IN THE MATTER OF: AN INTEREST ARBITRATION

BETWEEN

THE FORT GARRY TEACHERS' ASSOCIATION OF THE MANITOB A TEACHERS' SOCIETY

AND

THE FORT GARRY SCHOOL DIVISION NO. 5

ARBITRATOR: W.N. Fox-Decent

DATE OF AWARD: June 30, 2000

Appearances for the Association:

Karen Wiebe
Ron LeDoyen
Tom Paci
Henry Shyka
Joan Larsen
John Fast
Alan Holl

Appearances for the Board:

Jean Beaumont
Craig Stahlke
Ray Whiteway

In addition to the above, several trustees and teachers were in attendance from time to time. Some made presentations.

INTRODUCTION

This is the last arbitration under the present law as set out in Part VIII of *The Public Schools Act* (the "Act"). At the time of writing this report, the new law has been tabled in the Legislature which, if passed in its present form, will affect all Collective Agreements entered into after June 30th of this year. Therefore, although this arbitration award is written under the shadow of the new law, its contents are in accordance with the Act as it presently exists.

The Fort Garry School Board (the "Board") and the Fort Garry Teachers Association (the 'Association") afforded me great courtesy and co-operation as we proceeded with what turned out to be a rather long process. The use of the facilities of both parties for hearings and sustenance is very much appreciated.

PROCESS

My appointment as mediator/arbitrator dates from August 13, 1999, the mediation phase which lasted for two days was inconclusive and, therefore, on November 8, 1999, the mediation was converted to an arbitration.

The arbitration process began with presentations on jurisdictional issues by Valerie Mathews-Lemieux for the Association and Rob Simpson for the Board.

The merits of the issues as presented by both parties were considered beginning in February and ending in late May. Ray Whiteway led for the Board and Tom Paci for the Association. Each was assisted from time to time by other colleagues, including a number of teachers who spoke for some of the Association issues. The facilitation of those presentations, together with the ready provision of additional materials asked for, was gratefully received and is clearly a matter for positive note.

The entire process of hearings for mediation and arbitration, which began in September 1999 and concluded on May 24, 2000 lasted for 17 days, making this a somewhat remarkable arbitration in terms of its length measured in time.

JURISDICTIONAL ISSUES

The Association and the Board provided the arbitrator with their positions on whether jurisdiction did or did not exist to award on a number of issues before me.

These arguments were considered in detail, including the case material. I will deal with the jurisdictional question as necessary as we turn to those issues where jurisdiction is in question, one-by-one.

In general, I am of the view that Section 97(1) of the Act provides a broad jurisdiction to an interest arbitrator in its definition of "dispute".

There are, however, limits on an arbitrator's jurisdiction in the Act and the most specific of those limits on the matters at issue here are to be found in Section 126(2).

Since, in my respectful view, Section 97(1) provides a broad jurisdiction, Section 126(2) should be read as specific exceptions to that broad authority provided to arbitrators in the definition of dispute in Section 97(1).

In reading Section 126(2) therefore, I have taken the straight-forward, plain language interpretation of the words in that section. It is my view that this section was intended to exclude the arbitrator specifically from certain issues, and that this exclusion is not broad, but rather confined to the issues which are specifically enunciated.

Clearly, there was an intention to limit the arbitrator's jurisdiction by bringing Section 126(2) into the Act as an amendment in 1996. The issues intended to be outside the arbitrator's jurisdiction are stated in the four sub-clauses of this article. In my opinion, the meaning is quite clear and the intent is to be specific about the exclusions.

Therefore, the arbitrator must not deal with the specific issues which are confined in this clause. It would, however, be beyond an arbitrator's prudence to give broad interpretation to the words of exclusion. To put it in a simple way, if the Legislature intended to exclude more issues from arbitration (and there were suggestions for many more issues to be excluded from various parties), then the Legislature would have added those issues to the list. It was clearly and easily open to the law-makers in 1996 to add more issues to Section 126(2).

The language of Section 126(2), read in a straight-forward and plain meaning way, does not deal with sweeping generalizations about exclusions from arbitration. Instead, there is a confined list of specific issues which are to be interpreted as they are plainly written.

In reiteration, I state again that the general rather than the specific is to be found in the definition of dispute. Here is the broad vote of jurisdiction on the process of collective bargaining, including interest arbitration. The purpose of introducing Section 126(2) as law four years ago was indeed to restrict the power of arbitrators to rule on certain issues and thus, confine the broad base of authority given in Section 97(1). This restriction, however, in my view, was intended clearly and specifically, and indeed categorically, to instruct all parties, including the arbitrator, on what confinement there should be and what specific issues were to be excluded from an arbitrator's consideration. This, with deference to others whose view may be different, is a sensible and logical way to read and understand the connection between the broad definition of dispute in Section 97(1) and the exclusions to it which are found in Section 126(2).

FINANCIAL EFFECT

Section 129(3) of the Act, which became law in 1966, requires the arbitrator to consider matters which "might reasonably be expected to have a financial effect on the school division". There follows a list of five matters which are to be given consideration. These matters are closely related to the central question of a school division's "ability to pay".

In a strict or legal sense, a school division's ability to pay is only confined by its ability to raise taxes. If more money is needed and it is not forthcoming from other levels of Government, then the school division raises it by increasing the tax rate.

Regardless of Section 129(3) of the Act, an interest arbitrator should always and obviously consider the employer's ability to pay, whether in the private or public sector.

In the matter before us, the test of the financial effect may be distilled to the question of whether or not my award would have a reasonable impact on the tax payers of Fort Garry. I see it as my responsibility to ensure that my award does not have an unreasonable effect on the tax payers of Fort Garry in the form of a significant rise in their school tax bill.

In all issues before us which have a financial implication or ramification, I have given consideration to the impact of cost on the local tax payer.

The other matters listed in Section 129(3) that have to do with financial effect, such as comparability, recruitment and retention, and potential reduction of school services, have all been given consideration.

In summary, care has been taken to consider the "financial effect" throughout this award so that there will not be a deleterious impact on the tax payers in this school division.

AWARD ON THE ISSUES

Maternity Leave:

The Association has proposed an extension to the existing Collective Agreement provisions related to maternity leave to which there is not agreement from the Board.

A significant majority of the teachers in this division are female and would thus potentially benefit from any improvement to the provisions on this issue.

There is a significant cost factor associated with extending the maternity leave provisions, but this will be balanced against cost considerations related to other issues.

This is a suitable moment in time to grant an expanded provision relative to maternity leave. In so doing, I have not accepted the Association's proposal entirely as written, but have made some amendment to it as will be evident from reading the following clause:

> "Effective June 30, 2000, the following will be placed in the Collective Agreement:
>
> 1. After a qualifying period of one teaching year (10 months), every female teacher shall be entitled to maternity leave.

2. Except as otherwise provided herein, the provisions of The Manitoba Employment Standards Act will apply.

3. The teacher and the Board may mutually agree to extend the length of the leave if the teacher so desires. Any such arrangements shall be confirmed in writing by the Board.

4. A teacher taking maternity leave pursuant to this article shall be entitled to receive pay for the period of the leave up to seventeen weeks in the amount of 90% of the salary being received at the time leave was taken, this pay to include any benefits received from Employment Insurance pursuant to a Supplementary Employment Benefits Plan. The implementation of this clause is subject to the successful arrangement of a Supplementary Employment Benefits plan with the Canada Employment and Immigration Commission.

5. In respect of the period of maternity leave, payments made according to the Supplementary Employment Benefits Plan will consist of the following:
   (a) For the first two weeks, payment equivalent to ninety percent (90%) of her gross salary, and

   (b) Up to fifteen (15) additional weeks payment equivalent to the difference between the Employment Insurance benefits the employee is eligible to receive and ninety percent (90%) of her gross salary."

Special Needs Students:

The Association has advanced a proposal on special needs students and their teachers. The Board has opposed on this issue, both on jurisdictional grounds and because there is, in their view, already ample provision of policy on this matter within the Division.

I agree that this is a very significant issue. However, there has indeed been careful consideration on this matter by the Board, as reflected in its policy.

There needs to be more reference to the "special needs team" in Board policy. Although I cannot award this, I would recommend that the policy be amended to include a statement on the team of people who should make decisions on special needs issues and the necessity of full participation and consultation with this team. Such a statement should include the vital role which teachers have as participants on that team.

There is some doubt about my jurisdiction on this issue. Section 126(2) specifically excludes the size of classes. One is aware, in these late days of June and the legislative activity taking place therein, that the matter of class size is very closely related to the matter of class composition. The Association proposal contains the phrase 'appropriate class composition". This leaves me doubtful on the question of jurisdiction.

For these reasons, I decline to accept the proposal of the Association on special needs students.

Transfers:

The Association has proposed an amended article which would deal with transfer of teachers.

It is my view that the issue of transfers is specifically excluded from arbitrability under Section 126(2) of the Act. Accordingly, although I found the presentation of the Association and Board very interesting on this matter, I will not proceed further. Both parties are thanked for providing me much food for thought, though beyond my jurisdiction.

Complaints:

The Association has proposed a new article to deal with the issue of complaints against teachers or principals. The Board has opposed this proposal on the grounds of jurisdiction and the existence of adequate policy within the Division now.

On the matter of jurisdiction, there is no specific exclusion of this matter from arbitrability in Section 126(2), nor in any other part of the Act.

With regard to the question of adequate existing policy as asserted by the Board, I agree that there is a body of sound policy on the matter of complaints under several Board regulations. However, in that this seems to be an increasingly

complaint-filled world, it is useful to have some specific reference in the Collective Agreement. This will serve the purpose of providing the parties with a reference point inside their common working agreement which will serve to strengthen or reinforce the rights of parties, whether they be teachers/principals, the Division, or a complainant.

It is, therefore, awarded that the following clause be added to the Collective Agreement effective June 30, 2000. It is in a somewhat different form than that which was proposed by the Association.

(a) When a complaint is made against a teacher or principal, every reasonable attempt will be made to resolve the matter informally, through discussion with the teacher or principal against whom the complaint is made.

(b) if these attempts to resolve the matter are not successful, before the Board or Superintendent considers any complaint further, the complaint must be committed to writing and signed by the complainant. At least one week prior to any action being taken by the Board or Superintendent, the teacher or principal concerned shall be given a copy of the complaint and the Association President shall be informed of the complaint, together with the name of the teacher or principal in question.

(c) Sub-sections (a) and (b) shall apply under all circumstances except in the case of an urgent situation affecting the welfare of the division, or of a student or students, or of a teacher or principal.

(d) The Board and its agents shall act fairly, reasonably and in good faith in dealing with complaints.

Limited Term Contracts (Including Form 2A contracts):

The Association has proposed that teachers on a Form 2A contract should be advanced to a permanent Form 2 contract after two successive years of service. Clauses on this matter are now to be found in a number of other teacher Collective Agreements in Manitoba.

The Board has opposed this proposal partially on the grounds of its failing the test of arbitrability under Section 126(2) of the Act.

The granting of such a clause would provide some prospect of ongoing employment for those who are serving in a limited contract situation.

After reviewing the matter of jurisdiction, I do not believe that the matter of granting permanency to those in temporary appointments contravenes the specific words in Section 126(2) of the Act. It is at the discretion of the Board as to whether or not they appoint a teacher to a third successive year. All that an article dealing with this situation would do is require the Board to convert a temporary appointment to a permanent one if, and only if, they decide to carry that teacher forward into a third successive year.

The clause which is awarded here is different in part from that proposed by the Association. In fact, some of the language contained in my award clause was proposed by the Board as an alternative to the words provided by the Association.

The fundamental issue here in awarding this clause is to provide some protection and certainty to those teachers who are temporary. If their service continues, they will, at a known point in time, become permanent.

Add to existing Article 28:

b) Upon appointment to service beginning on or after June 30, 2000, teachers with two (2) successive full school years of service under a limited term contract shall, on employment for the third successive school year, be signed to a Form 2 contract.

c) Notwithstanding the foregoing, should the Division expect the teacher to be employed in the third successive school year for a period of less than three (3) months, the Division may employ such teacher on a limited term contract.

d) A teacher who has been employed by the Division under a limited term contract for two (2) successive school years and who subsequently is employed under a Form 2 contract, shall be deemed to have been employed under a Form 2 contract since the commencement of her or his duties under a limited term contract and shall be entitled

retroactively to seniority and to unused sick leave days accrued since his or her date of hire under a limited term contact.

Sick Leave – Family Leave:

The Association has proposed the deletion of the word "emergency" from the current article on sick leave – family leave. I am not convinced of the necessity of this change by the argument presented to me, and, therefore, the words of the current agreement will remain in place (Article 19C).

Increment:

The Association has asked me to award a change to increment dates from twice a year adjustment to a monthly adjustment on a teacher's annual anniversary of one year's experience.

Although this matter was supported by some examples of how teachers are affected by the present Collective Agreement language, and the improvement which would be achieved by this proposal, there are some administrative challenges and funding issues associated with this change to increment date.

After weighing the possible merit of change against the status quo, I have decided to decline this proposal and, therefore, the parties will continue to use the current Collective Agreement language.

Contact Time:

The Board challenged the arbitrability of this issue in accordance with the restrictions in the Act and, particularly, those to be found in Section 126(2). I do not see any specific prohibition in Section 126(2) which would cause me to decline this matter.

The Association's proposal is about contact time with students during the school day or the instructional day only, the meaning of both for the purposes of contact time being essentially the same.

In my view, contact time with students during the school/instructional day consists specifically of the following activities:

* teaching students

* consultation with students
* supervision of students

Contract time is not above extra-curricular or co-curricular activities.

This provision for some predictability and limitation on student contact time during the school/instructional day has found favour in some 12 other school divisions in Manitoba.

As the arguments were presented, I found the Board to have some sympathy with this proposal, although they formally opposed it, particularly on jurisdictional grounds.

It is reasonable and timely to award positively on this proposal. Again, the words I have chosen are not exactly the same as the proposal of the Association.

> Effective June 30, 2000 and thereafter, the student contact time assigned in any school year to any teacher, whether such time is in a teaching, consultative, or supervisory role, shall not, without the consent of the Association, be greater than 5% above the average student contact time assigned to teachers in each of Elementary, Junior High and Senior High, by the Division during the school year of September 1999 to June 2000.

Sabbatical Leave:

This had indeed been a fractious issue between the Board and the Association for years, entailing many proposals for change from the Board and also previous decisions in arbitration.

This has been the subject of much thought and consideration by the arbitrator. I have come to the conclusion that it is time for a change.

Sabbatical leave is but one avenue for professional development of teachers, but it consumes a large financial resource in return for an individual benefit to no more than 2% of teachers per year.

In this era of rapid change to what teachers require as professionals, sabbatical alone is too narrow a band to meet those requirements. Under the present Collective

Agreement, it does not provide any flexibility. Sabbatical is sabbatical in a rigid context, with a confined benefit to a few people.

Sabbaticals should and will continue, but they should be part of a larger and more flexible context for the professional development of teachers. One should add to the professional development challenge, a range of options for meeting that challenge successfully. One of those options remains sabbaticals, but there are a number of others.

In deciding to broaden and expand the professional development of teachers as provided for in the Collective Agreement, I think it is important that the new concept be jointly and equally administered by the Association and the Board, with a mechanism in place to resolve any irreconcilable differences between them.

I take it as a matter of good faith that the Division will be true to its commitment that this new professional development fund, although it replaces the specific sabbatical leave provisions, will not replace the funding presently allocated to other various forms of "continuing education" for staff of the Division, including teachers. Both Superintendent Beaumont and Secretary-Treasurer Stahlke suggest that a new professional development fund for teachers and the existing $500,000 plus allocation for "continuing education" of Division staff are separate issues.

At the end of the proverbial day on this issue, the arbitrator has decided that a narrow provision for sabbatical leave presently existing will be replaced by a broader and more flexible provision for professional development, including sabbatical leave.

Although the cost of providing sabbatical leave to the Board was in excess of $200,000 in the last year of recorded expenditure, it is a benefit that was worth in excess of $300,000 to the Association. The difference is explained by the lower cost of replacement teachers to the Board versus the higher aggregate value of the benefit to the Association. This difference in value is compensated for by the granting of the substantial addition to the Maternity leave benefit, as outlined earlier in this report.

Therefore, effective June 30, 2000 the existing sabbatical leave clause is removed and replaced with the following:

Professional Development Fund

1. The Board will establish a professional development fund by way of a separate allocation in its annual budget which will be jointly administered by the Association and Division.

2. The Board will make an annual allocation of $220,000 to this professional development fund.

3. The professional development fund will not be an imprest fund.

4. The professional development fund will be expended only on professional development activities for members of the Fort Garry Teachers' Association.

5. A management committee will be established to administer the fund comprised of equal representation from the Division and the Association. The Superintendent will appoint the Division representatives on the Management Committee and the President of the fort Garry Teachers' Association will appoint the Association representatives. The maximum size of the Management Committee will be eight (8).

6. The Division and the Association will agree on the name(s) of a third party or parties who will be available to mediate/arbitrate any irreconcilable differences between the parties on the administration of this fund. The decision of the third party mediator/arbitrator will be final and binding.

7. The professional development fund expenditures are for sabbaticals (full or partial), in-service training, workshops, conferences, a course or courses of study which may or may not include paid or unpaid leaves of absence, or any other professional development activity which is appropriate.

8. The professional development fund is set out in addition to any other budgeted professional development allocation for staff, including teachers, which the Board may choose to make in the course of establishing its annual budget.

9. Any professional development activity must have as its aim and purpose to provide a benefit and furtherance to the educational activities of the fort Garry School Division.

Preferential Hiring:

The Association has asked for a new clause on the subject of preferential hiring which would see part-time teachers given preference for vacant full-time teaching positions.

The Division opposed this addition on the grounds that the arbitrator did not have jurisdiction and that there is adequate existing policy on this matter already in place.

I agree with the Board on both of their assertions. This matter is directly related to the appointment of teachers and as such, is excluded by the specific language of Section 126(2) of the Act. Moreover, there is indeed reasonable policy already in place which effectively gives an on-going preference to part-time teachers who are already in the Division on a "first consideration" basis.

I, therefore, decline to award a change as proposed by the Association.

Effective Period (Duration):

This was the most contentious issue between the parties and, therefore, a matter of much lively debate.

The Board was of the view that an Agreement ending in June 2001 would best serve the interests of the parties after such a long period without any Agreement in place. Furthermore, an addition of one year would offer some stability and predictability which would well-serve the interests of both the Association and the Division.

The Association was of the emphatic view that having the Collective Agreement expire in 2001 would deny teachers and principals in Fort Garry the opportunity to bargain with the Board under the new terms and conditions provided by changes to Part VIII of the Act. There will be a new law in place effective June 30 this year, but access to it would be denied for one year, and teachers would be bound to an Agreement arbitrated under the terms of the old law.

I have sympathy for the position of the Board and had there not been a new body of law to take effect almost immediately, I would have given serious consideration to the effective period of this Agreement ending next year.

With the advent of changes to the Act, however, teachers would effectively be denied the right to bargain for another year and this would indeed be a serious denial going to the heart of the rights of full participation in collective bargaining at the appropriate moment in time. Imminent changes to the law make that appropriate moment now as opposed to one year later.

I, therefore, award that the effective period of this Collective Agreement will be from January 1, 1997 to June 30, 2000.

Salary Schedules:

The salary schedules for the effective period of this Agreement (January 1997 to June 30, 2000) have been agreed to by the Association and the Board for the following groups:

- Teachers (except substitutes)
- Principals and Vice-principals
- Department Heads
- Teaching Co-ordinators

This agreement between the parties on salaries is confirmed in this arbitration award.

Substitute Teachers Salary:

Effective June 30, 2000 an increase to substitute teachers' salaries will be awarded as follows:

Class 1 – 3	$ 88.00
Class 4 – 7	$104.00

Car Allowances:

Effective June 30, 2000, the amount of car allowances provided for in this Collective Agreement will be increased by 6%.

Parking:

Effective June 30, 2000 the parking charge provide for in Article 23 of this Agreement will be amended to the following:

One-Half Time to Full-Time	Below Half-Time
$75.00	$37.50

Interest On Retroactive Payments:

The Board has asked the arbitrator to waive the interest on retroactive payment on salary as provided in Article 5(b) of the Collective Agreement.

I see no reason to interfere with what has been previously negotiated and, therefore, the interest on retroactive payments will proceed as provided for in the current Agreement.

Principals – Date of Appointments:

The Association's request to have principals appointed no later than August 15th is declined. This would not appear to be an issue that requires attention by way of addition to the Collective Agreement.

CONCLUSION

It has been a privilege to be closely associated with many of the issues in education through this arbitration process. Much has been learned.

At the hear of the matter one finds teachers, students and a variety of administrators, in association with the elected school trustees who comprise the Board. All are highly valued members of the school system.

Within this system, teachers are the core professionals in delivery of quality education. They deserve, and receive, in this school division, a large measure of support. May it continue.

Jurisdiction is retained by the arbitrator to assist the parties, if necessary, in the implementation of this award.

Dated at Winnipeg, Manitoba, this 30th day of June, 2000.

W.N. Fox-Decent
Arbitrator