INTEREST ARBITRATION

BETWEEN

THE WINNIPEG TEACHERS ASSOCIATION

AND

THE WINNIPEG SCHOOL DIVISION NO. 1

Subject: Religious Holy Leave – Article 19.09 of the Collective Agreement

Arbitration Board:	Mr. Wally Fox-Decent Mr. William Olson, Q.C. Mr. David Shrom
Counsel for School Division:	Mr. Ray Whiteway
Counsel for Teachers' Association:	Mr. Henry Shyka Mr. Tom Paci
Present for Winnipeg School Division:	Mr. John Orlikow, Trustee Ms Janet Schubert, Chief Superintendent Mr. David Bell, Secretary-Treasurer Mr. Eugene Gerbasi, Director of Human Resources
Present for Teachers' Association:	Mr. David Nadjuch, President Ms Erna Braun, Vice-President Mr. Henry Pauls, Past President Ms Gail Fishman, Collective Bargaining Committee Member

INTRODUCTION

During the negotiations toward settlement of the present Collective Agreement (July 1, 2000 to June 30, 2003), settlement was reached on all matters except that of religious leave.

It was agreed to present the matter of religious leave to interest arbitration in the form of a proposal for a substantially amended clause from the Division as follows:

Proposed Article 19.09

Teachers under contract, Laboratory Assistants, Teachers of Adult ESL Programs and persons to which Article 33 is applicable shall not absent themselves from duty for reasons of religious holy days without first securing permission from the Superintendent. All requests for such approval shall be made through the principal on the form prescribed.

1. Employees as specified above desiring to observe recognized religious holy days will be allowed time off through one (1) of two (2) options:

   a) The religious holy day(s) leave will be granted on the basis that the employee will provide alternative service to the division on a day and time when they are not scheduled to work; or

   b) time off at full deduction of salary.

2. For the purposes of this Article, religious holy days shall be interpreted as major religious holy days normally observed by the employee specified above and designated as a day of obligation by the employees religion for which an employee must abstain from engaging in paid employment.

3. The following notification period will apply:

   a) for employees specified above requiring religious holy leaves prior to October 15th, ten (10) working days' notice in writing shall be given to the Division, for employees specified above requiring religious holy days after October 15th, notice in writing of leave required for that school year shall be given by September 30th.

   b) for those employees specified above commencing employment with the Division at a time other than the start of the school year and who require religious holy leave, notice in writing shall be given to the Division within ten (10) working days of active employment.

4. Where the appropriate notice has not been given to the Division, the Division shall provide religious holy days and that leave, at the Division's

The Winnipeg Teachers' Association wishes to retain the existing clause with no change as follows:

Present Article 19.09

1. No deduction from salary shall be made when teachers are absent for observance of religious holy days, up to a maximum of three (3) days per school year.

2. When teachers are absent for observance of religious holy days in excess of three (3) days per school year a teacher may receive regular salary less the rate for a substitute in the teacher's salary classification.

3. The following notification period will apply:

   a) for teachers requiring religious holy leaves for employees prior to October 15th, ten (10) working days' notice in writing shall be given to the Division, for teachers requiring religious holy days after October 15th, notice in writing of leave required for that school year shall be given by September 30th.

   b) for those teachers commencing employment with the Division at a time other than the start of the school year and who require religious holy leave, notice in writing shall be given to the Division within ten (10) working days of employment.

4. Where the appropriate notice has not been given to the Division, the Division shall provide religious holy days and that leave, at the Division's discretion may be with pay or at regular salary less the rate for a substitute in the teacher's salary classification, or with one two-hundredths (1/200ths) salary deduction per day. The Division shall act reasonably and fairly having regard to all circumstances.

5. Religious Holy Leave shall be extended to include individuals teaching in the Adult ESL Program.

The Interest Arbitration in this matter resulted in two days of hearing on October 21st and 22nd, 2002.

There is a long history of periodic discussion on this matter between the Division and the Association. In summary, there has been a clause for many years in the Collective Agreement providing for two or three days of paid leave for religious observance.

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SUMMARY OF THE POSITION OF THE DIVISION:

There are two main elements to the substantially amended clause proposed by the Division.

The first would provide a definition of religious holy days which, in the view of the Division, would have the effect of greater certainty around the question of what is or is not acceptable religious leave.

Such a definition would clarify the distinction between a religious holy day, a religious holiday, and a cultural holiday.

There are, in the Division's view, administrative challenges in the application of clause 19.09 as it now exists.

The second element responds to the question of what happens when a teacher asks for religious leave. It provides a response that would entitle a teacher to have an unspecified number of days of religious leave, with the teacher providing alternate service to the Division to compensate for those days, or with reduction of pay for the religious leave days.

There are several reasons the Division advances for seeking the provision of alternate services as follows:

The Division argues that alternate service is provided in all the other Collective Agreements involving the staff of the Winnipeg School Division.

The Division asserts that there have been complaints from other staff regarding the religious leave provision which is accessed by some, but not all teaches.

It is the position of the Division that alternate service provides for equity, where days off with pay does not.

Two cases of possible misuse related to the existing clause were advanced by the Division.

SUMMARY OF THE POSITION OF THE ASSOCIATION:

The Association indicates surprise at this proposal. They thought the matter was settled after several years of event and discussion, and they point to a Letter of Agreement of August 23, 1999 signed by both parties, which contains a clause as follows:

> (f) The Division and the Association acknowledge that the agreement reached in paragraphs (a), (b), (c), (d) and (e) above constitute a full and final resolution of the issue of religious holy leave. The agreement further constitutes reasonable accommodation as required by the Human Rights Code of Manitoba and a reasonable limit pursuant to section 1 of the Canadian Charter of Rights and Freedoms.

The Association argues that the existing clause in its essence has been in place more than 15 years. It does not appear to be broken, so why is there a need for repair?

It is the view of the Association that the Division proposal is not a form of reasonable accommodation, but rather, is a form of discrimination.

The Association position is that the concept of alternate service challenges or violates the concept of a standard school year for teachers as defined by regulation and the Collective Bargaining Agreement.

On the matter of complaints from other teachers not receiving religious holy leave, the Association position is that they represent teachers with complaints and no such representation is being made by the Association. The Association suggests no awareness of such complaints.

On the matter of misuse of the religious leave provision, the Association argues there are only two such cases indicated and they should be dealt with on an individual basis with whatever action is appropriate and reasonable.

ARBITRATION AWARD:

All of the case law provided by the parties has been given careful consideration.

A detailed comparison with other school division teacher bargaining agreements, particularly in Manitoba, has been undertaken.

It is now well established in arbitration and court decisions that there must be reasonable accommodation for religious leave which does not cause undue hardship.

The Division has not argued undue hardship to the employer.

The Association has suggested that the Division proposal could create an undue hardship position for teachers seeking religious leave.

The present Collective Agreement between these parties provides for reasonable accommodation and has done so for many years on the basis of a limited number of religious days leave without loss of pay.

This Board agrees that a definition of religious holy days in Article 19.09 is a useful addition and it will be provided below.

There are two questions which require response from this Board:

1. Is the Division proposal a form of reasonable accommodation?

2. If the Division proposal is reasonable accommodation, should this Board substitute it in place of the present language in the Collective Agreement which would suggest the Division proposal is a better form of reasonable accommodation?

As to the issue of alternate service and whether it is reasonable accommodation, this Board finds as follows:

The Division argues that other Collective Agreements in the Winnipeg School Division provides for alternate service either in the form of working on general holidays (e.g. Easter Monday, Christmas Day, Boxing Day) or mutually agreed to alternate arrangements "such as vacation, accumulated time or leave without pay".

Working on general holidays may be a practical and reasonable accommodation for other staff, especially those on a seven day shift schedule, but it is not for teachers where the schools are essentially closed down on those days.

Teacher contracts provide that a teacher "shall not be required to teach on holidays and vacations prescribed by law and regulations".

Alternate work for religious leave may be an accommodation for teachers, but to see it as a reasonable accommodation is not acceptable. It requires teachers to provide service on days not specified in the school calendar or during hours not otherwise considered part of the normal school day.

There are norms or established patterns in law, regulations, collective agreements, or policy with regard to teachers' duties. Alternate service goes beyond those norms or patterns.

Comparison with teaching peers in other Divisions is an important consideration in this Interest Arbitration. Indeed, comparison of same or similar occupations is a fundamental of most Interest Arbitrations.

No other Division in Manitoba provides for alternate service for teachers seeking religious day leave. Instead, like the Winnipeg Division now, they provide for limited days of religious leave without loss of pay.

Undue hardship to the Division as indicated above is not being argued here. If it were successfully argued, it would provide a mitigating factor to be considered by the Board.

On the Division's issue of equity, as they suggest is provided in the new proposal, versus the inequity of the present language which they argue, it may be just the reverse. The Division, in singling out teachers seeking religious leave and requiring them to work on other days may be proposing an inequity which would negatively discriminate against those teachers.

In summary:

1. Provision of a definition is considered to be useful addition to clause 19.09.

2. There may be other forms of reasonable accommodation different from the provision of limited religious days leave with pay. for teachers there may be other forms of accommodation and one or more of them may be reasonable.

3. The Division proposal of alternate service as reasonable accommodation is not supported by this Board. Accommodation it is, but it is not reasonable accommodation for teachers.

Since this Board does not agree with alternate service as a reasonable form of accommodation for teachers seeking religious leave (although it is certainly acceptable for some other occupations), the second question (on Page 5) requiring response from this Board, is probably irrelevant. Even if alternate service were found to be a completely acceptable form of reasonable accommodation, there appears to be little validity to suggest that it would be a better form of reasonable accommodation than is not found in the Collective Agreement as negotiated by the parries many years ago.

Furthermore, in the words of Arbitrator Scurfield:

"Arbitrators have frequently stated that an interest arbitration should try and replicate the result of free collective bargaining. In a sense, this is an artificial exercise because we know that the parties have not been able to reach an agreement. I think the point is better made from the opposite perspective, namely, that an arbitrator ought not to impose an agreement that a party acting reasonably would have rejected. In my opinion, arbitrators have the right to impose new articles in collective agreements where the arbitrator has concluded, based on the evidence, that the reluctance of one party to agree to the article is neither logical or fair. On the other hand, arbitrators should be reluctant to unilaterally introduce entirely new articles into collective agreements which have been developed over a long history of bargaining. The exceptions in this approach should the other hand, arbitrators should be reluctant to unilaterally introduce entirely new articles into collective agreements which have been developed over a long history of bargaining. The exceptions in this approach should be based on evidence that the current practice is impractical, inequitable, or out of step with what is occurring in other Divisions.

We concur.

Therefore, effective June 30, 2003, clause 19.09 of the current Collective Agreement will be modified to include a definition of religious holy days similar to that found in many other Metro Winnipeg divisions, including St. Vital, Seven Oaks, Fort Garry, Assiniboine South and River East.

Definition – Religious Holy Leave

Religious holy days shall be defined as "major religious holy days observed by the teacher and designated as a day of obligation by the teacher's religion".

Otherwise, the clause is to remain the same.

The Board offers its sincere thanks to counsel and the representatives of the Division and the Teachers' Association for their courtesy and co-operation.

Wally Fox-Decent

William Olson, Q.C. – I concur/do not concur with this award.

David Shrom – I concur/do not concur with this award.

Dated at Winnipeg Manitoba this 21st day of March 2003.

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Subject: Religious Holy Leave – Article 19.09 of the Collective Agreement

DISSENT OF E. W. OLSON

Thompson Dorfman Sweatman
Barristers and Solicitors
2200 – 201 Portage Avenue
WINNIPEG, Manitoba R3B 3L3

(E.W. Olson, Q.C./HVK – Matter No. 0059123 EWO)
Telephone: (204) 934-2534
Direct Fax: (204) 934-0534
E-Mail: ewo@tdslaw.com

I have reviewed the majority award in this matter and find that I cannot agree.

The fundamental basis for the majority's decision is that although alternate service may be an accommodation for teachers, it is not a "reasonable accommodation". In my respectful view, the reasons given for such a conclusion do not stand up to scrutiny. The majority has found that it is not "reasonable" because alternate service requires teachers to provide service on days not specified in the school calendar, or during hours not otherwise considered part of the normal school day, even though such arrangements are recognized as a reasonable accommodation for other staff. Again with respect, I fail to understand how, if it is a reasonable accommodation for other staff on a similar schedule, it could not also be for teachers.

As the Association here noted in its Submissions, the Ontario Court of Appeal in 2000, in ***Ontario v. O.P.S.E.U.*** concluded that scheduling changes should be the first area examined to determine whether an employee can be accommodated. Yet, as I understand the decision of the majority here, such scheduling changes could never constitute a "reasonable accommodation" because the majority has found that "days not specified in the school calendar", or "hours not otherwise considered part of the normal school day", or any alternate service that goes beyond "norms or patterns" established, cannot constitute reasonable accommodation. I disagree, and I believe other authorities have on a repeated basis.

In the ***Chambly*** case, the Supreme Court held that a secular calendar can set out a work schedule that is discriminatory in its effect. The evidence in that case, however, was lacking as to whether any days could be made up other than on normal teaching days. As noted in the ***Richmond*** arbitration in 2002 in Manitoba, where the evidence confirms there is work to be done and services to be performed in the absence of students, and when one accepts that teaching extends to duties beyond actual instructional contact time with students, the result can be different.

In prior arbitrations involving teachers of the St. James Assiniboia School Division No. 2, Arbitrator Graham acknowledged that the Federal Court of Appeal in Re: Richmond in 1997 had held that as the employer had offered grievors various options to permit them to observe Jewish holidays without loss of pay, including the use of annual or compensatory leave, or working extra hours (making up time). It had satisfied the burden of establishing reasonable accommodation short of undue hardship. Arbitrator Graham ended up concluding, on the facts of the case he was hearing, that the grievances were to be upheld in that the particular provisions were, in effect, discriminatory and other provisions did not represent a reasonable accommodation of the interest of the grievors in relation to religious leave. In so doing he recognized that, in other employment contexts, the case law provides examples of reasonable accommodation being achieved with respect to religious leaves, without providing for leaves with pay. He stated:

> "In those cases, the employees were given other options, such as taking the days required as part of their annual vacations, or working extra hours on other days to make up for the time away on leave. Counsel for

> the Division emphasized that reasonable accommodation, even in a school context, can be achieved in other ways, and not simply by granting leaves with pay."

The Dissent of Mr. Simpson, as nominee for the Division, also agreed that the needs and interests of the grievors relating to religious leave may be reasonably accommodated in other ways than providing such leave with pay, and that "scheduling of work may certainly be an appropriate alternative to paid leave". However, the evidentiary basis presented in that case distinguished its circumstances from the ***Chambly*** case, and Mr. Simpson observed:

> "The Chairman has noted the comment of Cory, J. in ***Chambly*** to the effect that a teacher can only teach when the school is open and the pupils are in attendance. That comment does not accord with the evidence before this Board, where the grievors who testified confirmed that there was work to do and services to be performed in the absence of students. If we accept that teaching extends to duties beyond actual instructional contact time with students, clearly there are duties that can be assigned and work that can be performed when students are not in attendance."
>
> (emphasis added)

Here the evidence is essentially uncontradicted that full time employees on a prearranged basis, can be involved in study skills classes before the commencement of the school year, remedial classes by subject are for students before and after the school day, subject area remedial classes before and after school terms, and be involved in other special duties that may be arranged directly between the Administrator and the teacher, such as course preparation work, assisting in the intake of students, library assistance, curriculum development and the adaptation of curriculum for specific schools. Indeed, the evidence is that these alternate services could be provided not only before and after the school day, or school term, but also on vacation days, weekends and, from time to time, in summer months.

The evidence further indicates that many of the bargaining units with which the Division here bargains collectively, in fact involve alternate service arrangements similar to that proposed for teachers here, in circumstances where the schedules of those non-teaching units is similar to teachers. In particular, WANTE involve some 1,200 clerical and teaching aids (instructional). Many of those have identical provisions to that sought here.

In my view, a careful reading of the majority award is necessary to avoid an internal inconsistency. As stated previously, the majority acknowledges that alternate work for religious leave may be an accommodation for teachers, but is not a "reasonable" accommodation. The majority, however, goes on to say that alternate service goes beyond norms or patterns, and is not provided in any other School Division in Manitoba. If the latter are the reasons why the accommodation here proposed is not "reasonable", then I assume, to avoid internal inconsistency, the majority is making the finding that the proposed accommodation here is not reasonable in these circumstances or at this time. If that is not a correct interpretation of the majority's decision, then norms or patterns are irrelevant, as are the provisions in any other School Division, as the majority would have said that alternate service can never be a reasonable accommodation in any circumstances, or at any time. They have not so stated, nor could they, otherwise the award would be internally inconsistent.

The majority also recognizes that teacher contracts do not forbid teaching on holidays or vacation; they merely provide that teachers shall not be "required" to work then. That is why the alternate service type of proposal is workable in that it requires some consensus to be reached by the Administration and the teacher concerned, and is not unilaterally imposed on the teacher.

Experience in other bargaining units demonstrates that alternate service provisions that are comparable, in fact, work. The CUPE experience resulted in a significant reduction in the requests from that which exists under the current wording. WANTE reflects similarly. The frequency of use of such alternate service provisions in other bargaining units within the Winnipeg School Division and elsewhere, and the experience gained through such usage is corroborative of the position taken by the Division here that these are realistic alternate service opportunities, contrary to the situation that occurred in ***Chambly.***

The majority suggests at pages 7 and 8 that Arbitrators should be reluctant to unilaterally introduce entirely new articles into collective agreements. This is not an entirely new article, but rather a proposed alternative means of providing reasonable accommodation which is permitted in law. If this Board is satisfied that the proposal not only is, in fact, an accommodation, but is reasonable in the circumstances, and I would so find, there is no impediment to an Interest Arbitration Board in concluding that proposal should be incorporated into the collective agreement.

To the extent that there has been confusion, several examples of improper usage, and administrative difficulties encountered in working with the current wording, and given the experience noted, there is good reason to implement such a proposal. it should not be necessary for a Division to await multiple concrete examples of alleged improper usage before such a change is made, if it otherwise satisfies the requirements noted above.

To the extent that the majority is suggesting that such changes should only be made if there is a comparable provision in another school division in Winnipeg, that cannot be the appropriate test. If it were, there could never be any changes from the status quo. While it is fair to compare provisions applicable to these teachers with provisions comparable to persons doing similar work in similar communities, one of the closest comparators would be those who work alongside these teachers, and they are currently governed by alternate service provisions which are being sought here, with acceptable results. So too there is a comparable provision in a collective agreement in Calgary between one of its major school divisions and Calgary teachers.

I agree with the majority that a definition may be useful to minimize or eliminate the confusion under the current wording, but I would have ordered the wording currently in a number of collective agreements in the Winnipeg School Division and elsewhere with non-teaching units, as proposed by the Division here, rather than the wording suggested by the majority.

Dated at Winnipeg, Manitoba this 24th day of March 2003.

E.W. Olson, Q.C.