in the Collective Agreement dealing with Special Leave (Article 6.10) and the provisions in the Collective Agreement dealing with Transfer (Article 12).

The relevant portions of Article 6.10 provide:

"6.10 Special Leave

The Division and the Association support in principle the concept that staff can benefit from exploring new learning experiences through a wide variety of opportunities. The Division and the Association recognize the need for the public school system to provide teaching opportunities for new teachers entering the profession.

1. Special leaves of absence may be granted by the school division to those Lakeshore School Division professional teaching staff who have the equivalent of ten (10) years of service with the Division.
2. Special Leaves of Absence may be for a full year or less.
3. No teacher shall be eligible for more than the equivalent of one year of Special Leave in any ten (10) year period of employment with the Lakeshore School Division...
5. A teacher granted a Special Leave of Absence shall be guaranteed his/her previous position in the same school. In the event that the position has become redundant because of course cancellation and/or a reduction in enrolment, the teacher shall be guaranteed a similar position
7. A Special Leave of Absence being granted will be conditional upon the availability of a replacement first or second year teacher suitable to the Board. The replacement teacher will sign a Form 2A Term Contract...
11. Teachers wishing to begin a Special Leave of Absence in any school year must apply in writing to the Superintendent on or before March 31st of the preceding school year"

Article 12 states:

"Article 12 Transfer

The Association recognizes the right of the Division to assign teachers employed by the Division to schools under its jurisdiction. The Division shall provide to any teacher being considered for transfer an opportunity for consultation with respect to the transfer and the details of the intended assignment. The most reasonable notice possible given the circumstances shall be provided to the teacher. The right to transfer shall be exercised fairly and reasonably, having due regard for the educational needs of the Division, and the interests of the teacher involved."

There is urgency associated with the determination of this grievance, because until the outcome is known, the Division will be unable to finalize its assignment of various teachers to particular schools, and its assignments of the courses to be taught by various teachers.

THE EVIDENCE

The evidence introduced at the hearing consisted of fourteen exhibits, some introduced by consent at the outset of the hearing, the remainder through witnesses during their testimony. The Union called one witness, the Grievor. The Division also called one witness, Phyllis Hildebrandt, the superintendent of the Division.

Some of the evidence introduced at the hearing was contentious. However, the basic background facts, most of which are un-contentious, are summarized below.

1. The Grievor has been a teacher for approximately 20 years; he has been employed by the Division for his entire working career.
2. The Grievor is married and resides in Ashern. His wife is a laboratory and x-ray technician who works at the Ashern hospital. Regardless of the outcome of this grievance, the Grievor wishes to continue to reside in Ashern.
3. For the last 15 years (approximately) the Grievor has taught primarily senior years (high school) math and science courses (including chemistry and physics) at Ashern Central School. Ashern Central is a grade 5 to 12 school with a student population which fluctuates but averages around 300 students. The teaching staff consists of approximately 20 teachers. Student enrolment at the high school level (grades 9 to 12, or senior 1 to 4) is approximately 200. The teaching staff for the senior 1 to 4 level consists of approximately 12 teachers. The school in Lundar is kindergarten to grade 4 and grades 9 to 12. The student enrolment in Lundar for the senior 1 to senior 4 years is approximately 150 students, and the teaching staff for those grade levels consists of approximately 10 teachers. Both the Lundar and Ashern Central schools provide programs for the senior 1 to senior 4 students which are similar, both academically and vocationally.
4. Lundar and Ashern are between 60 and 65 kilometers apart. The two towns are connected by a paved highway.
5. By letter dated March 21, 2002, the Grievor applied to Hildebrandt for a Special Leave for the year 2002 to 2003. Hildebrandt recommended to the Board of the Division that the Grievor's request for a Special Leave be granted. The Board granted the request; the Grievor was so advised by letter from Hildebrandt dated April 10, 2002.
6. Within a few days of the end of June, 2002 (i.e. virtually at the end of the school year) the Division and the Grievor became aware that the teacher who had been hired to replace the Grievor for the 2002/2003 school year would be unable to fulfill that

assignment. Accordingly, the Grievor reconsidered his plans to take a Special Leave, and agreed to continue to teach for the 2002/2003 school year, on the understanding that he would take his Special Leave the next year.

7. The Division was appreciative of the Grievor's willingness to defer his leave. The Grievor taught at Ashern Central during the 2002/2003 school year. As expected, in the spring of 2003, the Grievor indicated that he wished to take a Special Leave for the 2003/2004 school year. His request was granted, and he was so advised in writing by Hildebrandt by letter dated April 16, 2003.
8. Hildebrandt had become the superintendent of the Division in July 2001. It was her first position as a superintendent; prior to assuming the position she had been the principal of a school in another school division.
9. When Hildebrandt became superintendent, there were a variety of troublesome issues associated with Ashern Central. Those issues included student deportment and behaviour issues, timetabling challenges, staff discontent, and some persistent community complaints. In Hildebrandt's words, the "culture and climate at the school" were not good. Hildebrandt visited the school on 38 occasions in the first few months after becoming superintendent. As she indicated, this high number of visits was indicative of the various difficulties the school was experiencing.
10. There was also a high rate of turnover at the senior administrative level within Ashern Central. Gordon Charlesworth had become the principal of the school in the fall of 2000. He remained principal until February 2002.

Randy Chartrand became vice-principal at Ashern Central in January, 2002, shortly before Charlesworth left.
11. In or about January 2002, the Grievor was off on a medical leave for several weeks. Sometime in February, 2002, Hildebrandt herself assumed the role of acting principal following Charlesworth's departure, and carried on as acting principal until the end of April, 2002. By the time Hildebrandt had assumed the role of acting principal, the Grievor had returned from his medical leave. Accordingly the two of them worked in the same school for at least two months in the late winter and spring of 2002.
12. During that time, the Board advertised for a principal for Ashern Central. The Grievor applied, but was not offered the position. The Board decided to search for other candidates and accordingly re-advertised. As a temporary measure, Dona Jaremy, a retired principal, came back and acted as principal at Ashern Central for May and June, 2002.
13. By September 2002, a new principal, Bill Terry, had been hired for Ashern Central. Accordingly, the 2002-2003 school year started at Ashern Central with a new principal, and with a vice-principal (Chartrand) who was entering his first full year in that position. The Grievor, who had initially expected to be on a Special Leave for that school year, instead was back to teach for that year. He was carrying a teaching load of 7 courses, including chemistry and physics for both grades 11 and 12, as well as applied math, consumer math and biology for various grades.
14. Troublesome issues persisted at Ashern Central. Disharmony developed between the Grievor and Terry, and the Grievor and Chartrand. The evidence was not sufficient to establish the seriousness of the disharmony, or its cause, or the effect it had on the education being provided to the students. The school continued to be beset by additional challenges, including dissatisfaction on the part of a significant number of teachers. Those additional challenges were separate and apart from any tensions between the Grievor and Terry, and the Grievor and Chartrand.
15. There was evidence that provided some insight into the relationship between the Grievor and Chartrand, and the Grievor and Terry. By early 2003, the Grievor had developed concerns relating to Chartrand's involvement in supervising the student operation of the school canteen and a work experience program. Money had gone

missing, and the Grievor was dissatisfied with the way the situation was being handled. The Grievor raised his concerns with Chartrand, and the matter was initially left on the basis that the situation would be reassessed "in a while" to determine if matters improved. If they had not, the Grievor indicated that he would take his concerns to Terry. After some time had elapsed, matters had not been resolved to the Grievor's satisfaction and he accordingly took his concerns to Terry. A similar course of action was adopted, namely the Grievor waited for some period to determine if the problems would be resolved. If they were not, he would then take his concerns to Hildebrandt. The problems were not resolved to the Grievor's satisfaction and accordingly he advised Hildebrandt of his concerns.

16. Another situation involving the Grievor and Terry also arose prior to the end of the school year. In late April or early May 2003, Terry convened a meeting with the grade 12 students with respect to issues related to school attendance. Some teachers were also present at the meeting, but not the Grievor. Terry announced a policy with respect to attendance applicable to grade 12 students, which caused some displeasure and anxiety among the students. The Grievor testified that he received reports of the meeting both from grade 12 students and from some or all of the teachers who had been present.
17. Shortly after the meeting between Terry and the grade 12 students, a trustee of the Division (Leslie Tritthart) was in Ashern Central. Tritthart was a relatively new trustee but was known to the Grievor because they lived on the same street and attended the same church. She was in Ashern Central, not in her capacity as a trustee, but to attend to some matters related to her daughter, who was a student in the school. The Grievor was of the view that the meeting Terry had convened with the grade 12 students relating to attendance, and the reaction the meeting was causing, was an "explosive situation" and that Tritthart "needed to know" about it.
18. The Grievor approached Tritthart in the hallway of the school and proceeded to have a discussion with her, in an anteroom outside an office. The meeting lasted approximately 20 minutes and covered a variety of topics in addition to Terry's meeting with the grade 12 students.
19. Shortly thereafter, the Grievor received a letter dated May 6, 2003 from Hildebrandt which read in part as follows:

"It has been brought to my attention that you lobbied the trustee Leslie Tritthart regarding a complaint about your principal."

Hildebrandt's letter directed the Grievor to attend a meeting at the Board office in Ericksdale, and suggested that he ought to bring representation from the Manitoba Teachers' Society to the meeting. The meeting proceeded on May 15. Present were Hildebrandt, Annette Holowka, the assistant superintendent of the Division, the Grievor, and Saul Leibl, a staff officer from Manitoba Teachers' Society, who was in attendance to assist the Grievor.

20. Hildebrandt testified that when she wrote the letter dated May 6, 2003, directing the Grievor to attend a meeting at the Board office, and suggesting that an MTS representative should be present, she did so, because she anticipated that she would be addressing a disciplinary issue at the meeting, namely the Grievor's communication with trustee Tritthart.
21. The meeting lasted approximately 1 1/2 hours. Hildebrandt started the meeting by raising two issues that she considered to be disciplinary in nature. The first related to a meeting of teachers who were dissatisfied with Terry's performance which Hildebrandt thought had been held at the Grievor's home; the Grievor advised Hildebrandt that the meeting had not taken place at his home. The second issue related to the Grievor's communications with Tritthart.
22. Tritthart had approached Hildebrandt following the discussion she had had with the

Grievor at Ashern Central School and had reported to Hildebrandt that she was "uncomfortable with what had happened". Hildebrandt had taken notes of what Tritthart had told her had occurred during Tritthart's discussions with the Grievor. During Hildebrandt's meeting with the Grievor, she read aloud to the Grievor the notes she had taken of her meeting with Tritthart. Those notes indicated, among other things, that the Grievor had:

- told Tritthart that he was embarrassed to be teaching at Ashern Central School;
- told Tritthart that the school was the laughing stock of the Division; disparaged both Charlesworth and Terry;
- indicated that if Terry remained as principal at Ashern Central, the Grievor would not be teaching there.

Hildebrandt also advised the Grievor that Tritthart had reported to her that she (Tritthart) felt belittled and intimidated by the Grievor during her discussion with him at the school.

23. Hildebrandt asked the Grievor to respond to Tritthart's statements and the Grievor did so by indicating that Tritthart had misconstrued what he had said, and denied saying many of the things attributed to him. According to Hildebrandt, the Grievor also acknowledged it had likely been a "bad decision" for him to meet with trustee Tritthart and to discuss those issues with her.
24. Hildebrandt also candidly testified that during the course of her meeting with the Grievor on May 15, 2003, the nature and purpose of the meeting changed. On the basis of what the Grievor said about his discussions with Tritthart, and his acknowledgement that his approach to her was likely ill conceived, Hildebrandt concluded that the issue of the Grievor's inappropriate communications with trustee Tritthart could be resolved by means other than the imposition of discipline against the Grievor. However, Hildebrandt also concluded, on the basis of her extensive discussions with the Grievor on May 15, that the problems within the school remained serious and that the Grievor's interpersonal relationships, particularly those with Terry were problematic.
25. According to Hildebrandt, during the meeting of May 15, the Grievor reiterated one of the things Tritthart had reported that he had said at the meeting with her (Tritthart) at the school, namely that he did not want to be at Ashern Central if Terry was going to remain there. The Grievor also said to Hildebrandt that he (the Grievor) had "wanted to be the principal and should have been".
26. On the basis of the discussions at the May 15 meeting, and Hildebrandt's knowledge of the problems at the school, she came to the conclusion during the course of that meeting that a transfer of the Grievor from Ashern Central would be an appropriate course of action. She raised this prospect with the Grievor and Leibl. The Grievor's response was that he would not be comfortable with a transfer. Leibl indicated that he did not think a transfer was a good idea in view of the Special Leave which was upcoming. Before the meeting concluded, the Grievor and Leibl sought clarification as to whether Hildebrandt had in fact decided to transfer the Grievor from Ashern Central. Hildebrandt confirmed that she had in fact made that decision.
27. In her testimony, Hildebrandt indicated that she had several reasons for deciding to transfer the Grievor. Specifically:
 - (a) She had concluded that there would not be any significant change in the culture at Ashern Central if the status quo remained;
 - (b) The Grievor had commented that he had wanted to be principal, and that he did not want to be at Ashern Central if Terry was going to remain there. Given those comments, Hildebrandt did not think there was any likelihood that the relationship

between Terry and the Grievor would improve;

(c) She was concerned about the Grievor's health, given the fact that he had been on a medical leave a few months earlier, and the situation in the school was bound to be stressful;

(d) She was concerned about the educational environment for the students.

Hildebrandt could not recall whether there was any discussion with the Grievor and Leibl about the latter two points during the May 15 meeting.

28. Inasmuch as her decision was final, Hildebrandt wrote to the Grievor the next day confirming that he would be reassigned to another school in the Division, and that the reassignment would take effect in the fall of 2004, upon his return from his Special Leave. Hildebrandt did not provide details of the reassignment in May, 2003, because the reassignment was then 15 months in the future and decisions as to the details of the reassignment had not been made.
29. There were no significant communications between the parties with respect to the reassignment in the ensuing months. The two grievances were filed on September 2, 2003.
30. The Grievor commenced his Special Leave in September 2003, and has been on leave since that time. Hildebrandt advised the Grievor by letter dated May 6, 2004 that he was being transferred to Lundar School for the 2004-2005 year. The high school in Lundar is the closest school in the Division to Ashern Central that provides comparable senior 1 to senior 4 programming. As of the date of the hearing of this grievance (June 15 and 16, 2004) no details of the Grievor's actual teaching assignment had been provided to him because those details had not been finalized.
31. Terry is no longer the principal of Ashern Central. He has been replaced by Janet Zasitko.

ANALYSIS

The Association submits that this grievance ought to be decided solely on the basis of the Special Leave provisions in Article 6.10 of the Collective Agreement, and that the Transfer provisions in Article 12 need not be considered. The grievances themselves refer only to Article 6.10 and sections 19 and 80 of the Labour Relations Act; they make no mention at all of Article 12.

The Association's argument is that the clear unequivocal language of Article 6.10, particularly subsection 5, demonstrates that Article 6.10 was intended by the parties to prevail over Article 12.

The Association says that although the granting of a Special Leave is undoubtedly discretionary, once a decision to grant a Special Leave has been made, what happens when the leave expires is strictly prescribed by the clear wording of the Article itself.

According to the Association, the wording of subsection 5 in Article 6.10 is of great significance:

"6.10(5) A teacher granted a Special Leave of Absence shall be guaranteed his/her previous position in the same school. In the event that the position has become redundant because of course cancellation and/or a reduction in enrolment, the Teacher shall be guaranteed a similar position."

The Association points to three features of subsection 5 which are of importance. They are:

- (i) The exceptionally strong wording in relation to the teacher's previous position:

"A teacher...shall be guaranteed (underlining added) his/her previous position...";
- (ii) The specific reference to the guaranteed position being "in the same school";
- (iii) the fact that the subsection contemplates an exception, but only one exception, namely a redundancy because of course cancellation or reduction in enrolment. The Association says that inasmuch as the parties turned their minds to applicable exceptions and only provided for one such exception, no others are permitted.

The Division, on the other hand, says that the transfer provisions in Article 12 must be considered. The Division says this is so for at least two reasons:

- (i) the right of a division to transfer a student is an important management right of school boards recognized by statute (the Public Schools Act), the statutory form of contract (clause 4 of Schedule "D" to the PSA), and the Collective Agreement between the parties (Article 12). Therefore the Division says that granting of a Special Leave cannot detract from the Division's right to transfer a teacher.
- (ii) construing Article 6.10 as the Association urges, would lead to anomalous and illogical results. For example, a senior teacher who had taught for a significant number of years at a particular school would be subject to being transferred, while a teacher of the same seniority at the same school on a Special Leave could not be transferred.

It is noteworthy that there is nothing in the wording of the Collective Agreement which indicates one of the two articles is to be subordinate to the other. For example, neither article is said to be "subject to" the other.

Therefore, if the Board is to decide this case in terms of Article 6.10, it has little choice but to construe and interpret both articles, and to determine, if necessary, the basis upon which they co-exist in the Collective Agreement and can be reconciled with one another.

Accordingly the Board considers it necessary to consider Article 12. Doing so causes no prejudice to either party, as both parties attended at the hearing ready and willing to deal with Article 12. The evidence which was introduced and the submissions of both parties in argument, adequately dealt with Article 12 considerations.

Indeed, if the Division is unable to establish that it properly exercised its right to transfer the Grievor to Lundar School for the 2004-2005 school year pursuant to Article 12, it will not be necessary to make a determination relating to Article 6.10 and the relationship between the two articles.

Article 12 is virtually identical to a provision in a collective agreement, which I considered in the case of Seven Oaks School Division No. 10 and Seven Oaks Teachers Association [2000] M.G.A.D. No. 18 (File No. AA2 000-05-003) .

Both Article 12 and the article in the Seven Oaks case contain an express recognition by the respective associations that the divisions have the right to assign teachers employed by the divisions to schools under their respective jurisdictions. However, each article also limits the divisions' right to assign teachers in their absolute discretion by imposing three requirements that must be fulfilled by a division before being able to transfer a teacher from one school within the division to another. Those three requirements are:

1. Consultation with the teacher with respect to the transfer and the details of the intended assignment;
2. The provision of the most reasonable notice possible in the circumstances to the teacher, of the transfer;
3. The right to transfer must be exercised by the division fairly and reasonably with due regard for the educational needs of the division, and the interests of the teacher involved.

In this case, with respect to the second of the above-noted requirements, reasonable notice, the Association creatively argued that the notice required is notice of the intended decision to transfer, i.e. that the teacher involved should be given a reasonable notice that the division is contemplating a transfer. This is not an unreasonable argument, given that the first requirement is for consultation, which suggests a meaningful dialogue and an exchange of information between the parties, before a decision is made.

In the context of this case, the Association says the facts clearly establish that no such notice was given because Hildebrandt first thought of transferring the Grievor during the meeting of May 15, 2003, and had made the decision to do so by the end of the meeting.

Although this argument is creative, and not unreasonable given the requirement for consultation, I have ultimately concluded that the notice referred to in Article 12, is notice of the actual decision to reassign the teacher, not notice that such a decision is being contemplated. I agree with Mr. Simpson, on behalf of the Division, that the purpose behind the requirement for notice is to alert the teacher in question that he or she will not be returning to his or her former school and to provide that teacher with an opportunity to do whatever is practical to be ready for the new assignment.

In this case, the Grievor received oral notice on May 15, 2003 and written notice on May 16, 2003, of a reassignment that would be effective commencing in the fall of 2004. The Grievor also received written notice on May 6, 2004 that he was being transferred to Lundar School for the 2004/2005 school year. The notice of the reassignment, and the notice of the new school, was therefore adequate pursuant to Article 12.

With respect to the first requirement of Article 12, namely the requirement to consult with the teacher with respect to the transfer and the details of the intended assignment, I repeat my earlier observation that a consultation should involve a meaningful dialogue and an opportunity for an exchange of information. In the Seven Oaks case I accepted the proposition put forward by the Seven Oaks School Division that a requirement for consultation did not mean that at the end of the process, the teacher must

agree with the transfer. I continue to accept and endorse that proposition. However, the consultation must be meaningful.

The Division's evidence, through Hildebrandt was that meaningful consultation, sufficient for the purposes of Article 12 took place at the meeting of May 15, 2003. The meeting lasted approximately 1 1/2 hours. The Grievor was present along with Leibl. The Grievor and Leibl were given an opportunity to participate fully in the discussion, were afforded an opportunity to consult privately with one another, and then to carry on with the discussion. Although the prospect of a transfer only arose partway through the meeting, the superintendent outlined the Division's position, which was based in part on statements made by the Grievor at the meeting. Moreover, the Grievor was given an opportunity to respond to the Division's position relating to a transfer, and did so as both he and Leibl expressed their misgivings and reservations about any such transfer.

Although I believe Hildebrandt genuinely sought to engage in a meaningful dialogue with the Grievor, and to impart information to him and to receive information from him during the meeting, I am skeptical that consultation as required by Article 12 can occur within a meeting which was convened for an entirely different purpose (i.e. potential discipline), and in which the possibility of a transfer arose only partway through the meeting.

The Grievor and Leibl came to the meeting expecting, and undoubtedly preparing themselves for one thing, and ultimately having to deal with another. I am not critical of Hildebrandt for moving from the disciplinary topic, once that had been dealt with, to other topics which were of importance and concern to her and the Division. I am however doubtful that in the context of what occurred on May 15, 2003, the Grievor and Leibl were fully able to consider the implications of a transfer and to articulate all of their thoughts in relation to such a transfer. I am also doubtful that Hildebrandt, notwithstanding her sincerity, was able to fully and fairly consider whatever reservations the Grievor and Leibl were able to express about the transfer and to fully consider other options available to her before she made the decision to transfer by the end of the meeting. A consideration of the teacher's properly formulated position is surely an element in the consultation required by Article 12.

Turning lastly to the requirement that the right to transfer be exercised fairly and reasonably, the Article itself stipulates that due regard is to be had for "the educational needs of the division and the interests of the teacher involved". The evidence did establish that Hildebrandt was understandably concerned, about the disharmony at Ashern Central between the Grievor and Terry and the Grievor and Chartrand. It was reasonable for Hildebrandt to conclude that such disharmony was contributing to the negative "culture and climate" at the school.

The evidence did not establish, except in the most general way, if at all, what effect that disharmony was having upon the quality of education being offered to the students at Ashern Central or upon the quality of the Grievor's teaching.

I also note that there is a shortcoming in the evidence as to the regard the Division had for the interests of the Grievor. Hildebrandt did indicate she was mindful that the Grievor had been on a medical leave in early 2002 and was concerned about his health because the environment at Ashern Central was "stressful". However, Hildebrandt acknowledged that she had not reviewed any file material relating to his medical condition before the May 15 meeting and was not particularly familiar with the reasons for his earlier leave.

There was no additional information offered as to anything else that the Division had done to consider the Grievor's interests, other than being told by him at the May 15 meeting that he was not in favour of a transfer.

Finally, I consider it relevant that Hildebrandt had not discussed the transfer with anyone else within the Division (with the possible exception of the assistant superintendent) prior to making the decision, nor had she reviewed documents in the Grievor's personnel file, such as any recent performance appraisals, or any other documents that might have been relevant to the issue of transfer.

These factors represent deficiencies in the process undertaken by the Division before reassigning the Grievor.

In the result, the Division has failed to establish that it fulfilled the requirements set forth by Article 12 before it reassigned the Grievor, and ultimately transferred him from Ashern Central to Lundar School effective September, 2004. The Division's decision therefore cannot be sustained.

In terms of remedy, I hereby grant a declaration that the Division has not complied with Article 12 in relation to its decision to reassign the Grievor from Ashern Central and to transfer him to Lundar School for the 2004/2005 school year. I will also order that the Division's decision to reassign the Grievor from Ashern Central and to transfer him to Lundar School for the 2004/2005 school year be rescinded.

In view of the above-noted decision, it is not necessary in order to resolve the dispute between the parties, to make any determinations with respect to Article 6.10 and/or the relationship between Article 6.10 and Article 12.

I have decided it would be inappropriate for the Board to do so, notwithstanding the urgings of the Association.

The Board has provided the parties with a decision in this matter within two weeks of the completion of the hearing. It has strived to do so because it recognizes the exigencies facing both the Grievor and the Division, and the desire to have these matters resolved so that decisions affecting the students and teachers at Ashern Central and Lundar School for the 2004/2005 school year can be made.

The issues relating to Article 6.01 and its relationship to Article 12 are subtle and nuanced. In addition to the differing perspectives of the parties with respect to Article 6.01 referred to earlier in this Award, the Division has argued that the word "position" in Article 6.10 refers to a full time teaching position in the Division, not to a particular assignment in a particular school. The Association responds by correctly pointing out that subsection 5 refers to a "previous position in the same school". The Division in turn rebuts by arguing that on the facts of this case, the Grievor had been advised he was being reassigned (i.e. he no longer had a position at Ashern Central) before he commenced his Special Leave. That argument leads to the issue of whether the "guarantee" relating to the previous position arises when the Special Leave is granted, or when the Special Leave commences.

All of these issues, as well as those outlined earlier in the Award relating to Article 6.01, and its relationship to Article 12 warrant thought, reflection and adequate consideration of potentially relevant authorities. The time available has simply not been sufficient to enable this Board to fully consider those matters. Accordingly this Award is limited to deciding the issues associated with Article 12, and leaves open all of the issues relating to Article 6.01 described in this Award and the relationship between Article 6.01 and Article 12. It is hoped that this decision will be sufficient to determine this particular grievance once and for all.

DECISION AND REMEDY

A declaration is hereby granted that the Division has not complied with Article 12 in relation to its decision to reassign the Grievor from Ashern Central and to transfer the Grievor to Lundar School for the 2004/2005 school year.

An order is also hereby granted rescinding the Division's decision to reassign the Grievor from Ashern Central and to transfer him to Lundar School for the 2004/2005 school year.

DATED at Winnipeg, Manitoba, this 30th day of June, 2004.

A. Blair Graham, Q.C.
Chairman

I concur with the above Award

Mel Myers, Q.C.
Nominee of the Association and the Grievor

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AND IN THE MATTER OF A GRIEVANCE FILED BY THE LAKESHORE TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY DATED SEPTEMBER 2, 2004

AND IN THE MATTER OF A GRIEVANCE FILED BY THE LAKESHORE TEACHERS' ASSOCIATION ON BEHALF OF NEIL MACNEIL ALSO DATED SEPTEMBER 2, 2003

BETWEEN:

THE LAKESHORE TEACHERS' ASSOCIATION

(hereinafter referred to as the "Association") and

NEIL MACNEIL (hereinafter referred to as "Mr. MacNeil")

-and-

THE LAKESHORE SCHOOL DIVISION

(hereinafter called the "Division")

DISSENT

I have read the majority Award and with respect I cannot concur. I will not comment on the issue of Article 6 which is outstanding in its entirety.

With respect to Article 12, I cannot agree with the ultimate conclusion of the Board. Having declared their intent to transfer Mr. MacNeil, the Board certainly triggered necessary procedures under Article 12. Both at the meeting and thereafter Mr. MacNeil and his Association rep were given opportunities to make their views known on the transfer and the assignment. They did nothing. Their grievance was not

filed until September of 2003, well after the leave had commenced and the transfer decision had been well known for many months. When Mr. Liebel and Mr. MacNeil declined the opportunity to comment further by way of consultation at the meeting with the Board of Trustees perhaps they could be fairly taken to say later that they were taken by surprise and on reconsideration they had material to offer. However they never took that step. It now rings hollow to hear them complain many months later of a lack of opportunity to consult.

I would have dismissed the grievance on this point. I have noted in the evidence we received that Mr. MacNeil offered to us nothing that he would have wished to say to the Board with respect to the transfer and the assignment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June 2004.

G.D. Parkinson, Board Member