IN THE MATTER OF AN ARBITRATION:

BETWEEN:

RIVER EAST TRANSCONA SCHOOL DIVISION
(hereinafter referred to as "The Employer")

-and-

RIVER EAST TRANSCONA TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as "The Union")

- and -

ANITA SUDFELD
(hereinafter referred to as "The Grievor")

ARBITRATION AWARD

BOARD OF ARBITRATION:	**Gavin Wood**, Sole Arbitrator
DATE OF HEARING:	July 5, 2005
LOCATION OF HEARING:	Winnipeg, Manitoba
APPEARANCES:	**Rob Simpson** Counsel for the Employer
	Garth Smorang, Q.C. Counsel for the Union

IN THE MATTER OF: An Arbitration Between:

RIVER EAST TRANSCONA SCHOOL DIVISION
(hereinafter referred to as "The Employer")

-and-

RIVER EAST TRANSCONA TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY
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-and-

ANITA SUDFELD
(hereinafter referred to as "The Grievor")

AWARD

This arbitration proceeded on July 5, 2005. At the outset, the parties acknowledged that I was properly appointed and had jurisdiction to deal with the issues of the grievances.

The arbitration concerns two grievances, one filed by the Union and the other by Ms. Sudfeld ("the Grievor"), whereby it is alleged that the Employer has breached article 3(5) of the Collective Agreement and section 80 of The Labour Relations Act, C.C.S.M. 1987 c.L10, by failing to pay the Grievor at the appropriate rate as set out in the Collective Agreement (given her qualifications and experience).

Evidence

An agreed set of documents were filed at the outset, including the applicable Collective Agreement. A number of additional documents were filed as exhibits during

the course of testimony. The parties stipulated certain facts.

The Union called Ms. Sudfeld and Mr. Roland Stankevicius, President of the River East Transcona Teachers' Association. The Employer did not call evidence.

Counsel requested that if I find in favor of the grievance that I reserve jurisdiction with respect to the issue of quantum.

Factual Circumstances

The circumstances surrounding this grievance are virtually undisputed.

Ms. Sudfeld received her Bachelor of Physical Education degree in 1995 and subsequently a Bachelor of Education in 1997. Thereafter she worked at Kingsway Academy, a private school in the Bahamas, as a physical education teacher. Initially she had to provide proof of her teaching certificate in order to obtain that position. She remained with Kingsway Academy for 2 years. Then from January, 2000 to June, 2001 she taught as a substitute teacher for several Winnipeg school divisions.

In May, 2001 she applied for a position with the River East School Division. In doing so she provided a resume (Exhibit 3) which showed her profile as including: "Bachelor of Education, Bachelor of Physical Education, with 3 years teaching

experience". She accepted a 1 year term contract with the Division (a form 2A contract – Exhibit 4).

The salary schedule set out in article 3 of the Collective Agreement provides a grid determining salary based on qualification (by class) and years of experience (from zero to 9+ years). When Ms. Sudfeld began teaching under the term contract, she was designated as: "class 5, zero years of experience". Given her previous teaching, Ms. Sudfeld believed she had 3 years of experience. She applied to the Administration and Teachers' Certification Branch of the Manitoba Department of Education (the "Certification Branch") in order to correct her designation. Section 2(2) of the Teaching Certificates and Qualifications Regulation (Reg. 515/88) of the Education Administration Act, C.C.S.M.1987 c.E-10, provides:

> **2(2)** Where teaching or school clinician experience is referred to in this regulation, one year of experience as a teacher or clinician is calculated annually at the end of the spring term as follows:
>
> (a) one year of employment on a full time basis if the school year is 180 days or more;
>
> (b) 180 days of employment on a full time basis over a period of one or more years if the school year is less than 180 days; or
>
> (c) The equivalent of 180 days of full time employment on a part time or term basis over a period of one or more years;
>
> and includes maternity leave or parental leave granted in accordance with *The Employment Standards Act*, to a maximum in any school year of 85 teaching days for a full-time teacher and 85 teaching days pro-rated on the basis of the employment contract for a part-time teacher."

The regulation deals with teaching institutions outside the public school system in part as follows:

> "2(2.1) For the purposes of subsection (2), employment as a teacher or clinician means
>
> ...
>
> (b) approved experience gained in or out of the province in child or youth institutions outside the public school system where:
>
> (i) a teaching or clinician's certificate or equivalent was necessary for employment
>
> ... "

The Certification Branch sent Ms. Sudfeld a form to be completed by the private school in the Bahamas in order to determine if she qualified under the regulation for 2 years of experience while teaching in the Bahamas. The form (Exhibit 5) included the following question: whether "a teaching certificate was necessary for employment". The principal of Kingsway Academy forwarded the completed form to the Certification Branch. On the form (Exhibit 6(b)) the principal noted that a teaching certificate was not necessary for employment.

As a result, the Certification Branch advised Ms. Sudfeld by letter on November 8, 2001:

> "I regret to inform you that we are unable to recognize this experience as it does not meet the criteria as set out in Manitoba Regulations 515/88, Section 2 (2.1) (b) of the Education Administration Act.

...

> Kingsway Academy High School reported that a teaching certificate was not necessary for employment with their school, therefore, the experience is not eligible for credit with Manitoba Education, Training and Youth." (Exhibit 6A)

Upon receiving the letter, Ms. Sudfeld called the principal who had completed the form and requested he correct the form to show that, as was the case, she had been required to have a teaching certificate to teach at Kingsway Academy. The principal refused to do so.

Subsequently, in a letter dated January 9, 2002, the Certification Branch confirmed that the Grievor's substitute teaching in the Winnipeg school system during the period of January, 2000 to June, 2001 constituted one year of experience pursuant to the regulation. Therefore as of June 30, 2001 her classification was: "class five, one year experience". Her salary was retroactively changed by the Division to take into account the change in her classification from zero to 1 year of experience.

In July, 2002 Ms. Sudfeld was hired to full-time employment as a teacher with the Division (by a form 2 contract dated July 4, 2002 - Exhibit 8). Ms. Sudfeld was classified as: "class 5, 2 years experience".

Subsequently, Ms. Sudfeld was contacted by a friend who was interested in teaching in the Bahamas. To assist her in applying for a teaching position, Ms. Sudfeld checked the internet for information. On the internet Kingsway Academy required a

Bachelor of Education degree. She called the Certification Branch and asked to be provided once again with the necessary forms for the Bahamian authorities. She hoped that her 2 years of teaching in the Bahamas would be recognized. On receiving the form she forwarded it. This time the form was completed correctly, specifically showing that she had required a teaching certificate in order to teach at Kingsway Academy.

On receipt of the completed form, the Certification Branch by letter dated June 23, 2004 advised the Grievor that her teaching experience designation had been revised to include the 2 years of teaching in the Bahamas. Specifically the letter indicated that her designation as of June 30, 2003 was: "class 5, 5 years experience" (Exhibit 9).

As a result of this revision, the Division retroactively paid Ms. Sudfeld by the article 3 salary scale as a class 5, 5 years of experience teacher for the teaching year 2003-2004.

On being advised of this, Ms. Sudfeld spoke with the Manitoba Teachers' Society. In turn, on July 28, 2004, the Society wrote to the Division, indicating *inter alia*:

> "Ms. Sudfeld began teaching in River East in the fall of 2001. Due to errors not attributable to Ms. Sudfeld, she was not immediately credited with her two years teaching experience in Nassau. You were notified of the correction in June 23, 2004. The letter from the Certification Branch clearly credits her for the 97-98 and 98-99 academic years teaching in Nassau and gives her current standing in Class five with five years experience.

> The collective agreement Article 3(4)(a) requires that teachers be paid consistent with the classification and experience recognized by the Teacher Certification Branch. Accordingly she should have received back pay from the date of her employment with River East School Division reflecting two extra years of experience. She has to date received back pay for the 03-04 academic year only. Please correct this omission." (Exhibit 10)

In response, the Division wrote the Society on August 10, 2004 as follows:

> "Please be advised that the change in years of experience was verified as of June 30, 2003. It is our practice to pay retroactive pay according to the verification dates or a maximum of one year from notification." (Exhibit 11)

Ms. Sudfeld then was advised by the Society to involve her Local.

Mr. Stankevicius, President of the Union, was made aware of Ms. Sudfeld's concerns. A meeting of the Union and Division was held on October 7, 2004 to deal with those concerns. It was agreed that clarification should be sought from the Certification Branch concerning how the initial setting of her years of experience had come about. Accordingly, Ms. Sudfeld wrote to the Certification Branch on October 20, 2004, the following:

> "My superintendent has asked for a letter from the Certification Branch explaining the process in my case.
>
> Important to include are the date of my original application for recognition of this experience, my reasonable efforts to obtain the required correctly filled out documentation, the error in the filling out of the original form, my efforts to get the error corrected, and the final successful resolution of the issue. Also of some importance is that the wording in the letter from you

> dated June 23, 2004: "YEARS OF EXPERIENCE AS OF JUNE 30, 2003" is simply a convention to express years recognized at a certain point in time rather than an indication that experience would not have been recognized prior to that, had the appropriate information been suppled by the Bahamian school." (Exhibit 12)

The response dated October 28, 2004 from the Certification Branch provided *inter alia*:

> "A revised verification of teaching experience was received by fax on June 17, 2004. This verification reported the same period of time with Kingsway Academy School, Nassau, Bahamas, however, specified that **a teaching certificate was necessary for employment**. Since all necessary criteria were fulfilled, Ms. Sudfeld was given credit for this teaching experience. The revised experience was confirmed in a letter sent to Ms. Sudfeld on June 23, 2004 with a copy faxed to River East School Division.
>
> The verification letter listed the "Years of Experience as of June 30, 2003" including all teaching experience recorded with the Professional Certification and Student Records Unit. Experience is always report as of June 30th of the prior school year. This does not refer to the date when the experience was eligible. If the experience from the Bahamas had been received with the appropriate information in a prior school year, it could have been recognized at that time." (Exhibit 13) (emphasis in the original)

As well, the letter contained a certificate dated October 28, 2004 as to verification of classification and teaching experience, providing:

"09/97 - 12/99	Outside Manitoba (Nassau, Bahamas)	400.00 Days	
01/00 - 03/00	Inside Manitoba (substitute days)	8.00 Days	
03/00 - 06/00	Inside Manitoba (100% contract)	66.00 Days	
08/00 - 12/00	" " "	82.00 Days	
01/01 - 06/01	Inside Manitoba (substitute days)	43.50 Days	
08/01 - 06/02	Inside Manitoba (100% contract)	200.00 Days	1.00 Year
08/02 - 06/03	" " "	200.00 Days	1.00 Year

09/03 - 06/04	" "	" "	198.00 Days	1.00 Year

Total as of June 30, 2004: 6.00 Years, 59.50 Carryover Days, Class 5." (Exhibit 14) (emphasis in the original)

Subsequently, Mr. Stankevicius wrote to the Division on November 30, 2004, noting the information set out in the letter and certificate from the Certification Branch and requesting that the Grievor's teaching experience be corrected to her original date of employment with the Division and that her salary be retroactively adjusted (Exhibit 15).

In a response dated December 2, 2004, the Division took the following position:

> "In response to your letter received on November 30, 2004, regarding the recognized experience for Anita Sudfeld, please be advised that the Division can only act according to the information we receive.
>
> In June, 2004, we received revised information from the Education Department confirming experience as of June 30, 2003, as per the highlighted section of the attached letter.
>
> It is the Division's practice to pay retroactive pay for one year prior to the receipt of the correct information, just as the Department always reports experience as of June 30th of the prior school year. The Division responded in June, 2004, by paying Ms. Sudfeld retro pay to September, 2003, which reflects our current practice." (Exhibit 16)

Mr. Stankevicius testified that he was unaware of any prior practice by the Division of paying retroactive pay for only a 1 year period prior to receipt of corrected verification information. He was aware of occasions when the Division had mistakenly over-paid teachers. The Division then had insisted upon repayment of the whole

amount of the over-payment, not just 1 year of over-payment (although the Division provided terms for re-payment). In cross-examination he was unable to provide any specifics as to teachers who actually repaid for over-payment of salary.

On January 5, 2005, grievances were filed stating inter alia:

> "... the Division has breached Article 3(5) of the Collective Agreement and Section 80 of The Labour Relations Act by failing to pay her at the appropriate rate as set out in the Collective Agreement given her qualifications and experience. Further, by letter dated December 2nd, 2004 R.D. Hildebrand, Assistant Superintendent of the Division, has advised that it is the Divisions' practice to retroactively compensate her for the loss of pay only back one (1) year to September, 2003." (Exhibit 2A)

The Division in a letter dated February 3, 2005, advised:

> "In response to your e-mail dated January 27, 2005, I am writing to confirm that the division's decision to provide retroactive pay for Ms. Sudfeld back to September, 2003 was more than fair and reasonable.
>
> As per Article 3(4)a we have calculated years of experience as per The Manitoba Department of Education. The department has granted Ms. Sudfeld 5 years of experience as of June 30, 2003 and we have paid her accordingly." (Exhibit 17).

Mr. Sankevicius in a letter dated February 27, 2005, responded:

> "Your letter of 03 February 2005 indicated that the Division has rejected our request to correct Ms. Sudfeld's teaching experience and to pay her retroactively to the date of her hire (September 2001). We are assuming that your response constitutes the Division's rejection of our grievances filed on 07 January 2005." (Exhibit 18)

Submission

Mr. Smorang began with a review of "the facts to note". The Grievor had advised of her 3 years of experience when she applied for the position with the Division. Further, there was no question pursuant to the Collective Agreement that a teacher's teaching experience has a recognized value to the Division. In that regard, there was no suggestion that the Grievor's teaching experience in the Bahamas was of any lesser value. According to Mr. Smorang, the Employer had enjoyed the benefit of a teacher who began with 3 years of experience.

Mr. Smorang also reviewed the salary actually received by Ms. Sudfeld, maintaining that for the 2001/2002 school year she should have been paid as a teacher with 3 years of teaching experience, rather than the salary paid based on 1 year of experience, and for the 2002/2003 school year she should have been paid as a teacher with 4 years of teaching experience, rather than the salary paid based on 2 years of experience. In "rough terms" this amounted to a salary underpayment of $9,000.00. Further, according to Mr. Smorang, the Division, upon receipt of the letters from the Certification Branch of June 23, 2004 (Exhibit "9") and October 28, 2004 (Exhibit "13"), was well aware of the revised verification of her teaching experience. He emphasized the reference to the specific meaning of the phrase "years of experience as of June 30, 2003" set out in the letter from the Certification Branch of October 28, 2004.

He emphasized the position of the Grievor that the Division had "enjoyed" 2 years of Ms. Sudfeld's teaching experience without her receiving appropriate benefit.

He reminded of the Division's policy that required repayment of any over-payment of benefits. Specifically, that policy of repayment was not limited to one year of over-payment.

Ultimately, in considering the factual circumstances, Mr. Smorang maintained that the grievance raised the question of who should bear the burden of the mistake made by the third party.

In that regard Mr. Smorang referenced the following cases, noting that while none was directly on point, they provided assistance in determining where the burden of bearing the mistake should lie:

(a) British Columbia Teachers' Federation and Teacher's Federation Employees' Union (Ballash Grievance), [1998] B.C.C.A.A.A. No.5 (Laing), in which the unusual circumstances were summarized as follows:

> "The facts before me at that time were straightforward; the grievor was not receiving long term disability benefits at the time she was terminated because GWL had ended those benefits. On the basis of the actual facts now before me, she should have been receiving those benefits. The error by GWL has been remedied retroactively. It would be

> unreasonable, and manifestly unfair to the grievor, to deny her the protection of Article 20.5 when she would have been receiving the disability benefits that are a precondition to protection, but for the mistake of the insurance carrier. It is unreasonable that the grievor should lose the benefit of the negotiated bargain the parties to their collective agreement made on her behalf simply because of the unfortunate mistake of a third party, now that it has been recognized and rectified.
> As I have noted the arbitral authorities that I followed in reaching my earlier decision are set out in the paragraph quoted above. The underlying principle that flows from those decisions in that the parties to a collective agreement should be held to their negotiated bargain. As I said in my earlier award at page 20,"...the parties to this collective agreement have specifically created a nexus between the benefits in Article 11 and illness and injury, by reasons of Article 20.5." (page 11)

In the Arbitrator's decision, he emphasized the importance of honouring the negotiated bargain:

> "As a result, I find it would not be reasonable to deny the protection of Article 20.5 to the grievor in light of the actual facts now before me. She could not properly have been terminated had she been receiving long term disability benefits in November of 1996. In actual fact, she should have been receiving those benefits and would have done so but for the error of GWL. The negotiated bargain should be applied in these circumstance. Any other result would be inconsistent with the expressed intentions and contractual obligations of the parties and the arbitral principles I accepted and applied in my earlier award. It is worth noting that the parties have accepted the application of those principles before me and before the Labour Relations Board." (Page 11)

(b) Re: Kitimat General Hospital and I.U.O.E., Local 882 (1988), 11 C.L.A.S. 57, (McColl), which involved a mutual mistake in the method of calculation of overtime, resulting in the long term under-payment to the employee

grievors. The Arbitrator McColl framed the question before him in the following terms:

> "In the present case, when the Employer entered into the Agreement, it knew it was bound by Article 16.03 of the Agreement. The Agreement does not want for interpretation. Its intent is clearly spelled out. Through an administrative process in the payroll office, its provisions were simply ignored. Its practice of paying two hours at overtime related not at all to Article 16.03. It related more specifically to Article 16.01 which established the thirty-seven and one-half work week. From January 1, 1982 to May 1987, the Employer was obligated to pay engineers one-half hour overtime on each day an engineer worked his eight hour shift. It did not. (I might add that there was no evidence that this was known to those charged with negotiating the Agreement on behalf of the Employer in the first instance). Would it be inequitable now to direct the Employer to pay that which it was obligated to pay and that which it is not paying without dispute? I think not." (Page 9)

The Arbitrator reasoned as follows:

> "Approaching the issue from another angle, one must ask the question as to whether or not it is wrong in principle or in equity for the employees who have suffered the loss to seek redress to the commencement of the Agreement? It was argued by the Employer that the engineers themselves were partly to blame for the error. They are required to fill out their time sheets and the Employer provides a code which in part differentiates between straight time and overtime. This was never picked up by the payroll office and the reason it was not was never satisfactorily explained to me. Since the early 1970's, this Collective Agreement has provided for a seven and one-half work day. Ordinarily, any hours in excess of seven and one-half would attract overtime. Employees do not appear to have been specifically instructed to differentiate between straight time and overtime and from their point of view (and, I suppose, the Employer's) what was most important was the accurate recording of hours on the job. This they did. If they erred, their error was compounded by the Employer. Must they bear the brunt of the error? I think not." (Page 10)

(c) Re: Ottawa Board of Education and Federation of Women Teachers' Associations (1986), 25 L.A.C. (3d) 146, (Picker). This case dealt extensively with the law involving mistake of fact in the context of recovery for over-payment. It was noted that the basic principle of law is that money paid to another under a mistake of fact is recoverable unless the doctrine of estoppel applies or unless the party to whom the money was paid has materially changed its circumstances as a result of the receipt of the money (at page 19).

Mr. Simpson in response began by review of the Collective Agreement and the method of calculating of a teacher's salary based on the class/years of experience grid of article 3. He emphasized the provisions of articles 3(3) and 3(4), which provide in part:

> (3) Qualifications
>
> For the purpose of the Salary Schedule, teachers shall be placed according to the classification assigned by the Administration and Teachers' Certification Branch of the Manitoba Department of Education, Training and Youth.
>
> (4) Placement
>
> a) All teachers engaged by the Board shall be paid a basic salary in accordance with the salary schedule except as hereinafter noted. In calculating years of experience, no difference shall be made between the service in the River East School Division No. 9 and service elsewhere equated by the Administration and Teachers' Certification Branch of the Manitoba Department of Education, Training and Youth within limits set out in the salary schedule.
> ... (Exhibit 1)

Mr. Simpson emphasized that by those provisions the Certification Branch is responsible, and has the authority, to determine qualifications and years of teaching experience. (He also referenced the exception set forth in article 3(5), which is not applicable to the present circumstances.) For him, then, the Division is clearly required pursuant to article 3 to rely on the verification by the Certification Branch.

Mr. Simpson turned to a careful review of the steps whereby Ms. Sudfeld's years of experience were certified and then revised. Those series of steps are set out above. He noted that ultimately by the letter of June 23, 2004 (Exhibit "9") the Certification Branch verified her years of experience as of June 30, 2003 as "5 years". He maintained that the Division appropriately responded to that verification by retroactively adjusting her salary to reflect the revision. As a consequence, for the 2003/2004 school year she was paid based on 5 years of experience. Mr. Simpson concluded that the Division had complied with the "verification/certification/confirmation" process laid out in article 3. And on that basis he urged a finding that the grievance be dismissed.

Mr. Simpson asserted that it is reasonable (and required) for the parties to rely on the Certification Branch in the setting of a teacher's salaries, given the grid system set out in article 3. It is the teacher's responsibility to satisfy the Certification Branch in terms of both one's class and one's years of experience. The Division is not involved in that process.

Mr. Simpson also referenced article 22 dealing with the settlement of differences.

Article 22(1) provides:

> "Where there is a difference between the parties to, or person bound by the Agreement, or on whose behalf it was entered into concerning its content, meaning, application or violation, the aggrieved party shall within 30 teaching days of the event giving rise to the violation or difference, or within 30 teaching days from the date on which grievor became aware of the event giving rise to the violation or difference, whichever is later, notify the other party in writing stating the nature and particulars of the violation or difference and the solution sought. If a party to the collective agreement claims that the time limit imposed under the collective agreement has not been complied with the parties shall proceed to appoint an Arbitration Board, and if the Arbitration Board is satisfied that the irregularity with respect to the time limit has not prejudiced the parties to the Arbitration Board, it may, on application of any party to the Arbitration, declare that the irregularity does not affect validity of the decision of the Arbitration Board; and the declaration is binding on the parties to the Arbitration and on any person affected by the decision of an Arbitration Board."

Mr. Simpson noted for a grievance to succeed that a violation of the Collective Agreement must be found. It followed for Mr. Simpson that the issue was not one of applying an equity principle. Pursuant to 22(1), without breach there was no remedy. And here, according to Counsel, the Employer had complied with the Collective Agreement and specifically the process negotiated by the parties. That is, the Certification Branch provided verification of Ms. Sudfeld's years of experience as of June 30, 2003. Acting on that revised verification, the Division adjusted the Grievor's salary for the school year 2003-2004. He emphasized that there was no statement from the Certification Branch verifying her work experience for the school years 2001-2002 and 2002-2003. On that basis, he maintained that the Grievors had failed to discharge their onus of proving breach of article 3.

Mr. Simpson also noted that if a breach was determined to have occurred, the appropriate remedy must be considered. He referred again to article 22 (1) which requires a timely (30 teaching days) notification of the alleged violation. He reviewed the actual circumstances in terms of the remedy being sought, that is, retroactive salary for the teaching years 2001-2002 and 2002-2003.

Mr. Simpson acknowledged the "debate in the cases" as to whether a mistake in placement on a salary grid involves a single event (arising at the outset of the mistake) or a continually re-occurring event on each pay date. For Counsel the appropriate remedy is for payment of any missed salary within the time limit to initiate the grievance process (that is, 30 teaching days prior to the grievance being launched). He said though that the debate in the cases was inconsequential given that the last pay date in dispute is at the end of the 2002-2003 school year (that is, in the month of June, 2003).

In considering the issue of the appropriate remedy, he referred to the following:

(a) Brown and Beatty, Canadian Labour Arbitration (3d), in which it is noted:

> "Where it is established that the breach is a continuing one permitting the time period for launching the grievance to be measured from the latest occurrence, it has been held that the failure to initiate it within the stipulated time from the date of its first occurrence will not render it inarbitrable. However, the relief or damages awarded retroactively in such circumstances may be limited by the time-limit. This for example, where a grievance claimed improper payment of wages in the grievance was allowed, the award limited the damages recoverable to five full working days prior to the filing of the grievance, which was the time-limit for initiating the grievance." (paragraph 2:3128)

(b) Re Province of British Columbia and British Columbia Nurses' Union (1982), 5 LAC (3d) 404 (Getz);

(c) F.J. Davey Home for the Aged and O.N.A., (1990), 21 C.L.A.S. 181, (Samuels), in which Arbitrator Samuel rejected the approach of Arbitrator Getz in Re Province of British Columbia, supra, and preferred the view that an employer's refusal to take past experience into account should be regarded as a continuing grievance. He went on to find that the remedy should be limited to salary missed only within the time frame set for the commencement of the grievance (in that case, 9 days);

(d) Re Regional Municipality of Haldimand-Norfold and Health, Office & Professional Employees, Local 175, (1991) 23 L.A.C. (4th) 282 (Rose), in which as in Davey Home for the Aged, supra, the remedy awarded was limited to the missed salary for the grievance filing period under the collective agreement (at pp. 291 - 292);

(e) Re: Clarke Institute of Psychiatry and Ontario Nurses' Association, (2001) 95 L.A.C.(4th) 154 in which after citing the award in Davey Home, supra, Arbitrator Knopf noted in part:

> "If the general principles of labour relations administration and grievance arbitration are applied to the Aduseis' grievance, it would suggest that no remedy should be considered until the alleged breach was brought to the attention of management." (p. 173)

and:

> "If we were to reward redress to the grievors back to their date of hire, we would be violating the principles of labour relations, contract administration and grievance arbitration because the Employer would be saddled with liability before it was notified of the alleged breach of the collective agreement. We would also be ignoring the fact that the Association chose not to process the Aduseis' grievances."(p. 175)

In the present circumstances, Mr. Simpson argued, if a breach is found, arbitral law prescribed the retroactive salary to be limited to 30 teaching days prior to the filing of the grievance. Further, he noted, there was no damages within that period in the present circumstances, given that the Division had already paid Ms. Sudfeld for the 2003-2004 school year based on 5 years of teaching experience and for the 2004-2005 school year based on 6 years. For Mr. Simpson, she had been appropriately paid for 2 school years prior to the filing of the grievance (certainly well beyond 30 teaching days).

In response to the awards cited by the Grievors, Mr. Simpson re-emphasized the principle requiring the parties to live up to the bargain set, which herein was as detailed in the provisions of article 3.

In reply, Mr. Smorang maintained that a breach was clear in the circumstances. He reviewed again article 3 as to the bargain that had been reached concerning the salary of teachers. Based on the letters of verification dated June 23, 2004 (Exhibit 9) and October 28, 2004 (Exhibit 13), for Ms. Sudfeld that bargain had not been met by

the Division.

Counsel for the Griever noted that the Collective Agreement did not specifically speak to this situation. As a consequence, Section 80 of The Labor Relations Act should be considered. Section 80 provides:

> 80(1) Every collective agreement shall contain a provision obliging the employer, in administering the collective agreement, to act reasonably, fairly and in good faith, and in a manner consistent with the collective agreement as a whole.
>
> 80(2) Where a collective agreement does not contain a provision as required under subsection (1), it shall be deemed to contain the following provision:
>
> > In administering this agreement, the employer shall act reasonably, fairly, in good faith, and in a manner consistent with the agreement as a whole.

In that regard, Mr. Smorang pointed out that the Division had on two occasions retroactively paid Ms. Sudfeld once revised verifications were received. He noted, the Collective Agreement is silent with regards to a retroactive payment in the case of a revised verification by the Certification Branch. The Division in its letter of explanation dated February 3, 2005 (Exhibit 17) maintained that the retroactive pay "back to September 2003 was more than fair and reasonable". According to Mr. Smorang, in essence the position of the Grievors was that the Employer was incorrect in that conclusion. On that basis he maintained that Section 80 of the Labour Relations Act is violated when the Employer followed a practice of 1 year retroactive pay.

Mr. Smorang also took exception to the Division's position of suggesting that the

verification of years of experience as of June 30, 2003, (Exhibit 9) did not mean that there had also been a revised verification as of June 30, 2001 and June 30, 2002. He pointed to the certificate as to the calculation of years of experience (Exhibit 14).

On the issue of timeliness, he questioned how the Division could now raise the notice requirement of article 22(1) given that the Division had made no reference to timeliness until closing argument. He reviewed the letters exchanged in the lead up to the filing of the grievances. He maintained that it was only with the position set forth in the letter of December 2, 2004 (Exhibit 16) that the Division's position had clearly established that Ms. Sudfeld would only be paid retroactivity for 1 year. Accordingly, for Mr. Smorang, the grievance was brought in a timely manner, within 30 teaching days of that letter of denial.

Mr. Simpson then clarified two points. First, he denied that section 80 of The Labour Relations Act provides jurisdiction for an arbitrator to find a breach. He again re-emphasized the need for a breach to be found within the provisions of the Collective Agreement. He also clarified that the Division's position was not that the grievance was untimely, but rather given the arbitral principles that the appropriate remedy (if a breach was found) was for no damages to be awarded. For the Division the appropriate remedy, rather than timeliness, was the issue.

Analysis

The factual circumstances are not disputed. They need not be commented upon

in analyzing the grievance.

The approaches taken by Counsel in their submissions were quite different. This was possibly to be expected, given the factual circumstances. Mr. Smorang emphasized the facts and the equities he claimed result from the facts. He referenced awards dealing with analogous disputes. Mr. Simpson sought to emphasize the Employer's compliance with the process laid out in article 3 of the Collective Agreement. On that basis he challenged whether there was a breach of the Collective Agreement and went on to assert that arbitral principles precluded any remedy if a breach had occurred.

After considering those submissions, I prefer to approach the analysis by dealing with the questions Mr. Simpson developed, that is: whether there was a breach of the Collective Agreement; and if there was a breach, what was the appropriate remedy.

Was there a breach? Of course, the Collective Agreement doesn't deal specifically with the unique circumstances arising here. Mr. Simpson argued though that the process of article 3 was satisfied when the Employer paid Ms. Sudfeld retroactively for the 2003-2004 school year (given the revision to the years of experiences as of June 30, 2003 as set out in the letter of June 23, 2004). On consideration, I do not agree with that position. There is no provision within article 3 (or the Collective Agreement as a whole) which provides for a year limitation on retroactive pay. Rather by article 3 a teacher's salary is to be set by the salary grid with years of

experience to be determined by the Certification Branch. With the revision of the letter of June 23, 2004, Ms. Sudfeld was entitled by article 3 to an adjusted salary for her 3 teaching years within the Division prior to the revision.

Counsel for the Division suggested that the letter of June 23, 2004, only dealt with years of experience as of June 30, 2003. However, surely the revision leads automatically as well to the adjustment of her years of experience as of June 30, 2001 and June 30, 2002. This conclusion is supported by the letter of the Certification Branch dated October 28, 2004 which contains the following explanation: "Experience is always reported as of June 30th of the prior school year. This does not refer to the date when the experience was eligible. If the experience from the Bahamas had been received with the appropriate information in a prior school year, it could have been recognized at that time." (Exhibit 13).

This is not to say the Division was in breach of the Collective Agreement throughout those 3 years. Due to the mutual mistake of fact (based on the error of the third party) there was no breach on the facts -albeit erroneous facts- then available to the Certification Branch and the Division. The erroneous facts lead to the wrong years of experience for Ms. Sudfeld being set. The Division was not in breach based on what the Certification Branch certified.

Once the facts were corrected, on verification with the letter of June 23, 2004, it was revealed that 2 years of experience had not been recognized for the 3 years that

Ms. Sudfeld had taught in the Division. As in British Columbia's Teacher's Federation, supra, once the correct facts were ascertained then it followed that Ms. Sudfeld had been under-paid according to the article 3 salary grid for the 2 additional years of experience for each of those 3 teaching years.

The Division did recognize the obligation pursuant to the Agreement to adjust her salary retroactively. But only for one year. The Division made this adjustment based on policy rather than pursuant to the provisions of the Collective Agreement. When pressed concerning the policy, Mr. Ron Hildebrand, the Assistant Superintendent, Human Resources, of the Division wrote in his letter of December 2, 2004, that the Division can only act "according to the information we receive" (Exhibit 16). Certainly that position is understandable. However, he went on to note that the Division's practice is to pay one year prior to the receipt of the corrected information "just as the Department always reports experience as of June 30th of the prior school year". In the letter of February 3, 2005, by way of further explanation Mr. Hildebrand said that this practice was "more than fair and reasonable" (Exhibit 17).

I agree with Mr. Smorang that in commenting that its practice was fair and reasonable the Division appeared mindful of its obligation pursuant to s.80 (1) of The Labour Relations Act. However, on reflection I do not accept the basis for the 1 year retroactive salary policy. The fact that a teacher's experience is set as of June 30th of any given year is not a basis for limiting the retroactive salary adjustment to one year. Given the importance of years of experience (as set for in Collective Agreement), I am

satisfied that the Agreement called for retroactive adjustment for all three years once the mistake of fact was realized. There is no basis set forth before me during the course of the hearing to justify the 1 year policy. It amounts to an arbitrary cut off.

I appreciate the willingness of the Division to recognize the error by adjusting the salary, but I do not agree that it is reasonable to limit that adjustment to one year. For the Collective Agreement recognizes implicitly that with the extra years of experience the Grievor was of more value throughout her initial 3 years of teaching with the Division.

Once the mutual mistake was recognized, the Division and the Association entered into a course a negotiation in the fall of 2004. After a meeting between those parties on October 7, 2004, clarification was sought from the Certification Branch. That clarification came in the letter in response of October 28, 2004 (Exhibit 13). By the letter of November 30, 2004, the Association made a formal request for Ms. Sudfeld's salary to be adjusted for the 2 additional years. In the letter of December 2, 2004, in response to that request, the Division set its position denying that further adjustment. It was at that point that I am satisfied the Division came into breach of the Collective Agreement, and, in particular, of article 3.

This leads to the second question raised by Mr. Simpson: what remedy, if any, is Ms. Sudfeld entitled to? In answering, the uniqueness of the circumstances again must be noted. That uniqueness requires care in attempting to apply arbitral principles.

The position of the Division was set out by Mr. Simpson with his referral to the several awards which limit the remedy to the under-payment occurring during the time limit for initiating the grievance. Drawing on those awards, he referred to article 22 (with the 30 teaching day time limit).

I have had an opportunity to consider these awards. In each on the particular facts the employer failed to pay a grievor the amount he/she was entitled to be payed. For example, in Davey Home for the Aged, supra, there was a denial of credits for clinical experience which should have been recognized. In Regional Municipality of Haldimand-Norfold, supra, 5 years and 3 years of relevant experience where disregarded. And in Re Clark Institute of Psychiatry, supra, the non-recognition of previous experience was found to have been based on discrimination. In each of these cases the employer's failure to recognize the full prior experience of the employee was wrongful as within the knowledge of the employer from the outset. A breach of the collective agreement occurred from the outset. Also the employee in each knew of the failure. In those circumstances, the issue of timeliness of the grievance was raised. I believe fairly, while the arbitrators found that the breach of each the collective agreements was continuing, they also recognized that the remedy was limited to the time limit set for initiating the grievance.

I am satisfied the important distinction in the present circumstances is the mistake of fact caused by the third party. Given the mistake of fact, there was in effect no breach by the Division of the Collective Agreement until the correct previous

experience of Ms. Sudfeld was recognized through verification. It was only when that experience was revised and the Division subsequently set forth it's position at the beginning of December, 2004, that a breach of the Collective Agreement occurred. This is different from the awards where the real facts were known at the outset but the employer failed to pay according to the collective agreement based on those facts.

I drew support for this distinction from Re Ottawa Board of Education and Federation of Women Teachers Association, supra, in which the Supreme Court of Canada has endorsed the general principle that payment rising from mistake of fact is recoverable.

I have noted the comments of Arbitrator Knopf in Re Clark Institute of Psychiatry, supra, as to the unfairness to an employer in imposing liability for violation of a collective agreement when the violation is not brought to it's attention. However, again I believe there is a distinction where there is mutual mistake of fact, so that as here neither the employer nor the employee was aware of the breach until the mistake of fact was recognized.

Based on the above reasoning, I am satisfied that an appropriate remedy is for Ms. Sudfeld to receive retroactive pay for having 3 years of experience for the school year 2001-2002 and for having 4 years of experience for the school year 2002-2003.

Decision:

Therefore I find in favour of the Grievors. I order that Ms. Sudfeld is to receive retroactive salary as set forth above. I understand that the amount of that retroactive salary has not yet been calculated precisely. I will reserve jurisdiction then with respect to implementation of the award.

I wish to compliment Counsel on the expedited, yet thorough, manner in which the hearing was presented.

The parties shall share equally in the cost of the arbitrator.

DATED at Winnipeg, Manitoba, this 25th day of July, 2005

GAVIN WOOD