

IN THE MATTER OF AN ARBITRATION
UNDER THE PUBLIC SCHOOLS ACT, R.S.M., c.P250

AND IN THE MATTER OF THE TERMINATION OF THE
AGREEMENT BETWEEN THE ROLLING RIVER SCHOOL DIVISION NO. 39
AND BRENDA NICHOLSON

BETWEEN:

THE ROLLING RIVER TEACHERS' ASSOCIATION OF THE
MANITOBA TEACHERS' SOCIETY (hereinafter referred to as the
"Association") and BRENDA NICHOLSON (hereinafter referred to as
"Nicholson"),

- and -

THE ROLLING RIVER SCHOOL DIVISION NO. 39, (hereinafter
referred to as the "Division").

AWARD

BOARD OF ARBITRATION:

A. Blair Graham, Q.C. - Chairperson
Carole Wylie - Nominee of the Association and Nicholson
Gerald Parkinson - Nominee of the Division

APPEARANCES:

Garth Smorang, Q.C. - On behalf of the Association and Nicholson
Robert Simpson - On behalf of the Division

AWARD

INTRODUCTION

These proceedings relate to the termination of an employment agreement between the Rolling River School Division No. 39 (the "Division") and Brenda Nicholson ("Nicholson") which was dated May 2, 2001. The agreement was entered into pursuant to s.92(1) of the *Public Schools Act of Manitoba* (the "PSA"), and was in a form prescribed by regulation under the PSA (commonly referred to as a Form 2 agreement). The employment of Nicholson pursuant to the 2001 agreement commenced on August 28, 2001. The Agreement was of indefinite duration. More precisely, the Agreement was deemed to be continued in force, and to be renewed from year to year until terminated by one of the methods outlined in clause 6 of the agreement.

Clause 6 of the agreement provided for the termination of the agreement by various means including:

"By written notice given at least one month prior to December 31 or June 30, terminating the contract on December 31 or June 30, as the case may be, but the party giving notice of termination shall, on request, give to the other party the reason or reasons for terminating this agreement."

The Division terminated the employment agreement of Nicholson at a special meeting of the Board of Trustees of the Division (the "Board") held on April 27, 2006. The Chairperson of the Board advised Nicholson of that decision by letter dated May 2, 2006, which read, in part as follows:

"The Board has determined that your performance both as a Resource Teacher and more recently as Remedial Teacher has not met the Division's basic expectations of our teachers which the Board believes has a detrimental effect on your

students' education. We are hereby agreeing to the Superintendent's recommendation and are terminating your teaching contract effective immediately. The Division will provide payment for the remainder of the school year up until June 30, 2006."

Immediately thereafter, the Association and Nicholson took various steps pursuant to s.92(4) of the PSA. Specifically, they requested that the Division give reasons for the termination of the agreement. They then required that the matter of the termination of the agreement be submitted to an arbitration board.

Subsection 92(4) of the PSA provides the framework for these proceedings and the relevant portions of the subsection are therefore produced below:

"Action on termination of agreement

92(4) Where an agreement between a teacher and a school board is terminated by one of the parties thereto, the party receiving the notice of the termination may within seven days of the receipt thereof request the party terminating the agreement to give reasons for the termination, in which case the party terminating the agreement shall, within seven days from the date of receipt of the request, comply therewith and where the school board terminates the agreement of a teacher who has been employed by the school board under a prescribed agreement for more than one full school year, as defined by the minister by regulation, the following clauses apply:

(a) the teacher, by notice in writing served on the school board within seven days of the date the reason for terminating the agreement was given, may require that the matter of the termination of the agreement be submitted to an arbitration board composed of one representative appointed by the teacher and one representative appointed by the school board and a third person who shall be chairman of the board of arbitration, mutually acceptable to and chosen by the two persons so appointed, none of whom shall be a member or employee of the school board; . . .

(d) the issue before the arbitration board shall be whether or not the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement;

(e) where, after the completion of hearings, the arbitration board finds that the reason given for terminating the agreement does not constitute cause for terminating the agreement it shall direct that the agreement be continued in force and effect and subject to appeal as provided in *The Arbitration Act* the decision and direction of the arbitration board is binding upon the parties; . . .”

The decision of the Board to terminate the employment agreement with Nicholson was based on the recommendation of the Superintendent, Neil Whitley. His recommendation was contained in a report to the Board dated April 18, 2006. The report was 13 pages in length and included 15 attachments, many of which were lengthy and extensive. In the concluding paragraph of the report, Superintendent Whitley stated:

“It is my opinion that Brenda Nicholson has not demonstrated the skills necessary for competency in teaching.”

This board of arbitration was constituted pursuant to s.92(4) of the PSA to hear and determine the matter of the termination of the employment agreement between the Division and Nicholson. The hearing took place on April 2 and 3, and May 7, 8, and 9, 2007, in Minnedosa, Manitoba, and on May 14, 15, and 18, 2007, in Winnipeg, Manitoba. The parties confirmed at the commencement of the hearing that the board of arbitration had been properly constituted, and had the jurisdiction conferred upon it by s.92(4) of the PSA. An order excluding witnesses was granted.

These proceedings are notable because the Division terminated the employment agreement with Nicholson because they concluded that she was not a competent teacher. There are no allegations that Nicholson had engaged in any type of culpable misconduct. Indeed, the evidence established that Nicholson was a conscientious employee who, in the words of one Division witness, “tried very hard” to fulfill her employment responsibilities.

THE EVIDENCE

The Division called four witnesses as part of its case. They were:

- (i) Neil Whitley (“Whitley”), the Superintendent of the Division;
- (ii) Laurie Bachewich (“Bachewich”), the Principal of Onanole Elementary School (“Onanole”) from 2001 to the present. At all material times, Bachewich also performed teaching duties at Onanole;
- (iii) Debbie Parrott (“Parrott”), the Student Services Coordinator in the Division from January 1, 2003, to the present. Prior to becoming Student Services Coordinator, Parrott had been employed by the Division from 1979 as a teacher and as a resource teacher;
- (iv) Kathleen Slashinsky (“Slashinsky”), the Principal of Erickson Elementary School (“Erickson”) from 2002 to the present. At all material times, Slashinsky also performed teaching duties at Erickson.

The Association’s only witness was Nicholson.

Fifty-eight exhibits were also filed in the proceedings.

Many of the background facts were uncontentious. They will be summarized below to provide the factual context for the analysis and the decision which follows.

1. At the time of the hearing, Nicholson was 51 years of age. She is married with two adult children. She has resided in the Neepawa area for her entire life. Throughout her marriage, she has been actively involved in a mixed farming operation (grain and cattle) with her husband. In 1987, she commenced work as an Educational Assistant (an "EA"), and worked continuously as an EA in the Beautiful Plains and Pine Creek school divisions until 1999.
2. In 1995 Nicholson started taking courses toward a Bachelor of Education Degree in the Faculty of Education at the University of Manitoba through a program entitled "Weekend College". It was a requirement of that program that students have five years of work experience as an EA. For students, such as Nicholson, who were working as EAs while enrolled in the program, courses were offered on Friday evenings and on Saturdays and Sundays from 9:00 a.m. to 4:00 p.m. on alternate weekends. She also took summer courses and correspondence courses to accelerate her progress through the program. Nicholson graduated in 1999, with a Bachelor of Education. Her academic performance was very good; she was on the Dean's Honours List for 1997/1998. In 2000, while working as a teacher, Nicholson began the Special Education Diploma program offered by Brandon University, taking all of her courses either in the evenings or during the summer. She successfully completed that program in the summer of 2002, with a grade point average of 4.0 (an A average).
3. After completing the requirements for her Bachelor of Education degree, Nicholson commenced substitute teaching in various school divisions in her area

in September 1999. She continued substitute teaching until March 2000. In March 2000, she was hired by the Division on a full time term contract to teach grade 3 at Erickson Elementary School ("Erickson") until June 2000. In November, 2000 she was again employed by the Division until June 2001, pursuant to a part time (.5) term position teaching a split class of grade 3 and 4 students at Onanole Elementary School ("Onanole").

4. Commencing on April 28, 2001, Nicholson began working on a full time basis for the Division, as a teacher. Her work assignments in the Division from August 28, 2001, until the termination of her employment in the spring of 2006 are summarized in the following chart.

School Year	Position/School	FTE
2001/2002	Grade 3/4 Onanole Elementary School Resource - Onanole Elementary School Resource - Sandy Lake Elementary School	.50 FTE .25 FTE) .25 FTE) est.
2002/2003	Resource at Onanole, Erickson and Sandy Lake Elementary Schools	1.0 FTE
2003/2004	Resource - Onanole Elementary School Resource - Erickson Elementary School	.50 FTE .50 FTE
2004/2005	Resource - Onanole Elementary School Resource - Erickson Elementary School	.50 FTE .50 FTE
2005/2006	Remedial English Teacher - Erickson Elementary School	1.0 FTE

5. Nicholson's work assignment in the 2001/2002 school year consisted of a half time teaching assignment of a split class of grade 3 and grade 4 students at Onanole (similar to the half time term assignment of the previous year) and a half time resource teaching assignment divided between Onanole (a school with an approximate enrolment of 70 students), and the smaller Sandy Lake Elementary School ("Sandy Lake"). The half time resource teaching assignment was Nicholson's first assignment as a resource teacher. At the time, she was enrolled

in, but had not yet completed the Special Education Diploma program at Brandon University. The Division's evaluations of Nicholson's performance in the full-time term assignment from March 2000 to June 2000, and in the part-time assignment during the 2000/2001 school year, were positive.

6. In March 2002, Nicholson wrote to Jim Hardy ("Hardy"), the Assistant Superintendent of the Division, requesting a change of assignment for the 2002/2003 school year. Her letter to Hardy (exhibit 20) outlines the reasons for her request, including a desire to avoid driving significant distances on a regular basis. However, the more significant reason underlying her request for a change of assignment was the significant stress she was experiencing as a result of the demands associated with two different types of positions, namely a teaching position, and a resource position. Although her first preference was a teaching position closer to her home near Neepawa, none were available. Accordingly, Hardy inquired if she would be interested in a full time resource teaching assignment; Nicholson replied affirmatively. She was accordingly assigned a resource position at two schools, Onanole, and Erickson (a school with an approximate enrolment of 110 students). However, that assignment was only .83 of a full time equivalent position. Nicholson wanted a full time position and believed her employment agreement entitled her to such a position. She accordingly raised that issue with Whitley, who supplemented her assignment by giving her additional resource teaching responsibilities at Sandy Lake. In the result, she was given a full time resource teaching position divided between Onanole, Erickson, and Sandy Lake, for the 2002/2003 school year.
7. An important part of a resource teacher's responsibilities is to collect information and, in collaboration with other members of the school team, write Individual Education Plans ("IEPs"), for students who are academically challenged and who require modified programs. A resource teacher's responsibilities also includes writing Behaviour Intervention Plans ("BIPs") for students who are behaviourally

challenged, and for students who require adaptations to the regular classroom program. In addition, resource teachers must also write Funding Applications for students who are either behaviourally impaired (level II students with funding available to a maximum of \$10,000.00 annually), or who are seriously disabled/challenged (level III students with funding available to a maximum of \$20,000.00 annually).

8. During the 2002/2003 school year, Bachewich, the Principal of Onanole, was away for an extended period on a maternity leave. She had gone on maternity leave in May 2002, and returned at the end of spring break in 2003, a period of approximately 10 months. During that period, Bachewich had little, if any, direct contact with Nicholson. Upon Bachewich's return from leave, she received feedback from the person who had served as acting principal, and from other staff members about the manner in which the resource teaching program had been functioning in her absence. Slashinsky was the principal of Erickson during the 2002/2003 school year and had direct supervisory responsibilities in relation to Nicholson during that period. There are differences and inconsistencies in the evidence of Bachewich and Slashinsky, on one hand, and Nicholson on the other, with respect to whether or not Nicholson's performance during the 2002/2003 school year was satisfactory. Notwithstanding those differences, the evidence with respect to Nicholson's performance during that year does establish that:

- (i) Nicholson believed that the year had gone smoothly and that she had performed well as a resource teacher. She referred to one problem situation in which the acting principal at Onanole had approached her during the year with respect to the concern of a classroom teacher over a perceived lack of consultation on the part of Nicholson relating to a student or students of that teacher. A three-way meeting was held between the acting principal,

Nicholson, and the teacher involved. According to Nicholson, the problem was resolved;

- (ii) Prior to June 2003, neither Slashinsky, nor Bachewich, had met with Nicholson to review her performance or to express any criticisms or concerns with respect to her performance;
- (iii) Parrott, the Division's Student Services Coordinator, had concerns with respect to Funding Applications being worked on by Nicholson in May 2003. Accordingly, in mid-May Parrott and Nicholson met to review and work on several of those Funding Applications. On the basis of Parrott's review of the Funding Applications in question, she was concerned, and concluded that Nicholson was having difficulty with the type of information she was to gather, the type of information she was to include in each section of a Funding Application, and generally the manner in which Funding Applications should be developed and prepared. Nicholson described the meeting with Parrott as being very beneficial and testified that she had received legitimate constructive criticism from Parrott. Nicholson stated that she appreciated the assistance Parrott provided to her, particularly given the fact that she (Nicholson) was a new resource teacher and that she did not have much previous experience with Funding Applications. At the conclusion of the meeting, Nicholson and Parrott divided up the work remaining to be done on the Funding Applications. Ultimately, all the Funding Applications were submitted on time to the Department of Education;
- (iv) Nicholson had been requested to have IEPs prepared in draft form with respect to various students at both Onanole and Erickson by

the end of June 2003, but those draft IEPs were not done by the end of June 2003.

9. After Bachewich had returned from her maternity leave in the spring of 2003, she commenced her school planning for the 2003/2004 school year. In the course of doing so, she consulted with various people including Slashinsky about making changes to the resource program, as it was operating at Onanole and Erickson, with a view to improving the program at the two schools. Bachewich and Slashinsky decided to meet with Nicholson before the end of the school year to discuss the resource program at the two schools, and how it ought to operate in the upcoming year. Before meeting with Nicholson, Bachewich and Slashinsky consulted with Parrott to elicit her views as to potential improvements in the program. Parrott was asked to develop a document outlining the role of the resource teacher at Onanole and Erickson for the upcoming year, and she did so. Bachewich and Slashinsky jointly developed a "resource timeline" outlining the tasks expected to be done by the resource teacher throughout the year and outlining the applicable deadlines for the completion of any time-sensitive tasks. Bachewich and Slashinsky intended to present and review those documents with Nicholson at the meeting to assist her in understanding her role, and her duties and responsibilities as the resource teacher at the two schools in the 2003/2004 school year.
10. The meeting took place on June 23, 2003. Present were Bachewich, Slashinsky, Parrott, and Nicholson. There were differences in the evidence between the three Division witnesses on the one hand, and Nicholson on the other, as to what happened at the meeting. Those differences centred on two issues:
 - (i) Nicholson's attitude and demeanour at the meeting. The Division witnesses, particularly Bachewich, testified that the proposals for change were presented positively, and yet Nicholson reacted

defensively interpreting the proposals for change as criticism directed at her for the way she had been doing her job. In contrast, Nicholson testified that the meeting was constructive and denied that she defensive.

- (ii) The review and delivery of the role description for the resource teacher and of the resource timeline. The Division witnesses indicated that both documents were presented to Nicholson and reviewed with her; they also testified as to their belief that copies of both documents were left with Nicholson. In contrast, Nicholson testified that the timeline was reviewed with her and she suggested certain revisions which were agreed to by Bachewich and Slashinsky. Nicholson indicated that the timeline was not left with her but was to be revised according to her suggestions and then returned to her; she said she never received a revised timeline prior to the commencement of the fall term or indeed for many months thereafter. Bachewich and Slashinsky conceded that it was possible that the timeline was to be revised and provided to Nicholson in due course, but they thought that had been done. With respect to the role description of the resource teacher at Onanole and Erickson, Nicholson did not recall that document being reviewed at the meeting, and was adamant that she did not receive a copy of the role description either at the meeting, or at any time during 2003. Parrott however was equally adamant that the document had been reviewed with Nicholson and a copy left with her at the June 23, 2003 meeting.

11. Nicholson's assignment for 2003/2004 was as a full time resource teacher dividing her time roughly equally between Onanole and Erickson. She no longer had responsibilities at Sandy Lake because that school had been closed.

Nicholson testified that she was expected to have various IEPs completed in draft form by the end of June, but she was unable to complete them. She indicated she did some work on them over the summer, but could not complete the IEPs without having access to the classroom teachers and EAs involved with the students in question. She hoped to have the IEPs completed in September. Both Bachewich and Slashinsky relieved her of some of her other resource teaching duties in September, in order to provide her with additional time to complete the IEPs. Nonetheless Nicholson was unable to complete the IEPs. During her testimony, Nicholson described her physical and mental condition in September 2003. She was not well; she was having great difficulty sleeping, prone to crying episodes and was worried constantly about the difficulties she was experiencing in completing the IEPs. Nicholson had seen an EAP counsellor in June 2003, and continued doing so in September, but felt worse in September than she had in June. She started experiencing severe headaches and sought medical attention on or about October 1, 2003. As a result, she took a two month medical leave explaining that: "I was burnt out. It was a stress leave." She was on medical leave for two months and improved considerably as a result of medication, rest and exercise. Nicholson was unable to complete the IEPs prior to departing on leave.

12. During Nicholson's absence, arrangements were made for a substitute resource teacher (Alice MacInnes) to replace Nicholson. Ms MacInnes was retired, but had extensive experience as a resource teacher. With some assistance from Parrott, Ms. MacInnes was able to complete the IEPs.
13. Nicholson testified that by the end of November, she felt wonderful and "ready to come back". On December 1, 2003, the first day of Nicholson's return to work, a meeting was held involving five representatives of the Division (Whitley, Hardy, Slashinsky, Bachewich, and Parrott), and Nicholson. Whitley had convened the meeting after receiving requests for assistance and support from Slashinsky and

Bachewich in relation to Nicholson's role as a resource teacher in their schools. Whitley's purpose in convening the meeting was to review various concerns and issues which the administration had identified with Nicholson's performance as a resource teacher. Although a meeting with Nicholson upon her return from medical leave to review past events, and to chart a path for the future, might have been beneficial, the particular meeting of December 1, 2003, was ill-conceived and poorly handled. Nicholson was provided with no advance notice of the purpose of the meeting or of who would be in attendance. The number of Division representatives and their attitude and demeanour (or at least Nicholson's perception of their attitude and demeanour) intimidated Nicholson. Whitley spoke first and identified several concerns. Slashinsky and Bachewich then elaborated on those issues. Thus, on her first day back at work from a stress leave, her performance as a resource teacher was seriously criticized. She testified that she was shocked at the nature and extent of the criticism, indicating that apart from the difficulties she had experienced in completing the IEPs, she thought she had been performing well as a resource teacher, particularly in view of her lack of experience in that position.

14. Whitley provided a letter to Nicholson dated December 3, 2003, indicating that the letter was a "record of our meeting held at the Division office on December 1, 2003". None of the witnesses who testified, including Nicholson, questioned the accuracy of the letter as an outline of the concerns which had been expressed. Those concerns related to Nicholson's work prior to her leave, and fell into the following categories:

- Prioritizing work assignments
- Argumentative demeanour
- Communication with staff, administration and parents
- Meeting deadlines and goal setting
- Accuracy of IEPs and Funding Applications
- Seeking and accepting assistance.

In addition, the letter included four underlined subsections, namely, Prioritizing Work Assignments, Communication, IEP/Funding Applications, and Seeking and Accepting Assistance. The subsections contained some narrative commentary and some general directions for improvements in relation to each category.

15. Nicholson was provided with a new timeline, which took into account what had been done and what was still to be done during that school year, and also set deadlines for tasks which were to be completed during the remainder of the school year. Whitley's letter dated December 3, 2003, concluded with the following paragraph:

"The timeline mentioned previously, outlines goals and expectations for you. Progress towards these goals will be discussed with you at the end of each month. A written report will be provided to you on February 15 and April 15. These reports will be part of your formal evaluation."

The evaluation referred to in Whitley's letter of December 3, 2003, was intended to be a formal assessment by the Division of Nicholson's performance in her teaching assignments, as distinct from a professional growth process which is a collaborative, but primarily teacher-directed professional growth and development process, typically undertaken by teachers on a periodic basis.

16. Monthly meetings intended to assess Nicholson's progress towards identified goals did not occur. However, Slashinsky and Bachewich met with Nicholson together to review their evaluations of Nicholson's performance as a resource teacher on February 18 and April 16, 2004. Slashinsky and Bachewich, along with Parrott, also met with Nicholson, accompanied by Jim Brown, the local Association President, on June 18, 2004. The written reports jointly prepared by Slashinsky and Bachewich and reviewed with Nicholson at the February 18 and April 16, 2004 meetings were in evidence in these proceedings as one of the

attachments to Whitley's report to the Board of April 18, 2006 (exhibit 3). The written report of the June 18, 2004 meeting, which was not part of exhibit 3 was introduced separately into evidence (exhibit 14).

The evaluation reports prepared by Slashinsky and Bachewich were generally organized using the categories identified by Whitley in his December 3, 2003, letter (Prioritizing Work Assignments, Communication, IEP/Funding Applications, and Seeking and Accepting Assistance). IEP funding issues were frequently mentioned in the reports but not always under a separate subject heading. The June 2004 written report added an additional category, namely "Administrative Relationship". In general, the written reports relating to the February and April evaluations contained some positive comments, and some critical comments. The written report from June was more negative. For example, under the category "Communication", the following statements were included:

"Communications with teachers and administration is a vital part of your position. You need to communicate with staff in a cooperative and effective manner. You have shown that this area needs continued improvement. For example:

- implying/informing teachers that they are not doing their job is unprofessional;
- informing Student Services Coordinator that some teachers did not have or submit the information needed for IEPs, when it was.
- confrontational and demanding approach when talking with staff members..."

Under the category "Administrative Relationship", the notation was:

"Questioning administration's time and if administration is doing their duties is not your job. This borders on insubordination and will not be tolerated."

17. Parrott was in attendance at the June 18, 2004 evaluation meeting to address any questions that might arise at the meeting about IEPs, BIPs and Funding Applications. She prepared detailed notes of that meeting (which comprised attachment 7 to Exhibit 3) and testified as to her recollection of the meeting. Her notes and testimony reflect several areas in which Nicholson's performance was criticized and several lengthy discussions of those areas in which Nicholson asked questions and provided explanations for certain events. Parrott's notes also included reference to a subsequent meeting, also held on June 18, between herself and Nicholson, at which they discussed the various IEPs on which Nicholson had been working, which had been submitted to Parrott for review. Parrott had many concerns with respect to the IEPs, which she reviewed with Nicholson. They discussed several issues and many of Parrott's comments were critical. Nicholson had already re-done the same IEPs several times. In her direct examination, she acknowledged that she became emotional during the meeting and explained that she felt that the only feedback she had been receiving from Parrott consisted of unduly negative criticism. Nicholson told Parrott that she (Nicholson) thought Parrott was being "unprofessional". Parrott recalled that Nicholson had also accused her of being "picky". Parrott terminated the meeting and reported what had occurred to Slashinsky. At the end of the 2003/2004 school year, Parrott thought Nicholson had progressed somewhat with respect to the preparation of IEPs and BIPs, but that the "progress was really quite limited".
18. Nicholson provided written responses to two of the above-noted evaluation reports to Whitley. Her responses were provided several months later by separate letters, both dated October 1, 2004, one responding to the February 2004 evaluation, and the other to the June 2004 evaluation. Both responses were relatively detailed with attachments; the response to the June 2004 evaluation was particularly detailed with many attachments. Neither of those

responses of Nicholson were included in Whitley's April 2006 report to the Board (exhibit 3).

19. In late June 2004, Whitley met with Slashinsky and Bachewich, and a decision was made to place Nicholson on extended evaluation during the 2004/2005 school year. In cross-examination, Bachewich acknowledged that she understood "extended evaluation" to be equivalent to probation. She also conceded that she expressed her disagreement with that decision and that she did not support it. She explained however that although she was not supportive of the decision to place Nicholson on extended evaluation, she (Bachewich) realized that there were continuing problems "which had to be dealt with in some way".
20. Nicholson's assignment for the 2004/2005 school year was again a resource teaching assignment divided between Onanole and Erickson. By letter dated September 28, 2004, Whitley wrote to Nicholson with respect to work performance issues. He indicated that he had consulted with Slashinsky, Bachewich, and Parrott, and advised Nicholson that she had not made satisfactory progress in the following areas:
 - "1. Following directions and instructions from your immediate supervisors without being challenging or argumentative.
 2. Failure to meet the expected standard for writing IEPs.
 3. Failure to meet established timelines for IEPs and Funding Applications.
 4. Communicating effectively with staff.
 5. Acceptance of constructive criticism."

The penultimate paragraph of Whitley's September 28, 2004, letter read as follows:

"In accordance with Rolling River School Division Policy AFC/R #7 - Teacher Supervision and Evaluation, I am placing you on extended evaluation effective October 1, 2004. During this probationary period of probation (October 1, 2004 to April 15, 2005) you will be required to make improvements in the areas identified. In order to assist you in obtaining a satisfactory level of performance, we are prepared to enter into a mentorship agreement with the Manitoba Teachers' Society. Formal evaluations will be reviewed with you on or about December 1, 2004; February 15, 2005 and April 15, 2005. You will be advised by no later than May 20, 2005 of your status with the Rolling River School Division. Failure to improve your performance to a satisfactory level could result in a recommendation for termination of your Form 2 contract with the Division."

21. During the 2004/2005 school year, Nicholson participated in a mentorship program arranged through the Disability Benefits Plan of the Manitoba Teachers' Society. The mentor was Leisha Wilson ("Wilson"). The goal of the mentorship program was to have a respected colleague provide support and direction to Nicholson in her role as a resource teacher in a collaborative non-judgmental environment. The Division was aware and supportive of the mentorship program and was pleased with the choice of Wilson as mentor. Nicholson testified that she felt the mentorship program was extremely helpful. The Division however was ultimately dissatisfied with the mentorship program because they received no reports as to its progress and because the Division's representatives had minimal contact with Wilson throughout the year. The Disability Benefits Plan of the Manitoba Teachers' Society had made it clear from the outset that matters related to the mentorship program would be kept confidential in order to prevent any information forthcoming from the mentorship being used to criticize Nicholson as part of the Division's formal evaluation process. Whitley, on behalf

of the Division, indicated that he understood and accepted the confidentiality concern, but maintained that for the mentorship program to be effective, the Division had to receive some information by way of periodic reporting or, at the very least, a list of recommendations to be implemented. However, in the end result, the Division was uninformed as to the progress of the mentorship and Division representatives were unable to identify any positive developments attributable to the mentorship program.

22. The evaluation system in relation to Nicholson that was in place during the 2004/05 school year was different in some respects than the system which had been in place during the previous school year. The categories in the evaluation were somewhat different, being the five areas which had been referred to in Whitley's letter dated September 28, 2004, but there was substantial overlap between those two sets of categories. In some of the evaluations, the category related to the timelines for IEPs and Funding Applications was not referred to, particularly if there were no IEPs or Funding Applications due during that evaluation period. More importantly, separate evaluations were conducted by Slashinsky and Bachewich relating to Nicholson's performance at the Erickson and Onanole Schools respectively, whereas during the previous year joint evaluations had been conducted.
23. In general terms, the evaluations conducted by Bachewich contained some criticisms, some positive comments, and some practical suggestions for improvements. Overall, Bachewich's evaluations noted progress and improvements in most categories, although they identified the continuing need for improvements in some areas including her communications with teachers, and her work on IEPs.
24. The evaluations conducted by Slashinsky were less favourable, but the first two of those evaluations (December, 2004, and February, 2005) contained

references to satisfactory and improving performance in many categories. However, the final evaluation conducted by Slashinsky for the period from February 15 to April 15, 2005 was pointedly negative, particularly with respect to Nicholson following directions and instructions from immediate supervisors, and her ability to accept constructive criticism. Nicholson who was accompanied by a Manitoba Teachers' Society staff representative, Eldene Spencer ("Spencer") asked that certain portions of that evaluation be revised. Slashinsky did so, but many critical comments remained in the evaluation. Based on the evidence of both Slashinsky and Nicholson as to what occurred at that evaluation meeting, and their handwritten notes, which they both appended to the evaluation form, it is clear that there was an unpleasant interchange between them at the meeting, and that each of them felt some resentment and distrust towards the other.

25. In the 2004/2005 school year, Parrott recalled that her contact with Nicholson was somewhat less extensive than in the previous year. Parrott explained that the decreased contact was because she understood Nicholson was working with a mentor. Parrott recalled having two telephone conversations with Wilson, the mentor, one in the fall, in which Wilson had asked what Nicholson's shortcomings were, and the second in the winter, in which Wilson had asked what progress was being made. Parrott testified that the IEPs which were to be completed in September were not all completed. Accordingly to Parrott, some were substantially finished, some were done in draft form, but on others, little or no work had been done. During the 2004/2005 school year, all Funding Applications were submitted by Nicholson to Parrott for review on time. The IEPs which were to be ready at the end of June, 2005 were not all done. Parrott's observations of Nicholson's work on IEPs and BIPs from January, 2003 (when Parrott became Student Services Coordinator) to June, 2005, was that she had achieved limited progress but still required a great deal of support and assistance.

26. In May, 2005, after consulting with Slashinsky, Bachewich and Parrott, Whitley concluded that Nicholson had lost the confidence of the administration of Erickson and Onanole Schools as a resource teacher, and that she “couldn’t be a successful resource teacher”. Bachewich’s position was that although there had been improvement in Nicholson’s performance in 2004/2005, she had been provided with substantial support for two years and yet “there were continuing to be real issues and problems”. Slashinsky’s opinion was more stark. She testified that “it was my view she should not be continuing on a resource teacher”. Parrott was also supportive of a reassignment for Nicholson, reasoning that in the 2 ½ years she (Parrott) had dealt with her as Student Services Co-Ordinator, Nicholson had made only limited progress and did not seem to fully understand her role in preparing IEPs, BIPs and Funding Applications”. Whitley wrote to Nicholson by letter dated May 17, 2005, indicating that as a result of unsatisfactory performance as a resource teacher, a “change in assignment was contemplated and you will be informed in due course of your assignment for next year”. Nicholson testified that she was surprised when she was advised that she was to be re-assigned. She said that she knew there were areas in which improvement was required, but she felt she had grown over the course of the 04/05 school year and had learned valuable new strategies from her mentor. She thought she would be “continuing in resource”.
27. Whitley testified that he spent “a fair amount of time” thinking about and developing a new assignment for Nicholson for the 2005/2006 school year. He was personally involved in designing the assignment and tried to create a position in which Nicholson would be able to succeed. At Erickson, there was a remedial language development program for students with significantly weaker language art skills, than other students in the same grade. Slashinsky had been the teacher in that program, which, prior to the 2005/2006 school year, had only been available for students in grades 4, 5 and 6. It was decided that the program

would be expanded to include grades 1, 2 and 3, and that Nicholson would become the teacher in that program.

28. The design of the program was that students would be taken from their regular classrooms, and would be taught language arts by Nicholson. Approximately 30 students were initially included, but that number was reduced to 28 by October. Six students were removed from the program after spring break. The goal of the program was to improve the language arts skills of the students involved to the extent that they could be returned to their regular classrooms. The students in the program would not all be taught together; any given class would include between 5 and 8 students. Some EA assistance was also provided, and Nicholson's timetable was arranged so as to provide her with 190 minutes of non-contact/preparation time in every six day cycle.
29. Whitley testified that the Division hoped Nicholson would be able to succeed in this position and opined that "a teacher should be able to succeed in an assignment of this type". Nicholson testified that she regarded the assignment as "challenging" because all of the students were performing well below their grade level. Nonetheless she felt confident in her ability to teach in the program because she explained "this was an area at which I excelled". Nicholson was also nervous about Slashinsky doing an evaluation of her given that their relationship "had eroded to the point of no relationship" by the end of the previous school year. For her part, Slashinsky was prepared to work with Nicholson constructively at Erickson. Slashinsky did not specifically turn her mind to the fact that by the end of the 2004/2005 school year, her relationship with Nicholson had become seriously strained.
30. By letter dated June 23, 2005, Whitley advised Nicholson of her 2005/2006 assignment. The letter also advised that:

- (i) She was on formal evaluation and probation during the 2005/2006 school year;
- (ii) Slashinsky would be responsible for her evaluation; and
- (iii) Whitley would also be involved in the evaluation through classroom observation and conferencing.

Nicholson was formally evaluated six times during the year, although Slashinsky also dropped in to observe Nicholson teaching on other occasions. The formal evaluations were conducted on October 19, November 23 and December 13, 2005 and January 18, January 25 and February 1, 2006. Most of those formal evaluations were preceded by a pre-conference meeting (at which the lesson plan prepared by Nicholson was reviewed), and a post-conference meeting. After either the first or second evaluation meeting, Spencer attended the "post-conferences" with Nicholson. Whitley participated in the classroom observations on October 19 and December 13, 2005 and January 18, 25 and February 1, 2006. Whitley attended one post-conference. Hardy also participated in at least one classroom observation. Slashinsky's written evaluations were in evidence as attachment 15 to exhibit 3. Whitley's notes of his classroom observations were separately marked as exhibit 16. Nicholson responded in writing to the evaluations of January 18, 25 and February 1, 2006 to Slashinsky (cc to Whitley). Her responses were marked as exhibit 35.

31. The October 19th evaluation was generally positive. The November 23 evaluation was less so. Thereafter, the evaluations became increasingly more critical of Nicholson. The last three evaluations contained serious criticisms and outlined several areas in which Nicholson's teaching of her students had been unsatisfactory. Criticisms of Nicholson's performance included, but were not limited to, overly lengthy and confusing directions, poor transitioning from one

activity to the next, a lack of clear purpose for some activities, losing the attention of the students, and the inappropriateness of certain materials given the abilities of her students. On the basis of his observation, Whitley concluded Nicholson could plan a lesson well, but was not able to connect with the students. His overall assessment was bleak: "In the five classes I attended, I did not see any meaningfully instruction going on. There was a real and substantial disconnect between the teacher and the students.". Slashinsky's assessment, arrived at independently from Whitley, was similar to Whitley's, and her overall conclusion was that Nicholson had not improved over the course of the year. Slashinsky's position was that areas which had been noted in September as areas requiring improvement, continued to be areas requiring improvement in April.

32. Nicholson, for her part, thought all of the evaluations in 2005/2006 were unfair, except the October 19th evaluation. According to Nicholson, the evaluations focused almost exclusively on the negative, much more so than she thought was justified. She testified that after the November 23, 2005 evaluation, she felt the "writing was on the wall". She substantially disagreed with most of the criticisms of her performance. Nicholson's responses (in exhibit 35) to the January 18, 25 and February 1, 2006 evaluations, outlined her replies and rebuttals to the critical comments of the evaluators. Those responses were not included in Whitley's report to the Board (Exhibit 3). Other than the evaluation process, Nicholson thought the 2005/2006 school year had gone well. She thought she had had a very productive year with the students and reported receiving positive feedback from classroom teachers and from parents.
33. Whitley decided Nicholson's employment with the Division ought to be terminated. As noted elsewhere in this Award, he prepared an extensive report to the Board of the Division (exhibit 3) which recommended that Nicholson's employment contract be terminated. Slashinsky supported Whitley's recommendation. In her direct testimony, Slashinsky bluntly stated that "the

classroom seemed not to be the place for her” (Nicholson). Slashinsky provided three succinct reasons in support of her conclusion. They were:

- (i) Nicholson had classroom management problems;
- (ii) She was unable to be flexible in meeting student needs;
- (iii) She was unable to accept constructive criticism.

- 34. On April 18, 2006, Whitley submitted his report to the Board, and made a presentation to the Board. He was accompanied by Slashinsky, Bachewich and Parrott. The Board asked questions, which Whitley and the others answered.
- 35. April 19, 2006, Nicholson was asked to attend Whitley's office. She was given a letter dated April 19, 2006 which enclosed Whitley's report to the Board. She was also advised that the report had been presented to the Board the previous evening along with the recommendation that her employment agreement with the Division be terminated effectively June 30, 2006. She was also advised that the Board would be considering the report at a special meeting to be convened on April 27, 2006 at 7:00 p.m. She and her representative were offered the opportunity to attend that meeting to respond to the report and the recommendation for termination. Nicholson was directed not to attend at work in the interim.
- 36. At the Board meeting of April 7, Whitley made a presentation in support of his recommendation. Nicholson attended with Spencer who made an oral presentation on her behalf and submitted written materials to supplement his remarks (exhibit 4). Those materials included a variety of information such as letters of support from teachers and parents. The Board then deliberated in the absence of Whitley and other administration representatives, and of Nicholson and Spencer. The Board decided to accept Whitley's recommendation to terminate Nicholson's employment, and passed a resolution accordingly.

37. The Board advised Nicholson of its decision by letter dated May 2, 2006 from Colleen Jury, the Chairperson of the Board. By letter dated May 8, 2006, Spencer asked for the reasons for the termination of Nicholson's contract. By letter dated May 11, 2006, Jury replied referring Spencer to Whitley's report (exhibit 3) and to her own letter dated May 2, 2006. By letter dated May 15, 2006, Mr. Smorang, counsel for Nicholson wrote pursuant to Section 92(4) of the PSA requiring that the matter of the termination of Nicholson's agreement with the Division be submitted to arbitration.

ANALYSIS

Prior to considering the legal principles applicable to this case, it will be helpful to provide some commentary on the potentially relevant facts, broken into two time periods. The first period consists of the three school years commencing at the beginning of September, 2002 and ending in June, 2005. During those years, Nicholson was a resource teacher at Onanole and Erickson (during the first of those years, she was also the resource teacher at Sandy Lake). The second period is the partial school year commencing in September, 2005 and ending in April, 2006 when Nicholson was the teacher in the language arts development program at Erickson.

September, 2002 to June, 2005

There are significant factual disagreements between the parties as to various events and developments which occurred during this period. Two contentious issues warrant comment:

- (i) Issues relating to Funding Applications, IEPs and BIPs;

- (ii) issues relating to the accuracy and fairness of the evaluations conducted of Nicholson by the division in the 2003/2004, and 2004/2005 school years.

Funding Applications, IEPs and BIPs

All of the Division's witnesses identified shortcomings on Nicholson's part in relation to the preparation of Funding Applications, IEPs and BIPs.

Criticism of Nicholson's performance in relation to Funding Applications was the most severe in relation to the 2002/2003 school year, and persisted, but to a lesser degree in the 2003/2004 school year. In those years, the Division had concerns with respect to the timeliness of the preparation of the Funding Applications. Parrott had also concluded that Nicholson did not know the type of information to gather nor the process to follow in gathering the relevant information, nor did she understand the manner in which the relevant information should be organized and presented in a Funding Application. The Division however acknowledged that Nicholson's work in relation to Funding Applications had improved in the 2004/2005 year. By then, Funding Applications were being submitted to Parrott for review on time. Although Parrott indicated she was required to revise some of them prior to submitting them to the Department of Education, there were no instances of Funding Applications being submitted late to the Department, or of any Applications being rejected due to any deficiencies in their content.

With respect to Nicholson's position relating to Funding Applications, she indicated she had little or no experience with preparing them prior to becoming a resource teacher with the Division (notwithstanding her 11 years of experience as an EA), and that as a result of that inexperience, she had much to learn with respect to the proper completion of those Applications. However, Nicholson asserted that over the

course of time, her knowledge and experience grew, and that by the 2004/2005 school year her performance relation to Funding Applications was satisfactory.

I have concluded that on balance, and notwithstanding some lingering concerns, Nicholson's work in relation to Funding Applications was satisfactory and was not, and should not have been, a serious negative consideration in relation to her performance as a resource teacher.

With respect to IEPs and BIPs, the Division had significant concerns in relation to at least three areas, namely the timeliness of their completion, the nature of the information being accumulated by Nicholson for inclusion in the IEPs, and the content of the IEPs prepared by her. During the period from September, 2002 to June, 2005, the Division did note growth and progress on the part of Nicholson in some respects relating to IEPs, but had concluded that serious deficiencies persisted. The Division was also concerned, because it believed that it had provided substantial support and assistance to Nicholson in relation to IEPs and BIPs and notwithstanding that support and assistance, the progress which she achieved was minimal.

With respect to timeliness, Nicholson consistently failed to submit many of the draft IEPs for which she was responsible to Parrott for review by the deadlines which had been set. At various times, the deadlines were not met for extended periods of time, i.e. not just a matter of days. This frequently occurred even though Nicholson was often excused from her other duties as a resource teacher in order to be given extra time to complete the IEPs and BIPs.

With respect to the information being accumulated by Nicholson, the most serious criticism related to her alleged failure to consult with, or obtain necessary information from the teachers and/or the EAs of the students involved, with respect to issues such as the students' current level of performance and the setting of realistic goals for the students. Linked to that criticism was the complaint that Nicholson should

have been spending more time working with or testing the students herself, to gain a better understanding of their level of functioning. However, the Division's own evaluations in 2003/2004, and particularly in 2004/2005, noted substantial improvements in the communications between Nicholson and teachers and EAs. It must be said that at least some of those improvements came about as a result of initiatives undertaken, and suggestions made by Nicholson.

The content of the IEPs remained a concern to the Division. Problems which persisted related to a failure on the part of Nicholson to include sufficient information with respect to the students' current level of performance or to set goals or realistic goals for the students. A lack of clarity in articulating some of the goals was also an issue.

Nicholson had several responses to the criticisms made against her regarding IEPs and BIPs. She outlined those responses to Parrott and to Bachewich and Slashinsky in her meetings with them, and repeated many of them during her testimony at the hearing. She maintained that some of the deadlines set, particularly June deadlines, were simply unrealistic. She emphasized that this was particularly so given the high number of IEPs which she was required to do, and the complex and challenging nature of the problems being faced by many of the students whose IEPs she was preparing. Nicholson also frequently raised the issue that many of the teachers working with the students involved, either did not provide her with the information she required to complete the documents in a timely way, or at all, or provided inappropriate or incomplete information due to their lack of understanding as to what ought to be included in an IEP. Nicholson also argued that those difficulties were compounded by the fact that she was an itinerant teacher with responsibilities in two schools. Finding time to meet the teachers as well as coordinating all of her other tasks at two locations presented special challenges.

Nicholson also maintained that given her lack of knowledge and experience in relation to IEPs and BIPs prior to becoming a resource teacher, she was undergoing a growth process and had achieved substantial growth and development over her years as a resource teacher.

Finally, Nicholson also referred to the lack of a standardized Divisional "template" for IEPs and the fact that different resource teachers within the Division included different types of information in the IEPs for which they were responsible. Ironically, substantial work was done on such a template in the 2004/2005 year, which ultimately resulted in a revised template being available for use, but not until the spring of 2005. Nicholson indicated she regarded the revised document as superior to its predecessor and she would have used it in relation to all of the IEPs for which she was responsible in the spring and fall of 2005, had she been given the opportunity. She also asserted that the use of such a document would have been of great assistance to her in enabling her to complete the IEPs in a way that was acceptable to Parrott. However, she was re-assigned out of resource teaching effective the commencement of the 2005/2006 school year.

Attachment 13 to exhibit 3 was a document entitled "Administrative Supports for Brenda Nicholson 03-05, Onanole and Erickson Elementary Schools". Each of Parrott, Bachewich, and Slashinsky testified as to the supports that were provided to Nicholson to assist her in performing her duties as a resource teacher at Onanole and Erickson during that period. The document lists 17 types of supports which were provided to Nicholson. Although Nicholson asserted that some of the supports which were provided were not directly effective in dealing with immediate problems, she did not dispute that the supports listed, and some additional supports referred to by the Division's witnesses, were in fact provided to her. I note that many of the supports were directly related to helping Nicholson complete IEPs and BIPs.

My overall conclusion with respect to the issue of IEPs and BIPs between September 2002 and June 2005, is that Nicholson did have a challenging and burdensome caseload and did show progress in the development and completion of IEPs. However, deficiencies persisted in the areas of both timeliness and content. I have also concluded that the deficiencies persisted notwithstanding the substantial supports which were provided to Nicholson by the Division. Furthermore, I have concluded that the deficiencies were not minor, or problems merely of form, but rather related to issues of substance and important content. IEPs are important documents and when prepared and utilized properly can have a very beneficial impact on a student's progress and development. It was therefore reasonable and appropriate for the Division to take Nicholson's continuing difficulties with IEPs and BIPs into account when determining her ongoing suitability as a resource teacher within the Division.

The 2003/2004 and 2004/2005 Evaluations

As noted elsewhere in this Award, the written evaluations prepared by Slashinsky and Bachewich in February, April and June, 2004 were based on the categories or topics identified by Whitley in his December 3, 2003 letter (Prioritizing Work Assignments, Communications, IEP/Funding Applications, and Seeking and Accepting Assistance). Those topics were reviewed and discussed with Nicholson at the evaluation meetings. It was clear to Slashinsky and Bachewich, and they must have thought it would be crystal clear to Nicholson, that her performance in those particular categories was being evaluated during the applicable periods. The contents of the evaluation reports have been described in general terms in the "Evidence" section of this Award. The evaluation reports, particularly the February and April reports, were not unduly negative; they contained many positive statements about Nicholson's performance. However, the testimony of Slashinsky and Bachewich as to what occurred during the evaluation meetings themselves was more negative.

Both Slashinsky and Bachewich expressed surprise and frustration at Nicholson's attitude and behaviour at the February, April and June, 2004 evaluation meetings. They described her as being confrontational and argumentative. They said Nicholson was assertive and expressed concerns about her heavy workload and not being given enough time to meet IEP and Funding Application deadlines. According to Slashinsky and Bachewich, Nicholson frequently stated that teachers were not cooperating in providing her with necessary information to complete IEPs. In addition, she repeatedly maintained that the evaluation process was unclear to her, that she did not understand the criteria being used to assess her performance, or the basis upon which determinations would be made as to whether her performance was improving.

Accordingly to Slashinsky and Bachewich, at Nicholson's insistence, a disproportionate amount of time at the evaluation meetings was spent discussing the evaluation process and various problems being encountered by Nicholson in the workplace, as opposed to discussing issues directly related to her performance and ways to improve her performance.

My impression of both Slashinsky and Bachewich's reaction to these particular evaluation meetings was that they were both dismayed at Nicholson's reaction to their comments and frustrated by her apparent inability or unwillingness to accept valid constructive criticism and to be receptive to their suggestions for improvements.

Both Slashinsky and Bachewich expressed similar frustrations with the individual evaluations which they conducted during the 2004/2005 school year. The evaluation categories were different, from the previous year, being based on the five areas identified in Whitley's letter dated September 28, 2004. Nicholson's behaviour during the 2004/2005 evaluation meetings also changed, from being argumentative to being taciturn. According to Slashinsky and Bachewich, she said much less in the 2004/2005 evaluation meetings, instead concentrating on taking extensive notes.

However, the impression of both Slashinsky and Bachewich was that Nicholson remained pre-occupied with her perception that the evaluation process was unfair, and close-minded with respect to their assessment of her performance.

I should state that I have noted the differences between Bachewich's testimony at the hearing (particularly in cross-examination) and her comments in her formal evaluations of Nicholson, particularly during the 2004/2005 school year, (many of which were quite positive), and the summaries attributed to Bachewich of her assessment of Nicholson's performance from 2003 to 2005 contained in Whitley's report to the Board, (which were negative). It is difficult to reconcile those differences in their entirety, because they are stark. However, I consider it likely that Bachewich did find Nicholson's attitudes and behaviour at the evaluation meetings and some of their other interactions to be frustrating and counter-productive, but that she (Bachewich) nonetheless noted improvements in Nicholson's actual performance as a resource teacher from September 2003 to June 2005.

Nicholson's perspective on the evaluations she received in 2003/2004 and 2004/2005 was fundamentally different from the perspective of Slashinsky and Bachewich. Mr. Smorang, in his submission on behalf of Nicholson, pointed to the December 1, 2003 meeting, immediately following Nicholson's return from medical leave, as a significant watershed. Nicholson, who until that meeting, had not had a negative performance review from either Slashinsky or Bachewich, was shocked by what transpired on December 1, 2003. Given the events of the December 1, 2003 meeting, it was not surprising that Nicholson's behaviour thereafter was characterized by a certain degree of suspicion and defensiveness.

Furthermore, in her own testimony, Nicholson rejected the notion that she refused to accept criticism or to listen to suggestions from Slashinsky or Bachewich for improvements in her teaching methods. She asserts that she was always open to fair constructive criticism and was attentive to the comments of Slashinsky and Bachewich

and also to the comments of Parrott. The evaluations of both Slashinsky and Bachewich from September, 2003 to June, 2005 support that assertion because they note areas of significant improvement and progress in Nicholson's performance in many of the categories on which she was being evaluated and which were discussed at the evaluation meetings.

However, Nicholson also stated that when she thought criticisms were unfair, and particularly when they were based on factual inaccuracies, she would defend her position and seek to correct the inaccuracies. Examples of Nicholson doing so in a formal way are found in her two letters to Whitley, both dated October 1, 2004 responding to the February, 2004 and June, 2004 evaluations (Exhibit 22 and 28).

Furthermore, Nicholson, and the Association on her behalf, did have serious concerns about the evaluation process, and they expressed their concerns on several occasions. By way of example, Diane Beresford of the Manitoba Teachers' Society raised that issue and others in her correspondence with Whitley in February, 2004 (Exhibit 25). Nicholson also expressed her concerns about the evaluation process in her letter to Whitley dated September 17, 2004 (Exhibit 31) and in her two letters to Whitley dated October 1, 2004. In general terms, Nicholson's concerns with respect to the evaluation process related to:

- (i) An alleged lack of clarity in the criteria pursuant to which her performance was to be evaluated;
- (ii) A lack of clear performance standards defining the level of performance required;
- (iii) The absence of any discernable method of objectively assessing Nicholson's performance against a set of defined performance

standards, in order to determine whether performance had improved or not.

Doubtless Nicholson also expressed her concerns about the evaluation process to Slashinsky and Bachewich during some of the evaluation meetings. Given the importance of this issue to Nicholson generally, and the emphasis she placed on it during her testimony at the hearing, I am satisfied that Nicholson did spend a significant amount of time at many evaluation meetings discussing her concerns about the evaluation process, and that Slashinsky and Bachewich legitimately felt that much of that time could have been more productively spent discussing Nicholson's actual performance.

The period from September 2002 to June 2005, and the events that occurred during that period in relation to Nicholson's employment, are important to the outcome of this case. Although Nicholson's employment agreement was not terminated until April, 2006, at which time she was employed as a remedial language arts teacher, her performance as a resource teacher, primarily at Onanole and Erickson, is relevant because the decision of the Division to terminate Nicholson's employment was based in part on the conclusion of Whitley and other senior administrators, that Nicholson had not reached an acceptable level of performance as a resource teacher.

Whitley had decided in late April 2005 that Nicholson should be reassigned, out of resource teaching because, in Whitley's words, "she couldn't be a successful resource teacher". Slashinsky agreed with that decision. Bachewich, whose assessments of Nicholson's performance were more positive than those of Slashinsky, nonetheless thought she "needed a change from resource". Bachewich was about to leave on a second maternity leave and testified that she wasn't confident that while she was away that Nicholson would be "up to the task". Parrott, who was not Nicholson's supervisor, but who had had extensive dealings with her from January, 2003 to June, 2005 agreed with the decision to remove her from resource teaching.

Nicholson, had been on evaluation from December, 2003 onward. She was placed on extended evaluation (i.e. probation) from October 1, 2004 to April 15, 2005. The joint evaluations conducted by Slashinsky and Bachewich from December, 2003 to June, 2004 and their separate evaluations conducted during the 2004/2005 school year were thorough. Parrott's comments and observations as Student Services Coordinator during those same periods were consistent with Slashinsky's conclusions. In short, the three senior administrators, who had the most frequent contact with Nicholson, had all concluded that her progress as a resource teacher had been slow and had identified shortcomings in her work.

Significantly, all of those administrators had found her at various times, and to varying degrees, to be resistant to their suggestions for improvements and unwilling to accept constructive criticism. Disturbingly, there were instances in which two of those administrators (Parrott in June, 2004 and Slashinsky in the spring of 2005) had experienced unpleasant encounters with Nicholson in the context of meetings to discuss her work; those encounters had placed a strain on their professional interactions.

In these proceedings, the counterpoints to the conclusions of the Division relating to Nicholson's performance as a resource teacher were:

- (i) Nicholson's criticisms of the evaluation process;
- (ii) her own assessment of her performance as a resource teacher;
and
- (iii) some of the evidence contained in the formal evaluation reports.

With respect to Nicholson's criticisms of the evaluation process up to June, 2005, I have two observations:

- (i) some of Nicholson's criticisms may have merit. Most notably, specific performance standards clearly defining the level of performance required, and a method of assessing Nicholson's performance against such performance standards were arguably lacking. However, Nicholson's criticisms cannot be characterized as disinterested or unbiased. They are the criticisms of Nicholson and the Association, both of whom are vitally interested in the outcome of this case. In order for such criticisms to have a substantial impact on the arbitration board's deliberations, they ought to have been put forward by an appropriately qualified expert, able to opine on whether there were flaws in the evaluation process, and if so, whether those flaws had, or may have had, an effect on the conclusions of the Division;
- (ii) the evidence as to manner in which the evaluation process was actually conducted established that:
 - (a) Nicholson was advised in writing that she was on evaluation and subsequently on extended evaluation continuously from and after December, 2003;
 - (b) the areas of performance on which she was to be assessed were clearly defined in Whitley's letter dated December 3, 2003, and were again also clearly defined when they were changed somewhat in Whitley's letter dated September 28, 2004;
 - (c) in most instances, evaluation reports were provided to Nicholson in advance of evaluation meetings in order to

enable her to review them before the evaluation meetings occurred;

- (d) evaluation meetings took place at which the evaluations were reviewed with Nicholson by Slashinsky and/or Bachewich;
- (e) the evaluation reports dealt with the areas of performance which had been identified by Whitley;
- (f) Nicholson was encouraged to provide her comments both orally during the evaluation meetings and subsequently in writing if she chose to do so. She participated in the evaluation meetings and in some cases, subsequently provided additional comments in writing;
- (g) Nicholson was supported by the Association throughout the evaluation process;
- (h) the evaluation reports were balanced. Many of them noted significant and satisfactory progress in the areas of performance which were being assessed and also included other types of positive and constructive comments.

In short, the evidence does not establish that the evaluation process up to the spring of 2005 was unfair or unreasonable. It is also significant that the evaluation process up to the spring of 2005 did not result in the termination of Nicholson's employment, but rather to an extension of her formal evaluation and probation and to a reassignment for 2005/2006.

Nicholson's own assessment of her performance was that, although there were areas in which she required improvement, she had generally performed well as a resource teacher. She emphasized that she had had no experience as a resource teacher prior to 2001 and that she had acquired only half time experience as a resource teacher in the 2001/2002 school year. Therefore, given that limited experience, the challenging nature and volume of the workload, and the itinerant nature of the assignment, her progress was satisfactory.

Interestingly, Nicholson's own assessment of her progress as a resource teacher is not inconsistent with the evaluation reports of Slashinsky and Bachewich. As noted elsewhere, Bachewich's evaluations of Nicholson's progress, particularly in 2004/2005 were generally positive, but identified some ongoing deficiencies. Slashinsky's evaluations were less positive (indeed her evaluation for the period from February 15, 2005 to April 15, 2005 was very negative) but nonetheless noted progress in some areas.

Therefore, although the evidence establishes that Nicholson's performance as a resource teacher had been slow, it is impossible to conclude on the basis of the evaluation reports that she was not progressing towards the goal of becoming an effective resource teacher.

I recognize that there were ongoing deficiencies with her work, particularly relating to the timeliness of IEPs and the content and organization of IEPs. I also recognize that some of Nicholson's difficulties related to problems she was encountering in working constructively with administrators, and that she bears some responsibility for those difficulties.

Furthermore, although there had been improvements in Nicholson's performance, those improvements were achieved, at least in part, as a result of the considerable support and assistance which she received from the Division.

In such circumstances, it was entirely appropriate for the Division to question whether it was an effective use of its human resources to continue to devote that level of support to Nicholson as a resource teacher, given the conclusion of the administrators that her progress as a resource teacher was slow, and her performance unsatisfactory in some important respects.

Given all of the foregoing considerations, I have concluded that Whitley's decision, taken after consulting with Slashinsky, Bachewich and Parrott, to remove Nicholson from resource teaching and to provide her with another assignment for the 2005/2006 school year was logical and sensible. The decision was made in good faith, after a considered assessment of Nicholson's strengths and weaknesses as a resource teacher.

It should be emphasized that this conclusion is not equivalent to a finding that Nicholson was an incompetent resource teacher, nor that she could never become a competent resource teacher. From 2002 to 2005, Nicholson was on a continuum as a resource teacher and was progressing towards the goal of becoming an experienced, capable and effective resource teacher. However, her progress toward that goal was slower than the Division considered reasonably acceptable.

September, 2005 to April, 2006

I accept Whitley's evidence that he thoughtfully attempted to provide a teaching assignment for Nicholson commencing in September 2005 in which she could succeed. I believe that he and the other administrators involved in the decision thought that teaching at Erickson in a language development program for students who were performing below their grade level, would allow Nicholson to utilize the skills she had acquired working as an EA for many years and to instruct a particular set of students in

one school while utilizing her classroom teaching (as opposed to resource teaching) skills.

It is not necessary for the purposes of this Award to decide whether this was a “plum” assignment (as it was described by Division witnesses because of the limited number of students, the EA assistance, and adequate preparation time incorporated into the teaching schedule), or whether it was a challenging assignment (as described by Nicholson because all of the students were below grade level and because of the inadequacies of the infrastructure). With respect to inadequate infrastructure, Nicholson referred to the lack of a specific classroom, the cluttered surroundings as depicted in the photographs introduced as exhibit 56, and the necessity of moving the teaching materials from room to room on a trolley.

I have reservations about the assignment which I will comment on below, but I have concluded that the assignment was given to Nicholson in good faith, after assessing her background and experience. In cross-examination, it was suggested to Whitley that the 2005/2006 assignment was a “set up”, made with the knowledge that Nicholson would fail, thereby providing the Division with a justification to terminate her agreement. Whitley responded to that suggestion with resentment, describing it as “insulting” and “repugnant”, given his responsibility to look after the best interests of students. Whitley’s resentment was justified; I find that the 2005/2006 assignment was made with the reasonable expectation that Nicholson would succeed; Nicholson herself indicated that the assignment was into an area at which she “excelled”.

Whitley provided details of the assignment to Nicholson by letter dated June 23, 2005. He also notified her that she would be on formal evaluation and probation and provided a copy of regulation AFC/R entitled “Supervision and Evaluation”.

Slashinsky was to be ultimately responsible for the evaluation. As noted elsewhere, six formal classroom observations were conducted by Slashinsky, and all of them, except one, were also attended by Whitley. In most cases, pre- and post-observation conferences took place between Slashinsky and Nicholson. Some of the pre-conferences and one of the post-conferences were attended by Whitley.

There is considerable disagreement between Slashinsky and Whitley on the one hand, and Nicholson on the other, with respect to the level of teaching skills demonstrated by Nicholson during the classroom observations. All of Slashinsky's evaluation reports, except the first one, were critical of Nicholson's teaching skills. Some of Slashinsky's statements in the reports were extremely critical. For example, at the end of the report relating to the November 23, 2005, observation she wrote: "By the end of this lesson, no significant learning took place. At our post-meeting, you were in denial of how the lesson progressed, which is a pattern."

Whitley's notes of his observations (exhibit 16) contained many highly critical references such as: "What help or attention did D----- get all lesson?"

Nicholson responded in writing to the evaluation reports of the January 18, January 25, and February 1, 2006, observations. Her responses contained point by point rebuttals of the criticisms made by Slashinsky relating to those observations. Many of Nicholson's responses, and her explanations for doing the things which she did, are thoughtful and cannot be rejected out of hand. However, both Slashinsky and Whitley concluded that Nicholson's teaching had many significant shortcomings, and that little effective instruction was being provided by Nicholson, and little meaningful learning was taking place.

In any pedagogical debate with respect to the effectiveness of a teacher's teaching, between an experienced Superintendent and Principal, who are responsible for the evaluation of the teacher, on the one hand, and the teacher who is being

evaluated, on the other, the conclusions of the Superintendent and Principal will normally be preferred.

However, Nicholson and the Association assert that there are at least two factors which undermine Whitley's and Slashinsky's evaluation of Nicholson's performance from September 2005 to April 2006.

Firstly, they repeat their criticisms of the evaluation process. In the context of the 2005/2006 evaluation, they specifically complain about a lack of clear performance standards defining the level of performance required of Nicholson, and they again point to the absence of any discernable method of objectively assessing Nicholson's performance against a set of defined standards.

Secondly, they assert that the Division has not met its own threshold, in that it has failed to comply with its own regulation (exhibit 15) in at least two important respects. They say that there was no meeting between Nicholson, Slashinsky and Whitley to discuss shortcomings and to potentially extend timelines for improvement as required by s.7(a) of the regulation. They also maintain that Nicholson was not provided with written expectations for improvement and identified timelines at any time during the 2005/2006 year, as contemplated by s.7(b) of the regulation.

I am unwilling to reject or discount the assessment of Whitley and Slashinsky on the basis of those alleged flaws in the assessment process.

While I recognize the value and importance of clearly defined performance standards in an evaluation process, I also recognize that it can be very difficult to set such standards when assessing intangible and abstract skills such as the ability to effectively teach challenging students who are performing well below grade level. Moreover, the evaluation reports were not vague or abstract; they contained many specific examples of deficiencies and concrete suggestions for improvement.

With respect to the arguments related to exhibit 15, I am unable to make a finding that the Division failed to comply with s.7(a) and/or s.7(b) of the regulation in view of the post-conference sessions which were held, and specifically the post-conference session which Whitley attended, and in view of the argument that s.7(b) may be inapplicable because no decision was made to extend the period of evaluation beyond April 2006.

However, there are two elements of the 2005/2006 assignment which are troubling, and both relate to the involvement of Slashinsky as the person ultimately responsible for the evaluation of Nicholson. They are:

- (i) The strained relationship that existed between Slashinsky and Nicholson. As previously noted, in the spring of 2005 Slashinsky had conducted an evaluation of Nicholson as resource teacher at Erickson which was critical of Nicholson's performance. Nicholson disagreed with the evaluation, and an unpleasant exchange between them ensued. On the basis of both of their descriptions of the meeting in their testimony, and their notes endorsed on the evaluation form, it is clear that there was a feeling of mutual resentment and distrust between them in the spring of 2005. Nicholson frankly stated that their relationship had "eroded to the point of no relationship";
- (ii) The assignment to Erickson was a teaching position which Slashinsky herself had performed with respect to the grade 4, 5 and 6 students in the immediately preceding year or years.

Given those two elements, it would be extremely difficult for Slashinsky to provide an objective and detached assessment of Nicholson's performance as a

teacher in the language development program at Erickson. In Slashinsky's capacity as a Principal and administrator, Nicholson had been a source of frustration to her for an extended period of time. Their relationship had become strained. Furthermore, Slashinsky was being asked to evaluate Nicholson's performance in a role, which she herself had performed in the very recent past. When Slashinsky performed that role she was both an experienced teacher and an effective teacher and administrator. It would be very difficult for her not to compare Nicholson's approach and techniques with her own, and to find Nicholson's performance wanting in comparison.

In making those observations, I am not being critical of Slashinsky. The deterioration of the relationship between her and Nicholson was as much the responsibility of Nicholson as it was of Slashinsky. I am also not suggesting that Slashinsky was consciously biased or deliberately condemnatory of Nicholson's performance because of any feelings of ill-will towards Nicholson. However, I am stating that it would be extremely difficult for Slashinsky to provide an entirely objective assessment of Nicholson's performance and not to be influenced to some extent, at least subconsciously, by the two factors noted above.

Nicholson was on probation in 2005/2006. She had been advised that if she continued "to experience significant shortcomings, a decision regarding your employment status will be made". In such circumstances, it was very important that the person primarily responsible for the evaluation of Nicholson's performance be objective.

Given the foregoing, from an evaluation perspective, it would have been preferable to have given Nicholson either a different teaching assignment for the 2005/2006 school year (at a school other than Erickson) or to have assigned another Principal or administrator to conduct the classroom observations, pre-, and post-conferences, and to otherwise become responsible for Nicholson's evaluation.

Two additional aspects of Nicholson's performance as a teacher in 2005/2006, and the Division's assessment of that performance are important to the outcome of this case. They are:

- (i) Nicholson's assignment in 2005/2006 was as a classroom teacher in a remedial program, not as a resource teacher. She had not worked as a classroom teacher in the previous three school years. Prior to that, her classroom teaching experience had been limited. She had only obtained her Bachelor of Education in 1999, worked in a full time term teaching position from March to June 2000, worked in a half-time term position from November 2000 to June 2001, and then worked in a half-time position for the Division in the 2001/2002 school year. The assessments which had been conducted of her performance as a classroom teacher in the early stages of her career had been positive.
- (ii) Nicholson has strengths as a teacher. She is conscientious and hardworking. Slashinsky, to her credit, on two occasions during her testimony, referred to Nicholson's dedication, and the fact that she "tried very hard". Nicholson also has intellectual strengths as demonstrated by her achievements in both the Bachelor of Education, and Special Education diploma programs.

Although the Division had encountered considerable frustrations and had developed legitimate and genuine concerns with respect to her performance as a resource teacher and had made a sensible decision to transfer her out of resource teaching in the spring of 2005, Nicholson had shown progress as resource teacher in 2003/2004, and 2004/2005 as evidenced by the evaluation reports of Slashinsky and Bachewich.

The assignment for the 2005/2006 school year was a teaching assignment in a remedial program (as opposed to a resource teaching assignment), and Nicholson undoubtedly struggled with that assignment. However, she had not been in a full time teaching assignment for three and a half years and had received positive evaluations in her limited earlier teaching assignments. Accordingly, she was still relatively inexperienced in a teaching role. Although she had worked as an E.A., she had had no previous experience as a teacher in a remedial program. As noted above, there was also a flaw in the assessment process in 2005/2006 relating to Slashinsky's role as Nicholson's primary evaluator. All of these factors, taken together, and combined with Nicholson's other positive attributes, including her scholastic achievements and her dedication, lead me to the conclusion that the Division's decision to terminate her employment agreement was premature, and cannot be sustained.

The Division has not proven that Nicholson is an incompetent teacher. The Division has also not demonstrated that there are no positions available within the Division into which Nicholson could be reasonably assigned. Such an assignment would be one in which there would be a reasonable prospect for her to succeed and for her students to receive the high standard of education to which they are entitled.

In reaching this conclusion, I have carefully reviewed all of the authorities referred to by the parties. I will only comment briefly upon them. A review of several cases involving teachers and school divisions in Manitoba including *Kopchuk and the St. Boniface School Division No. 4* [1972] M.J. No. 51 (Man. Ct. of A.) and *Kelsey School Division No. 45 v. Orchard* (1979) 1 N.R. (2nd) 233 (Man. Ct. of A.) and *Turtle Mountain School Division v. Carrillo*, an unreported 1989 decision of a Board of Arbitration Chaired by Paul Teskey, establish that the proven incompetence of a teacher is cause for terminating the employment agreement of that teacher. However, those authorities and others also establish that a school division's decision to terminate a teacher's employment agreement on the basis of incompetence is reviewable by a board of arbitration. In other words, a board of arbitration is entitled, and my view is

obliged, to determine whether incompetence, or a lack of competence, has been established according to the appropriate evidentiary standard, namely the balance of probabilities. The *Kelsey School Division* case, *supra*, is noteworthy because both the majority of the board of arbitration and the Court of Appeal ordered the reinstatement of the teacher, notwithstanding findings that he was of below average ability, and in the face of evidence from administrators, fellow teachers, and a student, of the teacher's lack of ability.

I have also specifically considered the *Re Edith Cavell Private Hospital v. Hospital Employees' Union Local 180* (1982) 6 L.A.C. (3rd) 229 and *Re Island Farm Dairies and Teamsters Local 464* (1996) 52 L.A.C. (4th) cases, the first of which was a non-culpable termination case, and the second a non-culpable demotion case. Those cases set forth a series of requirements which employers must fulfill before being able to terminate or demote employees solely on the basis of substandard performance. Neither of those cases dealt with teachers, or school divisions, or the statutory provisions applicable in this case.

Nonetheless, I have reflected on the requirements set forth in *Edith Cavell* and *Island Farm Dairies*. I am not prepared to find that all of the requirements referred to in those cases ought to apply in the context of agreements between teachers and school divisions in Manitoba. I also note in passing that many of the conditions referred to in those cases were fulfilled by the Division in this case. However, those two cases do reinforce the proposition that an employer has a relatively high threshold to meet when taking steps that will adversely affect an employee's status on the basis of substandard performance.

The Division has not met the requisite threshold in this case.

DECISION

The decision of this board of arbitration is that the reason given by the Division for the termination of their employment agreement with Nicholson, namely a lack of competency on the part of Nicholson, has not been proven. Therefore, the reasons given by the Division do not constitute cause for terminating the employment agreement of Nicholson. Accordingly, we direct that the Division's employment agreement with Nicholson be continued in force and effect.

DATED this 31st day of July, 2007.



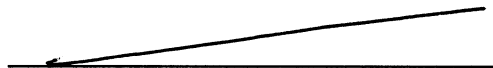
A. Blair Graham, Q.C.
Chairperson

I concur with the above Award and reserve the right to provide supplementary reasons in due course.



Carole Wylie
Nominee on behalf of the Association
and Nicholson

I dissent from the above Award, and I will be providing dissenting reasons in due course.



Gerald Parkinson
Nominee on behalf of the Division